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A Discourse Theoretical Perspective on Judicial Climate Decisions

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With a Foreword by Prof. Dr. Klaus Günther

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Foreword

The ongoing debate about whether courts should merely apply existing law or, at least in so-called hard cases, create new law in the process of applying it, thereby assuming legislative powers that are not provided for in the system of separation of powers, is gaining new significance in many current court cases around the world dealing with climate protection. When legislatures hesitate to enact effective legal regulations to reduce the greenhouse effect, when executives implement such regulations only half-heartedly or not at all, or when powerful private actors such as companies try to circumvent restrictive regulations, it is often the courts that are called upon. The expectations placed on them by the actors bringing the lawsuits are high: they are expected to legally oblige the other two branches of government to make more effective, climate-friendly use of their powers and to hold private companies liable for the climate-damaging consequences of irreversible consumption of natural resources or for the manufacture of products whose mass use has massive climate-damaging consequences. Can and, above all, may courts, especially constitutional courts, act as legislators themselves in this area, or must they limit themselves to applying existing law? And if the latter is the case, do legal systems based on, among other things, existing human rights offer no possibility of interpreting and applying them in such a way that the demand for effective legal measures to slow down or reduce climate change can be justified?

The study presented here addresses these questions and discusses them with the help of the discourse theory of law developed by Jürgen Habermas, Robert Alexy, and myself, among others. This theory was not chosen by the author in the context in question here by chance or arbitrarily. By distinguishing between discourses of justification and

the application of norms, it opens up a perspective for a critical discussion of the problem of legitimizing apex court decisions and, because this theory itself is the subject of controversy even within discourse theory itself, provides opportunities for a critical review of its own basic assumptions.

The author conducts this critical discussion in four steps: *First*, she outlines the essential features of discourse theory in law, as developed primarily by Habermas, focusing on the equal origins of private and public autonomy. In the *second* step, she turns to the question of how the system of rights generated by the intertwining of the legal form with the principle of democracy is concretized and structured, with a focus on the role of case law. Here, as throughout the work, the author demonstrates her ability to summarize complex arguments confidently and present them in a clear and comprehensible manner, making these sections an excellent introduction to the discourse theory of law as a whole, as formulated by Habermas primarily in his monograph "Between Facts and Norms." The system of rights, the function of the separation of powers, and the special role of case law are also discussed here with a view to possible fundamental and human rights or extensions of existing rights in light of climate change and its consequences.

The author takes her *third* step by critically examining a proposal by Laura Burgers, which is accused of simply equating judicial development of the law with legislative activity in the form of justice and of allowing an existing consensus in society on normative issues to suffice as a basis for legitimizing this type of judicial development of the law. In contrast, she insists on the distinction between the justification and application of norms (justification and application discourse), which she explains with the help of an argument developed by Milan Kuhli and myself, thus safeguarding it against objections directed against a simplistic understanding of that distinction. This precise distinction, which was originally justified on the basis of a decision by the former Yugoslavia Tribunal, focuses primarily on the task of identifying norms through case law in the face of applicable but vague and indeterminate principles and rights. This identification proves to be a complex and

demanding task because, in normative orders such as a legal system, applicable norms can never be identified as individual entities, but only in their context with other norms, which varies from case to case and cannot be done without interpretation and justification.* Therefore, a careful differentiation is required here between arguments that develop and thereby change the law, i.e., legislative arguments, and arguments that identify the law, i.e., in a broader sense, arguments that apply the law. Here, the author takes an important step by distinguishing between the two types of arguments or discourses, but insisting on their necessary interaction.

In the *fourth* step, the author analyzes two important decisions by apex courts using these criteria—the *Neubauer* decision by the German Federal Constitutional Court and the ruling by the ECtHR on the lawsuit brought by the Swiss Association, *KlimaSeniorinnen*. She examines in detail whether and to what extent the reasoning behind these decisions meets these criteria. The conclusion is that they have a law-developing character, but that they do so in such a way that they are to be understood as contributions to a public discourse on the content and scope of existing principles and rights, based on an interpretation of previous judgments and interpretations, which remain open to public criticism.** This is also evident from the fact that in both cases the lawsuits were brought not only by those directly affected in their rights, but also as an act of strategic litigation. This means that the plaintiffs pursued not only their own interests but also those of third parties, which characterizes the lawsuits themselves as contributions to a public discourse. For this reason alone, the judgments handed down in these cases would inevitably be statements within this discourse and

* A revised version will be presented in: Klaus Günther, Anwendungsdiskurse, revisited, in: Carsten Bäcker, Martin Borowski und Jan-Reinhard Sieckmann (Eds.), Grundlagen der demokratischen Verfassung. Festschrift für Robert Alexy zum 80. Geburtstag, Tübingen (Mohr/Siebeck Verlag), 2025 (forthcoming).

** I have attempted to show that this is primarily an interpretation and elaboration of the temporal dimension of unsaturated human rights, namely civil liberties, in: Klaus Günther, Die Zeitlichkeit der Freiheit. Rechtsphilosophische Anmerkungen zum Klimabeschluss des Bundesverfassungsgerichts, in: Merkur. Zeitschrift für europäisches Denken, No. 875, (76). 2022, p. 18–32.

would then also be discussed as such. Only the criterion of legislative revisability is not met, as these are decisions that are binding on the legislature.

This study therefore proves to be an important contribution both to discourse theory in law and to the discussion about an appropriate legal response to the increasingly serious harmful consequences of climate change.

Klaus Günther
Frankfurt, August 2025

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1 Introduction

Strategic climate litigation is increasingly being used to hold governments and private actors accountable for acting in ways that are harmful to the climate, causing damages through their emissions, not setting sufficiently ambitious climate goals, or not (being on track to) reaching the goals they have set.[1] It aims to directly involve courts in determining the way forward in climate policies. Many climate cases are dismissed for lack of jurisdiction, standing of the applicants, justiciability, or on other procedural grounds.[2] Of those that reach a decision on the merits many are uncertain or negative in their effects on climate change action.[3] However, some cases have been admitted to the merits stage and have led to heavily discussed decisions that are favourable for climate action as courts, for example, strike down climate laws and policies as unconstitutional or in violation of human right. This has opened the door for discussions about courts' legitimacy in taking climate-related decisions, often in the absence of clear legislation and rights.

