

## Courts in quest for legitimacy; the case of wrongful life

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### *I. Introduction*

This discussion will consider how different courts deal with difficult cases, and how courts seek to maintain the legitimacy of their judicial authority. How do courts search for legitimacy? From what sources do they draw their legitimacy? As a central example I will use the problem often referred to as the “wrongful life” cases: can a medical care provider be held liable for negligent malpractice that results in the creation or preservation of a life that is not considered worth living? This question touches upon the autonomy of the plaintiff. By comparing three judicial decisions in “wrongful life” cases from courts from the United States, France and the Netherlands I hope to illustrate different possible sources of judicial legitimacy.

As early as 1982 the Supreme Court of California had to decide a wrongful life case (*Turpin v. Sortini*).<sup>1</sup> The case was about two sisters– ironically named Hope and Joy Turpin – who both suffered from a hereditary hearing defect which robbed them of their hearing. Due to an incorrect diagnosis of Hope’s hearing problems, the parents had already conceived Joy before they found out about the true condition of Hope. They would not have wanted a second child had they known in advance that she too would suffer from this hereditary hearing defect. Can the doctor, Sortini, be held liable for the wrongful life of Joy? The court answered the question negatively on the ground that the damage cannot be determined in any

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<sup>1</sup> *Turpin v. Sortini*, 31 Cal. 3d 220; 643 P.2d 954.

rational or reasoned fashion. That would involve comparison of the Joyce's present condition with the situation as it would be if she did not exist at all, which is – as the court acknowledged – “outside the realm of human competence.” On the same ground, the court did sustain the claim for extraordinary expenses for specialised teaching, training and hearing equipment during her lifetime.

The French *Cour de cassation* twice addressed the wrongful life issue, both in the same case of Nicolas Perruche.<sup>2</sup> This case concerns a boy whose mother is infected with Rubella during her pregnancy, which led to serious neurological problems for her son (deafness, partial blindness, and a heart condition; symptoms of the so-called Gregg syndrome). The mother was wrongly diagnosed, which deprived her of the option of aborting her child (as she claims she would have chosen to do). Though the appeal court had decided that the doctor and the laboratory could not be held liable because there was no causal connection between their wrongdoing and the claimed damage (since that was the result of the Rubella infection), the *Cour de cassation* overturned that decision and sent the case to another appeal court. This court also decided that the required causal link was missing and the case was again put before the *Cour de cassation*. In the second Nicolas Perruche decision, the *Cour* ruled that due to the negligence of the doctor and the laboratory the mother was deprived of the option of having her child aborted, and that the defendants could be held liable for that wrongdoing. After a fierce public debate, the legislator prohibited wrongful life claims across the board; damage can only be compensated when this damage is a direct consequence of medical malpractice.

Only last year the Dutch *Hoge Raad* was confronted with a wrongful life case<sup>3</sup>, During her pregnancy, the mother consulted her midwife because there were two cases of handicaps due

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<sup>2</sup> *Cour de cassation*, Nicolas Perruche 1 and 2 (26 marche 1996, D. 1997, Jur. P. 35, 17 novembre 2000, D. 2001, Jur. P. 332).

<sup>3</sup> *Hoge Raad* 18 maart 2005, LJN:AR5213

to a chromosome disorder in her husband's family. The midwife did not think it necessary to investigate the matter any further. This was later considered a professional failure with dramatic effects. Once born, baby Kelly turned out to have both mental and physical handicaps from which she suffered severely. The parents claimed damage – both on their own accord and in the name of Kelly – and their claims were sustained by both the appeal court and the *Hoge Raad*. The *Hoge Raad* not only addressed the legal issues but also considered moral and pragmatic arguments that had been put forward against wrongful life claims. First, there is the moral opposition that sustaining these claims violates the principle of the dignity of human life, which acknowledges that having not been born is preferable to living in a condition like this. Second, there is the pragmatic argument that sustaining claims like this will tempt doctors to practice “defensive medicine” to avoid serious risk. Both arguments were carefully examined and rejected. The decision has been well accepted by the general public.

Here we have three cases of “wrongful life”, decided by three different courts, in different ways on different grounds. As I already conceded, I will not go into the details of the arguments for and against wrongful life claims, but instead address the question of how courts search for legitimacy in difficult questions. Only recently Mitchell Lasser published an interesting book in which he compared the *Cour de cassation*, the US Supreme Court and the European Court of Justice (ECJ), thus drawing experience from different legal systems.<sup>4</sup> What I find attractive in his approach is the fact that he combines the discursive and the institutional dimensions of the courts under investigation, showing us connections which were heretofore unnoticed. Lasser's analysis however, does not, recognize the functional dimension of the courts, which is an important third element in their relation to legitimacy.

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<sup>4</sup> Lasser, Mitchel, *Judicial Deliberations: A Comparative Analysis of Judicial Transparency and Legitimacy*. Oxford: Oxford University Press, 2004.

