3 The Justification of Climate Decisions

3.1 Climate Rights for the Protection of Private and Public Autonomy

Discourse theory does not directly speak of something like climate rights in the system of rights which defines abstract kinds of rights citizens need to grant each other when legitimately governed in a democracy. To recall, the system of rights defines five categories of abstract rights that should mediate tensions between private and public autonomy.[126] It does so by setting out categories of individual liberties that form the basis of private autonomy in the sense that they create a sphere of morally neutralised action which has to be preserved by law for it to be legitimate.[127] These rights will have to be elaborated through political discourse to be justified and legitimated through a legislative procedure that is based on the principle of popular sovereignty.[128] The first category entails basic rights to the equal individual liberties. Habermas understands liberty rights in a rather traditional sense as *inter alia* 'habeas corpus, freedom of religion, and property rights – in short, those liberties that guarantee an autonomous life-conduct and the pursuit of happiness'.[129] Category 2 involves membership rights in a voluntary association and category 3 requires the availability of legal remedies to violations of any of the basic rights. Category 4 establishes the need for equal opportunities of participation in the political process. Lastly, category 5 encompasses the social, technological and

126 Baxter (n 22) 63.
127 ibid 65.
128 ibid 64, 71.
129 Habermas, 'Constitutional Democracy' (n 53) 118.

ecological rights that are required to safeguard the equal opportunity of all citizens to make use of the rights provided for in the other categories.

This Section discusses how climate rights can fit into the system of rights by being viewed as rights safeguarding ecological conditions necessary for equal access to other fundamental rights. The following elaborates the effects of climate change on both the general enjoyment of civil and political rights, as well as its effects on equal opportunities to enjoy these rights. Lastly, it is discussed that the way in which most countries have elaborated the system of rights in their national legislation does not suffice for what would be required given the severe effects of climate change on the (equal) enjoyment of most other fundamental rights.

Climate rights seem to fit best with the fifth category as safeguarding the ecological prerequisites for being able to equally realise the rights enshrined in the other categories of the system of rights. However, as such climate rights would only be relatively justified rights. As Baxter points out, for these rights three questions arise. First, how equal should the opportunities to exercise one's private and public autonomy be made? Second, how close should the connection between social and ecological rights, on the one hand, and private and public autonomy, on the other, be for the latter to be justified. And third, what should a court do, or rather what is it legitimated to do, if it finds that not enough has been done to implement these rights, given that they play a rather minor role in various countries.[130] Habermas does not seem to provide an elaborate answer to these questions. The only indication given by the system of rights is that they should be elaborated in the legislative process, with little indication what should happen in case they are not elaborated (sufficiently). The fact that climate rights have not been properly elaborated, if at all, in most jurisdictions poses of course a challenge for them to ground legitimate judicial intervention in general. This point is discussed in more detail below when engaging

130 Baxter (n 22) 146.

with the argument that discourse theory can legitimise the protection of climate rights by courts. But when they are thought of as part of the fifth category, it might pose a particular problem, because these rights are only relatively justified. We know that the system of rights needs to be elaborated and implemented through the legislative process and that rights for safeguarding the ecological living conditions are only justified insofar as they are necessary given the current circumstances. This could allow for the conclusion that climate rights are not deemed necessary in the current circumstance by the legislative branch influenced by the discursive power of the citizenry, because in a functioning discourse-theoretical process of law-enactment they would have been created if they were deemed necessary. On this reading, courts might be even less justified to rely on them for countering the legislative majority. Not only have the rights not been elaborated yet as fundamental rights, but they also seem to be thought of as not necessary given the current circumstances. This would mean that climate rights are not even justified in themselves.

The claim that climate rights are in fact unnecessary to secure the living conditions for citizens to have equal opportunities to utilise their other civil and political rights seems counterintuitive and is being proven wrong in current research. The climate needs to be protected because the effects of anthropogenic climate change are already encroaching on people's equal opportunities to enjoy their most basic civil and political rights and will only continue to do so more devastatingly in the future without timely and radical intervention.[131] The consequences of the global climate crisis threaten rights such as the right to security, the right to life and the right to a standard of living adequate for health and well-being, rights related to culture, religion, and language, as well as economic, social, and cultural rights, including the right of self-determination and the rights to freely determine one's political status and freely pursue one's economic, social, and

