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.