This concerns the actual role that courts play in the legal order and in society at large. The most effective frame of analysis will give due attention to three different dimensions of legitimacy: the discursive, the institutional, and the functional dimensions of legitimacy (or, in other words, the argumentative, organizational, and social aspects of legitimacy). The specific arrangements that are responsible for the legitimacy of a specific court can be analyzed as specific combinations of discursive, institutional and functional variables. To illustrate this hypothesis I will elaborate on the examples introduced, replacing for general purposes the Supreme Court of California by the US Supreme Court (since the differences are not relevant in this context).

## *II. Two opposites: Cour de cassation and US Supreme Court*

### *A. Cour de cassation*

It is not unusual among comparatists to present the French *Cour de cassation* and the US Supreme Court as opposites.<sup>5</sup> The *Cour de cassation* is held to be rather formalistic, because of its short decisions, which are syllogistic in structure and magisterial in tone. The US Supreme Court, on the other hand, is considered to be pragmatic, because of its extensively personally and politically motivated decisions. These differences are there, not to be ignored, but the picture is more complex than this simple opposition suggests. Lasser relativizes this opposition from both sides. On closer inspection it seems rather unfair to depict the French judiciary as formalistic. In addition to the formal-seeming structured judicial decisions, there is an unofficial discourse which is constituted by the opinions of the Advocates General, the annotations of legal scholars, and the reports of the reporting magistrates.<sup>6</sup> Though the results of this discourse are discussed in a public hearing and not always published, it is here

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<sup>5</sup> For the background of the respective different legal systems I recommend Glenn, H. Patrick. *Legal Traditions of the World*. Oxford: Oxford University Press, 2000.

<sup>6</sup> *Supra* n. 4.

that the real debate takes place. In this (partly) hidden discourse an intense debate is taking place concerning equity, substantive justice, and the contemporary needs of society. This debate is channelled through the recognized legal forms, such as precedents, interpretations, and the opinions of scholars, but is in reality an open-ended, equity-oriented and personal debate, in which all the arguments that are lacking in the official discourse are exchanged. As such, it provides a necessary complement to the official discourse, which could not exist in the form that it does without the sheltered debate in the unofficial discourse. The unofficial discourse provides the insights, arguments and points of view, on the basis of which the *Cour de cassation* makes its laconic decisions. These authorized interpretations of law reappear in the decisions in their typical formalized, syllogistic, and ritualized forms. Actually, it is the established division of labour between the two spheres of discourse that makes the system work, attributing the real debate to the unofficial discourse, and reserving the authorized decision-making to the *Cour* itself. This advances the efficiency of the system by making it possible for the *Cour de cassation* (162 judges and 27 Advocates- General) to deal with a caseload of 30, 000 to 35, 000 cases a year.<sup>7</sup>

But does the *Cour de cassation* also serve the legitimacy of the system? From what sources does the court draw its legitimacy? The French system draws mainly from institutional sources to generate judicial legitimacy.<sup>8</sup> Lasser explains that the judicial system is firmly anchored in the political system by which French society shapes itself. Several of these anchors can be mentioned. First, there is the strict separation of the judicial system from the political system, secured by the separation of powers, the theory of sources of law which secures the supremacy of legislation, and a methodology of strict law application. Of course this separation is backed by a rather positivistic legal theory, in which a strict division is

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<sup>7</sup> [www.courdecassation.fr](http://www.courdecassation.fr) (L'activité de la Cour, statistique année 2004). The 162 judges, 27 advocates general, and 18 legal writers, are divided over 6 chambers: 3 civil chambers, 1 commercial, 1 social, and 1 criminal chamber.

<sup>8</sup> *Supra* n. 4.

maintained between the domain of facts and that of the values.<sup>9</sup> Second, there is a state-formed elite of magistrates (and law professors, for that matter), selected and educated on a meritocratic basis. They form, so to speak, the human flesh on the skeleton of the judicial system. Thirdly, this elite has a republican ethos of service to the state, in the name of the general public interest. This ethos presupposes a right answer to difficult legal questions which can be discussed, discovered and authoritatively given by the state-formed elite of judges and magistrates (reminiscent of Plato's "philosopher-kings").<sup>10</sup>

This socio-institutional arrangement has provided judicial legitimacy thus far, as Lasser shows, but it can be questioned whether it will continue to do so in the foreseeable future. To explain this we have to take his analysis beyond the discursive and institutional level to consider the functional aspects of legitimacy. This perspective reveals three possible risks for the French answer to the question of judicial legitimacy. The first is that the separation of the judicial and the political system is increasingly difficult to uphold in modern West-European legal systems.<sup>11</sup> As Guarnieri and Pederzoli have shown in an extensive comparative study, the judiciary plays an increasingly important political role, which raises new issues of legitimacy (such as "who guards the guardians?").<sup>12</sup> This places the judge in West-European legal systems, including France, more in the forefront of controversial political issues.

