Legitimacy, so peculiar to legal (...) thinking, is as much phenomenon in the world as problem.
It is force in the world.**

1 Introduction

Law is omnipresent in modern society and legal institutions have a major place in the structure of Western societies. Law and legal process are increasing enormously. ‘Law seems to be a kind of replacement, a substitute for traditional authority.’ The same goes for the Netherlands: there is a great deal of litigation. However, we should not exaggerate: we cannot say that a litigation explosion is taking place in the Netherlands. That does not alter the fact that the courts have to decide many cases, often with respect to immensely complex and interwoven problems.

Sometimes the legitimacy of a court decision is questioned because a decision in a (criminal) case runs contrary to public opinion, which, however, is often quite superficially informed by the media. Another problem is that legal procedures may take a long time, whereas the ‘substance of individual consent to a process of decision-making, that may initially attach to and legitimate outcomes, thins as the process expands in scope and lengthens in time.’ Furthermore, the Supreme Court is frequently criticized by the legal profession for not paying due respect to the Court's function of developing the law. In this way, we notice a difference between the authority and legitimacy attributed to the judiciary by citizens, on the one hand, and by jurists, on the other. One cause of this difference may also be the fact that values shared by jurists may differ from those shared by non-jurists. Which one should be taken into account when judging the claim of objectivity? However, these problems do not constitute a legitimation crisis of the judiciary.

The judiciary fulfils a special role in the state under the rule of law. ‘As the guarantor of justice, a fundamental value in a law-governed State, it must enjoy public confidence if it is to be successful in carrying out its duties.’ This confidence cannot be based on the judiciary's power to decide conflicts alone. Authority means more than power; it means legitimate power. Therefore, the judiciary has to honour (legal) values and principles like consistency, coherence, legal certainty, predictability, and not the least justice and objectivity. Respect for the more general

3. Vining 1995, p. 280. If urgent cases, a party can resort to a speedy civil or administrative procedure (interim injunction proceedings or provisional relief) before the president of a district court; see Blankenburg and Bruinsma 1991, p. 23 ff.
principles of proper administration of justice attributes to the legitimacy of the judiciary. These general principles of proper administration of justice are part of the general principles of law. Therefore, the legitimacy of the judiciary is closely connected to the legitimacy of the law. In the next sections, I will discuss the concept of legitimacy and its relation to legal principles. I will use some recent Dutch theses to illustrate the importance and the use of principles for the legitimacy of law in general and for the legitimacy of the judiciary in particular and to add a Dutch touch to the international debate. However, I will start with some characteristics of the judiciary, followed by an analysis of the concepts of legality and legitimacy.

2 Some characteristics of the judiciary

The function of a court is to respond to a situation. Therefore, it has a passive nature. Judges do not choose their own agenda. Furthermore, principal limitations derive from the way in which cases get to the courts and the way in which issues are framed and reasons adduced and from the provisions for effectuating court decisions. Judicial action therefore tends to be unsystematic and uneven. Moreover, judicial decisions stand a good chance of being ineffective or effective in ways not intended. The courts decisions are only binding on the case and cannot bring an unwilling administrator or private actor to a change of policy that would profit other people than the individual litigants who have enough resources, initiative, and foresight to take legal action. So institutional factors raise questions about the power of judicial review in general. Nevertheless, people often go to court, because they want to resolve their conflicts.

In providing a solution to a given problem, the decisions of the courts contribute to the law in one way or another by the interpretation, the clarification, and, sometimes, the development of the law. Especially, in the development of law, courts are active in framing the law. However, since the competing interests of the parties involved are necessarily at stake the resolution of the conflict according to the law is another purpose why courts exist. The way in which the courts perform these two functions, conflict resolution and law-making, can contribute to their and the law's legitimacy.

The judiciary is multifaceted: supreme courts, courts of appeal, courts of first instance, etc. These courts may be divided into several divisions (or even separate courts), concerning, e.g., civil law, administrative law, criminal law, tax law cases. Therefore, the balance between the objectives of the applicable law and the function of the court will differ. For example, in administrative law for lower courts, establishing the facts of the case at hand and the legal protection of the citizen against the authorities may be more important than the court's function of developing the law or guaranteeing the unity of the law.

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The legitimacy of the judiciary cannot be assessed without taking in account the performance of the other law-making institutions. Here we have to pay attention to the deficit of the regulative capacity of the normative structure of the general law, which seems no longer able to express or transmit precise normative contents. Legislation with its formal characteristics of limited flexibility and reduced capacity for adaptation and self-correction seems ill-suited to the exercise of effective and timely control of the growing variety and variability of the cases which emerge from a complex society. Despite the flood of legislation, the normative ‘sovereignty’ assigned to the parliamentary legislator is usurped by the interpreters: the administration and the judiciary (which has to control the administration).\textsuperscript{10}

No wonder the courts have to decide many cases, often with respect to immensely complex and interwoven problems. An important reason is that politics has been increasingly judicialized: there has been a substantial transfer of decision-making from the legislature, the cabinet, and the civil service to the courts.\textsuperscript{11} In recent years, the Dutch Supreme Court has given new interpretations to existing statutes or formulated new rules for unforeseen problems in many decisions, making new legislation unnecessary. But also on issues on which Parliament was unable to pass legislation, such as the right to strike, euthanasia, and abortion, the Court has produced case law.\textsuperscript{12} More generally, compromise – an important characteristic of Dutch politics - is often to be found in the content of legislation: conflicting coalition opinions are assimilated in the text of new laws. Such a diffuse and vague statute often needs extensive interpretation before it can be applied in practice, which opens up the opportunity for the judiciary to play an important role in many controversial matters.\textsuperscript{13} Furthermore, in public law, the judiciary has become more actively involved in the legal protection of the citizen. This is all the more important, because the legislator often adopts the perspective of the administration and assigns discretionary powers to the administration, whereas democratic control by parliament is diminishing. More generally, the diminishing authority of other law-making institutions may contribute to the comparatively high legitimacy of the courts, e.g., as a result of general disenchantment with the political branches of government.

