4 Discussion of Selected Climate Decisions

The previous Section discussed possible short-comings of discourse-theoretical justification of climate decisions and how Kuhli and Günther's reframing of discourses of norm application as discourses of norm identification together with their elaboration of legitimate judicial law-making form the internal perspective offers firmer discourse-theoretical grounds of legitimate judicial climate decisions given the lack of explicit climate rights legislation. The present Section applies these concepts to two highly discussed climate decisions in the European realm. First, the order in *Neubauer* of the German Federal Constitutional Court is analysed and second the *Klimaseniorinnen* decision of the European Court of Human Rights. It is concluded that both these decisions can be viewed as involving legitimate judicial law-making. However, this claim can also be refuted as neither decision meets all of the criteria proposed by Kuhli and Günther fully. The application of their framework thus allows for a more nuanced discussion of the decisions' democratic legitimacy.

4.1 *Neubauer* of the German Federal Constitutional Court

The decision in *Neubauer and Others* of 24 March 2021 of the German Federal Constitutional Court is concerned with the German Federal Climate Change Act [Klimaschutzgesetz].[194] The Climate Change Act came into force in December 2019 and was the first legal instrument in Germany to set binding greenhouse gas emission targets. In its

194 Bundes-Klimaschutzgesetz of 12 December 2019 (BGBl. I S. 2513).

initial version that was discussed before the Federal Constitutional Court the objective of the act was to achieve national and EU climate targets, "based on" the obligations under the Paris Agreement and Germany's political commitment at the 2019 UN Climate Summit to pursue climate neutrality by 2050.[195] For the period until 2030, the Climate Change Act required reductions of greenhouse gas emissions by at least fifty-five percent compared to 1990 levels.[196] To reach these national climate change goals, the Act prescribes that yearly reduction goals are set for certain economic sectors through annual emission budgets.[197] However, the Act did not include any climate change objectives after 2030, as those had been struck out during the legislative process.[198] Thus, the Federal Government was merely required to set annually decreasing emissions budgets for the periods after 2030 by regulation.[199] Several individuals and environmental organisations from Germany and abroad claimed that the Federal Climate Change Act violated their fundamental rights and would be insufficient for reducing greenhouse gas emissions. Therefore, they initiated constitutional complaint proceedings before the Federal Constitutional Court. In these proceedings the Federal Constitutional Court examines whether specific constitutional law has been violated and may declare legislation unconstitutional and void or require amendments. Its decisions in constitutional complaint proceedings are final and binding on all constitutional state organs, the courts and public authorities.[200]

The *Neubauer* decision followed the initiation of four constitutional complaints against the Federal Climate Change Act and against the failure to take further measures to reduce greenhouse gas emissions. The complainants primarily alleged that the state had not introduced a legal framework sufficient for swiftly reducing greenhouse gases. They

195 ibid §1.
196 ibid §3(1).
197 ibid §4(1).
198 R Bodle and S Sina, 'The German Federal Constitutional Court's Decision on the Climate Change Act' (2022) 16 Carbon & Climate Law Review 18, 18.
199 Bundes-Klimaschutzgesetz of 12 December 2019 (BGBl. I S. 2513) §4(6).
200 Bodle and Sina (n 198) 18–19.

claimed that the reduction of CO_2 emissions specified in the Federal Climate Change Act is not sufficient to stay within the remaining CO_2 budget that correlates with a temperature limit of 1.5°C. For these claims they relied primarily on duties of protection arising from fundamental rights under article 2(2) first sentence (fundamental right to life and physical integrity) and article 14(1) (fundamental right to property) of the German Basic Law [Grundgesetz], as well as on a fundamental right to a future consistent with human dignity [menschenwürdige Zukunft] and a fundamental right to an ecological minimum standard of living [ökologisches Existenzminimum], which they derived from article 2(1) (fundamental right to free development of one's personality) in conjunction with article 20a (fundamental national objective to protect the natural foundations of life and animals), and from article 2(1) in conjunction with article 1(1) first sentence (human dignity) of the Basic Law. Regarding obligations to reduce emissions for periods after 2030, the complainants relied on fundamental freedoms more generally.[201] The complaints were found to be admissible insofar as the complainants were natural persons and claimed that duties of protection arising from fundamental rights have been violated.[202]