The second risk is that in a pluralistic society it is increasingly difficult to build legitimacy on a shared conception of substantive justice, to be discovered by a legal elite. This is true not only because people are becoming less inclined to put trust in legal elites, but also

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<sup>9</sup> This was the prevailing legal theory in the days of the formation of the *Code Civil* (1804), which is up until this day the most important legal source for the *Cour de cassation* and the French judiciary in general.

<sup>10</sup> *Supra* n. 4.

<sup>11</sup> The same applies to its different parts, such as the separation of powers, the methodology of law application and the positivistic separation of facts and law.

<sup>12</sup> Carlo Guarnieri and Patrizia Pederzoli. *The Power of Judges: A Comparative Study of Courts and Democracy*. Oxford: Oxford University Press, 2002.

because substantive justice gives way to procedural justice. What is considered to be the right outcome of legal proceedings is not so much the right answer, in any objective sense, but rather the result of a fair trial in which all parties have had their due. Finally, it has been noticed that citizens in modern society put their trust less in input-legitimacy, and turn increasingly to output-legitimacy.<sup>13</sup> If this is true, it means that judicial legitimacy depends less on factors such as institutional independence or the selection, recruitment and training of judges, than it does on factors like the quality of the proceedings, decisions, motivations, communication, and the like. It is the performance of the judiciary that counts, rather than its position in society. Of course, this relativizes the French institutional answer to the question of legitimacy.

### *B. US Supreme Court*

Let us turn now to the other extreme and the US Supreme Court. The US system is characterized by a unified, integrated discourse in the form of the judicial opinion. These opinions are well known for their anti-formalism. This is illustrated by the decisions of the US Supreme Court. The sheer length of the decisions – which can take some 20 or more pages – suggests an extensive argumentation in a dialogical form. Characteristic of these decisions is a heavily fact-oriented analysis, in which the judges devote considerable effort to describing the factual circumstances of the case. This is not just a starting point for the application of the law, but also as an exemplification of a realistic orientation in the law, in which legal consequences depend largely on their purposes and effects. The consequences of the decisions, more than the court's rationale, seem to be the determining factor in the decision-making process. This is all written down in a very personal style, in which the legal

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<sup>13</sup> Wetenschappelijke Raad voor het Regeringsbeleid (WRR), *De toekomst van onze nationale rechtsstaat*, The Hague 2002, p. 110.

ethos of the judge can easily be recognized. The individual judicial responsibility is strengthened, of course, by the personal signature of the judge under the majority decision, as well as by the possibility of concurring and dissenting opinions. Each judge is accountable for both his or her personal decisions as well as for his or her arguments in each individual decision. Therefore it is in the first place the judge speaking, not the court or the judiciary.<sup>14</sup> On the other hand, the opinion transcends sheer pragmatism, because policy arguments are channelled through formal means, such as judicial tests, rules of thumb, legal principles, precedents, and the like. To accuse an American judge of engaging in politics is as serious a criticism as to blame him or her of formalism.

The Supreme Court is notorious for its ethos of independence. President Eisenhower famously stated: “During my presidency I have made two mistakes, and they are both sitting in the Supreme Court”. This illustrates the extent which the Supreme Court (unlike the *Cour de cassation*) plays an outspoken political role through its power of constitutional review.<sup>15</sup> The discourse in which the judiciary participates can be characterized as both anti-formalistic and anti-policy, or – the other way around – it has both formal and pragmatic aspects. The judicial discourse is largely an autonomous one, which constitutes a separated interpretive, argumentative, hermeneutic discourse.<sup>16</sup>

From what sources does the Supreme Court draw its legitimacy? The Supreme Court draws mainly from discursive sources to generate judicial legitimacy.<sup>17</sup> Several anchors embed this practice firmly in the judicial system, as Lasser shows. First, there is the doctrine of case law, which supplies each judicial decision with a recognized legal purpose. In that

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<sup>14</sup> The high profile of the nine judges of the Supreme Court is illustrated by their curricula on the Supreme Court’s website. (see [www.supremecourtus.gov](http://www.supremecourtus.gov) )

<sup>15</sup> Which in France is attributed to the *Conseil constitutionnel*.

<sup>16</sup> Which deals with an increasing caseload: 1460 cases on the docket in 1945, 2313 in 1960, and more than 7000 nowadays (see [www.supremecourtus.gov](http://www.supremecourtus.gov)).

<sup>17</sup> *Supra* n. 4..



sense, the legislator and the judiciary are “partners in the business of law.” The emphasis is not so much on the doctrine of the separation of powers, as it is on the balance of powers (“checks and balances”). Second, there is the theory and practice of explaining and justifying case law by argumentative means, to an ever-increasing level of detail. This contributes not only to the understanding and acceptance of the decision by the parties, but also to a context of judicial accountability and transparency towards society at large. In broader terms, this “good reasons approach” serves both an informational and educational purpose, and forms an exemplary illustration of what judicial decision-making and responsibility can and should be. The discourse of the Supreme Court is an integrated discourse with a plurivocal cacophonous sound, since each judge has his or her own voice. This system exemplifies the ideas of practical rationality and procedural justice in a democratic system, showing that there is not one right answer (to be discovered and authorized by a judiciary elite), but that there are several options that can be defended on good grounds. In a democratic society this seems preferable, simply because more people recognize their views and convictions in the motivations of the courts.