131 See e.g. Barry S Levy and Jonathan A Patz, 'Climate Change, Human Rights, and Social Justice' (2015) 81 Annals of Global Health 310.

cultural development[132] Climate change influences the frequency and intensity of extreme weather events leading to increased heatwaves, heavy precipitation and droughts. These changes have already resulted in reduced food and water security, the loss of livelihoods and culture, widespread economic damages in various sectors and lead to the destruction of homes and infrastructure, adverse impacts on human health which can be fatal, as is seen for example by a rising heat-related mortality burden,[133] as well as are increasingly driving displacement around the globe.[134] Additionally, climate change likely increases the global frequency of collective violence, such as war and other forms of armed conflict, state-sponsored violence, and organized violent crime.[135]

The effects of climate change not only negatively influence citizens' opportunities to utilise their civil and political rights, they also heavily influence equal access to those opportunities. Without answering the question raised earlier, how equal the opportunity to enjoy basic rights need to be, it should be clear that climate change makes it too unequal. While this thesis is concerned with courts' responses to the situation in individual countries and not with the application of discourse theory to the international realm, it should nonetheless be noted that the magnitude and severity of adverse consequences experienced as a result of climate change differs vastly globally with developing countries, that have historically contributed least to the current situation, enduring the greatest impact.[136] However, and more relevant to the present consider-

132 ibid 310.

133 Elisa Gallo and others, 'Heat-Related Mortality in Europe during 2023 and the Role of Adaptation in Protecting Health' (2024) 30 Nature Medicine 3101.

134 'Summary for Policy Makers, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (Intergovernmental Panel on Climate Change (IPCC) 2023) 5–6 <https://www.ipcc.ch/report/ar6/syr/> accessed 28 April 2025.

135 Levy and Patz (n 131) 316.

136 'Summary for Policy Makers, Climate Change 2023: Synthesis Report. Contribution of Working Groups I, II and III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change' (n 134) 5–6.

ations, climate change-related infringements on opportunities to realise basic rights are also unevenly distributed within states. Risk factors that make populations or subgroups within populations more vulnerable to the adverse effects of climate change are for example poverty, minority status, being of female gender, young or old age, and having various diseases and disabilities.[137] Moreover,

> [t]he adverse human-rights consequences of climate change are likely to have the greatest impact on populations already suffering from human rights violations, such as [..] residents of low-income communities in high-income countries, as well as minority groups, unemployed people, individuals with chronic diseases and disabilities, and people living in unsafe or marginal environments.[138]

Clearly the ecological rights necessary to protect equal access to other basic rights that are elaborated do not correspond to what would be necessary. Discourse theory does not seem to provide an answer to what is to be done about this divergence between perceived necessity and actual necessity. On the one hand, category 5 speaks of the current circumstances necessitating safeguarding of living conditions which indicates that rights are justified with refence to the actual circumstances. On the other hand, it is hardly imaginable that the requirement for any basic rights to be elaborated through the legislative process would be lifted in this case, and particularly that the competence of elaboration would be devolved to the courts who are, after all, bound to discourses of application. This latter conclusion might be inferable from Habermas' discussion of the necessity of basic social rights given the unequal distribution of economic power, assets and living conditions. Habermas holds that growing socio-economic inequalities 'have increasingly destroyed the factual preconditions for an equal opportunity to make effective use of equally distributed legal powers'.[139] He prescribes two correctives to this process to preserve the normative content of legal

137 Levy and Patz (n 131) 312.

138 ibid 313.

139 Jürgen Habermas, 'On the Internal Relation between the Rule of Law and Democracy' in Jürgen Habermas, Ciaran Cronin and Pablo De Greiff (eds), *The inclusion of the other: studies in political theory* (Polity Press 2002) 261.

equality. First, existing norms (in this case of private law) need to be substantively specified. Second, basic social rights that ground claims to more justly distributed social wealth and more effective protection against social dangers have to be introduced.[140] If these correctives are transferred to the current threat that the effects of climate change pose, they would probably involve an adequate expansion of existing environmental and climate legislation and the introduction of substantive climate rights. Both of these are processes that culminate at the legislative, not the judicial level. Thus, it seems unlikely that courts would be justified, under a discourse-theoretical framework, to elaborate climate rights for safeguarding ecological prerequisites to preserve equal access to basic rights, even if they are required.