The Federal Constitutional Court ruled that the constitutional complaints are partially successful. It did not find that the legislator had violated its constitutional duties to protect the complainants against the risks of climate change. However, fundamental rights had been violated because 'the emission amounts allowed by the Federal Climate Change Act in the current period [until 2030] are capable of giving rise to substantial burdens to reduce emissions in later periods'.[203] While the risk to fundamental freedoms is not unconstitutional on the grounds of any violation of objective constitutional law,

> there is a lack of precautionary measures required by fundamental rights in order to guarantee freedom over time and across generations – precautionary measures aimed at mitigating the substantial emission reduction burdens which the legislator offloaded onto the post-2030 period with

201 *Neubauer* (n 7) §1.
202 ibid §90.
203 ibid §142.

> the challenged provisions and which it will then have to impose on the complainants (and others) due to Art. 20a [of the Basic Law] and due to the obligation arising from fundamental rights to afford protection against impairments caused by climate change.[204]

Therefore, the Federal Constitutional Court required the legislator to regulate the reduction targets for periods after 2030 in more detail by 31 December 2022 in accordance with the provisions of the order of the Federal Constitutional Court.[205]

The *Neubauer* decision from the German Federal Constitutional Court is an interesting climate decision because the Federal Constitutional Court did not really create climate rights to find part of the German Federal Climate Change Act unconstitutional. As mentioned above, the German Basic Law already included a climate change provision in the form of article 20a. This provision contains a fundamental national objective from which a binding protection mandate concerning the natural foundations of life follows for the legislature. However, it is left up to the legislature to implement this objective. This is why the Federal Constitutional Court was rather prudent in controlling the state's action with regard to article 20a of the Basic Law in past decisions as well as in *Neubauer*.[206] The literature around the decision discusses whether it "subjectivises" the national objective and thereby transforms it into an environmental basic right.[207] Some hold that following the decision, fundamental rights and the fundamental national objective enshrined in article 20a of the Basic Law can hardly be considered separately from each other in the context of climate protection and that relying on the duty to protect the legislator can now be called upon by the courts to pursue policies aimed at climate neutrality.[208] It seems that in its rather complex construction, the Federal Constitution-

204 ibid.
205 ibid §268.
206 Lorenz Lang, 'Art. 20a GG in der Hand des Bundesverfassungsgerichts – Potential für einen Anspruch auf Gesetzgebung?' (2022) 44 Natur und Recht 230, 233.
207 See e.g. Lang (n 206); Christian Calliess, 'Das „Klimaurteil" Des Bundesverfassungsgerichts: „Versubjektivierung" Des Art. 20a GG?' (2021) 6 Zeitschrift für Umweltrecht 355.
208 Lang (n 206) 235.

al Court mainly developed the defensive aspect [Abwehrrecht] of fundamental rights, without turning the fundamental national objective to protect the natural foundations of life into a subjective fundamental right itself.[209] This aspect of the decision, thus, might not prove as the most problematic in terms of judicial law-making. Though it has been criticised by Josef Franz Lindner, that the way in which the Federal Constitutional Court engaged the state's duty to protect with regard to article 20a of the Basic Law is not consistent and cannot be connected to previous fundamental rights dogmatics.[210] If this is the case, then it poses a challenge to the legitimacy of the Federal Constitutional Court's decision. Even though not mentioned among the requirements listed by Kuhli and Günther, consistency with past institutional history is among the general requirements for any courts as mandated by the certainty requirement.[211] Other authors, however, do not seem to be of this opinion and deem the Federal Constitutional Court's interpretation a 'convincing [one] of positive constitutional law'.[212]