Are there no drawbacks for the American system then? According to Lasser there are, because there is no alternative discourse as in France.<sup>18</sup> There are no Advocate General opinions and the academic commentary is banished to the law reviews. This may be a trivial difference because there is enough opportunity for difference of opinion within this integrated discourse itself (as through the possibility of concurring and dissenting opinions). Again the analysis must be taken a step further to understand the real problem which arises from the vulnerability of judicial discourse in relation to political influence. The ongoing debate on judicial restraint or activism shows permanent awareness of the political role of the Supreme Court. This is reflected in the political character of the appointment of judges in the Supreme

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<sup>18</sup> *Supra* n. 4.

Court. Because of this, the independence of the judges is dependent on their ethos, which is not a very strong safeguard. The case of *Bush vs. Gore* illustrated this problem by dividing the Supreme Court along party lines. This reveals how important it is that judicial discourse remains firmly rooted in a strong institutional setting. While the Supreme Court is strong in discursive sources of legitimacy, it is weak in institutional sources. The *Cour de cassation* is just the opposite. From this perspective, they are mirror images of each other.

### C. The European courts as in-between

#### 1. European Court of Justice (ECJ)

Similar analysis can be extended to the European courts. From this standpoint both the European Court of Justice and the European Court of Human Rights take an in-between position between the opposites already discussed, but each in a different way. The ECJ is characterized by Lasser as a hybrid which originated as an offspring of its model, the *Cour de cassation*, but with Anglo-American overtones.<sup>19</sup> As in the French example, the ECJ encompasses two discursive spheres: the official discourse of the decisions of the ECJ and the unofficial sphere of the opinions of the Advocate Generals and the annotations of legal commentators. As in the French case, the distinction is based on a division of labour between authoritative decision-making and substantive debate. The rulings of the ECJ are the result of collegial decision making. They suggest logical compulsion and are written in an impersonal style. Lasser stresses that they differ from the decisions of the *Cour de cassation*, however, in that they use purposive arguments in considering the EU treaties as a whole, seeking to advance the effectiveness of community law, the requirements of legal certainty and uniformity, the legal protection of individual community rights, and finally: the system of the

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<sup>19</sup> The ECJ consists of 25 judges (1 per member state of the EU) and 8 Advocate Generals, organised in chambers of 3 or 5 judges, or a grand chamber of 13 judges. In 2004, they dealt with 665 cases, 531 new ones, and 840 pending (in 2000: 526, 503, and 873 respectively) (see [www.curia.eu.int](http://www.curia.eu.int)). The court of first instance is not taken into consideration.

treaty. Thus, the ECJ tries to improve the French example on the discursive level, by allowing for more extensive motivations. In this respect, the ECJ resembles the US Supreme Court, but there is a fundamental difference. Because of the dialogue with precedents and its factual character, the motivation behind the decisions of the US Supreme Court reaches an ever-increasing level of detail, while the motivations of the ECJ remain at a rather abstract level. This reflects the different responsibility of the ECJ which is to build a legal system on the provisions of the Treaties. As Tim Koopmans writes: “The Court had to feel its way. It did so by deriving some basic rules from the multiplicity of technical provisions, by interpreting these rules in the light of the aims of the treaty, and by slowly developing a system of case law on that foundation.”<sup>20</sup>

Bengoetxea has drawn a similar, but more precise picture than Lasser. The ECJ is in his words “very Dworkinian”, “taking the European Community project seriously and making the best and most coherent story of European integration which is embodied in that project”.<sup>21</sup> The ECJ makes use of different kinds of methods of interpretation and reasoning, mainly (i) semiotic or linguistic arguments (divergence between different language versions, ordinary language), (ii) systematic and contextual arguments (in situations of gap or antinomy: the *sedes materiae* argument and quasilogical arguments such as the argument *per analogiam*, *a fortiori*, *a pari*, *lex specialis*, *lex superior*, *a contrario*, conceptual arguments, and teleo-systematic arguments), and (iii) teleological, functional or consequentialist arguments (the apagogic argument, the weighing and balancing of principles, policy arguments).<sup>22</sup> In general, preference is given to systematic-functional criteria (“a systematic-

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<sup>20</sup> Koopmans, Tim. *Courts and Political Institutions: A Comparative View*. Cambridge: Cambridge University Press, 2003, p. 89.

<sup>21</sup> Bengoetxea, Joxerramon. *The Legal Reasoning of the European Court of Justice: Towards a European Jurisprudence*. Oxford: Oxford University Press, 1993. p. vi and 99.