The legitimacy of courts' engagement with politically loaded and legally underregulated issues has been questioned by academia and

1 United Nations Environment Programme, *Global Climate Litigation Report: 2023 Status Review* (United Nations Environment Programme 2023) xi <https://wedocs.unep.org/20.500.11822/43008> accessed 3 July 2025.

2 Empirically see Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2024 Snapshot' (Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science 2024) 5. For a more theoretical discussion why climate litigation might be dismissed see Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80 The Modern Law Review 173, 183–188.

3 Setzer and Higham (n 2) 5.

politics alike.[4] Ran Hirschl observes that the "judicialization of politics", i.e. the increasing importance of courts and judges in shaping public policy decisions, has 'expanded its scope to become a manifold, multifaceted phenomenon that [...] now includes the wholesale transfer to the courts of some of the most pertinent and polemical political controversies a democratic polity can contemplate'.[5] He holds that it is the judicialization of those questions that involve high political stakes and where the constitution offers little guidelines that most call into question the democratic legitimacy of judicial review.[6]

With decisions such as the order in *Neubauer*[7] by the German Federal Constitutional Court, or the *KlimaSeniorinnen*[8] judgement of the European Court of Human Rights the debate surrounding judicial review's democratic legitimacy has gained traction in the field of climate litigation. Some find the courts overstepping their proper realm by adjudicating questions of climate policy because the judiciary is not elected and hence does not necessarily represent the majority view in the population. Thus, when courts "enact" climate policy, they are not held accountable to the public as the legislature would be.[9] Additionally, courts' answers to questions on the climate crisis might infringe upon the principle of separation of powers in another way. Some view the principle of separation of powers as having an intrinsically agonistic

4 See e.g. Ran Hirschl, 'The Judicialization of Politics' in Robert Goodin (ed), *The Oxford Handbook of Political Science* (1st edn, Oxford University Press 2013) <https://academic.oup.com/edited-volume/35474/chapter/303819594> accessed 3 July 2025; C Neal Tate and Torbjörn Vallinder, 'The Global Expansion of Judicial Power: The Judicialization of Politics' in C Neal Tate and Torbjorn Vallinder (eds), *The Global Expansion of Judicial Power* (New York University Press 2022) <https://www.degruyter.com/document/doi/10.18574/nyu/9780814770078.003.0004/html> accessed 3 July 2025; Alec Stone Sweet, *Governing with Judges: Constitutional Politics in Europe* (1st edn, Oxford University PressOxford 2000) <https://academic.oup.com/book/3943> accessed 3 July 2025.

5 Hirschl (n 4) 253–254.

6 ibid 257.

7 *Neubauer et al v Germany* [2021] Bunderverfassungsgericht 1 BvR 2656/18.

8 *Verein KlimaSeniorinnen Schweiz and Others v Switzerland* [2024] European Court of Human Rights App no. 53600/20.

9 Heather Colby and others, 'Judging Climate Change: The Role of the Judiciary in the Fight Against Climate Change' (2020) 7 Oslo Law Review 168, 170.

nature which serves the purpose of perpetuating the possibility of political struggle. Climate decisions by courts, thus, could put an early end to the ongoing discourse about climate change and hinder this democratically desirable political struggle.[10] Others consider climate decisions to be legitimate or even argue that since courts are tasked with protecting citizens' fundamental rights, they have an obligation to adjudicate climate-related questions.[11] For example, they are seen as a way to correct power imbalances and to reinstate democratic values.[12] Manuela Niehaus holds that climate decisions do not violate the principle of separation of powers because all three branches of government can legitimately be involved in law-creation, though courts are less free than the legislative branch since they are bound to the case at hand, restricted by the plaintiffs' wills, and take decisions retrospectively.[13] In a different paper Niehaus raised the argument that since courts are basing their arguments on international obligations, even if they have not been transformed into national law yet, courts reaffirm values already held by society, and thereby protect interests that have been acknowledged but have so far remained unprotected.[14] Katrina Fischer Kuh makes a similar argument in the American context, whereby courts have particularly strong claims to legitimacy when protecting intergenerational interests because children and future generations have

10 See, e.g. Christina Eckes, 'Tackling the Climate Crisis with Counter-Majoritarian Instruments: Judges between Political Paralysis, Science, and International Law' (2022) 2021 6 European Papers – A Journal on Law and Integration 13071324, 1323.

11 Cinnamon Piñon Carlarne, 'The Essential Role of Climate Litigation and the Courts in Averting Climate Crisis' in Benoit Mayer and Alexander Zahar (eds), *Debating Climate Law* (1st edn, Cambridge University Press 2021) 126.

12 Eilidh Robb, 'Making Democracy Great Again: An Exploration of Democratic Values in Climate Change Litigation' [2018] No. 11 Working Paper, University of Strathclyde 10.

13 Manuela Niehaus, *Global Climate Constitutionalism "from below": The Role of Climate Change Litigation for International Climate Lawmaking* (Springer Fachmedien Wiesbaden 2023) 413.