What is discussed as an entirely new aspect the Federal Constitutional Court develops in *Neubauer*, is the intertemporal validity of all fundamental rights. And it is based on this concept that it finds parts of the Federal Climate Change Act to be unconstitutional. By considering the intertemporal aspect of fundamental rights, the Federal Constitutional Court holds that

> [t]he efforts required under Art. 20a [Basic Law] to reduce greenhouse gas emissions after 2030 will be considerable. Whether they will be so drastic as to inevitably entail unacceptable impairments of fundamental rights from today's perspective is impossible to determine. Nevertheless, the risk of serious burdens is significant. Due to the obligation to contain the risks of significant impairments of fundamental rights, as well as the general obligation to respect fundamental rights, the emission amounts specified until 2030 [...] can ultimately only be reconciled with the potentially affect-

209 Calliess (n 207) 356.

210 Josef Franz Lindner, 'Freiheit in der Klimakrise' in Phillip Hellwege and Daniel Wolff (eds), *Klimakrisenrecht* (Mohr Siebeck 2024) 112.

211 Baxter (n 22) 107.

212 Mathias Hong, „Erfunden" und „gefunden"' [2023] Verfassungsblog: On Matters Constitutional <https://intrechtdok.de/receive/mir_mods_00015745> accessed 7 July 2025.

> ed fundamental freedoms if precautionary measures are taken in order to manage the reduction burdens anticipated after 2030 in ways that respect fundamental rights.[213]

Counter to the discussion surrounding article 20a of the Basic Law, many authors seem to find the argumentation plausible that fundamental rights have an intertemporal component and that foreseeable future encroachments can be considered a violation already today.[214]

The legitimacy of the *Neubauer* decision is certainly controversial. It seems fit to analyse it through the lens of Kuhli and Günther's framework as the Federal Constitutional Court engaged in a creative act of developing a new dimension of how fundamental rights apply but at the same time did so based on existing principles and constitutional provisions. Without making refence to Kuhli and Günther, Hong wrote about the decision that it shows how 'fundamental rights courts can "invent" and "find" rights at the same time [zugleich "erfinden" und "finden"]'.[215] The following applies Kuhli and Günther's criteria for legitimate judicial law-making to the Federal Constitutional Court's *Neubauer* decision to offer a perspective on whether it can be considered legitimate. The first criterion is that the court needs to participate in an ongoing public discussion. This certainly was the case at the time of the ruling with ongoing global climate change protests, international debates and pervious climate decisions in other jurisdictions. It can also be affirmed that the Federal Constitutional Court through its decision participated in the debate with a concrete relevant case. The Federal Climate Change Act had only recently been passed in Germany and was widely discussed and criticised. Moreover, issues of intergenerational justice regarding climate change had also been prevalent in public and academic discussions.[216] The obtaining of the first and second criterium can be further substantiated by considering the applicants and their aims for the complaint. As mentioned, the order in *Neubauer* is based on several constitutional complaints that

213 *Neubauer* (n 7) §245.
214 See e.g. Lindner (n 210) 110.
215 Hong (n 212).
216 See e.g. Fischer Kuh (n 15) 746; Eckes (n 10) 1312.

were filed by many interested parties and supported by civil society organisations, thus representing a significant part of the population and actively engaging the court in the ongoing debate. Moreover, *Neubauer* is clearly an instance of strategic litigation as the aim was to create wider societal change beyond the interests of the claimants.[217] Regarding the principles the Federal Constitutional Court was asked to apply it needs to be considered whether they were already concrete norms or needed further elaboration by the Federal Constitutional Court. While the right to freely develop one's personality had been elaborated previously by the Federal Constitutional Court and in public (academic) discourses, it presents itself nonetheless as a rather vague principle in the text of the Basic Law that justifies further elaboration to be appliable as a concrete norm. Similarly, it is not immediately clear what the fundamental national objective to protect the natural foundations of life and animals enshrined in article 20a of the Basic Law amounts to in practice. Thus, the inherently vague nature of these constitutional provisions could justify the Federal Constitutional Court in needing to provide further specific provisions to apply them in a concrete case.