3 Legality and legitimacy

‘Power is a negative thing, authority a positive.’\textsuperscript{14} In the law, power and authority are related to legality and legitimacy, respectively. The ‘meta-legal’ issue of legitimacy


\textsuperscript{13}Ten Kate and Van Koppen 1995, pp. 373-374.

\textsuperscript{14}Vining 1995, p. 285.
Therefore, legitimacy is regarded as a necessary condition for effectiveness. The fact be supported by some ethical justification – a legal foundation – in order to survive. Therefore, legitimacy is regarded as a necessary condition for effectiveness. The fact cannot be solved in terms of positive law alone. ‘Legitimacy’ is sometimes used to describe in general terms the criteria for the ‘validity’ of power, i.e., its ‘title’ for giving commands and demanding obedience from those who, in turn, are themselves under the obligation to obey. The problem of legitimacy is thus closely related to political obligation because obedience is owed only to the commands of legitimate power. In this sense, legitimacy presupposes legality, the existence of a legal system and of a power issuing orders according to its rules. But legitimacy also provides the justification of legality, by surrounding power with an aura of authority. It is a kind of a special qualification, a surplus to the (pure) force which the state exercises in the name of the law. A legitimate system of law is distinct from a system of mere commands coercively enforced.

According to Weber, nowadays, the most usual basis of legitimacy is ‘the belief in legality, the readiness to conform with rules which are formally correct and have been imposed by accepted procedures.’ Observing that modern societies are ruled by rational law, Weber identifies rational legitimacy with legality. This is the rule of law, not of men: commands or rational rules are issued in the name of an impersonal norm rather than in the name of a personal authority. In turn, the issuing of a command constitutes obedience to a norm rather than an arbitrary decision. Power is legitimate in so far as it corresponds with rational norms. In this way, obedience is given to the norms rather than to the persons who issue the norms.

The principle of legality is thus closely connected to the modern conception of the state under the rule of law. However, what kind of legitimation does this rational legality offer? Which values are assured by this ‘notion of power as force exercised according to, and in the name of law’? Posing this question means leaving the strictly formal approach, because it cannot be answered in purely descriptive terms. We commit ourselves to a particular view about the end, the content of law itself, about the end pursued through norms and that justifies their existence. For legality to provide legitimation, on top of the ‘normalization’ of force, it must necessarily refer not only to the formal structure of power but to its intrinsic nature.

An important issue in classical political theory is the evaluative distinction between legitimate and illegitimate power. The general argument is that power must be supported by some ethical justification – a legal foundation – in order to survive. Therefore, legitimacy is regarded as a necessary condition for effectiveness. The fact

17. A.J. Hoekema and N.F. van Maanen, Typen van legaliteit, Deventer: Kluwer 2000, p. 45 ff. label this type of legality 'formal legality', beside which they distinguish, compensation legality, risk collectivization legality, forum legality, cooperative legality, and pluralistic legality.
that (supreme) power must have an ethical justification has given rise to several
evaluative principles of legitimacy.\textsuperscript{21} However, the `arrival’ of legal positivism
seemed to do away with this kind of justification which power needed in order to
survive. According to Kelsen, one of the most eminent supporters of positivist
theory, a legal norm is not valid because it has a certain content, but because it is
created in a certain way.\textsuperscript{22} Here, we should keep in mind that, for Kelsen, law is a
system of norms; the – presupposed - basic norm (\textit{Grundnorm}) is at the top of this
normative hierarchy. For this reason alone, the validity of each norm within the
system, what makes it belong to the legal order or system, is determined not by an
evaluation of its content, but by the specific process it is created by. The only
criterion is whether that norm was produced or posited in accordance with the
criteria of validity of a higher norm.\textsuperscript{23} Therefore any kind of content might be
law.\textsuperscript{24}

To Kelsen, the principle of legitimacy means that `a norm of a legal order is
valid until its validity is terminated in a way determined by this legal order or
replaced by the validity of another norm of this order.’\textsuperscript{25} This Kelsenian principle of
legitimacy is limited by the principle of effectiveness. Although, according to
Kelsen, the validity of a legal norm is not identical with its effectiveness,
effectiveness is the condition (but not the reason) for validity `in the sense that a
legal order as a whole, and a single legal norm, can no longer be regarded as valid
when they cease to be effective’.\textsuperscript{26} For norms to be effective, they must be executed.
A constitution or legal order is effective if the norms created in conformity with it
are by and large applied and obeyed. So, from the positivist point of view,
legitimacy is purely and simply a matter of fact; legitimacy derives no longer from
evaluative criteria but from the reasons of efficacy.

Furthermore, legality is identical with legitimacy. For, in the positivist
conception, law is considered law only if made by authorities appointed by the
system itself and enforced by other authorities also appointed by the system. This
means, according to Kelsen, that the principle of legitimacy can be restated as the
`principle that a norm may be created only by the competent organ, that is, the organ
authorized for this purpose by a valid legal norm.’\textsuperscript{27} Therefore, `the question of the
legality [\textit{Gesetzmässigkeit}] of a judicial decision (…) is the question whether an act
that claims to creating [!] a legal norm conforms to the higher norm which regulates
its creation’ is the question of the competent authority.\textsuperscript{28}

\textsuperscript{21} Cf. N. Bobbio, \textit{Democracy and Dictatorship}, Minneapolis: University of Minnesota Press
1989, pp. 83-86, distinguishes `at least six which can be grouped together as antithetical pairs of
the three great unifying principles, will, nature and history’.

Ultimately, the legal norm must be created in a way determined by the basic norm.

