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### Justitia, the People's Power and Mother Earth

*Democratic legitimacy of judicial law-making in European private law cases on climate change*

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# II.

## BOUNDARIES OF DEMOCRATICALLY LEGITIMATE JUDICIAL LAW-MAKING IN EUROPEAN PRIVATE LAW

‘What motivates me, is that I believe I am right.’  
*Roda Verheyen, lawyer for Saúl Lluyia, on the climate case against German oil giant  
RWE*

### A. INTRODUCTION

How often have you seen a lawyer weep just after he heard the court reading the decision aloud in which it becomes clear that he has won the case for his client? It happened in June 2015, when the District Court in The Hague rendered its *Urgenda* decision: lawyer Roger Cox became overwhelmed by emotion.<sup>61</sup> The Court’s decision meant a victory in a battle he and his teammates had been engaged in for years.<sup>62</sup> Already in 2011, Cox had published his book *Revolution Justified*, warning against climate change and the inherently inactive governments and markets in this respect, as well as showing how law could pave

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<sup>61</sup> Rechtbank Den Haag 24 June 2015 Stichting Urgenda/Staat der Nederlanden ECLI:NL:RBDHA:2015:7145.

<sup>62</sup> And still is: Cox is a special advisor for the Belgian *Klimaatzaak*, a similar case; and acts as the primary lawyer in the case the Dutch NGO *Milieudefensie* started against oil giant Dutch Royal Shell.

the way for a justified energy revolution.<sup>63</sup> The Court adopted many of his pioneering arguments in its decision.

Cox was one of the lawyers of the Urgenda Foundation, a Dutch NGO pointing at the ‘urgent agenda’ – hence the portmanteau ‘Urgenda’ – to make the economy 100% sustainable.<sup>64</sup> Since its establishment in 2007, the foundation finished several projects, including a grand scale procurement of solar panels to make these affordable for normal households. In 2013, it initiated the now world famous ‘climate case’. Urgenda sued the Dutch State for setting non-ambitious goals to combat climate change, and argued that this constituted a tort. In 2015, the Court issued its judgment and it agreed: it ordered the Dutch State to reduce greenhouse gas emissions in the Netherlands by the end of 2020 with at least 25% compared to the level of 1990. The Court of Appeal of The Hague upheld the decision in October 2018, and the Supreme Court subsequently did the same in December 2019.

To litigate on issues of climate change is not unique. Already in 2015, scholars noted a ‘climate litigation explosion’.<sup>65</sup> Yet the unprecedented success of the Urgenda Foundation may well be one of the reasons climate change litigation has become an established movement unlikely to stop anytime soon; today, the worldwide number of lawsuits concerning the responsibility for the dangers of climate change, has surpassed one thousand.<sup>66</sup> Academics have praised the judgments rendered so far for making climate change ‘tangible and routine’,<sup>67</sup> and for contributing to ‘cosmopolitan justice’.<sup>68</sup> Others enthusiastically circumscribed the Dutch *Urgenda* judgment as ‘law-finding 3.0’.<sup>69</sup>

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<sup>63</sup> In Dutch, the title of the book is *Revolutie met recht*, which one could translate either as ‘revolution with law’ or as ‘legitimate/legal/justified revolution’. It was translated into English in 2012. Roger Cox, *Revolution Justified* (Planet Prosperity Foundation 2012).

<sup>64</sup> With *Urgenda* in italics I refer to the Court’s decision, with Urgenda in normal font to the Foundation.

<sup>65</sup> Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation* (Cambridge University Press 2015).

<sup>66</sup> The Sabin Center of Climate Change Law of Columbia University keeps track of all the climate cases at <http://climatecasechart.com/>.

<sup>67</sup> Catalina Vallejo, ‘Suing the State for Climate Change; Empirical Assessment of Climate Change Jurisprudence in Cases against Governments’ (PhD thesis, Los Andes University 2018). [forthcoming].

<sup>68</sup> Esmeralda Colombo, ‘The Quest for Cosmopolitan Justice in Climate Matters’ (2017) 2 *Nordisk Miljörättslig Tidskrift* 25.

<sup>69</sup> Marc Loth and Rob van Gestel, ‘Urgenda: Roekeloze Rechtspraak of Rechtsvinding 3.0?’ [2015] *Nederlands Juristenblad* 2598. [translation LB].

At the same time, the climate cases became the subject of controversy, and *Urgenda* was heavily criticised, especially in the Dutch national debate.<sup>70</sup> As also underlined in the Introduction to this thesis, we are confronted with a tension between law and politics. Environmental activists resort to the legal institution of the judiciary, but this strategy is rejected by many because they believe that the environment as a problem belongs to the domain of the political institutions, subject to the people's power rather than to the discretion of a single court. In the latter view, it does not lie within the boundaries of democratically legitimate judicial law-making to determine appropriate climate action.