3.2 Courts' Engagement with Climate Rights

This Section is concerned with the argument that discourse theory can legitimise the protection of climate rights by courts and the question of how judicial decisions in climate litigation can be discourse-theoretically legitimated despite the current lack of adequate legislation to rely on. The argument has been significantly brought forward by Laura Burgers; it is this version of the argument that is here considered and developed. After outlining Burgers' argument, two aspects of it are critiqued as being not fully consistent with the discourse-theoretical approach she takes. First, her conception of judicial decisions as always being a form of law-making is at odds with the consequences of differentiating between discourses of justification and discourses of application. Second, her view that the system of rights can be elaborated by consensus alone and official institutions merely provide the most authoritative articulation of the law risks being an imprecise representation of the process Habermas presents. According to discourse theory, the elaboration of the system of rights requires the passing of law by the legislature, maybe particularly in the case of basic rights which

140 ibid 261–262.

mostly require special constitutional majorities or other procedures. As a potential way in which climate decisions can still be legitimate under a discourse-theoretical framework, Kuhli and Günther's (2011) adaptation of a norm discourse of application to a discourse of norm identification is introduced and their criteria for legitimate judicial law-making are discussed with regards to climate litigation.

On the outset, let us briefly revisit what role discourse theory ascribes to the courts. The public sphere of constitutional democracies is thought of as consisting of a formal and an informal sphere, whereby the judiciary forms the formal public sphere together with parliament and the administration. Valid, i.e. legitimately produced, law is informed by the various discourses that are present in civil society which makes up the informal public sphere. These discourses reach the formal public sphere where parliament enacts laws based upon them. Laws are then to be executed by the administration and enforced by the courts (whose decisions are also executed by the administration). Between these three formal branches exists a relationship of checks and balances as well as a separation of powers. The role of the courts is, therefore, generally limited to applying existing legal norms to individual cases. Because many norms are inherently indeterminate and several ones could apply to a specific case, courts are considered to engage in discourses of application where it is determined which norm out of several, all of which are assumed to be valid, is most appropriate for a given context. This decision on appropriateness should be carried out with regard to rational external justifications of the norm and be consistent with the institutional history of the court. The engagement in such discourses of application is what decisively sets the judiciary apart from the legislature which in turn mostly engages in discourses of justification. Discourses of justification, as the name suggests, are at work when legal norms are discursively justified upon enactment. In this process moral, ethical, and pragmatic reasons can be engaged. Courts ought not to engage in this kind of reasoning but should limit themselves to discourses of application where already justified general norms are applied to the particular circumstances of the case at hand.

Constitutional review, in the discourse-theoretical framework, is also conceived of as a version of discourses of application; though not without critique.[141] In this constitutional discourse of application it is determined whether higher level constitutional norms are applicable (as they should be) to ordinary legal norms. In doing so, constitutional courts act as guardians of the procedural preconditions for legitimate democratic law-making by securing the system of rights that enables citizens' private and public autonomy, and guaranteeing the fairness and openness of democratic processes. This means that constitutional courts may only object to the democratic majority if a certain legal norm is counter to the basic rights elaborated in the given jurisdiction.

3.2.1 Constitutionalisation by the Citizens and Legitimate Judicial Law-Making

In her application of discourse theory to argue for the legitimacy of courts' climate decisions, Burgers essentially argues that increasing climate litigation 'is likely to influence the democratic legitimacy of judicial law-making on climate change, as it indicates an increasing realization that a sound environment is a constitutional value and is therefore a prerequisite for democracy'.[142] On her reconstruction, climate rights are constitutionalised through the discourse about them in society, academia and politics.[143] In her symposium article 'Should Judges Make Climate Law', Burgers starts out by stating that under her conception 'all judicial decisions fall under the heading of "judicial lawmaking" because […] it is impossible to make a clear-cut distinction between the application of law and lawmaking'.[144] This conception of what judges do has significant consequences for then trying to reconstruct the issue by relying on discourse theory, as is discussed below. After a brief introduction of the general outline of Habermas' theory