\textsuperscript{23} Cf. D. Dyzenhaus, \textit{Legality and Legitimacy, Carl Schmitt, Hans Kelsen and Herman Heller

\textsuperscript{24} Kelsen 1989, p. 198.
\textsuperscript{25} Kelsen 1989, p. 209.
\textsuperscript{26} Kelsen 1989, pp. 211-212.
\textsuperscript{27} Kelsen 1989, p. 276.
\textsuperscript{28} Passerin d'Entrèves 1967, p. 148.
In conclusion, to the positivist, law is considered law only if created by competent authorities. However, as Spinoza already observed, the power and the right of a government depends on the way it uses its competencies.\footnote{E.g., Spinoza, Tractatus theologico-politicus (transl. S. Shirly), Leiden, E.J. Brill, p. 237 ff. According to Bobbio 1989, p. 143, he sees things \textit{ex parte populi}, from the ‘view of the ruled in order to justify their right not to be oppressed and the ruler’s duty to proclaim just laws’. Cf. J.L.M. Griibnau, ‘La force du droit. La contribution de Spinoza à la théorie du droit’, \textit{Revue interdisciplinaire d'études juridiques}, décembre 1995/janvier 1996.} Therefore, to judge the legitimacy of a legal order, and more specifically of a judicial decision, we should abandon the strictly formal and descriptive approach. To evaluate law, e.g., legal rules and judicial decisions, in terms of ‘good law’, which should be obeyed, we have to look at the content of law and the end of the legal norms. ‘A value-clause must be inserted somewhere in the legal system’. Otherwise, we cannot assume that the judge is the holder not only of power, but of legitimate power.\footnote{W. Bobbio 1989, p. 88.}

Thus, legitimacy concerns evaluative criteria for the obligation to obey the law. Directives, rules, or decisions can generate a legitimate obligation to obey: they give good reasons for acting in accordance with their content. According to Lucy, the ‘legitimacy condition of law’ holds that ‘judicial decisions and other sources of law can in some circumstances be authoritative’\footnote{W. Lucy, \textit{Understanding and Explaining Adjudication}, Oxford: Oxford University Press, 1999, pp. 140-141.}. The legitimacy of the judiciary thus means the recognition of the authority of the judiciary and its decisions. The litigant party who is ordered recognizes the judge who orders as a positive guidance. The judge should do more than exercise legal power; he is to inspire initiative and willing obedience in the name of law. Law, and its voice, the judge, is to evoke initiative and willing obedience.\footnote{Vining 1995, pp. 286-287.} With Habermas, we can name legality and legitimacy the two dimensions of legal validity. The dimension of legitimacy concerns rational procedures for making and applying law which promise to legitimate the expectations that are stabilized in this way. Law-abiding behaviour, based on respect for the law (‘the norms 	extit{deserve} legal obedience’), involves more than mere compliance. In this way, according to Habermas, the legal order can fulfil a socially integrative function.\footnote{According L.M. Friedman, \textit{Total Justice}, New York: Russel Sage Foundation, 1994b (1985), p. 30, we should not overestimate the strength and value of legitimacy as a factor in social integration.} In order to fulfil this function and the legitimacy claim of law, court rulings must be capable if being consistently rendered within the framework of the existing legal order and they should be rationally grounded so that all parties involved can accept them as rational decisions.\footnote{J. Habermas, \textit{Between Facts and Norms}, Oxford: Polity Press, 1996, p. 198. However, we should take into account, as Lucy reminds us, that even mistaken legal propositions can sometimes have legitimate authority and thus generate obligations to obey.}

Below, I will discuss the importance of principles which serve the law’s aim of justice. Principles are evaluative criteria for the law and therefore for the law’s claim

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34. J. Habermas, \textit{Between Facts and Norms}, Oxford: Polity Press, 1996, p. 198. However, we should take into account, as Lucy reminds us, that even mistaken legal propositions can sometimes have legitimate authority and thus generate obligations to obey.
to legitimacy. There, I will return to these conditions (meta principles) of consistent decision-making and rational acceptability. Respect for general principles of law contributes to the consistency and rationality of judicial decisions, and, therefore, to their legitimacy.

4 Legitimacy based on mutual trust

Klein Kranenberg sets out to provide an original justification of legal authority by analyzing the relation between the authority of law and legal interpretation. It is often said that legal interpretation undermines the authority of law, because the person (or institution) who interprets the law really determines what ought to be done. Since it is also generally accepted that the law never speaks for itself but always stands in need of interpretation, scepticism about the possibility of ‘a government of laws, not of men’ is never far off in discussions about judicial interpretation. Klein Kranenberg defends the thesis that the authority of law is made possible by mutual trust between the legislator and its citizens and that judicial interpretation, rather than disrupting this trust, is an indispensable means to preserve it. An analysis of some important contemporary debates in legal philosophy leads her to the conclusion that law does not claim authority after, but before its meaning can be known.

In order to get a better grasp of the moral dilemma created by the law’s claim to blind obedience, i.e., to accept the authority of law even when nothing about its content can be known, she draws an analogy between friendship and respect for law. Both friendship and a legal system are founded on mutual trust. This foundation of trust distinguishes a system of rules from a set of orders and, although itself unjustified by anything other than one’s willingness to put one’s faith in the law, it justifies one’s acceptance of law’s authority ex ante.

The judge, the representative par excellence of the legal point of view, is as bound by the law’s blind promise of justice as if he had made it himself. That means that he is bound to a promise of justice, which is attributed to him by the ‘other’ to whom he applies the law. For only if this ‘other’ finds his own sense of justice respected by the law can he be expected to accept law’s claim to authority. Hence, we find that anyone who appeals to the law as requiring a particular decision is by that act bound to a promise of justice, the content of which is determined by precisely the ‘other’ whose obedience to law he claims.

