YOUNG ACADEMICS

European Legal Theory 4

Clara Valeria Kammeringer

Between Climate Cases and Legitimacy

A Discourse Theoretical Perspective on Judicial Climate Decisions

Tectum

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European Legal Theory | 4

Edited by
Prof. Lorenz Schulz,
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Prof. Migle Laukyte and
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Clara Valeria Kammeringer

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With a Foreword by Prof. Dr. Klaus Günther

Tectum Verlag

This publication was sponsored by the Frankfurt LLM programme in Legal Theory (Goethe University and European Academy of Legal Theory).

The Deutsche Nationalbibliothek lists this publication in the Deutsche Nationalbibliografie; detailed bibliographic data are available on the Internet at http://dnb.d-nb.de

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Young Academics: European Legal Theory; Vol. 4

ISBN 978-3-68900-466-8
ePDF 978-3-68900-467-5
ISSN 2944-3962

DOI: https://doi.org/10.5771/9783689004675

1st Edition 2025

Published by
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden
www.nomos.de

Production of the printed version:
Nomos Verlagsgesellschaft mbH & Co. KG
Waldseestraße 3–5 | 76530 Baden-Baden

Onlineversion

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

Table of Contents