The last two criteria for legitimate judicial law-making proposed by Kuhli and Günther refer to the ways in which civil society and the other branches of government can engage with the interpretation of the court and whether its validity remains defeasible in later discourses. In terms of public engagement with the decision directly it is again relevant that the plaintiffs were mainly young people, the non-governmental organisation BUND and the German Solar Energy Association [Solarenergie-Förderverein Deutschland]. The preparation of the constitutional complaints was additionally supported by other environmental organisations, including Deutsche Umwelthilfe, Fridays for Future and

217 On the definition of strategic climate litigation cf. Joana Setzer, Nicola Silbert and Lisa Vanhala, 'The Effectiveness of Climate Change Litigation' in Francesco Sindico and others (eds), *Research Handbook on Climate Change Litigation* (Edward Elgar Publishing 2024) 245. For a discussion of *Neubauer* as strategic climate litigation see, e.g. Jacqueline Peel and Rebekkah Markey-Towler, 'Recipe for Success?: Lessons for Strategic Climate Litigation from the *Sharma*, *Neubauer*, and *Shell* Cases' (2021) 22 German Law Journal 1484.

Greenpeace. In terms of engagement by third parties outside of the initial complaints, the German Federal Constitutional Court may invite expert third parties [sachkundigen Dritte] to submit statements.[218] This was not the case in *Neubauer* but the Federal Constitutional Court drew on various expert reports when discussing the facts of climate change. However, different from what Kuhli and Günther discuss as a sign of legitimacy, the decision of the Federal Constitutional Court cannot be overruled by the legislature. Furthermore, decisions of the Federal Constitutional Court are binding on the constitutional bodies of the Federal Government and the Federal States as well as all courts and authorities.[219] While this rule mostly relates to the specific facts of the case decided, certain decisions of the Federal Constitutional Court, in particular on the constitutionality of a legal provision, have the force of law and therefore apply beyond the individual case.[220] While the decisions remain to be implemented by the legislator and the executive and can be amended in future normative discourses, these legal regulations certainly place a limitation on this.

To conclude, given the new emphasis and intertwining of the fundamental national objective to protect the natural foundations of life and animals with the basic right to freely develop one's personality additional to the development of the intertemporal aspect of basic rights, the German Federal Constitutional Court in the *Neubauer* decision most likely went beyond mere norm identification but engaged in a discourse of justification and thus judicial law-making. However, given that the Federal Constitutional Court was referring and contributing to an ongoing public discussion with its decision and the norms it had to apply where rather vague and justified further elaboration to become appliable, the decision can be seen as legitimate under the framework developed by Kuhli and Günther. This is conclusion is further supported by the ample civic engagement with the decision both immediately

218 Bundesverfassungsgerichtsgesetz in der Fassung der Bekanntmachung vom 11. August 1993 (BGBl. I S. 1473) §27a.
219 ibid §31(1).
220 ibid §31(2).

before the Federal Constitutional Court as well as in the aftermath of the decision. However, the binding nature of the decision for the other branches of government and future court decision limits the extent to which the interpretation by the Federal Constitutional Court can be challenged in future normative discourses which reduces its legitimacy under Kuhli and Günther's framework. Moreover, whether the decision is in line with the institutional history of the Federal Constitutional Court, and also whether it is clear enough to offer a point of departure for future decisions is debated. Both of those considerations form part of the proper role of any court under discourse theory and if not met, present a further issue for the decision's legitimacy.