14 Manuela Niehaus, 'Gerichte Gegen Gesetzgeber? – Der Klimawandel in Den Gerichtssälen' in Benedikt Huggins and others (eds), *Zugang zu Recht: 61. Junge Tagung Öffentliches Recht* (Nomos Verlagsgesellschaft mbH & Co KG 2021) 256–259.

no other means of participation in the democratic process despite their unique stakes in climate change issues. Hence, judicial engagement in these cases can be viewed as protecting a disadvantaged minority.[15]

Views evidently diverge on the question of courts' legitimacy to decide questions related to climate policies, especially with only vague legislation being in place for the courts to rely on. However, with (strategic) climate litigation being on the rise globally, it is crucial to shed further light onto the conditions of its legitimacy. This is especially the case since governments are among the one's questioning courts' decisions based on a lack of legitimacy. For example, the Swiss parliament decided not to implement the decision of the European Court of Human Rights in *KlimaSeniorinnen* for this reason, against the wishes of the leftist-green minority. The Swiss parliament criticised the decision as illegitimate judicial activism and accused the European Court of Human Rights of breaching the principle of separation of powers, thereby disregarding democratic processes.[16]

This thesis aims to further substantiate the discussion concerning the legitimacy of judicial climate decisions given the current lack of comprehensive legislation. It is specifically concerned with the argument that the co-originality of public and private autonomy and courts' legitimacy to engage in judicial review when protecting the system of rights, as defined by Jürgen Habermas in his discourse theory of law, offers such legitimacy. The co-originality thesis is Habermas' answer to the dispute between liberalists and republicans whether private or public autonomy takes primacy over the other. Habermas argues that the two presuppose each other and can thus not be subordinated. Based on the equal importance of both, Habermas sets out an abstract system of rights that, when substantiated in the legislative process, lays down the basic rights citizens need to grant each other when governing jointly

15 Katrina Fischer Kuh, 'The Legitimacy of Judicial Climate Engagement' (2019) 46 Ecology Law Quarterly 731, 754–758.

16 Donatsch, 'Schweiz Will Urteil Zum Klimaschutz Nicht Umsetzen: „Es Ist Ein Verrat"' *Frankfurter Rundschau* (Frankfurt am Main, 14 June 2024) <https://www.fr.de/politik/umsetzung-klimaseniorinnen-schweiz-egmr-klimaschutz-urteil-keine-93126899.html> accessed 3 July 2025.

through the medium of law. Because protecting these rights is essential for maintaining the possibility of democratic governance understood in a discourse-theoretical sense, courts may decide against the democratic majority when this is necessary to secure these rights.

The argument that discourse theory offers a justification for courts' legitimacy in deciding climate-related cases notably has been brought forth by Laura Burgers in her symposium article 'Should Judges Make Climate Law', which is the version of the argument this thesis engages with.[17] Burgers uses Habermas' political theory to reconstruct the tension between law and politics generated by these lawsuits. Her reconstruction finds that 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'.[18] She argues that the ongoing constitutionalisation of climate rights through the discourse about them in society, academia and politics is sufficient to consider them as basic rights capable of justifying counter-majoritarian judicial intervention as is foreseen in Habermas' theory, despite climate rights not (yet) being formally enshrined in most legal systems.[19] Burgers takes a rather low standard for ascertaining that the system of rights is elaborated through the political process. On her account, politics is defined as 'societal debates on how the law should be shaped, conducted in the public sphere and in the political institutions'.[20] The legal domain is entered when such societal debates lead to consensus and such consensus is confirmed as being law either through legislation or judicial interpretation. Burgers, thereby, seems to make the codification of a consensus as law through the regular legislative process

17 Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9 Transnational Environmental Law 55. Her argument has been cited for example by Niehaus (n 13) 384; Henrik Lando, 'Should Courts Decide Climate Policies?: A Critical Perspective on Climate Litigation in Light of the Urgenda Verdict' (2024) 20 Review of Law & Economics 175, 194.

18 Burgers (n 17) 56.

19 ibid 63.

20 ibid 64.

expendable as 'the legitimacy of the law lies not within the institutions of the legislature or judiciary, but in the inter-subjective debates among citizens – the official institutions merely provide the most authoritative articulation of the law'.[21]

To investigate Burgers' claim further, this thesis is guided by the following 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 from under a Habermasian framework? Specifically, can courts legitimately create climate rights to justify their interventions?* While Burgers' research is focused on private law in the European context, the research here presented is rather focused on public law and the decisions of constitutional and human rights courts. However, both Burgers' work, and this thesis are mainly concerned with Habermas' system of rights and its use by the judiciary. To place this topic in the framework of Habermas' work, it might be useful to refer to the systematisation Hugh Baxter presents in his book *Habermas: The Discourse Theory of Law and Democracy*.[22] Baxter points out that the title *Between Facts and Norms*, suggests that Habermas' theory is always concerned with the distinction between facticity and validity. Facticity on the highest level then refers to ideas such as law's positivity and predictability, institutional connections, and coercive enforcement. Validity, on the other hand, relates to law's (ideal) legitimacy and rational acceptability.[23] The validity aspect of the theory is also considered as the discourse theory of law proper while the facticity aspect can be seen as the communication theory of society. The dichotomy of facticity and validity reaches deeper than this first level, and so also within the discourse theory of law proper, the two can be distinguished. Here facticity means the principles of the constitutional state and validity refers to the system of rights.[24] Hence,

21 ibid.
22 Hugh Baxter, *Habermas: The Discourse Theory of Law and Democracy* (Stanford law books 2011).
23 ibid 62.
24 ibid 63.

this thesis is concerned with the validity aspect of the discourse theory of law proper.

The research presented in this thesis is based on academic literature and selected judicial decisions. As the question of judicial review's legitimacy in climate change is approached from a discourse theoretical perspective, the bulk of the literature drawn on is by and on Habermas, and other theorists working on discourse theory, notably Milan Kuhli and Klaus Günther on judicial law-making.[25] The reconstruction of Habermas' theory is largely based on Baxter's interpretation,[26] as well as James Finlayson and Dafydd Rees's[27] and Christopher Zurn's[28] discussions. A second group of literature is concerned with the phenomenon of climate rights and their constitutionalisation, including Laura Burgers' work. Lastly, as the theoretical findings are discussed in the context of two climate decisions, the research draws on those decisions as well as secondary literature about them.

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

25 Milan Kuhli and Klaus Günther, 'Judicial Lawmaking, Discourse Theory, and the ICTY on Belligerent Reprisals' (2011) 12 German Law Journal 1261.

26 Baxter (n 22).

27 James Gordon Finlayson and Dafydd Huw Rees, 'Jürgen Habermas' in Edward N Zalta and Uri Nodelman (eds), *The Stanford Encyclopedia of Philosophy* (Metaphysics Research Lab, Stanford University 2023) <https://plato.stanford.edu/archives/win2023/entries/habermas/>.