35. J. Klein Kranenberg, Authority and Interpretation (doctoral thesis), Santiago de Chile/Tilburg: Schoordijk Institute, 1999.
The continuous back-and-forth between the legal point of view and the moral point of view of the ‘other’ to which the legal point of view is accountable provides the judge with an opportunity for interpretation. For adjudication is interpretation. ‘Adjudication is the process by which a judge comes to understand the meaning of an authoritative legal text and the values in that text.’\textsuperscript{37} Klein Kranenberg, inspired by Raz, then uses the concept of ‘detached point of view’, which defines law as an effective power with an intelligible claim to practical authority. In detached statements, ‘law’s authority is relativized to a point of view, but still explained as \textit{de jure}, not as \textit{de facto}'.\textsuperscript{38}

Interpretation, as seen from this ‘detached point of view’, is the decision to improve, or to make an exception to, the rule if respect for the other so requires. The more a judge has confidence in the moral standards of the other (and thus of himself before he adopted the legal point of view), the larger his interpretive space will be; the less he has confidence in the other (and thus in himself), the more formal he will be. Thus, interpretation is presented as only an instrument to repair law, which itself is an instrument of justice, and not as an authority-claiming decision that creates an exception to an authority-claiming rule. The way interpretation works according to the internal point of view, is by determining the meaning of law as the legislator \textit{really} meant it, so that law will again be able to produce justice on its own. Hence, the internal point of view operates by transforming conflicts between the legal and the moral points of view into disagreements about the meaning of words. The internal point of view declares itself indispensable to authoritatively ending these disagreements.

Thus, Klein Kranenberg explains what makes it possible for the law to exist as a normative phenomenon which is binding upon judges. The analogy between friendship and respect for law is instructive but seems a little far-fetched, because abstract respect for law is not based on a personal, symmetrical, in important aspects emotional, ‘reciprocal’ relationship.\textsuperscript{39} Pessers elaborates on this fundamental notion of mutuality.\textsuperscript{40} She defends the thesis that the principle of mutuality refers not only to the simple retributive justice of \textit{do ut des}, or the complementarity of rights and obligations (both elements of reciprocity), but also to solidarity. In homogeneous social groups mutuality takes the form of the exchange of services according to each other’s needs in the confidence of a rough balancing out in the long run. Parties take alternating positions as creditor and debtor. In her view, modern law forces human

\begin{itemize}
\item \textsuperscript{39} Cf. Raz 1979, p. 250 ff. Please note that friends have an exit option, which the legislator, judges and citizens do not have; at least to leave the legal order is not a serious possibility for most citizens.
\end{itemize}
beings – being strangers in large, heterogeneous societies - to recognize the other at least as a co-member of the community of law. 'In this way law functions as a symbolic order through which in the other the own legal subjectivity is reflected.' However, a co-member of the community of law will not acquire any solidarity – in the sense of mutuality – until this symbolic legal order (as a kind of intermediary) reflects more than just a common legal subjectivity. According to Pessers, the growing influence of the norm of mutuality is the essence of the `socializing of law' (including protection of a weaker contracting party, etc.)

Legal order constitutes mutuality between strangers. Klein Kranenberg is right in that mutual trust is a necessary condition for a legal order. The legislator, judges and citizens all need to have faith in law, before they know the content of concrete legal regulations and decisions. But mutual trust is not a sufficient condition for legitimacy of legal decisions. What is missing in her theory is any view about the content of law, a particular view on the aim of law. The judge is bound by law's blind promise of justice, but she does not offer us any criterion or standard for justice. In particular, she does not mention legal principles (especially principles which do not originate from the competent legal authorities).

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Legal principles as the normative core of law

Positivists certainly have a point in insisting that law needs to be made by competent lawmakers. However, they are wrong in maintaining that these lawmakers are not bound by any other norm than the legal norms issued by higher legal authorities. Their theory does not account for legal values and principles, as a basis for criticizing legislation and legal decisions like judicial decisions, for lawmakers are bound by legal principles. Therefore, besides the concept of legality we need the concept of legitimacy to explain the authority of law and the citizens' duty of obedience to the law.

The law itself aims to realise a value, i.e., justice, which is the specific constitutive value of law. As such, it is a system which embodies values which are `essential determinants of the law's content.' Some of these more specific legal values are legality, equality, predictability, transparency, (judicial) impartiality, a fair opportunity to be heard. Principles can be considered as expressions of legal values, and constitute the normative core of law in a modern democratic state. Law is connected to the fundamental norms and values prevalent in a society of free and equal citizens by means of general legal principles.

Dworkin defines a principle as a standard which is to be observed because it is

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`a requirement of justice or fairness or some other dimension of morality'.

However, we should distinguish between legal principles, which serve legal values, and moral principles, which serve moral values. Therefore, a legal principle is to be observed as a standard because it is a requirement of the internal morality of law, not so much the external, non-legal, dimension of morality. Legal principles are standards which are specific for the law (they are not purely moral principles). The development and actual meaning of legal principles is coloured by extra-legal influences, like the prevailing (moral) norms in a society or the practice which the law aims to regulate. These internal standards are generated and developed by the legal system itself (although they are influenced by morality). These principles are not the product of the will of some law-making institution; the origin of legal principles does not lie in a particular decision of some legislator or court. Their origin lies ‘in a sense of appropriateness developed in the profession and the public over time’.

Principles are concretisations of legal values in the legal system. Legal principles may specify legal values as a whole: these general legal principles are common denominators of the various sections of the legal system. Legal principles may also specify legal values in a specific part of the legal system, e.g., public or private law, or even a more specific subdivision of law, tort law or tax law. They exist at varying levels of generality in the legal system.

Principles are intermediaries between legal values and positive law, i.e., legal rules. Rules in the form of general and established laws, form the basis for government interference with the liberties of the citizen. Government of laws and not of men is rule governance. Legal rules are made by weighing principles. Rule-making implies the determination of the actual content of principles and the balancing of principles. Principles are the basis for the creation of rules. The validity of these principles cannot be derived from the authority or power of a specific person or institution. These principles are to be considered as vehicles in the movement back and forth between values and legal rules. Rules are to be seen as operationalisations of principles. Consequently, rules have a more concrete and ‘technical’ character than principles and are normally less value-laden. Law-making institutions concretise principles into rules which are directly applicable (‘in an all-or-nothing fashion’).