4.2 *KlimaSeniorinnen* of the European Court of Human Rights

The Swiss association, *Verein KlimaSeniorinnen*, together with four women turned to the European Court of Human Rights (ECtHR) because they considered that the Swiss authorities did not take sufficient action to mitigate the effects of climate change, despite alleged obligations under the European Convention on Human Rights. Prior to the proceedings before the Strasburg Court, the applicants had initiated administrative procedures before the Swiss Federal Council and other Swiss environmental and energy authorities, complaining about various failings in the area of climate protection. The request and all following appeals were dismissed by the Swiss Federal Department of the Environment, Transport, Energy and Communications, the Swiss Federal Administrative Court, and finally the Swiss Federal Supreme Court. The decisions that the request was inadmissible were mainly based on issues of standing. The four individuals as well as the association, which consists of more than 2,000 older women who complain of health problems that are exacerbated during heatwaves, significantly affecting their lives, living conditions and well-being, were deemed to

not be sufficiently directly affected by the alleged failings of the Swiss Government.[221]

Before the European Court of Human Rights, the applicants claimed that Switzerland had violated their right to life (article 2 ECHR), and failed to ensure respect for their private and family life, including their home (article 8 ECHR), as well as infringed upon their rights of access to justice (articles 6, right to a fair trial and 13 ECHR, right to a fair remedy). These violations are claimed to have occurred due to various failures of the Swiss authorities to mitigate the effects of climate change, and in particular the effects global warming which supposedly adversely affect their lives, living conditions and health. Concerning the alleged violations of articles 2 and 8, the applicants claimed that Switzerland had failed to introduce suitable legislation and to put appropriate and sufficient measures in place to attain the targets for combating climate change, in line with its international commitments.[222]

It should be noted that the facts of *KlimaSeniorinnen* were fundamentally different from any of the European Court of Human Rights' previous environmental cases, which all dealt with specific sources from which environmental harm arose.[223] Climate change, however, is not caused by one single or specific source, sources of GHG emissions are not limited to specific dangerous activities, CO_2 is not as such toxic, the chain of events that leads to harmful consequences is highly complex and more difficult to predict, and climate change is a polycentric issue which cannot be addressed by specific localised or single-sector measures.[224] To address this different nature of climate change compared to other environmental issues, the ECtHR heavily relied on international regulations and commitments in its argumentation. While it had referred to international environmental law before,

221 *KlimaSeniorinnen* (n 8) §22–63.
222 ibid §§296, 575, 641.
223 ibid §415.
224 ibid §§416–419.

the ECtHR' argumentation does not suggest that it had engaged in an in-depth analysis of international instruments until now.[225]

Basing itself, *inter alia*, on this analysis of international environmental law and state obligations, the European Court of Human Rights finds that

> in line with the international commitments undertaken by the member States, most notably under the United Nations Framework Convention on Climate Change (UNFCCC) and the 2015 Paris climate agreement, and in the light of the compelling scientific advice provided, in particular, by the Intergovernmental Panel on Climate Change (IPCC), States need to put in place the necessary regulations and measures aimed at preventing an increase in GHG concentrations in the Earth's atmosphere and a rise in global average temperature beyond levels capable of producing serious and irreversible adverse effects on human rights under Article 8.[226]

Before reaching this novel interpretation of article 8, and the accompanying expansion of human rights into the realm of positive obligations in relation to climate change, the ECtHR had to consider whether the applicants had standing under the Convention. Similarly to the Swiss authorities, the ECtHR found that the four individual applicants did not meet the criteria for victim-status, the threshold for which is particularly high in climate litigation as the Convention does not admit general public-interest complaints.[227] However, counter to the national decisions, the ECtHR found that the association had standing in the case under consideration.[228] It held that because climate change provides for an exceptional crisis, and because of a general need for interest mobilisation and organisation in complex modern societies, specifically the need for intergenerational burden sharing and the underrepresentation of future generations in the democratic process, as well as for the effective protection of the Convention rights it is appropriate to allow for recourse to legal action by associations in the context

225 Ole W Pedersen, 'The European Court of Human Rights and International Environmental Law' in John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (1st edn, Cambridge University Press 2018) 94.
226 *KlimaSeniorinnen* (n 8) §546.
227 ibid §§460, 488, 535.
228 ibid §526.