Remarkable in this context is that quite a few commentators who expressed this kind of *procedural* criticism, agreed with the *outcome* in the *Urgenda* judgments. That is, they recognised the need to address climate change, but still held that climate change should not be dealt with by the private law judiciary, but rather by other branches of government with stronger democratic legitimacy.<sup>71</sup> In other words, although *politically* they were on the side of Mother Earth, *legally* they believed Justitia's role implied the duty to behave deferential to the People's Power as articulated by the government.

Even more remarkably, critical scholars seemed to have changed their minds in April 2018, when the Dutch NGO Milieudefensie announced to initiate a climate case against oil giant Royal Dutch Shell. In the media, these scholars were rather positive about the chance of Milieudefensie winning this case, pointing to the success of the *Urgenda* case without questioning its democratic legitimacy.<sup>72</sup> The general opinion among jurists was even positive when the decision in the *Urgenda* case on appeal followed a few months later.<sup>73</sup> What happened here?

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<sup>70</sup> As also mentioned in I. Introduction.

<sup>71</sup> Boer, de (n 7); Schutgens (n 7); Zeben, van (n 7). And later also L Besselink, 'Naschrift: Het Gaat Er Niet Om Dat de Rechter Recht Moet Spreken, Maar Dat Hij Niet Mag Wetgeven' (2019) 94 *Nederlands Juristenblad*.

<sup>72</sup> Cf Mitchell van de Klundert, 'Shell-zaak meer dan pr-stunt? "Winst Milieudefensie niet ondenkbaar"' (NOS, 16 November 2018) <<https://nos.nl/artikel/2225829-shell-zaak-meer-dan-pr-stunt-winst-milieudefensie-niet-ondenkbaar.html>> accessed 31 May 2018; Gerard Reijn, 'Milieudefensie daagt Shell voor de rechter om klimaat' *de Volkskrant* (4 April 2018).

<sup>73</sup> T Barkhuysen and ML Van Emmerik, 'Zorgplichten Volgens de Hoge Raad En Het Europees Hof Voor de Rechten van de Mens: Van Lindenbaum/Cohen via Kelderluik En Öneriyildiz Naar Urgenda?' 2019 *Rechtsgeleerd Magazijn Themis* 43; Leonard Besselink, 'De Constitutioneel Meer Legitieme Manier van Toetsing, Urgenda Voor Het Gerechtshof Den Haag' 93 *Nederlands Juristenblad* NJB 3078; Tim Bleeker, 'Hof Den Haag: Nederlands Klimaatbeleid in Strijd Met Het EVRM' (2018) 39 *Nederlands Tijdschrift voor Burgerlijk Recht* 289; Laura Burgers and Tim Staal, 'Climate Action as Positive Human Rights Obligation: The Appeals Judgment in *Urgenda v The Netherlands*', *Netherlands Yearbook of International Law* 2018 (Springer TMC

Apparently, the outer boundaries of what is perceived as democratically legitimate judicial law-making can shift. But if so, how can we then determine where these boundaries lie?

This chapter serves as the framework for analysing the topic of this book: the controversial role of the judiciary in European private law when confronted with lawsuits about climate change. It uses a reconstructive approach to meet a twofold aim. Firstly, to characterise this role by sketching the conventional outer boundaries of democratically legitimate judicial law-making, using the work of the German philosopher Jürgen Habermas. Secondly, comprehending what the climate lawsuits mean for these boundaries, which urges us to reconsider the democratic legitimacy of judicial law-making on climate change. This leads to the following central claims in this chapter. Although the role of the judiciary as such remains unchanged, the climate lawsuits are indicative of a growing recognition that a sound environment is a constitutional matter and therefore a prerequisite of democracy to be protected by judges. This recognition is operationalised in the climate cases in *inter alia* European private law. Furthermore, these lawsuits are pushing the current boundaries of democratically legitimate law-making, as they point to the interests of certain groups who fall outside the polis of national constitutional democracies but are heavily affected by an environmental problem like climate change.<sup>74</sup>

The structure of the chapter is as follows. Section B sketches a Habermasian ideal of the judiciary bound by what the citizenry decide and lay down in law. I explain how this ideal is reflected in the debates around environmentalist lawsuits, taking the debate around *Urgenda* as an example.<sup>75</sup> Thereafter, in Section C, I go on to discuss Habermas' co-originality thesis to elucidate the dynamic character of law-making and law-application. In Section D, an *intermezzo* on civil disobedience follows to clarify how I see the deliberative power of lawsuits on climate change

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Asser Press 2019); Pieter Gillaerts and Thijs Nuninga, 'Privaatrecht En Preventie: Urgenda in Hoger Beroep' (2019) 9 *Aansprakelijkheid, verzekering en schade* 41; Jessy Maria Emaus, 'Subsidiariteit, Preventie En Voorzorg. Een Verklaring van Het Arrest in de Klimaatzaak Aan de Hand van Drie Fundamentele Beginselen in Het Recht Onder Het EVRM' (2019) 2019/11 *Aansprakelijkheid, verzekering en schade* 56; NF Kreeftmeijer, 'Proportionele Aansprakelijkheid Voor Klimaatschade, Een Te Kleine Bijdrage?' (2019) 2019/12 *Aansprakelijkheid, verzekering en schade* 65; Jaap Spier, "'There Is No Future without Addressing Climate Change'" (2019) 37 *Journal of Energy & Natural Resources Law* 181.