141 See e.g. Zurn (n 28) 20–21.
142 Burgers (n 17) 56.
143 ibid 63.
144 ibid 59.

including the way 'political conversations' held in society 'seep into' political institutions and the principle of democracy, Burgers discusses the role of the judiciary under discourse theory. Here Burgers mentions the judiciary's limitation to discourses of application and that this could imply that 'for as long as no law exists that determines responsibility for the dangers of climate change, judges should not meddle in this issue'.[145] However, she discards this interpretation because 'another condition of democratic legitimacy is that the law can be changed' and this, according to Burgers, can also happen through "new interpretations" as courts must interpret law dynamically to fit current circumstances.[146]

Turning the discussion to constitutional norms, Burgers notes that they tend to be least susceptible for change, at least formally.[147] At this point the system of rights is introduced as a 'constellation of fundamental rights that warrant public autonomy' and 'protect the individual' by traditionally 'warranting private autonomy'.[148] Because protecting citizens' private autonomy is necessary to guarantee their ability to participate as full members of society, i.e. to protect their public autonomy and safeguard democracy itself,[149] judges may oppose democratic majorities when the system of rights is threatened, as this threatens democracy itself.[150] But in case 'a dynamic judicial interpretation [..] opposes democratic majority decisions [it] should always be built on a fundamental right'.[151] The definition and scope of fundamental rights, according to Burgers reading of discourse theory, is determined by the citizens.[152] This is a second crucial point in Burgers' reconstruction that is taken up in the discussion below. Thus, according to Burgers, when judges re-interpret fundamental rights legitimately, they have to provide an interpretation which is already presupposed as valid

145 ibid 62.
146 ibid.
147 ibid.
148 ibid.
149 ibid.
150 ibid 63.
151 ibid.
152 ibid.

by being accepted in large parts of society. Judicial decisions thereby 'represent the voice of democracy: they confirm a societally changed interpretation of the law not (yet) made explicit by legislators'.[153] For Burgers, the legal domain is entered as soon as consensus emerges in societal debates and this consensus is then merely 'confirmed as being law either by means of legislation or by a judicial interpretation of earlier legislation'.[154] Summing up, Burgers' reading of discourse theory claims, that 'the judiciary may interpret any legal rule to fit present-day conditions; however, where an interpretation goes against democratic majority decision making, it must be built on a fundamental right to count as democratically legitimate'.[155] Importantly, fundamental rights are defined by the citizens whereby anything on which there is consensus in political debates, be they held in the informal or formal public sphere, counts as enforceable law,[156] though a judge needs 'strong societal signals to hold such a constitutional conception against a rule adopted by political institutions'.[157]

This thesis argues that Burgers' reconstruction offers a somewhat limited account of two connected aspects of discourse theory and its application to the legitimacy of judicial intervention through climate litigation. The first point to be discussed relates to her claim that all judicial decisions are a form of judicial law-making and that the requirements for courts to limit themselves to discourses of application does not imply that they should not intervene in matters of climate change because they can dynamically interpret the law. The second point refers to the issue of elaborating the system of rights as required by Habermas. Regarding the first point, discourse theory makes a clear distinction between discourses of application and discourses of justification. This distinction relates to the different argumentative logic that underlies the kinds of discourses, the types of reasons that can legitimately be considered to ground arguments, and the function they

153 ibid.
154 ibid 64.
155 ibid.
156 ibid 63.
157 ibid 68.

fulfil. When enacting laws, the legislature is engaged in discourses of justification wherein it is free to draw on normative, pragmatic, and empirical reasons to justify legal norms. When courts decide cases before them, their task is not to justify legal norms but to decide which legal norm (that is presumed to be valid) most appropriately applies to the circumstances of the case. Hence, their pattern of argumentation is limited to considerations as to whether the norm applies to the facts of the case.[158] Therefore, discourse theory, according to Habermas and Günther, seems to hold the position that it is possible to differentiate between the processes of law-making and law application. Burgers, thus, does not seem to fully capture this dynamic when stating that all judicial decisions are law-making because distinguishing between law-making and the application of law is not possible. This assertion seems to be at odds with the adoption of a discourse-theoretical framework for her further argumentation. Indeed, not all theorists working on discourse theory agree that the distinction between discourses of justification and discourses of application are clearly distinguishable. Alexy, for example, put forward the so-called Special Case Thesis whereby legal argumentation is considered merely a special case of general practical discourse.[159] Thereby the distinction between discourses of justification and discourses of application becomes superfluous. However, Burgers does mention this debate but only bases herself on the version of discourse theory as presented by Habermas in *Between Facts and Norms*. While the question whether discourses of application can clearly be distinguished from discourses of justification is a fair one, and even Habermas admits that juristic discourses of application can be in need of supplementation by elements taken from discourses of justification, this discussion should not be overlooked when holding that all judicial decisions are law-making. The discussion of judicial law-making in Burgers' symposium article is very limited. However, a more elaborate discussion coming to the same conclusion can be found