28 Christopher Zurn, 'A Question of Institutionalization: Habermas on the Justification of Court-Based Constitutional Review' in Camil Ungureanu and Klaus Günther (eds), *Jürgen Habermas, Volumes I and II* (Ashgate 2011).

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 emphasis 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.

The thesis is divided into three Sections. In Section 2, Habermas' discourse theory is presented, starting with a general introduction to the theory followed by a more detailed discussion of the system of rights and the co-originality thesis. Building onto this foundation, the theoretical framework then moves on to present the discourse theoretical perspective on legitimate judicial review (by constitutional courts) after giving an overview of discourse theory's general conception of the judiciary including the notion of a discourse of application. Section 3 of the thesis applies 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 is 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 is assessed, and the discourse of norm identification is discussed as a potential re-conceptualisation of judicial review that justifies some judicial engagement in climate litigation. Section 4 then turns to analysing the courts' approaches in two significant European climate decisions: the German Federal Constitutional Court's order in *Neubauer*,[29] and the European Court of Human Rights' judgement in *KlimaSeniorinnen*.[30] Finally, the thesis concludes

29 *Neubauer* (n 7).
30 *KlimaSeniorinnen* (n 8).

which a synthesis of the arguments presented and an outlook for what they may mean for the legitimacy of past and future climate decisions.

2 Theoretical Framework

2.1 Habermas' Discourse Theory of Law

This Section provides a general introduction to Habermas' discourse theory. The first part places discourse theory in its broader context and introduces its general outlines by presenting the discourse principle and the principle of democracy from which the theory of democracy follows. Furthermore, the relevance of discourse theory's proceduralist understanding of modern state's legitimacy and its legal positivist assumptions are discussed and how these finally lead to the importance of protecting private and public autonomy. The second part is concerned with the co-originality thesis and the system of rights. It introduces Habermas' critique of liberalism and republicanism in balancing human rights and popular sovereignty before presenting discourse theory's answer in the form of the co-originality of human rights and popular sovereignty. Lastly, the system of rights with its five categories of rights is presented.

2.1.1 General Remarks

Habermas initially presented his discourse theory of law in *Faktizität und Geltung* (1992),[31] published in English as *Between Facts and Norms* in 1996.[32] His political and legal theory is concerned with how constitu-

31 asJürgen Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1992).

32 Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996).

tional democracies create and institutionalise democratically legitimate laws. The account discourse theory provides attempts to find middle ground between libertarianism and republicanism, since during the late 1980s and early 1990s, when Habermas was conceptualising his theory and writing *Between Facts and Norms*, there was a heated debate in political theory between the two camps. To this end, discourse theory introduced the co-originality (or equiprimordiality) of liberal rights and popular sovereignty.[33] According to Habermas, neither liberalism nor republicanism realise the true co-originality of private and public autonomy, with liberalism deeming the former more important and republicanism the latter.[34] How exactly discourse theory conceives of the co-originality of the two is discussed below. For now, it suffices to say that both are needed in a "radical democracy" as they presuppose each other. Habermas assumes that the rule of law cannot exist without such radical democracy. However, he recognises that given our present-day conditions, radical democracy needs to be made compatible with the large bureaucracy through which modern states are organised. With this in mind, discourse theory reconstructs and describes how discourse is institutionalised by political and legal systems. In this sense, the theory offers both a descriptive sociology of law and jurisprudence, as well as a theory of prescriptive normative philosophy.[35] At the heart of discourse theory lies the discourse principle which holds D: exactly those action norms are valid (legitimate) to which all possibly affected persons could agree as participants in rational discourse.

D expresses requirements for justification that are valid in a post-conventional (rationalised) lifeworld.[36] Habermas takes the social condition of a rationalised lifeworld as the premise for his analysis of modern law. Rationalisation means that cultural traditions have been secularised and lost their power to prescribe the division of labour and social norms. This leads to the fact that actions need to be coordinated

33 Finlayson and Rees (n 27).
34 Jürgen Habermas, 'Remarks on Legitimation through Human Rights' (1998) 24 Philosophy & Social Criticism 157, 159.
35 Finlayson and Rees (n 27).
36 Baxter (n 22) 68.

by citizens themselves. While communicative action is one way for a society to coordinate itself, communicative agreement is difficult to achieve and hence needs to be subsidised by law.[37] In D, action norms then are to be understood as temporally, socially, and substantively generalised behavioural expectations. Affected persons are those people whose interests are touched by the foreseeable consequences of a general practice regulated by the relevant norm. Rational discourse is understood as any attempt to reach an understanding over problematic validity claims in situations where free processing of topics and contributions, information and reasons is possible.[38]

From the general discourse principle D, Habermas derives the more specific principle of democracy, which states that only those statutes may claim legitimacy that can meet with the assent of all citizens in a discursive process of legislation that in turn has been legally constituted. It is important to note that the democratic principle is independent from the moral principle, which Habermas also derives from the discourse principle. The democratic political process is viewed as autonomous and forms the sole source of legitimacy for the production of law.[39] This relates back to the rationalisation of the lifeworld, according to which the social order can no longer be based on religious or metaphysical supports.[40] According to the democratic principle, law is valid if it has been created in a legitimate way, as legitimacy is concerned with procedure and the origins of a law rather than its substantive merit.[41] Probably the most difficult aspect of the democratic principle for any imaginably functioning political system is the requirement for universal assent. When discussing this issue, Baxter states that universal assent is in fact too high a standard that would render all law illegitimate if narrowly understood. The discourse process where legitimate law can claim the assent of all citizens is to be seen as idealised

37 ibid 60.
38 ibid 68–69.
39 Finlayson and Rees (n 27).
40 Baxter (n 22) 61.
41 ibid 96.

and counterfactual.[42] Furthermore, assent by all citizens might mean something weaker than univocal endorsement as Habermas agrees that the discourse principle allows room for bargaining and compromise.[43] Despite this tension, the democratic principle expresses the important notion that addressees of the law need to be and at also perceive themselves as its authors. This is the case if they show fidelity to the recognised procedure and thus have to accept its outcomes even if they do not endorse the law substantively.[44]