Formulation by law-making institutions gives rules an ‘imperative’ quality. In this respect, they are commands formulated by authorized institutions. Principles do

48. Cf. Taekema 2000, pp. 11-12, 80, who discusses Alexy’s conceptualisation of principles as ‘Optimierungsgebote’ interpreted as the optimising demanded by principles of legal values, with not only a deontological but also an axiological dimension (R. Alexy, ‘Rechtsregeln und Rechtsprinzipien’, Archiv für Rechts- und Sozialphilosophie, Beih. 25, 1985, p. 24).
not have this ‘imperative’ quality; they only have a normative quality.⁵⁰ Concretising principles into rules also presupposes power to enforce these rules. This imperative quality promotes legal certainty and legal equality. Law therefore needs the imperative quality. However, law ultimately cannot be regarded as a command. Since general legal principles constitute the legal translations of certain basic values of a society, law-making should conform to legal principles. Therefore, the normative quality as well as the imperative quality are necessary requirements of law.

In sum, the body of law - statute law, case law, the decisions and regulations of the administration, and judicial decisions - should be ‘consistent in principle’.⁵¹ This implies that law is not only legitimised because it is established and enacted by authorized institutions. Rather, legal principles function as essential criteria of evaluation, in the sense that the legislator who seeks to implement policies by means of law is bound by legal principles. Even so, the judiciary is not only bound by the law promulgated by the legislature (principle of legality) but also by legal principles (unwritten law).

In this way, principles perform an important function in ensuring the legitimacy of the legal order and the - living - law. Under the rule of law, power is turned into legal competence (legality). However, the way authority is exercised should be compatible with an overall framework of basic values of the legal order (legitimacy). Legitimacy requires a substantive evaluation as to whether rules agree with the principles of law.

Legality and legitimacy are both necessary properties of law.⁵² Legal rules should be created by authoritative bodies. At the same time, however, they ought to be consonant with the integrated whole of legal principles. Legitimacy of positive law is guaranteed by its conformity to general legal principles. The procedural dimension - legality - and the substantive dimension - legitimacy - are intrinsically connected.⁵³ Law is not only a normative order, it is also command in the sense that law should be enforced and accompanied by sanctions. In rightly insisting on legitimacy, one could be inclined to try to eliminate power. That would be a mistake, because law cannot do without power. The tension between legality and legitimacy is the tension between the law of power and the power of law.⁵⁴

In the next sections, I will discuss three issues related to legitimacy in the sense of respect for principles: the determination of the ends and principles which underpin ambiguous law, the rationality of principled decision-making, and the relation between principles, rules, and facts of the case at hand.

6 The determination of the aim of ambiguous law

⁵³ Gribnau 1999, p. 23.
⁵⁴ Compare Radbruch 1950, pp. 117-118. Effectuating principled law also depends on power to enforce it. This is the dialectic of might and right.
Legitimate judicial decisions have to account for the purpose or meaning of the law, which finds its expression in principles. This is may be a difficult task, especially when the law is ambiguous. The daily practice of judicial procedures raises a number of legal questions. A judge can routinely answer many legal questions on the basis of statutes, precedents, and his own practical training. In certain cases, however, a judge is confronted with hard cases, which cannot be solved in the usual ways. This is particularly so when legal questions are not answered unambiguously in statutes or case law. It may also concern questions which, according to the letter of statutes or precedents, must be answered in a standard way, but which, due to changed circumstances or changed points of view, can no longer be resolved with such standard answers.

On the basis of the theories of Scholten, Dworkin, and Rawls, a method can be constructed, which enables the judge to solve these hard cases. This constructivism is based on the analysis of the problems of legal interpretation: how do hard cases arise? Reasons include: the open texture of law, our relative ignorance of the facts and our relative indeterminacy of aim. Statutes and precedents are formulated in ambiguous language by people with limited knowledge of social reality. One of the consequences of these problems of legal interpretation is that in the course of time several authorities have to formulate again and again, new solutions for unforeseen hard cases. This means that the law is not an unambiguous system of rules promulgated at a particular moment by one authority, but a collection of diverse rules and decisions which have been devised by several authorities over time. Constructivism attempts to find solutions to hard cases by constructing a normative unity in the diversity of rules and precedents. Thus, a constructivist account tries to establish intersubjective agreement on a coherent theory. Whoever attempts to answer a hard legal question can interpret the law with a constructive scheme of goals, interests, and principles. A constructive scheme can bring order in the diversity of sources of law (human rights treaties, the Constitution, statutes and regulations, administrative and judicial decisions). With a constructive scheme it is possible to establish the purpose or meaning of the law, and to state the consistency of a diversity of treaty texts, constitutional and statutory rules, judicial decisions, etc. This constructive scheme formulates the purpose or meaning of the applicable law in terms of objectives which are pursued. These goals can be further explained in terms of the interests which are at issue. These interests can be ordered with normative principles. This scheme of goals, interests, and principles can be used as an interpretative theory.

According to the constructivist theory which Rozemond uses, there are two

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57. Cf. Habermas 1996, p. 198: 'An existing law is the product of an opaque web of past decisions by the legislature and the judiciary and it can include traditions of customary law as well.'
requirements for an interpretative theory: the fit requirement and the justification requirement.59 These dimensions of fit and justification guide the judge to find the most coherent interpretation of the law; coherence being a criterion of legitimation. The fit requirement means that an interpretative theory must fit the positive substance of the applicable law. This positive substance consists of paradigms of law, which are recognized by everyone as part of the applicable law. The justification requirement means that an interpretative theory must be able to provide a justification of the various constituent parts of the law. The justification can be formulated with goals, interests, and principles which underpin the applicable law. Legislation and human rights treaties can be seen as the expression of normative theories on, e.g., the relationship between the citizens and the state, the legal protection of the citizens against the authorities, the relationship between citizens between themselves, etc. In hard cases, legal decisions can be justified on the basis of a normative scheme underlying the paradigms of law.