158 Kuhli and Günther (n 25) 1265–1266.

159 See e.g. Robert Alexy, 'The Special Case Thesis' (1999) 12 Ratio Juris 374.

in her PhD thesis *Justitia, the People's Power and Mother Earth*.[160] There Burgers holds that law-application and law-making cannot be clearly distinguished, and that she hence consideres all judicial decisions as judicial law-making. However, doing so with the aim of studying the limits of democratically legitimate judicial law-making.[161] She considers as democratically legitimate judicial law-making as 'judicial practice that does not illegitimately encroaching on the tasks of the other branches of government'.[162] While acknowledging that courts are meant to apply law in a Habermasian framework,[163] Burgers finds that this "boundary" has to be balanced with the need for the law to remain changeable and for courts to protect fundamental rights.[164] This leads to the second possible short-coming of Burgers' reconstruction.

The second possible limitation for Burgers' conception of how a discourse-theoretical framework can justify climate decisions relates to how the system of rights is legitimately elaborated. Burgers describes the 'constitutionalisation of the environment' as follows: litigating environmentalists claim '[t]hat the accepted interpretation of the law has changed and […] the judge merely needs to confirm this'.[165] This claim of a new accepted interpretation of the law is based on the longstanding "global consensus on the necessity to act against the environmental problem of climate change" as expressed in the 1992 United Nations Framework Convention on Climate Change (UNFCC) and was confirmed in the 2015 Paris Agreement.[166] The claims of climate change litigants nonetheless go against decisions taken by the democratic majority, so if a court decides in their favour it needs to base itself on a constitutional climate rights to be legitimate.[167] Without the existence

160 Laura Burgers, 'Justitia, the People's Power and Mother Earth: Democratic Legitimacy of Judicial Law-Making in European Private Law Cases on Climate Change' (PhD Thesis, University of Amsterdam 2020).
161 ibid 33.
162 ibid 34.
163 ibid 49.
164 ibid 52–54.
165 Burgers (n 17) 69.
166 ibid.
167 ibid 70.

of explicit constitutional climate rights, Burgers positions the constitutionalisation of climate rights in the broader realm of constitutional environmental rights where she points towards a degree of environmental constitutionalism in the majority of constitutions worldwide, the fact that environmental rights are increasingly read into other fundamental rights by judicial bodies, as well as UN statements, academic debate and the very existence of climate litigation.[168] In summary, Burgers claims that 'the international climate litigation trend is indicative of the growing consensus that the environment is a constitutional matter and therefore a prerequisite for democracy' which is to be protected by judges.[169]

Burgers acknowledges that she is describing a circular process.[170] The ongoing political and larger societal discourse about the necessity of curbing anthropogenic climate change and its relation to a wider discourse about fundamental environmental rights are seen as sufficient to legitimise courts' decisions in climate litigation. On the reading of Habermas presented here, this would likely be an overly reductive framing of the process of constitutionalisation that risks missing some critical dimensions. Under a discourse-theoretical framework, debates within society are supposed to inform and ground any legal norm. This is enshrined in the principle of democracy and described through the process of the circulation of communicative power from the periphery to the centre. However, law is still produced through the legislative process. This is one way in which Habermas recognises the complexity of modern society and its need to organise itself with the help of a bureaucracy. It would be impossible to decide what the law is if it was merely based on the discussions within society. If the production of law based solely on rational discourse has ever been successful, it was within very small homogenous societies that showed a high degree of popular participation. This is no longer the case. As discourse theory acknowledges, we live in pluralistic societies, and it is precisely the

168 ibid 71–72.
169 ibid 75.
170 ibid.

task of the legislature and the administration to channel the various discourses that are underway in society, and through the formal democratic process turn them into laws.