How does Habermas envision such a discourse process of legislation? Generally, Habermas conceives of a formal and an informal public sphere in his theory of democracy. The formal public, parliamentary, sphere consists of the trias politica: parliament (the legislature), administration (the executive), and the judiciary. Importantly parliament is understood as a public forum legally established to take decisions. The informal public sphere refers to civil society. Here, several kinds of discourse, such as moral, ethical, and pragmatic, are present. For Habermas, a functioning deliberative democracy that creates valid, i.e. legitimately produced, law is one where discourses and their results reach the formal public sphere from the informal public sphere through various channels. Thus, through the circulation of communicative power from the periphery to the centre, for example, public opinion or moral norms should find their way to the legislature where they are discussed and cast into legal form and policies. Any laws and policies should through this process be informed by public opinion and shared moral values which is why citizens view themselves as their authors and accept them. In our large and complex states, the citizens cannot be the direct authors of their laws, which is why Habermas relies on this indirect way of participation in discourses in the informal public sphere.[45] For this to be possible there need to be public spaces for political discussion. These are usually provided through an active civil

42 ibid 74.
43 ibid 75.
44 ibid 100.
45 Finlayson and Rees (n 27).

society in the form of voluntary associations that are separate from the state.[46]

As mentioned, Habermas provides a proceduralist account of legitimacy. Before moving on to discussing the system of rights and the co-originality thesis, some more words on what exactly constitutes legitimate constitutional democracies and their laws under discourse theory are in order. In his article 'Remarks on Legitimation Through Human Rights', Habermas begins with stating that

> [b]ecause the medium of state power is constituted in forms of law, political orders draw their recognition from the legitimacy claim of law. That is, law requires more than mere acceptance; besides demanding that its addressees give it de facto recognition, the law claims to *deserve* their recognition.[47]

This is to say that states are legitimated through the justifications and constructions which legitimate the law that constitutes the state. At the core of modern legal orders are individual (political and private) rights as they allow for the pursuit of personal preferences and do away with the obligation to publicly justify one's actions within what is legally permitted. This is another way in which law and morality are separated under discourse theory, as pointed out earlier. One implication of this, which is important when justifying the co-originality of private and public autonomy, is that, different from morality, legal systems are spatio-temporally limited and only protect the integrity of its members if they acquire the artificial status of bearers of individual rights.[48]

Habermas assumes that all modern states are constituted by positive law, which he understands as law that is enacted and coercive.[49] This means that in valid law 'the facticity of the state's enforcement and implementation of law [is] intertwined with the legitimacy of the purportedly rational procedure of law-making'.[50] Citizens are thus free to follow the law either because it is coercive, or because they respect it. This implies that the state needs to ensure both the legality of

46 ibid.
47 Habermas, 'Remarks on Legitimation through Human Rights' (n 34) 157.
48 ibid 158.
49 ibid 157.
50 ibid 158.

behaviour in the sense of enforced average compliance and legitimacy of the rules through their proper enactment.[51] However, the positivity of law also poses a challenge to its legitimacy in the sense that the posited rules are always changeable by the political legislator. In contrast, morally grounded laws can be considered eternally valid. With the rationalisation of the lifeworld, eternally valid morality can no longer secure law's validity in our pluralistic societies. Popular sovereignty and human rights are instead the normative perspectives through which changeable law is supposed to be legitimated. The democratic nature of popular sovereignty's procedure justifies the presumption that it leads to legitimate outcomes. Classical human rights, according to Habermas, ground an inherently legitimate rule of law as they secure citizens' life and private liberties.[52] Law's positivity is, furthermore, the reason there even exists a distinction between public and private autonomy. While law protects the equal autonomy of each person, '[t]he binding character of legal norms stems not just from the insight into what is equally good for all, but from the collectively binding decisions of authorities who make and apply the law'.[53] This necessitates a distinction between authors who make and apply the law and addressees who are subject to valid law. Hence autonomy in the legal sphere takes on the dual form of private and public, though the two of them mutually presuppose each other.[54]

2.1.2 The Co-Originality Thesis and the System of Rights

Habermas stresses the co-originality of public and private autonomy, that is of popular sovereignty and (liberal) human rights, because he deems that political philosophy has thus far failed to strike an adequate balance between the two. According to his reconstruction, republican-

51 ibid.
52 ibid 159.
53 Jürgen Habermas, 'Constitutional Democracy: A Paradoxical Union of Contradictory Principles?' (2001) 29 Political Theory 766, 779.
54 ibid.

ism prioritises citizens' public autonomy over their private autonomy since human rights themselves are legitimated by the political community's ethical self-understanding and sovereign self-determination. Liberalism, on the other hand, treats human rights as inherently legitimate and favours them over citizens' public autonomy against the danger of a tyrannical rule of the majorities.[55] Against these two perspectives, Habermas claims that 'the idea of human rights – Kant's fundamental right to equal individual liberties – must neither be merely imposed on the sovereign legislator as an external barrier nor be instrumentalised as a functional requisite for democratic self-determination'.[56]

The co-originality of private and public autonomy follows from the principle of democracy, which states that a law may claim legitimacy only if all citizens could consent to it after participating in rational discourses. Accordingly, discourses are the place where reasonable political will can develop. This means that 'the presumption of legitimate outcomes, which the democratic procedure is supposed to justify, ultimately rests on an elaborate communicative arrangement'.[57] For Habermas this implies that the necessary forms of communication and the conditions that ensure legitimacy have to be legally institutionalised.[58]

Public autonomy generally refers to the democratic procedures of law-making, i.e. the discursive processes of opinion- and will-formation in which the sovereignty of the people becomes binding.[59] Popular sovereignty is required as it ensures that citizens can equally realise their private autonomy by engaging in the democratic process utilising their public autonomy.[60] While human rights secure private autonomy, as discussed below, these rights need to be justified and legitimated through a legislative procedure that is based on the principle of popular sovereignty.[61]

55 Habermas, 'Remarks on Legitimation through Human Rights' (n 34) 159.
56 ibid 159–160.
57 ibid 160.
58 ibid.
59 Baxter (n 22) 67.
60 Habermas, 'Remarks on Legitimation through Human Rights' (n 34) 161.
61 Baxter (n 22) 63–64.