of climate change.[229] However, to remain compliant with the exclusion of general public-interest complaints, the applicant association needs to satisfy a number of conditions to have the right to act on behalf of individuals and to lodge an application on account of the alleged failure of a State to take adequate measures to protect them from the harmful effects of climate change on their lives and health.[230] For the association *Verein Klimaseniorinnen*, the ECtHR found that these criteria were fulfilled.[231] Furthermore, it found that article 8 was applicable to its complaint, which is why the ECtHR decided not to consider the case from the angle of article 2 ECHR.[232]

When discussing the alleged violation of article 8 ECHR, the European Court of Human Rights developed the aforementioned right for individuals to effective protection by the State authorities from the serious adverse effects of climate change on their lives, health, well-being and quality of life. Following this, the ECtHR held that a contracting State's main duty is to adopt, and to apply in practice, regulations and measures capable of mitigating the existing and potentially irreversible, future effects of climate change. This obligation flows from the causal relationship between climate change and the enjoyment of Convention rights, and the fact that the object and purpose of the Convention, as an instrument for the protection of human rights, requires that its provisions must be interpreted and applied so as to guarantee rights that are practical and effective.[233] Concerning the complaint in relation

229 ibid §499. This narrow application of standing criteria to only climate-related cases has been confirmed in later environmental case where an association has been denied standing (see *Cannavacciuolo and Others v Italy* [2025] European Court of Human Rights App. nos. 51567/14 and 3 others.).

230 *KlimaSeniorinnen* (n 8) §§500–503. These criteria are: (a) being lawfully established in the jurisdiction concerned or have standing to act there; (b) being able to demonstrate that the association pursues a dedicated purpose in accordance with its statutory objectives in the defence of the human rights […]; and (c) being able to demonstrate that it can be regarded as genuinely qualified and representative (§502).
to act on behalf of members or other affected individuals […]

231 ibid §§521–526.

232 ibid §536.

233 ibid §§519, 538–540.

to Switzerland, the ECtHR found that there had been critical gaps in the process of putting in place the relevant domestic regulatory framework, including a failure by the Swiss authorities to quantify, through a carbon budget or otherwise, national greenhouse gas emissions limitations. The Swiss authorities had not acted in time and in an appropriate way to devise and implement the relevant legislation and measures in accordance with their positive obligations pursuant to article 8 of the Convention, which were of relevance in the context of climate change. Therefore, the Swiss Confederation had exceeded its margin of appreciation and had failed to comply with its duties in this respect.[234] Thus, the ECtHR found a violation of article 8 of the Convention.[235] Furthermore, it held that the reasons provided by the national authorities for not considering the merits of the complaints were insufficient and since there were no further legal avenues or safeguards available, it found a violation of article 6§1 ECHR.[236] As per article 46 of the Convention, states have a legal obligation to adopt measures in its domestic legal order to put an end to the violation found by the ECtHR and to redress the situation. While the ECtHR sometimes chooses to indicate certain measures to be adopted, it abstained from doing so in the case at hand given the complexity and nature of the issues involved and left the choice of measures up to the discretion of the Swiss Confederation, against the request of the applicants.[237]

In discussions of *KlimaSeniorinnen*, it is held that the decision has 'undoubtedly expanded the reach of human right'.[238] Different from the German Federal Constitutional Court, the European Court of Human Rights expanded article 8 ECHR to include the new right to be protected from severe negative consequences of climate change. The situation seems similar to what Kuhli and Günther describe and

234 ibid §§558–572.
235 ibid §574.
236 ibid §§635–638, 640.
237 ibid §§656–657.
238 Anna Hoffmann, 'Five Key Points from the Groundbreaking European Court of Human Rights Climate Judgment in *Verein KlimaSeniorinnen Schweiz v Switzerland*' (2024) 26 Environmental Law Review 91, 92.