Burgers seems to apply a lower procedural standard of law-creation for constitutional norms than for other ordinary laws. However, the proper role of constitutional courts, on Habermas' account, is to watch over the system of rights without elaborating it themselves. While true for all legal norms, the standard for constitutional norms is even higher as the process for elaborating and justifying constitutional norms is different from the democratic process to be followed for ordinary legal norms. Ordinary legal norms can be elaborated by the regular legislative body. Because laws are underdetermined and require (dynamic) interpretation, the judiciary might be afforded more leeway when engaging with regular legal norms in this way. However, the proper actor to elaborate constitutional norms is the citizenry as a whole in their special configuration as a constitutional assembly, or at least a special configuration of the legislature.[171] It thereby follows that judicial intervention in constitutional disputes is particularly contentious because it would have to justify its decision before the electorate at large which it simply cannot do.

While the constitution is viewed as a dynamic, continuously evolving project in discourse theory, there are very strict procedural rules for how the constitution can be changed, at least in civil law but also in most common law countries.[172] The procedures that often require larger majorities, the approval of all chambers of parliament, the approval of two successive parliaments, or even a popular referendum are meant to afford constitutional amendments the legitimacy of the citizenry as a constitutional assembly. This is precisely required because 'the constitution "constitutes" the state' in as much as it lays the 'state's foundations', as Burgers puts it herself.[173] These complex procedures

171 Zurn (n 28) 442.

172 Burgers also acknowledges in her PhD thesis that constitutional norms are least susceptible to change. Burgers (n 160) 53.

173 Burgers (n 17) 71.

that carry the weight of the entire population cannot simply be substituted by consensus in society, even if litigants assume the law is already on their side.[174] This might be the case from a moral perspective, but not from a legal one. As Habermas holds,

> [h]uman rights are Janus-faced, looking simultaneously toward morality and the law. Their moral content notwithstanding, they have the form of legal rights. Like moral norms, they refer to every creature 'that bears a human countenance', but as legal norms they protect individual persons only insofar as the latter belong to a particular legal community – normally the citizens of a nation-state.[175]

his assumption, that 'free and equal citizens take counsel together on how they can regulate their common life not only by means of positive law but also legitimately',[176] implies that

> the model of constitution-making is understood in such a way that human rights are not pre-given moral truths to be discovered but rather are constructions. Unlike moral rights, it is rather clear that legal rights must not remain politically non-binding. As individual, or "subjective", rights, human rights have an inherently juridical nature and are conceptually oriented toward positive enactment by legislative bodies.[177]

Thus, the ongoing discourse about the necessity of climate rights and the political commitments already made can justify future constitutional climate rights. But this justification needs to take place at the legislative level through the democratic process foreseen for constitutional amendments. The argument that climate rights are being claimed in climate litigation and thereby are proof of an existing consensus in society that can legitimate courts' confirming these climate rights is circular. Climate decisions cannot justify themselves. For the judiciary to legitimately decide against a legal norm passed by the democratic majority, it needs to base itself on the protection of rights that are fundamental to the processes of democracy itself. These rights need

174 Cf. ibid 69.
175 Habermas, 'Remarks on Legitimation through Human Rights' (n 34) 161.
176 ibid 164.
177 ibid.

to be elaborated with the assent of the citizenry as the constitutional assembly or through the legislative procedure chosen to represent it.

In conclusion, Burgers' conception of climate decisions under discourse theory certainly provides many interesting insights. However, the fact that she 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, at least according to Habermas with Günther. This distinction implies that law-making can be defined, and it is decidedly not what courts are supposed to engage in. This misconception then somewhat carries on into the argument's presentation of the constitutionalisation of basic rights. Here Burgers might underestimate the importance of the formal procedure that provides constitutional rights with the necessary legitimacy of a constitutional assembly and allows courts to "confirm rights" which have not been adequately elaborated through this process. 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.

3.2.2 Shifting to Norm Identification

The preceding discussion of how Burgers' discourse-theoretical conception of the climate decisions' legitimacy might not be in alignment with certain important aspects of the theory might lead one to assume that a justification under discourse theory is not possible. The core of the problem is that formally constitutionalised climate rights are lacking in most countries. As was discussed above, in the case of climate rights this hardly allows for the conclusion that they are simply unnecessary given the current circumstances. There is plenty of scientific evidence that points the opposite way: we have to protect the climate for the democratic process to be secured. In the face of political inertia, people increasingly turn to the courts to see the climate and their rights protected and hope to bring governments to take action.