At the same time, human rights institutionalise the communicative conditions for reasonable political will-formation. They make the exercise of popular sovereignty possible and hence cannot be imposed as external constraints (against the claims of liberalists). How human rights enable political will-formation is immediately plausible for political rights of communication and participation, but not necessarily for civil rights. On the one hand, they have intrinsic value and cannot be reduced to their instrumental value for democratic will-formation. On the other hand, since citizens participate in legislation as only legal subjects, 'the legal code as such must already be available before the communicative presuppositions of a discursive will-formation can be institutionalized in the form of civil rights'.[62] However, to create a legal code, legal persons who are bearers of individual rights and form a voluntary association of citizens are required. This is to say that 'there is no law without the private autonomy of legal persons in general'.[63] This is why, not only political rights are needed to institutionalise the conditions for the exercise of public autonomy, but also civil rights since without them, there would be no medium through which to legally institutionalise these conditions.[64] In short, 'citizens can make appropriate use of their public autonomy only if, on the basis of their equally protected private autonomy, they are sufficiently independent'.[65]

The idea of legitimate law, therefore, presupposes that of a legal subject as bearer of rights.[66] To develop this concept further, Habermas poses the following question: 'What basic rights must free and equal citizens mutually accord one another if they want to regulate their common life legitimately by means of positive law?'.[67] His answer is a system of rights consisting of five kinds of rights. These rights are equally distributed, mutually recognised individual liberties,[68] where

62 Habermas, 'Remarks on Legitimation through Human Rights' (n 34) 160.
63 ibid 160–161.
64 ibid 161.
65 ibid.
66 Finlayson and Rees (n 27).
67 Habermas, 'Remarks on Legitimation through Human Rights' (n 34) 160.
68 Baxter (n 22) 65.

'categories of rights devoted to private autonomy respond to the "liberal" side of the liberal/republican divide, and the categories of rights that secure public or civic autonomy respond to the "republican" side'.[69] It is important to note that the system of rights does not elaborate any specific rights. Instead, it describes unsaturated kinds of rights that will need to be elaborated by the citizens in a given democratic political system using their political autonomy. Thus, the political process of establishing a specific system of rights for a legal community is left, as much as is possible, to the citizens as the discourse theory of democratic legitimacy is strictly procedural rather than substantive.[70] Moreover, for the rights to be effective legal rights they require legal institutionalisation, which should also be determined by engaging citizens' political autonomy.[71]

The system of rights comprises the following five categories of rights:[72]

1. Basic rights that result from the politically autonomous elaboration of the *right to the greatest possible measure of equal individual liberties*.
2. Basic rights that result from the politically autonomous elaboration of the *status of a member* in a voluntary association of consociates under law.
3. Basic rights that result immediately from the *actionability* of rights and from the politically autonomous elaboration of individual *legal protection*.
4. Basic rights to equal opportunities to participate in processes of opinion- and will-formation in which citizens exercise their *political autonomy* and through which they generate legitimate law.
5. Basic rights to the provision of living conditions that are socially, technologically, and ecologically safeguarded, insofar as the current

69 ibid 129.
70 Finlayson and Rees (n 27).
71 Baxter (n 22) 72.
72 Habermas, *Between Facts and Norms* (n 32) 122–123.

circumstances make it necessary if citizens are to have equal opportunities to utilize the civil rights listed in (1) through (4).

Generally speaking, categories 1–3 are civil rights that arise from the application of the discourse principle to the form of law and define citizens' private autonomy.[73] They form the 'necessary basis for an association of citizens that has definite social boundaries and whose members mutually recognize one another as bearers of actionable individual rights'.[74] Categories 4 and 5 are political and social rights that secure practically and materially enabling conditions ensuring the effectiveness of the first three categories of rights.[75] The first category of rights follows from the idea that people would not agree upon unequal rights in the rational discourse that discourse theory presupposes. Moreover, they would allow each other the greatest possible liberty without encroaching on someone else's.[76] The second and third category of rights follow from the first one since legal personality entails membership in a legal community and the actionability of rights. Thus, category two encompasses citizenship rules, as well as rules on immigration and emigration. Category 3 mainly requires the availability of legal remedies for violations of individual rights.[77]

The last two categories represent the perspective of participants in democratic law-making,[78] or of citizens who recognize one another as mutual authors of the law.[79] In contrast, the first three categories contain principles from the perspective of nonparticipants,[80] or from the perspective of participants who expect to act as addressees of the law.[81] Category 4 sets out the process through which the other categories and itself can be elaborated and how legal norms can be created. Here the

73 Finlayson and Rees (n 27).
74 Habermas, 'Constitutional Democracy' (n 53) 777.
75 Finlayson and Rees (n 27).
76 Baxter (n 22) 70.
77 ibid 71–72.
78 ibid 74.
79 Habermas, 'Constitutional Democracy' (n 53) 777.
80 Baxter (n 22) 74.
81 Habermas, 'Constitutional Democracy' (n 53) 777.

co-originality of private and public autonomy is again evident in that citizens can secure their private autonomy by engaging their public autonomy and the use of their public autonomy is guided by the rights from the first three categories which establish private autonomy.[82] The last category of rights, category 5, refers to social rights that might be typical for welfare states. Different from the other categories which are absolutely justified in themselves, category 5 is justified only relatively to the other four categories of rights. Thus, social and ecological rights are only justified to the extent that they are necessary to guarantee the exercise of the other kinds of rights.[83]

2.2 Judicial Review in Discourse Theory

The following Section is concerned with the role discourse theory attributes to judicial review, and under which circumstances it is considered legitimate. To understand the overall place of the judiciary and that of judicial review in discourse theory's conception of the state, first the general principles of the constitutional state [Rechtsstaat] are outlined. Second, the role of the judiciary and the concept of a discourse of application will be introduced. Finally, the discussion turns to constitutional adjudication und the question of how judicial review is considered legitimate.