<sup>22</sup> See *Id* at 233-270.

cum-dynamic-interpretation”), as is shown for example in the ruling in the case of *Van Gend and Loos* (in which the object of the Treaty and article 177 justify the conclusion that Community law has an authority which can be invoked by their nationals, from which it follows that if the Treaty imposes obligations on individuals and Member States, it must also confer rights on individuals). The frequent appeal to the system of the Treaties and the aims they pursue makes us aware that “in doing so the Court is engaging in a special form of social action, furthering the aims of the Treaties by recourse to dynamic criteria and reconstructing the EC law into a coherent and consistent whole by recourse to systematic criteria”.<sup>23</sup> This is done in favour of the overall objective of obtaining legitimacy for the EC and its law: “Using contextual and systematic criteria of interpretation can thus be seen as a form of social action whereby the Court seeks to obtain legitimacy and adherence to a body of norms”.<sup>24</sup> The sought-after legitimacy extends not only to the law of the EC, but also to its institutions, including the Court itself: “The relevance of the Court’s justification of its own decisions lies in the attempt to achieve legitimacy amongst the audiences to which such justifications are addressed. The making legitimate of the European Community idea of an ever closer union is thus an internal process assumed by the judges of the ECJ before their audiences”.<sup>25</sup> From this we can conclude that the discursive legitimacy the ECJ seeks to establish in its rulings is closely connected to the formation of the European community as a whole and the process of European integration. Recent developments have shown that this makes the ECJ vulnerable when the project of European integration becomes unpopular or even suspect for the general public. At the end of the day, the legitimacy of the ECJ shares the fate of that of the other EU institutions and even of the political process of European integration, embedded as it is in the institutions and the formation of the European Community.

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<sup>23</sup> See *id.* at 234.

<sup>24</sup> See *id.* at 98.

<sup>25</sup> See *id.* at 99.

## 2. *European Court of Human Rights (ECHR)*

Although the ECHR had to build a legal discourse from scratch, as did the ECJ, the starting-point was rather different. In the wording of Tim Koopmans: “The provisions of the European Convention are not very technical, but rather general and vague. In order to make the provisions workable, the European Court had to break them up into three or four ‘sub-standards’ which were practicable and which could, in their turn, lead to further ramifications”.<sup>26</sup> The ECHR succeeded in creating a lively and effective discourse on human rights, and the question arises how this can be explained. One of the explanations is perhaps that the human rights discourse of the ECHR is, in terms of Lasser, a unified discursive context. The majority decisions of the Court, dealing with the alleged violation of one of the provisions of the European treaty on human rights, speak with one voice. They are the result of collegial decision-making and are formulated in an impersonal tone (“the Court”). The rulings of the court are rather long, containing extensive descriptions of the procedure, the facts (the circumstances of the case and the relevant domestic law), and the law (the applicants complaints, the alleged violations, and the court’s assessment), resulting in the decision. Debate is stimulated by the possibility of concurring and (jointly or partly) dissenting opinions, which display a more personal tone (such as “I”, “we” and “in my view”) arguing why the majority decision is supposed to be wrong. There is no institute such as the Advocate Generals advising the court, but there is a lively tradition of legal scholars discussing the case law of the Court, both on a national and an international level. All in all, the discourse organizes a rather lively discussion on the meaning and extension of the human rights provisions of the treaty.

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<sup>26</sup> *Supra* n.20.

The ECHR owes its legitimacy partly to the transparency and the accountability of its rulings.. If the ECJ can be characterized as “a Dworkinian Court”, then the ECHR surely can. In building a human rights discourse on the basis of a single treaty, Koopmans writes, “the European Court thereby explicitly accepted the idea of legal evolution in the area of human rights protection, and the role of the judiciary in drawing conclusions from it. That attitude may have contributed to the more or less activist character of much of the European Court’s case law”.<sup>27</sup> Only recently the ECHR confirmed its conviction that the Treaty is a living document, to be interpreted in the light of present-day opinions.<sup>28</sup> Although it has been said that the ECJ too plays an activist role, there is a notable difference. Starting in the economic area, the ECJ has built a new legal system of a somewhat technocratic nature, which has not attracted a lot of public attention.<sup>29</sup> The ECHR on the other hand, created a discourse on human rights with remarkable results, which did arouse a lot of public attention and support. Besides, the case law of the ECHR has proved to be a vehicle for social, legal and political change in most of the members of the Council of Europe. The case law of the ECHR has initiated major legal reforms in the Member States, in private law, criminal law, as well as in administrative law. The ECHR can be addressed by individual citizens when all national legal means are exhausted, which makes the court very accessible for individual citizens and activist lawyers. This, more than anything else, has contributed to the legitimacy of the ECHR. The success of the ECHR can be measured by the enormous growth in the case load, which increased from some 5,979 cases in 1998 to 13,858 cases in 2001.<sup>30</sup> Proposals for judicial reform are in discussion now, intended to rescue the court from its own success. Another risk is that certain Member States of the Council of Europe have developed

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<sup>27</sup> *Surpa* n.20.