can hence be analysed under their framework. Given the novelty of climate change obligations under article 8 ECHR, and the way the decision is discussed, it is fair to say that the Court went beyond mere descriptive norm-identification but created a new right in the European human rights framework. While basing itself on state practices and international obligations when defining the new aspect of article 8, the Court hardly refers to international materials but only relies on its own case law in the merits section of the judgement.[239] The only exceptions are two general references to international commitments undertaken by the member States under the UNFCCC and the Paris Agreement.[240] But as Kuhli and Günther describe, while the European Court of Human Rights initially defines a new right, it does so from a position of critical reflection about established legal principles. The ECtHR acknowledges that it is difficult to clearly distinguish between questions of law and questions of policy-making and political choice, given the complexity of environmental policy-making.[241] It states that measure to address climate change need to follow from democratically legitimate action by the legislature and the executive, which cannot be substituted by judicial intervention.[242] However, the ECtHR also holds that 'this does not exclude the possibility that where complaints raised before the Court relate to State policy with respect to an issue affecting the Convention rights of an individual or group of individuals, this subject matter is no longer merely an issue of politics or policy but also a matter of law'.[243] It views the task of the judiciary as to ensure the necessary supervision of compliance with the law, which includes assessing the proportionality of measures taken (or lack thereof) by a state.[244] An important notion in this context is also the European Court

239 *KlimaSeniorinnen* (n 8) §§538–576.
240 ibid §§546, 563.
241 ibid §449.
242 ibid §§411–412.
243 ibid §450.
244 ibid §412; Andreas Hösli and Meret Rehmann, 'Verein KlimaSeniorinnen Schweiz and Others v. Switzerland: The European Court of Human Rights' Answer to Climate Change' (2024) 14 Climate Law 263, 272.

of Human Rights' living instrument doctrine, which requires that the Convention 'must be interpreted in the light of present-day conditions, and in accordance with developments in international law, so as to reflect the increasingly high standard being required in the area of the protection of human rights'.[245] As was argued above and is the view of the ECtHR and other authors, the effects of climate change have indeed become part of present-day conditions and therefore need to be considered when interpreting the Convention rights.[246]

Seeing that the European Court of Human Rights most likely engaged in judicial law-making but with a strong element of norm identification as it heavily relies on international agreements, the decision will now be assessed following Kuhli and Günther's criteria. As with the German *Neubauer* decision, not much needs to be said on the point whether the Court was referring to an ongoing discussion. If anything, the argument that there is such an ongoing discussion is strengthened given the increasing number of climate decision prior to *Klimaseniorinnen* and a continued public debate, acts of civil disobedience, and international discussions the topic of climate rights. Thus, the ECtHR did not invent a norm but certainly referred to an ongoing discussion. Similarly, the ECtHR participated in this debate with the concrete case before it. As discussed above, heat waves caused by anthropogenic climate change pose an increasing threat to the health and lives of individuals. The association *KlimaSeniorinnen* successfully argued before the European Court of Human Rights that the daily lives of its members (and elderly women in Switzerland generally) were significantly impacted by the effects of climate change. Similarly to and possibly more significantly than in *Neubauer*, the fact that the applicant was an association, who was accepted by the European Court of Human Rights to speak for its members and elderly Swiss women generally, indicates the ECtHR's contribution to the discussion surrounding the interpretation of the right to respect for private and family life by holding that it includes a right to be protected from severe

245 *KlimaSeniorinnen* (n 8) §434.
246 See e.g. Hoffmann (n 238) 96.

adverse effects of climate change. Again, the large number of concerned persons represented by *KlimaSeniorinnen* and the strategic aims of the case indicate the ongoing discussion around climate action and the ECtHR's active participation in the discourse with the present case.[247] This leads to the question whether the principles under consideration are of a moral and legal kind. As Kuhli and Günther point out, the principles used by the ICTY could not be directly applied as rules but required the Tribunal to justify a proposed norm according to these general moral principles. It could be questioned whether the principles enshrined in article 8 ECHR are as vague as to require such a formulation of an appliable norm. However, the formulation of the article is rather vague and leaves a lot of room for interpretation which the ECtHR has previously filled. With the living instrument doctrine, it could equally be held that the ECtHR is required to continuously develop the meaning of the principles enshrined in the Convention and transform them into concrete norms that can be applied.