2.2.1 The Constitutional State [Rechtsstaat]

The account of the constitutional state that discourse theory offers is concerned with the institutions, procedures, and mechanisms that are required for legitimately actualising the abstract categories of rights set out in the system of rights through positive law. The principles of the

82 Baxter (n 22) 72–73.
83 ibid 75.

constitutional state thus set out the kind of arrangement that needs to be defined in positive law for a legal order to be legitimate.[84]

In his reconstruction of the constitutional state, Habermas states that law and political power are internally linked in two ways. First, the validity of legal norms requires adequate law enforcement, as discussed above. This means, for example, that rights ought to be enforced through courts with sanctions applied by state-personnel to give effect to judgements if necessary.[85] Second, the two are linked in the legislative process as legitimate law-making requires a democratic process which is set with the help of governmental power and where the executive power implements enacted laws.[86] Thus, in a constitutional state law presupposes political power and political power presupposes law – the two are reciprocal.[87]

Since Habermas assumes a complex modern state that is reliant on the integrative achievements of law for his theory,[88] he introduces the concept of administrative power as a second power next to communicative power, i.e. the motivating force of discursively produced shared beliefs.[89] As has been noted, the source of legitimate law is citizens' communicative power. However, in assuming a complex society, Habermas acknowledges that a bureaucratic state is needed since using rational discourse as the only means of producing law would only work, if at all, in a very small homogenous society with a high degree of popular participation.[90] Baxter termed administrative power the "counter concept to communicative power" since it does not entail communicative action or discourse but is developed within formal bureaucratic organisations as the steering medium of a self-regulating administrative system.[91] Because administrative power does not involve

84 ibid 82.
85 ibid 83.
86 ibid.
87 ibid.
88 Habermas, 'Remarks on Legitimation through Human Rights' (n 34) 164.
89 Habermas, *Between Facts and Norms* (n 32) 147.
90 Finlayson and Rees (n 27).
91 Baxter (n 22) 86–87.

discourse, it should be tied to the law-making power of citizens' communicative power in both its generation and application.[92] However, Habermas also states that the administrative power has a self-steering mechanism that should not be interfered with.[93] Though Baxter adds to this point that

> the administrative system cannot be entirely "self-steering", on Habermas's premises, because [...] [l]egitimate law, on Habermas's view, is both the product of democratic lawmaking and the mechanism that defines the structures of official command and obedience that Habermas calls "administrative power". Law, in other words, is a mechanism for effecting, and regulating, what Habermas calls the "conversion of communicative into administrative power".[94]

To this end, the constitutional state under discourse theory entails common institutions tasked with constraining the official use of power: an independent and impartial judiciary bound by the rule of law, legal controls over the state administration, and the separation of powers.[95]

2.2.2 The Role of the Judiciary

Generally, the role of the judiciary is limited to the application of existing legal norms to individual cases.[96] This follows from discourse theory's positivistic understanding of law, whereby legal norms enacted by representative bodies are at the centre of modern law. However, this discourse theoretical conception of the judiciary's proper function still leaves room for the claim that most norms are inherently indeterminate because they do not specify in detail and in advance the exact situations to which they apply. This results in several norms being potentially applicable to a certain case. Through discourses of application, courts must therefore determine which valid norm is most appropriately ap-

92 ibid 83.
93 Habermas, *Between Facts and Norms* (n 32) 150.
94 Baxter (n 22) 88.
95 ibid.
96 Habermas, *Between Facts and Norms* (n 32) 172.

plied in a given context.[97] The legitimacy requirement prescribes that courts should carry out the application of law with regard to rational external justifications, i.e. the reasons that justified the norm when it was enacted.[98] The certainty requirement asks of the courts to act in consistency with the institutional history and at the same time mandates that judicial decisions can be points of connection for future ones.[99]

One key concept for the functioning of the judiciary as understood by discourse theory, is the difference between discourses of justification and discourses of application. The two discourses follow different argumentative logics and fulfil different purposes. Discourse of justification are what the legislature is engaged in when discursively justifying legal norms in their enactment. To this end, they might draw on all kinds of reasons and discourses: moral, ethical, and pragmatic.[100] Discourses of application are concerned with applying general norms to particular circumstances in the most appropriate way and as such they are the specialty of the courts.[101] To be precise, courts are not allowed to engage in discourses of justification. Habermas presents two reasons for this. First, courts' institutional set up lacks a democratic warrant. Only the parties to the dispute and the impartial judge are involved before a court, but not the citizenry at large through public discourse.[102] Second, since courts already have the coercive power of the state at their disposal to enforce judgements, they could command administrative power untied to the communicative power of democratic discourses if they were able to engage in discourses of justification and thereby enact law.[103]

One can pose the question whether the distinction between application and justification is truly as clear as discourse theory seems to

97 Baxter (n 22) 110–111.
98 ibid 107.
99 ibid.
100 Habermas, *Between Facts and Norms* (n 32) 192.
101 Baxter (n 22) 91, 94.
102 ibid 103; Habermas, *Between Facts and Norms* (n 32) 172.
103 Baxter (n 22) 103; Habermas, *Between Facts and Norms* (n 32) 172.

presume it to be.[104] Habermas already acknowledges that the discourse-theoretical understanding might have to be relativised and states that

> [t]o the extent that legal programs are in need of further specification by the courts – because decisions in the grey area between legislation and adjudication tend to devolve on the judiciary, all provisos notwithstanding – juristic discourses of application must be visibly supplemented by elements taken from discourses of justification.[105]

A more specific proposal to address the issue of legal indeterminacy presented by Kuhli and Günther (2011) is discussed below as a possible framework to view courts' decisions in climate change matters without the existence of explicit climate rights.