<sup>28</sup> ECHR 13 July 2004, nr. 69498/01, NJ 2005, 508.

<sup>29</sup> *Supra* n. 21.

<sup>30</sup> European Court of Human Rights, informatienoot van de griffier 2004, p.3 (see [www.echr.coe.int](http://www.echr.coe.int) ).

an attitude of non-compliance to the rulings of the court (most notably Russia). This could weaken the court's legitimacy. Lastly, it should be noticed that the input-legitimacy of the ECHR is rather weak. The judges are appointed from the 45 Member States by the Parliamentary Assembly, for a period of 6 years.<sup>31</sup> For both the ECJ and the ECHR the idea and practice of national representation makes the legitimacy of the courts vulnerable. In hard cases citizens could respond to the rulings of both European courts with the question: why should we accept a ruling that is given by some politically appointed judges from until recently unknown countries? The future will teach us whether the European courts can afford to ignore this criticism or whether institutional reform will be necessary.

#### 4. *The Dutch Hoge Raad*

Let us return to the national courts, in this case the Dutch *Hoge Raad*. As in the cases of the ECJ and the ECHR, the *Hoge Raad* can be characterized as falling in-between the two extremes, in the sense that it draws its legitimacy both from institutional and discursive factors. Let us examine them individually. On the institutional level, the *Hoge Raad* is comparable to the *Cour de cassation* and is in fact, historically, a copy of the French system. Both are courts of cassation in civil and criminal cases, dealing only with questions of law (not questions of fact). As such they are not to be understood as third instance courts (next to the courts of first instance and the appellate courts), but rather as offering a form of judicial review (checking whether the law is correctly applied). "The principal role of a Supreme Court is to give authoritative rulings on the law", John Bell writes, and as such they fulfil a national role (distinct from the regional role of appeal courts).<sup>32</sup> In this line the primary

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<sup>31</sup> There are 45 judges; one judge for each party to the treaty. They are organised in 4 sections formed for 3 years, each of which contains committees of 3 judges for 1 year. Additionally, there are chambers of 7 judges, and the grand chamber of 17 judges ([www.echr.coe.int](http://www.echr.coe.int)).

<sup>32</sup> Bell, John. *Reflections on Continental European Supreme Courts*. *Legal Studies* (2004) 160.

responsibility of the *Hoge Raad* is to serve the uniformity of the legal system, for which task it is given a position at the top of the judicial hierarchy for civil and criminal adjudication (administrative adjudication is attributed to another hierarchy with the Council of State at the top). In playing this unifying role the *Hoge Raad* fulfils two other functions attributed by law, namely the legal protection of the parties involved, and the creation of law. This last function requires more explanation since according to the doctrine of the separation of powers (*Trias Politica*) it is supposed to be the legislature which makes the law, and the judiciary that applies the law. In the Netherlands this doctrine of the separation of powers is less strictly applied than in France, since it is an acknowledged fact that judicial lawmaking is both necessary (interpretation involves the creation of new law) and desirable (judicial lawmaking keeps the law up to date). This more flexible approach to the relation between the legislature and the judiciary – more as a balance of powers than as a separation of powers – is completed with a less positivistic, more hermeneutic approach by judges. The *Hoge Raad* and in fact the judiciary as a whole, is seen as being engaged in the interpretation of evolving law in individual cases, which involves the mutual adjustment of facts and norms. This picture was already sketched by an influential pre-war Dutch scholar (Paul Scholten), and it resembles the Dworkinian picture of judicial adjudication far better than the positivistic model.<sup>33</sup>

As a result, the case law of the *Hoge Raad* is *de facto* a source of law, in the sense that is in fact authoritative for other courts (not *de iure* since it is not legally binding). Both the *Hoge Raad* itself and the lower courts tend to follow its case law, both on legal grounds (equality) and for pragmatic purposes (saving parties the trouble of cassation). Though the doctrine of *stare decisis* is not formally in place in the Netherlands, adjudication can be regarded as an ongoing dialogue with precedents. In this dialogue, not only the *Hoge Raad* and the lower

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33 Scholten, Paul. *Algemeen Deel*. Zwolle 1974(2).



courts play their part, but also the Advocates General with their conclusions in each case in cassation and the legal scholars with their annotations. The distinction Lasser makes between the official discourse of the rulings of the court and the unofficial discourse of the conclusions and annotations is to be made in the Dutch context as well, though less strictly. As we saw, in France the substantial debate takes place in unofficial discourse, while the *Cour de cassation* presents its authoritative choice from among the discussed alternatives in a syllogistic form and in a magisterial tone. In the Netherlands, the division of labour between the official and the unofficial discourse is somewhat more vague, because the *Hoge Raad* plays an active role in the discussion of matters of substantial justice, equity and social needs. Its reasoning contains interpretive arguments and deliberations made on moral grounds and with regard to the factual consequences.