The other two criteria defined by Kuhli and Günther refer to the possibility of public and legislative engagement with the judicial decision directly and the influence it can have on the interpretation through future discourses. The European human rights system has institutionalised public engagement in the form of *amicus curiae* briefs. Third-party governments, international organisations, non-governmental organisation, and individuals have the possibility to submit comments for the European Court of Human Rights. In the case of *KlimaSeniorinnen* twenty-three entities submitted *amicus curiae* briefs, among them eight other states, the United Nations High Commissioner for Human Rights, the United Nations Special Rapporteurs on toxics and human rights, and on human rights and the environment with the Independent Expert on the enjoyment of all human rights by older persons, as well as several NGOs, legal centres, and legal experts. The

247 For a discussion of the relevance of representation through civil society organisations in court and a discussion of *KlimaSeniorinnen* see, e.g. Christina Eckes, Clara Kammeringer and August Coenders, 'Democratie En Vertegenwoordiging van Het Algemeen Belang' [2025] Nederlands Juristenblad 2031.

decision thus cannot only be critically evaluated and be influenced by the public but civic engagement was indeed lively. However, the Court's decision cannot be immediately overruled by a legislative body. The Swiss executive and legislature are bound by the decision and need to take it into considerations for future actions and decisions. The decision, for example, required the Swiss Federal Government to develop a methodologically robust carbon budget. While legally required to implement the decision, the Council of Europe lacks *de facto* enforcement powers which makes it possible to disregard a decision, even if that is legally prohibited. In fact, both chambers of the Swiss parliament claimed that the Court had overstepped its powers and called on the Swiss government to ignore the ruling.[248] However, this does not influence the here more relevant question whether it is per design possible for the decision to be overruled by legislative bodies; the answer to which is no. This also influences the last criterion which concerns the long-term effect of the decision. The decisions of the European Court of Human Rights are binding in the immediate case and set a strong precedent following which all Signatories to the European Convention on Human Rights will have to consider the ECtHR's view.[249] The *KlimaSeniorinnen* decision in particular is expected to have far-reaching consequences for these jurisdictions and even beyond Europe. As Andreas Hösli and Meret Rehmann put it: 'Interested actors (including plaintiffs in climate litigation) in various European jurisdictions (and possibly elsewhere) are likely to rely on this decision in relation to the ECtHR's findings on causality, state responsibility, and other key issues in the decision'.[250] While the decision remains subject to the acceptance of later participants in the normative discourse, especially in the form of whether or not it is implemented, it sets a limiting legally binding precedent. Legally overruling the decision would require significant changes to the European human rights system as it is currently

248 Hösli and Rehmann (n 244) 283–284.

249 For a discussion of the implications of *KlimaSeniorinnen* for national contexts see, e.g. Eckes, Kammeringer and Coenders (n 247).

250 Hösli and Rehmann (n 244) 284.

established, or changes to the international obligations on which the Court relied for its findings. If states were to change their international commitments with regards to climate action, the arguments of the European Court of Human Rights would lose some of their force. In this sense it is possible to further submit the interpretation provided by the Court to public discourse, though it might not be as defeasible as Kuhli and Günther have in mind for it to be legitimate judicial law-making.

In conclusion, given the novelty of the right to be protected against sever consequences of climate change, which the European Court of Human Rights read into the right to respect for private and family life in *KlimaSeniorinnen*, it is fair to say that the Court went beyond mere norm identification but engaged in norm justification. However, as developed by Kuhli and Günther, judicial law-making can be legitimate under certain circumstances. On first glance, it seems that the conditions proposed are mostly met which would render the decision legitimate under a Habermasian framework. The Court defined the new aspect of article 8 ECHR from a point of critical reflective attitude, building onto and engaging with the broader societal and international discourse. What might pose a problem for the decision's legitimacy under Kuhli and Günther's framework is that the principles applied are not as vague and underdetermined to justify the need for judicial concretisation, and that the possibility for legislatively and generally discursively overruling the interpretation is limited given the legally binding nature of the decision in the case at hand and the strong precedent it sets for all High Contracting Parties to the European Convention of Human Rights.