However, in hard cases, the fit requirement and the justification requirement may contradict one another. It may be difficult to justify certain statutory provisions or judicial decisions according to an interpretative theory which sets forth the goals, interests, and principles of the applicable law. In that case, the statutory provisions or judicial decisions can be adapted to the interpretative theory. It is also possible to adjust or supplement the interpretative theory on the basis of the judgments which are derived from statutes and precedents.

Here, Rozemond uses Rawls’ method of reflective equilibrium.60 When opposition arises between specific judgments and general principles, judgments and principles are adjusted or supplemented until a reflective equilibrium is arrived at in which judgments and principles fit together. This method of reflective equilibrium is a combination of inductive and deductive reasoning: in this way neither the abstract legal values or principles nor the concrete facts of the case at hand are made absolute in judicial decisions, while the normative unity of law is respected. In this way, the rule of law can be understood as an obligation on the judiciary to systematize the law and to bring it up to date. Judges thus are legitimised to assist and cooperate with the legislature (and the administration).61 The judges further elaborate the law - being an expression of normative principles - and bring it up to date in the light of unforeseen practical developments. They do this within the framework of a coherent interpretation of the law. However, we should not overemphasise this ideal of

60. J. Rawls, A Theory of Justice, Oxford, Oxford University Press, 1971, pp.147-48. According to this method, normative judgment-forming consists of constructing a unity in individual moral judgments. The construction of a unity can be achieved with ethical principles. People can form considered judgments on a series of ethical questions. They can endeavour to order these moral judgements with the aid of ethical principles. As a method of interpretation, constructivism is an elaboration of this method of reflective equilibrium; Rozemond 1998, p. 58 ff.
61. Cf. J.G. Sauvéplanne, Codified and Judge Made Law. The Role of Courts and Legislators in Civil and Common Law Systems, Amsterdam etc.: KNAW 1982, p. 120: 'A system of law [civil as well as common law systems] must be created and developed by the interaction between legislature and judiciary. It must exist both of statute law and judge made law. The life of a code depends on its judicial interpretation.'
coherence, because we may well risk making the legal system immune for change. Thus, on the one hand, the law is in need of consistency, coherence, and rationality, on the other hand, it needs sources of controversy, ambiguity, and openness to be able to keep pace with the developments in society.

7 Standards of rationality in the implementation of principles

Although respect for general principles of law, which form part of the rule of law, is a necessary condition for the legitimacy of judicial decisions, sceptics have argued that they are not very useful standards. It is often said that these principles, which can, to some extent, be seen as a bridge to or legal counterpart of the norms and values of society, are not very helpful in providing practical guidance to (legal) decision-makers like the judge. In this context, it is argued that, in most cases principles can do little more than offer ‘considerations that must be taken into account.’ In her study, Burg attempts to improve on this rather negative picture of the guiding capacity of principles by identifying several standards of rationality that prescribe how principles should be applied.

According to Burg, legal principles are ideals, they are pure statements of something good to be promoted or protected. This means that, like ideals, they can often not be fully realized and, in actual practice, they often come in conflict with each other. Likewise, they need to be elaborated with regard to what is actually the case and what is actually possible in the real world, i.e., the legal order. ‘Principles, being ideals, are in their realization dependent on what is actually possible and on the legal possibilities defined by other principles.’ However, only the general principles with a wide significance within the legal system which have a coherence-creating capacity have the characteristics of an ideal. Respect for these ideals attributes to law's legitimacy: law is measured against the ideals it sets for itself. Therefore, judicial decisions should respect (honour) legal principles.

The standards of rationality in the implementation of principles differ according to whether one is faced with a simple context (where only one principle is applicable or a set of principles that all point towards the same decision) or with a complex context (where competing principles apply). In simple contexts, one standard

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66. Burg 2000, p. 13: ‘To the extent that the positive law is ultimately justifiable under a small number of compatible general principle, it is coherent in principle.’ Cf. Dworkin 1986.
applies: from the set of decisions that are possible in the situation at hand, select the one that maximizes the realization of the applicable principle(s). The process of reasoning with principles is distinctively different in complex contexts, which occur frequently. The question of the guiding capacity of principles is most pressing in these cases for it is not at all clear how principles that pull in opposite directions can direct the decision-making process. This problem of competing principles is ‘the problem of how to decide which one among all of the decisions that are actually possible in a given situation, each representing different comparative weighing of the competing principles, should be selected.’

Burg identifies three standards that apply to cases in which conflicting principles pertain. First of all, a judicial or legislative decision has to be an optimal decision, meaning that no other decision would have been possible in that context that realizes more of at least one principle while realizing no less of any other principle. Secondly, principles should be implemented in a consistent manner. This means, that in cases that are similar, the conflict between principles is resolved in a way that realizes these principles to the same degree. In addition, the demand of principled consistency implies that in cases that are dissimilar, the conflict should be resolved in a way that accords with their dissimilarity. Third, the conflict may not be resolved in a way which is disproportionate: the price, in terms of the non-realization of some principle(s), may not be out of any reasonable proportion to the gain achieved in terms of the realization of one or more competing principle(s). It appears, that with these standards, we have moved beyond the rather weak notion, that in complex contexts, principles are merely ‘points of view that need to be taken into account’. Each of these conditions of rationality makes its own different contribution to reducing the indeterminacy under conflicting principles.

8 Principles, rules and the facts of the case

Due respect for legal principles attributes to the legitimacy of judicial decisions but this reference to these abstract legal principles is not enough. The law-making institutions make rules by weighing and specifying principles. Law is a system of rules which are the result of the weighing of principles. However, rules ‘can never issue perfect instructions which precisely encompass everyone’s best interests and guarantee fair play for everyone at once. People and situations differ, and human

70. This requirement of optimization refers to what is also known as ‘Pareto-optimality; Burg 2000, p. 141 ff.
71. This requirement of consistency is an attempt to elaborate in more detail Dworkin’s idea of integrity in law. Of course, the ‘truth is, that the law is always approaching, and never reaching, consistency’, O.W. Holmes, The Common Law, Boston: Little, Brown and Company, 1881, p. 36.
72. The case law of the European Court of Human Rights (ECtHR 23 July 1968, Belgian languages, Series A, No. 6, p. 34, s. 10, offers an interesting analogy. As regards Art. 14 ECHR, the Court also uses the requirement of objective and reasonable justification, which requirement is met if the following two conditions are fulfilled: a. a legitimate aim of government policy is pursued; b. there is reasonable relationship of proportionality between the means employed and the aim sought to be realised.
affairs are characterized by an almost permanent state of instability. It is therefore impossible to devise, for any given situation, a simple rule which will apply to everyone for ever. Rules are generalizations for the purpose of legal certainty (predictability) and equality. This is an important purpose, but rules have a limited capacity to serve this purpose.