The case of baby Kelly provides a useful illustration, since in its ruling the court addressed legal arguments, the principle of the dignity of human life, and the possible consequences of the decision itself (see paragraph 1). This took some 12 pages, next to the 28 pages of the conclusion of the Procurator General. One can say that the *Hoge Raad* – in comparison with the *Cour de cassation* – has improved both the quality and quantity of its reasoning. In this ambition to improve on its reasoning the *Hoge Raad* resembles more the US Supreme Court than the *Cour de cassation*. In other words, in its output the *Hoge Raad* aspires to emulate the American example, while its input continues to reflect its French origin. This is the characteristic middle position of the *Hoge Raad*, between two opposites.

##### *5. Comparing the wrongful life cases*

This comparison of French, American, European, and Dutch courts establishes a perspective from which to examine the “wrongful life” cases. Apart from its outcome, the Supreme Court of California ruling is the most convincing. It is a reasoned reflection on the precedents available, the legislation at hand and the principles involved, with a due regard for

the choices left to be made. It is clear in the questions to be answered (“This case presents the question of whether a child born with an hereditary affliction may maintain a tort action against a medical care provider who – before the child’s conception – negligently failed to advise the child’s parents of the possibility of the hereditary condition, depriving them of the opportunity to choose not to conceive the child”) and it is cautious in the policies accepted (“we cannot assert with confidence that in every situation there would be a societal consensus that life is preferable to never having been born at all”). It is directed to the parties involved and the public at large and it is written in comprehensible language (here and there even in a literary style). It reflects differences of opinion by the simultaneous publication of concurring and dissenting opinions, thus showing that the plurality of opinions in society on such a complicated moral issue is reflected within the court, though on higher legal ground. As mentioned before, this does more justice to the ideas of practical reason and procedural justice than the alternative: one authorized opinion, arrived at through voting in chambers. The first approach is more convincing, as it signals that the ruling is convincing because it rests on solid grounds, not because it is delivered by a specific court. As such, the ruling is an example of horizontal authority, not of vertical authority. This is more effective in a society where the authority of institutions is no longer taken for granted, but has to be earned on each occasion of performance. Are there no drawbacks then for the methods of California Supreme Court? I think there are, but they cannot be read from the court’s rulings. As we mentioned in the context of the US Supreme Court, they are of an institutional nature. Though there are different procedures for the appointment of judges in state courts and in federal courts, they are both politically influenced. This makes these courts vulnerable, perhaps not so much to political influence (which is tempered by the judicial ethos of independence), as to the more indirect influence of political criticism (which is hard to redress).

Compare this picture with the French approach in the cases of Nicolas Perruche. In very short, syllogistically structured rulings the *Cour de cassation* “dictated” its decision. This decision was far less convincing. We can hardly find any reasons for the decision that the causal connection between the tort and the damage was not lacking, nor is there substantial deliberation on precedents and principles. What we do find is an unclear structure in which deliberations are tied to means of cassation (“moyen des cassation”), deliberations are put in the indirect mode (“Que...”), and where the decision is delivered (not reasoned). It is not surprising in a controversial matter such as this that the ruling (after being committed) failed to convince even the appeals court (which made the exceptional step of following the first appellate court instead of the *Cour de cassation*). Neither is it surprising that in France the question of the admissibility of wrongful life claims was eventually not decided by the judiciary, but by the legislature. Of course, one can say that this is very much the French way of doing things, since it fits the model of the *Trias Politica*. This is true, but one can hardly maintain that this contributes to the legitimacy of the *Cour de cassation*. As the case of the ECHR has shown, the social, moral and political role a court plays can be of crucial importance for its legitimacy. A lack of social relevance can be damaging for judicial legitimacy. When the *Cour de cassation* aspires to be a relevant institution in present day French society it has to reconsider its ways of dealing with important questions like this. Otherwise it runs the risk of being marginalized. On a more abstract level, the French case illustrates the extent to which legitimacy depends on functional variables. This vindicates the extension of Lasser’s approach to embrace functionality.

What about the *Hoge Raad* ruling in the case of baby Kelly? The extensively reasoned judgement was far more convincing than those of the *Cour de cassation*, but in comparison with the ruling of the Californian court some weaknesses remained. First, though the decision was supported by reasoning, this was done in only in one voice (because there were