2.2.3 Constitutional Adjudication

The aspect of constitutional adjudication this thesis is most interest in, is the constitutional review of legislation. While constitutional review is sometimes viewed critically especially based on arguments making reference to separation of powers, discourse theory states that the separation of powers does not, in principle, preclude constitutional review.[106] According to Zurn, Habermas offers two distinct considerations why judicial review is not paternalistic. The first relates to the fact that discourse theory views courts as being engaged in discourses of application.[107] From the fact that courts are precluded from engaging in discourses of justification, it follows that also constitutional courts must restrict themselves to applying basic rights.[108] Indeed, also constitutional review can be understood as engaging in a discourse of application. Rather than applying a regular statute to a factual situation, consti-

104 Baxter (n 22) 104.
105 Habermas, *Between Facts and Norms* (n 32) 439.
106 ibid 120.
107 Zurn (n 28) 437. It should be noted that Zurn finds neither consideration convincing against the charge of judicial paternalism. However, this can be disregarded for the moment as they are nonetheless insightful for understanding the discourse-theoretical conception of judicial review.
108 Baxter (n 22) 121.

tutional courts determine whether higher level constitutional norms are applicable (as they should be) to ordinary legal norms when conducting constitutional review.[109] The second consideration why constitutional review is not paternalistic is grounded on an understanding of the separation of governmental powers along the lines of specialised discursive functions. According to this thought, the judiciary holds particular institutional competence to deal with legal discourses of application as are required by the exercise of constitutional review.[110]

Habermas presents a "proceduralist account" of constitutional adjudication, which he develops, again, in contrast to his conception of the liberal and republican approach. The role discourse theory ascribes to constitutional adjudication, and especially constitutional review, is procedural in the sense that it should act as a guardian of the procedural preconditions for legitimate democratic law-making. This is to say, 'the constitutional court should keep watch over just that system of rights that makes citizens' private and public autonomy equally possible'.[111] Habermas elaborates that

> abstract judicial review should refer primarily to the conditions for the democratic genesis of laws. More specifically, it must start by examining the communication structures of a public sphere subverted by the power of the mass media; go on to consider the actual chances that divergent and marginal voices will be heard and that formally equal rights of participation will be effectively exercised; and conclude with the equal parliamentary representation of all the currently relevant groups, interest positions, and value orientations. Here it must also refer to the range of issues, arguments and problems, values and interests that find their way into parliamentary deliberation and are considered in the justification of approved norms.[112]

Zurn elaborates that the task of guaranteeing the procedural fairness and openness of democratic processes involves

> keeping open the channels of political change, guaranteeing that individuals' civil, membership, legal, political, and social rights are respected,

109 Zurn (n 28) 432–433.
110 ibid 438.
111 Habermas, *Between Facts and Norms* (n 32) 263.
112 ibid 265.

> scrutinizing the constitutional quality and propriety of the reasons justifying governmental action, and ensuring that the channels of influence from independent, civil society public spheres to the strong public sphere remain unobstructed and undistorted by administrative, economic, and social powers.[113]

Habermas' limited discussions suggest being in favour of a 'rather bold constitutional adjudication'.[114] He, for example, rejects limiting constitutional courts' analysis to purely formal equality, their task is not only to guard against infringements of equal liberties by the state. Rather, constitutional courts should also be attentive towards the risks that concentrated social and economic power pose to private and public autonomy, as he views growing power concentrations as the most relevant development in social circumstances.[115] However, it remains unclear in *Between Facts and Norms* to what extent a constitutional court may rely on disparities of social and economic power that influence the divergence between full and actual participation to invalidate, rewrite, or refuse to apply law.[116]

Nevertheless, the "boldness" of the approach Habermas recommends should not be overstated either. For example, discourse theory views the constitution as a project that is to be developed not just by the courts, but also by the legislature and the citizens at large. The courts certainly are not the only ones that can or should be engaged in constitutional interpretation.[117] Moreover, the system of rights the constitutional court should keep watch over, is, as discussed above, unsaturated until democratic law-making defines the abstract categories for a given society. This means that constitutional courts are limited to enforcing existing legal norms, just as the regular judiciary is also limited to discourses of application. While constitutional courts, on Habermas' account, should watch over the system of rights, they are bound to the system of rights that has been previously elaborated

113 Zurn (n 28) 436.
114 Habermas, *Between Facts and Norms* (n 32) 280.
115 Baxter (n 22) 130, 137.
116 ibid 137.
117 ibid 142.

through the democratic process.[118] Here it should be born in mind that the democratic process for elaborating and justifying constitutional norms is different from the democratic process to be followed for ordinary legal norms. While the proper actors for the latter are those actors with ordinary legislative powers, for constitutional norms it is the citizenry as a whole in their special configuration as a constitutional assembly, or at least a special configuration of the legislature.[119] Because the resolution of constitutional controversies should be justified before the electorate at large, judicial interference is particularly problematic in this case.

This relates to what Habermas terms the problem of "value jurisprudence". This problem arises when constitutional courts view the constitution not as a system of rules that is structured by principles but as a concrete order of values.[120] This view, where principles express values that need to be balanced if principles compete, is a conceptual error, according to Habermas, in short, because values recommend while principles command.[121] 'Values are "teleological", reflect "intersubjectively shared preferences", and are only "relatively binding", while principles are "deontological" and "absolutely binding"'.[122] While values can form part of the law and of constitutional provisions they do so through discourses of justification which courts, including constitutional courts, ought not to engage in.[123] Certainly, the problem of delineating between the two discourses especially in cases of vague legal provisions, as is often the case with constitutional provisions expressing basic rights, obtains here as well. Nonetheless, Habermas holds that legal principles may not be treated by constitutional courts as mere values that can simply be balanced. This would let the courts act as a legislative body whose proper task it in fact is to balance between different values and

118 ibid 145–146.
119 Zurn (n 28) 552.
120 Habermas, *Between Facts and Norms* (n 32) 254.
121 Baxter (n 22) 121.
122 ibid.
123 ibid.

preferences expressed in a pluralistic society.[124] While a constitutional court

> reopens the package of reasons that legitimated legislative decisions so that it might mobilize them for a coherent ruling on the individual case in agreement with existing principles of law; it may not, however, use these reasons in an implicitly legislative manner that directly elaborates and develops the system of rights.[125]

124 ibid 125.

125 Habermas, *Between Facts and Norms* (n 32) 262.

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.

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.

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 emphasis 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.

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Just enjoy the ride!
~ LL.M. in Legal Theory 2024/25

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