Law is a system of rules which are the result of the weighing of principles. Courts can apply the rules to the facts of the case. However, this can never be a quasi mechanical process. In the view of Smith, judicial rules and principles are *topoi*, authoritative arguments for a judicial ruling without definitive application. In clear cases, there is no reason to doubt the reasonableness of an application in a specific case. In hard cases, there are facts and circumstances that deviate so much from the clear cases that application of a rule (or precedent) can no longer be considered to be based on a weighing of interests and principles prescribed by the legislator or another authority. Application of a rule may conflict with one or more judicial principles that the legislator or other authority did not take into account in drawing up the rule concerned. In such cases, the judge will have to determine to what extent application of the rule is still reasonable and fair in the circumstances of the case. In making these considerations, the facts have an evident importance for judicial interpretation and legitimation: the judge does not weigh up principles in abstracto, but principles whose validity in the specific case he has determined. The judge formulates a new rule on the basis of principles which can be applied in similar cases.

The facts of the case play a double role in these considerations. On the one hand, they are the data on the basis of which judgement is passed but, on the other hand they contribute to the decision. Legitimate judicial decision-making is also a matter of tailoring the rule to fit the case. What we call the ‘rule’ is not of a different order from the cases to which the rule applies: the rule is the product of the same evaluation that gives the facts their significance and makes it a judicial case. Rule, facts, and decision are thus inextricably interlinked in the legal judgment: ius in causa positum.

In short, reference to legal principles attributes to legitimacy. The judge cannot ‘directly’ apply legal principles a case. Law needs the intermediary of rules between principles and the facts. For his decision to achieve (concrete) legitimacy, he must weigh and specify the legal principles into a rule which, in its turn, must be explained to be the rule applicable to the case at hand. Furthermore, the content of the rule and the principles ‘behind’ it is partly qualified by the facts of the case at hand. In applying and making the rule fit the facts the significance and content of the rule becomes renewed. Principles, too, are determined in this ‘dialectical’ process, a

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combination of inductive and deductive reasoning.\(^7\)\(^6\) So, contrary to the Atiyah's view, it is not so that 'the whole point of principles is that they attempt to generalise, to get away from details of facts of particular cases', because, the reverse is of equal importance: the meaning of principles cannot become clear except in cases with their particular facts. The process of generalisation and the process of concretisation complement each other.\(^7\)\(^7\)

Thus, legal principles are not rigid but flexible norms which enable law to respond to the developments in society, which attributes to its legitimacy. This goes for civil laws as well for common law systems. According to Cotterell, the idea of a common law 'as principles of law seems more appropriate for capturing this shifting, dynamic character, if only principles suggest flexible guidelines for legal decision-making rather than rules that control'.\(^7\)\(^8\)

9 Principles in judicial practice

For judicial decisions to be legitimate, i.e., authoritative and not authoritarian, effectiveness is a necessary but not a sufficient condition. Furthermore, mutual trust between the judiciary and the citizens \(\text{ex ante}\) is important but this trust should be continuous and should be reinforced by legitimate judicial decisions. This mutual trust \(\text{ex post}\) will attribute and renew mutual trust \(\text{ex ante}\) for the future cases to be decided by the judiciary. In the long run, this mutual trust between the judiciary and the citizens cannot do without a responsive attitude of the judiciary towards the current opinions concerning law and justice among the legal community.

Principles are expressions of the values the law serves. They are means to promote the coherence and rationality of the law. Therefore, respect for legal principles, is a necessary condition for legitimate judicial decisions. These principles demand among others consistency, coherence, legal certainty, predictability, equality, and not the least justice and objectivity. From this follows, that the fidelity of the courts to the law means not only being faithful to the rules of law which legislative action has brought in the statute book, but also to 'those principles that form the backbone of the law, and which have performed this same function over centuries'.\(^7\)\(^9\) To be sure, judicial decisions often must be seen partly as commands, but legitimacy implies respect for principles (as well). In this way, legal principles are binding upon judges. Old principles will have to be applied to new and unforeseen situations; and in this process they may take a shape they had never shown before. Legal principles may be actualised by a statute, but also by a court of

\(^{76}\) Already in the natural law tradition, it was clear that judicial decisions carried the judge beyond the point where he could regard himself as simply applying a principle or rule or even as deducing conclusions from it. The decision is shaped, but never fully determined, by a principle or rule. See J. Finnis, *Natural Law and Natural Rights*, Oxford, Clarendon Press, 1980, pp. 254 ff.


legitimacy of the judiciary

law. We should add that legal principles ‘discipline’ the judge: the judge complies with the system of the law. Judges may not interpret the law according to their own convictions unless they find it consistent with the structural design of the legal system as a whole, ‘and also with the dominant past lines of interpretation by other judges.’

However, we should not forget the passive or reactive nature of the judiciary. They decide cases one at a time, and the will be decided largely in the order in which they arise. This means courts often attribute to the development of the law in ‘an uneven, unsystematic, often illogical way’. That does not alter the fact that especially the Supreme Court should use its possibilities to contribute to the development of the law, e.g., by developing as much as possible clear and specific rules and the summing up of circumstances that are relevant for the decision. Here, the coordination of judicial decision-making is also relevant. Judges can make agreements on how to interpret the law in the future or a special way of access to the Supreme Court could be created to ensure special attention to the co-ordination of judicial decision-making.