But under a discourse-theoretical framework, courts may only strike down majority-based legislation if they can argue that it endangers fundamental rights. Taking inspiration from Burgers' approach, the following discussion elaborates on her work by sketching a way how this cycle can be escaped by exploring the potential of Kuhli and Günther's reconceptualization of discourses of application as discourses of norm identification.[178]

In their article from 2011, Kuhli and Günther develop the tools that discourse theory offers to identify judicial law-making as well as address the question of its legitimacy. They conclude that there can be instances of judicial law-making that are legitimate under certain circumstances. To establish their account of judicial law-making, Kuhli and Günther analyse decisions of international criminal courts and tribunals, in particular, the caselaw of the International Criminal Tribunal for the Former Yugoslavia (ICTY).[179] Kuhli and Günther generally define judicial law-making as instances where 'courts create normative expectations beyond the individual case' i.e. it depends on 'whether courts' normative declarations have an effect which is abstract and general'.[180] They modify discourse theory's traditional differentiation between discourses of norm justification and discourses of norm application to revolve around norm justification and norm identification. As is expected in a discourse-theoretical framework, they hold that norm justification falls within the realm of the legislature and when courts engage in it, they perform judicial law-making.[181] They differentiate between the two discourses by viewing discourses of justification as determining a norm's validity by testing whether it is in the common interest of all participants in the discourse. In discourses of norm application, it is considered whether a norm that is taken to be valid is appropriate in a given context. Any discourse that has as its subject the question of a norm's validity and thereby falls under the category

178 Kuhli and Günther (n 25).
179 ibid 1261.
180 ibid.
181 ibid 1261–1262.

of discourse of justification is considered as law-making, regardless of who engages in it.[182]

While norm justification is an essentially creative process, norm identification may have a creative element but is not 'essentially creative'.[183] Norm identification is relevant in fields of law where the norms in question are unclear, elusive and vague. When engaging in norm identification, a court aims to answer the more or less *descriptive* question of whether a norm is already acknowledged in the legal community, rather than the *prescriptive* question of whether a norm is valid or desirable, as the latter is characteristic of discourses of norm justification.[184] The question whether what a court engages in is judicial law-making, on Kuhli and Günther's account, therefore, hinges on the question whether it 'only identif[ies] norms in a (more or less) descriptive way or if [it] make[s] decisions as to the validity of norms in a normative (and therefore prescriptive) way'.[185] One crucial aspect of norm identification is that it assumes the law already to be there and only being in need of correct identification. This includes the presupposition that this previously existing norm is already valid and accepted, and is, therefore, binding upon those to whom it applies.[186] The criteria according to which a norm is identified are independent from reasons and justifications that are relied on in discourses of justification. Thereby, nothing about the identification of a norm adds anything to its validity. On example for a criterion according to which norms can be identified is state practice. There it is assumed that states have already decided about the norm's validity.[187] A second aspect is that the identified norm is assumed to serve as a reason and justification for legal claims and demands without further steps required.[188] Norm identification is a version of discourses of norm application

182 ibid 1265–1266.
183 ibid 1262.
184 ibid 1266.
185 ibid.
186 ibid 1274–1275.
187 ibid 1275.
188 ibid.

because both take place from the internal perspective of participants in the judicial process, while discourses of justification are held from the external perspective. Norm identification usually also starts from an external point of view since it requires the collection of empirical and theoretical data. However, once the norm has been identified the court shifts from observer to participant whereby the norm serves as a legal standard it has to apply.[189]

By analysing the the ICTY's *Kupreškić* decision, Kuhli and Günther find that the court switches from a discourse of norm identification to a discourse of norm justification and creates law. However, while it is law-making on a first level, it is a form of norm identification on a second level. The paradoxical result is that the court creates new law 'from a point of view which is defined as a critical reflective acceptance of a norm'.[190] Kuhli and Günther's tentative explanation is that the principles the court was basing its decision on were given but lacked a plain and determinate meaning. The principles in question (the principle of humanity and the principle of public conscience) could not be 'applied as rules according to a limited range of necessary and sufficient conditions [but] require courts […] to justify some proposed norm according to [those] principles'.[191] Kuhli and Günther hold that the ICTY's decision is an instance of judicial law-making but a legitimate one because the court acted as a participant in a discursive community and offered a ruling with a claim of international law that remained contestable.[192] They highlight the following five features of the decision that might be viewed as criteria for legitimate judicial law-making:[193]