no concurring or dissenting opinions). Therefore the ruling does not reflect the diversity of opinions that exist in society when considering such a controversial matter like this, as does the Californian ruling did, because it allowed dissents. As has been explained this seems a serious drawback, both from the perspective of democracy and of transparency. The *Hoge Raad* succeeded in fulfilling its role as a moral/legal guide for public debate, but more in the manner of Plato's "king philosopher." In a modern society the moral role of a court such as the *Hoge Raad* will be more relevant if it reflects the diversity of opinions in society within the court itself. Second, though the ruling in the case of baby Kelly did refer to the moral principle of the dignity of human life, it did not really succeed in integrating this principle in the legal reasoning. What do I mean by this? As has been mentioned, the *Hoge Raad* sustained the claim of the parents (both on their own accord and in the name of Kelly), and did not consider this a violation of the principle of the dignity of human life. On the contrary, the *Hoge Raad* concluded that sustaining the claim would better serve that purpose, but putting Kelly in a better position to lead a bearable life. This is a truism, of course, but it misses the point of the argument. In making this suggestion, the *Hoge Raad* transforms the argument from a general principle that justifies a legal decision into a specific goal that is realised by a legal decision. As such it justifies too much, implying that every claim must be sustained, because this will put the complainant in a better position to lead a fulfilling human life). The *Hoge Raad* made this mistake because it addressed this moral principle directly, without the mediation of legal sources. Where the *Cour de cassation* was too exclusive, refusing to consider the moral merits of the case, the *Hoge Raad* was too inclusive. The first approach is not convincing in a case with such important moral overtones as this one, the second case is not convincing in a society which is so morally divided as ours. Both considerations must be taken into account by courts if they hope to maintain their legitimacy.

#### *D. Conclusions*

Where does this leave us? After introducing the case of wrongful life we considered the sources from which different courts draw their legitimacy in dealing with hard cases such as this. First, we contrasted the rather formalized, short, syllogistic, magisterial decisions of the French *Cour de cassation*, with the pragmatic, long, dialogical, personal decisions of the US Supreme Court justices. The French system seems to rely on input-factors as dominant sources for judicial legitimacy (institutional legitimacy), while the Supreme Court draws its legitimacy from discursive means (discursive legitimacy). This situation is strengthened by a different organisation of the debate. The French system displays a bifurcation with an emphasis on the unofficial discourse as the context for the real debate, while in the American system the debate takes place within the court itself (as is shown by majority and minority opinions). For Europeans the difference is relevant, because the French system is mimicked in the ECJ, while the American system is copied by the ECHR. As has been argued, the latter system seems preferable in a modern democracy, where substantive justice and social elitism have given way to procedural justice and meritocracy.

The European courts seem to take in-between positions, as they each display a unique mixture of output- and input-legitimacy. The ECJ has built up a legal system based on the EU Treaties, interpreting them and other EU provisions in a Dworkinian fashion in the best possible way to advance European integration. As Bengoetxea writes, “the ECJ has ‘une certaine idée de l’Europe.’” The consequence is that the legitimacy of the ECJ is connected with the European integration as a whole, which is not without risk, as recent developments show. The ECHR has developed a human rights discourse on the basis of the Treaty of Rome (1950), also interpreting it in a Dworkinian fashion. Its activism has been more successful than that of the ECJ, because the topics dealt with speak more to the mind (are less technocratic), have had a large positive impact on the legal systems of the Member States..

The legitimacy of the ECHR is not to be taken for granted however, because the Court has serious problems both with caseload and compliance. Finally, there is the issue of national representation among the judges appointed in the courts, which is a serious risk for the legitimacy of both European courts.

The Dutch *Hoge Raad* takes another in-between position between the opposites of the *Cour de cassation* and the US Supreme Court. On the one hand, the institutional setting is copied from the French example, including the bifurcation between the official and the unofficial discourse. On the other hand, the *Hoge Raad* seeks legitimacy by improving the reasoning of the decisions, apparently aspiring to resemble the American courts. The resemblances and differences are illustrated by the way the different courts have dealt with wrongful life claims. As has been mentioned the rulings of the *Cour de cassation* and the California Supreme Court could not differ more in content and style. Again, the *Hoge Raad* takes the middle ground and draws from both institutional and discursive sources of legitimacy.

Finally, the question can be asked how to improve or strengthen the Courts' legitimacy? This review of the issues surrounding legitimacy suggests that strengthening legitimacy will require improvement both in the input and output of the courts. On the input side, the possibility of political appointments creates a serious reason for concern about the California Supreme Court (as well as the US Supreme Court). For the *Cour de cassation* and the *Hoge Raad*, it is the elitist character of the court that attracts attention. The selection on merit creates risks for the representative nature of the courts and can be questioned from a democratic point of view. Though the risks for the American and these European courts mirror each other, they will both need to be aware of the risks they run on the input side. On top of that, the *Cour de cassation* and (to a lesser extent) the *Hoge Raad* have to improve their performance (on the output side). The example of the "wrongful life" case shows that the *Hoge Raad* does reasonably well but could improve by introducing a practice of

concurring and dissenting opinions. The *Cour de cassation* though has performed rather poorly in the cases of Nicolas Perruche and seriously faces the risk of marginalization. For all courts discussed we can conclude that their legitimacy forms a serious challenge. In reflecting on this we should integrate the institutional, discursive and social dimensions of the problem. Only then can we aspire to improve the legitimacy of our courts.