Promoting legal certainty and equality in this way, the legitimacy of the courts will grow.

In public law, legal principles especially will come to the fore, when the judiciary becomes more actively involved in the legal protection of the citizen. From its independent position, it can correct the possible arbitrariness of the legislator and remedy the diminished legal certainty and equality offered by the law (or by administrative acts), because of its enormous growth and complexity. In this context, the Dutch courts recognised and – further - developed legal principles. First, the judiciary, on the basis of case law, has developed legal principles with regard to improper actions and decisions of the administration. The courts, in cooperation with jurisprudence, have developed legal principles of justice which offer protection to the citizen.

These principles are sometimes called principles of good administration, and comprise procedural norms but also substantive norms. The judiciary offers the citizen extra legal protection in addition to the protection embodied by statutory law. In a way, the diminished legal security of statutory law is compensated by these principles of good administration, especially when they protect the legitimate expectations of the citizen. Through the development of legal principles, the


administration is no longer exclusively bound by the (statutory) law. The principle of legality remains in full force, but in cases in which there is a conflict with the law (i.e., legal principles), the principle of legitimacy may correct the principle of legality in order to attain legitimate administrative decisions. Furthermore, sometimes the law itself is reviewed for compatibility with the fundamental legal principles, especially the principle of equality. The fundamental legal principles used by the judiciary in this process of review are expressed in the constitution or in international treaties.85

The judiciary should certainly be very cautious in reviewing enacted law, a fortiori in reviewing Acts of Parliament. The non-elected judiciary is not democratically legitimized, but may certainly claim to have some special expertise. Judges are disciplined by the specificity of the cases they must decide and, as a result, their professional experience reflects 'the value of deliberative wisdom – the wisdom that consists in a knowledge of particulars and that no general theory can provide'.86 Because of their specialized legal education, judges are experts at applying the law, and - more broadly - at making value judgements. 'The authority of judges derives in part from their epistemological competence.'87 As mentioned before, it is not their job to express their own moral convictions, but to form and enforce opinions about the demand of the system of law. In a way, they function like democratic institutions. Important decisions, hard cases, are reasoned and public. As such, they feed expectations and breed a common understanding of a country's legal system. The independent judiciary is formally not accountable to anyone, but they are certainly public. 'They are constantly in the public gaze, and subject to public criticism'.88 They are judged by the public and respond to it.

10 The communicative and symbolic dimension of judicial decisions

Of course, legitimacy is the result not only of reference to (legal) values and principles. The application of the judicial procedures instituted to produce binding decisions itself produces legitimacy (Luhmann's 'Legitimität durch Verfahren'). Where the same subjects participate in the proceedings within the limits of the established rule, legitimacy is reckoned as the performance of the system itself.89 To

that extent far as legal procedures serve important values such as rationality, impartiality (objectivity), fairness, and consistency, they may contribute to the legitimacy of a decision, independently of the outcome. More generally speaking, the formal element of the law contributes to the legitimacy of rules and institutions.

In this way, the deliberative nature of adjudication can strengthen the willingness of opposing parties or groups to continue as 'members of a common enterprise even when there is no shared standard to resolve their disputes', as Kromman formulates it. Often, the interests and values of the parties will be sufficiently similar to permit comparison. However, the claims of the parties cannot always be 'commensurated without recharacterizing them in a way that alters their essential meaning for the parties involved'. The judge must try to create common points of agreement, but in the presence of such 'tragic' conflicts, he should try to preserve the bonds of political fraternity. In these tragic conflicts, it is not so easy to exercise judicial power 'with insight into social values, and with suppleness of adaptation to changing social needs'.

In these kinds of conflicts, the duty of the judge to carefully give reasons for his decisions is all the more important. However, judges not only have to decide cases and give reasons for their decisions, they should also educate their public about the meaning of the law, Witteveen calls this judicial communication. In communication practices, judges can be educators: by interacting with actors in the field they can generate new ideas about what the law in difficult areas should be. They should try to unite parts of the (legal) community by trying to find a common denominator in the different, prevailing views. Therefore, they should detect the principles behind the prevailing views. By formulating them with convincing clarity 'everybody can recognize them as the right principles for the case at hand'.

Here, we should pay attention to the symbolic dimension of law, also expressed by principles. Van Klink argues that law is not merely a set of rules, but also a symbol for something higher. It gives expression to one or more values which are essential for a (legal) community. Therefore, a legal norm can be called 'symbolic' (in the positive sense), if this norm, e.g., a law or a judicial decision, has attained an extraordinary meaning in the legal community in which it functions. Even if they are not executed, such symbolic judicial decisions have a fundamental importance. Furthermore, open norms which are laid down in communicative laws enable the
judiciary to adopt a responsive attitude towards the current opinions concerning law and justice among the legal community.\footnote{Van Klink 1998, pp.101 ff, 443.} It goes without saying that this responsive attitude will contribute to the legitimacy of the judiciary.

11 Conclusion

Legitimacy regards evaluative criteria for the obligation to obey the law. Besides the concept of legality (law should be created by authoritative bodies), we need the concept of legitimacy to explain the authority of law and the citizens’ duty of obedience to the law. Respect for legal principles reinforce the law's claim to legitimacy, for legal principles serve the law's aim of justice. They are expressions of the values the law serves and can be seen as a bridge to the norms and values of a society. As such, they are evaluative criteria for the law and, therefore, for the law's claim to legitimacy.

Thus, legal principles function as essential criteria of evaluation for law-making by the judiciary, and its legitimacy. The judiciary is bound by legal principles. Subsequently, in this report, some topics in legal theory regarding the role of principles in judicial decision-making were analysed, e.g., the determination of the aim of ambiguous law, the standards of rationality in the implementation of principles, and the relationship between principles, rules, and the facts of the case. Finally, some aspects of judicial practice and the contribution of judicial communication and of symbolic judicial decisions to judicial legitimacy were discussed.