1) The court is referring to an ongoing public discussion.
2) The court participates in this debate with a concrete relevant case.
3) The court's decision regarding the principles can be criticized by the public and can be overruled by legislative bodies; the possibility

189 ibid.
190 ibid 1276.
191 ibid.
192 ibid 1278.
193 ibid 1276–1277.

of public engagement before the court should be secured by institutional arrangements and procedural rules such as the possibility to submit amicus curiae briefs.

4) The principles under consideration are of a moral as well as legal kind; it is characteristic of law-making from an internal point of view that some moral norms are recognized as legal norms and integrated by the courts into the web of legal principles and rules, while at the same time treating those moral norms as if they were already there in the law, and already valid.
5) Whereas judges are authorized to decide and settle the discourse of legal norm application in concrete cases, its law-making remains subject to the acceptance of later participants in the normative discourse whose number is – in principle – infinite. In this later practice, the validity that a court claims for a norm, which it has created and justified to resolve a singular case, remains defeasible; the legally binding nature of such a rule for other cases has to be contested publicly in an ongoing discourse of justification.

This approach presented by Kuhli and Günther offers a way in which climate decisions might be legitimate despite the lack of comprehensive legislation. They found that in the context of criminal international law courts sometimes engage in judicial law-making by going beyond norm identification and actually creating law. However, in the case discussed the new rule was created from an internal point of view, rather than the traditionally external point of view that is presented when engaging in discourses of justification. Given this and the fact that several other requirements were met, this kind of judicial law-making was deemed legitimate from a discourse-theoretical perspective. On first sight it seems that these circumstances could also obtain for climate decisions. Courts often base their decisions in climate litigation on other, established legal principles and basic rights which can be rather vague at times. Though, depending on the specific case, it could be a point of contention that the principles are not undetermined enough for courts to legitimately develop them further through the kind of judicial law-making described here. Putting this aside for now, the

courts when confronted with climate litigation are part of an ongoing public discussion and the cases form part of this debate, particularly since many of them are strategic litigation cases. While dependent on the specific case, it is in principle possible that the courts' decisions can be criticized by the public through participatory means before the court and overruled by legislative bodies. Equally subject to the specific case and court, it is also generally possible for the validity of the rule to be contested publicly in an ongoing discourse of justification.

Before considering the European Court of Human Rights' *KlimaSeniorinnen* decision and the German Federal Constitutional Court's order in *Neubauer* through the lens of the theory just developed, let us consider how it compares to and resolves some of the issues identified in the approach advocated for by Burgers. Burgers and the above-developed theory seem to reach the same conclusion: climate decisions can be legitimate. Though they do so in slightly different ways, which are relevant for this conclusion to be justifiable in a discourse-theoretical framework. Regarding the first point of criticism offered here, Kuhli and Günther develop a clear definition of judicial law-making. They thereby uphold that not all judicial decisions are law-making and that there is a clear difference between discourses of justification and discourses of application. The second point that is criticised is that the creation of basic rights cannot take place through societal discourses alone to be merely confirmed by the courts but needs to follow the democratic rules specifically designed for constitutional amendments. The way Burgers describes global climate constitutionalism and how judges interact with it by confirming the law thereby created seems similar to how Kuhli and Günther describe the process of norm identification. However, the account of legitimate judicial law-making Kuhli and Günther offer does not draw a direct line from some form of consensus in society to valid law that needs to be applied by the courts. They rather emphasise the courts as participating in this 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. By upholding

the distinction between norm justification and norm application they can introduce norm identification as a variety of the latter. Through making this aspect of norm application explicit and acknowledging that it has creative components similar to norm justification, their approach allows for a more nuanced determination of a situation that is norm justification on one level but norm identification on another which creates the possibility for legitimate judicial law-making. However, it is crucial for this that courts base themselves on existing legal principles, something that is not explicitly required by Burgers' conceptualisation. While these nuances are subtle, they base Kuhli and Günther's approach on firmer discourse-theoretical grounds.