

5 Conclusion

With the climate crisis unfolding rapidly and comprehensive climate legislation still lacking, more and more people are turning towards the courts for help. However, the legitimacy of judicial decisions in climate cases is contested. To substantiate the ongoing academic discussion, the present thesis investigated the argument that Habermas' discourse theory of law can offer legitimacy to the courts when engaging with climate litigation. In particular this thesis engaged with Laura Burgers' version of this argument and drew on Kuhli and Günther's (2011) framework to elaborate a more robust account of how discourse theory may legitimise climate decisions. The research here presented was guided by the research questions: Under what conditions can Habermas' co-originality thesis provide a robust defence against the charge of illegitimate judicial intervention through climate decisions? Where can climate rights that justify such decisions legitimately originate under a Habermasian framework? Specifically, can courts legitimately create climate rights to justify their interventions?

To this end Habermas' discourse theory was presented, starting with a general introduction to the theory to then discuss in more detail the system of rights and the co-originality thesis. Following this, the discourse theoretical perspective on legitimate judicial review (by constitutional courts) was discussed after giving an overview of the theory's general conception of the judiciary including the notion of a discourse of application. The third Section of this thesis applied the theoretical insights to the matter of climate rights. After discussing the role of climate rights for the protection of public and private autonomy and their potential place in the system of rights, focus was shifted to the legitimate elaboration of the system of rights and hence whether and

how courts can be part of the establishment of climate rights. Burgers' argument was assessed, and Kuhli and Günther's reformulation of a discourse of application as one of norm identification was discussed as a potential re-conception of judicial review that can entail legitimate judicial law-making and could allow for judicial engagement with climate rights. Finally, the fourth Section analysed the courts' approaches in two significant European climate decisions: the German Federal Constitutional Court's *Neubauer*, and the European Court of Human Rights' judgement in *KlimaSeniorinnen*.

It is argued that Burgers' conceptualisation of the discourse theory of law offers a helpful starting point for discussing the legitimacy of judicial climate decisions from a discourse theoretical perspective. However, it might overlook certain aspects of discourse theory that lead it to ascribe to the judiciary a too ambitious role and assume too low a standard for what it means to elaborate the system of rights. In particular, the fact that Burgers conceives of any judicial decision as judicial law-making seems to be at odds with the differentiation discourse theory strikes between discourses of justification and discourses of application. This distinction implies that law-making can be defined and is precisely not what courts are supposed to engage in. This omission then somewhat carries on into Burgers' discussion of the constitutionalisation of basic rights. When holding that societal consensus can be confirmed as valid law through either the legislature *or the judiciary*, she seems to again underestimate the importance Habermas' theory places on the distinction between a discourse of justification versus a discourse of application. The former defines the process of law-making and courts are explicitly not permitted to engage in it. The latter, on the other hand, is what characterises the regular judicial process as well as the processes of judicial review. Hence, it is not clear that a seeming consensus in society is sufficient to justify decisions resulting from strategic climate litigation based on uncodified climate rights. Focussing only on consensus in society as a basis for legitimising judicial law-making risks overlooking the importance of the formal procedure that provides constitutional rights with the necessary legitimacy of a

constitutional assembly. At least under the limited theoretical structure of climate constitutionalism and without further discussion of how the discourse of application functions, judicial law-making in climate decisions cannot be justified as easily within a discourse-theoretical framework.

This is not to mean, however, that Habermas' requirement to protect both private and public autonomy through judicially securing the system of rights does not support the existence and protection of climate rights. The abstract rights foreseen in the system of rights strongly suggest that more elaborate climate rights should be created by the legislature to safeguard the circumstances where everyone has equal opportunities to use their basic rights. Following the initial interpretation of Habermas' discourse-theoretical framework, it seems unlikely that courts would be justified to elaborate climate rights for safeguarding ecological prerequisites to preserve equal access to basic rights, even if they are required. However, it is argued here that Kuhli and Günther's framework offers an alternative that allows for and reflects the current trend of rising judicial engagement in climate change questions while also allowing for a nuanced and therefore more robust discussion. Kuhli and Günther offer a clear definition of judicial law-making, upholding the differentiation between discourses of justification and discourses of application. When discussing how courts can engage in norm justification on one level but norm identification on another, which in turn leads to the possibility for legitimate judicial law-making, namely from an internal reflective point of view, Kuhli and Günther emphasize the courts as participating in the discourse through their decisions and note at several points that the court's decision needs to remain criticisable and amenable through the public discourse and the regular ways of legitimate law-creation. Thereby, their account offers a more nuanced and fitting understanding in discourse-theoretical terms of how the system of rights can be elaborated through the courts.

Finally, when considering the German Federal Constitutional Court's *Neubauer* decision and the European Court of Human Rights' decision in *Klimaseniorinnen* through the framework proposed by

Kuhli and Günther, it is concluded that both of these decisions can be viewed as involving legitimate judicial law-making. However, this claim can also be refuted, or in any case needs to be qualified, as neither decision fully meets the criteria proposed by Kuhli and Günther. This is particularly the case with regards to the question to what extent the public and the legislature are involved in the discourse before the courts and in how far the validity of the courts' decisions can still be reviewed and their interpretation be amended in future discourses, since both courts issue legally binding decisions beyond the mere facts of the case.

The considerations outlined above rest on the interpretation of discourse theory presented in Section 2 of this thesis. This interpretation is not without critique, as it has been challenged on several points and approached in different ways. Such critiques, along with alternative understandings of the premises underpinning discourse theory, may affect the validity of the arguments developed here, since they depend on accepting particular versions of those foundational assumptions.

The considerations presented here can hopefully contribute to the ongoing discussion about judicial decisions' legitimacy in climate litigation. These cases will presumably only become more common in the future and given the detrimental effects climate change already has on fundamental rights and dire prospects we face if we do not take immediate and drastic actions, they are important. Citizens have realised that politics is not doing enough, and they are turning to the courts for help. However, it is nonetheless important to preserve the foundations of democratic systems and allow for discourse to shape policies. Therefore, it will continue to be important to reflect upon the courts' role in this struggle and investigate the actual effects of climate decisions on the democratic process as well as their effectiveness in combatting climate change to hopefully head towards a sustainable future.