<sup>74</sup> The groups pointed to include people in other nations, future generations, and non-humans. These are the groups that are rendered visible by the climate cases, in my analysis. It may well be that we will later discover other groups that are invisible in our current discourses.

<sup>75</sup> Chapters III-IV will delve extensively into the other climate cases of European private law.

in this dynamic law-making process – when can the judiciary legitimately affirm certain opinions widely shared in society as law? In Section E, I argue that the climate lawsuits can only be understood together with a global movement often referred to as ‘environmental constitutionalism’. Section F outlines that, whilst this movement is already influencing the democratic legitimacy of judicial law-making on climate change, it is at the same time stretched by the climate lawsuits so as to question the current boundaries of democratically legitimate law-making in the (European) constitutional democracies, as climate change threatens beings who are outside their ‘polis’. (This last claim will be further substantiated in Chapter III on people from other nations, and Chapter IV on future generations. Non-humans will be addressed in an epilogue to this thesis). This chapter finishes with some concluding remarks (Section G).

## **B. THE IDEAL JUSTITIA BOUND BY DEMOCRATIC LAWS AND THE PARTIES’ FACTS**

In his 1992 masterpiece *Faktizität und Geltung*<sup>76</sup> (Between Facts and Norms),<sup>77</sup> the German philosopher Jürgen Habermas analyses the ‘self-understanding’ of constitutional democracies:<sup>78</sup> when do citizens themselves deem the law legitimate – or in other words rightly valid – so they will comply with it? His elaborate answer to this question also clarifies the distinction between law and politics, and links that to the role of the judiciary in a constitutional democracy.

### **1. Political autonomy through the public sphere**

In constitutional democracies, we continuously hold political conversations on how our society should be shaped. We do this in the so-called ‘public sphere’;<sup>79</sup> on television and social media, in newspapers, pubs, and on the street. These conversations and debates seep into our political institutions, where parliament

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<sup>76</sup> J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp 1998).

<sup>77</sup> Throughout this book, I cite from this translation: J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Reig tr, John Wiley & Sons, 2015).

<sup>78</sup> With constitutional democracy, I refer to the German term *Demokratische Rechtsstaat*: a democratic State guided by the rule of law.

<sup>79</sup> The term ‘public sphere’ (Öffentlichkeit) was coined by Habermas in his 1962 *Habilitation* entitled *Strukturwandel der Öffentlichkeit*. Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry Into a Category of Bourgeois Society* (15th edn, John Wiley & Sons 2019).

and government leaders take final decisions. Once society-wide deliberations thus have resulted in a law, the political discussions on this particular topic may stop (for the time being) and the newly enacted law may be enforced.

According to Habermas' democracy principle, such a 'discursive process of legislation that in turn has been legally constituted' leads to democratically legitimate law because it can meet with the assent (*Zustimmung*) of all citizens.<sup>80</sup> *Can* meet with the assent: not every citizen has to participate, and definitely not everybody in the same manner. Citizens often leave legal decision-making to the formal legislative process within the political institutions. Yet the debates in society are essential, because these allow citizens to influence the outcome of the political process,<sup>81</sup> or to interfere where the institutions seem to take the wrong decisions – established legislation sometimes again leads to renewed debates.<sup>82</sup> It is crucial that people can be involved in the discussion on what the law should look like, whether this is within an official institution - the 'political centre'<sup>83</sup> – or outside of it<sup>84</sup> - the 'periphery'.<sup>85</sup> From the periphery of the political system, any person can thus activate debates in the public sphere, which has the function to signal and problematise societal questions.<sup>86</sup>

Habermas calls this ability to participate in the democratic legislation process 'public', or 'political' autonomy.<sup>87</sup> Through this public autonomy we decide together which laws bind us, and therefore we agree everyone should comply with them.<sup>88</sup> Even if I feel opposed to a certain legal provision I do endorse the democratic procedures that brought it about. This is the essence of democratic legitimacy.<sup>89</sup> The legitimacy of the law lies in the general agreement among citizens that they can and must challenge the laws they dislike through their

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<sup>80</sup> Habermas, *Between Facts and Norms* (n 51) 110. *Zustimmung* could also be translated into English as approval, endorsement.

<sup>81</sup> *ibid* 371.

<sup>82</sup> *ibid* 380.

<sup>83</sup> *ibid* 381.

<sup>84</sup> *ibid* 171.

<sup>85</sup> *ibid* 381.

<sup>86</sup> *ibid* 359.

<sup>87</sup> *ibid* 104.

<sup>88</sup> *ibid* 32.

<sup>89</sup> We comply with a law either because we agree with it, or because we fear the legal consequences of not complying. Law thus frees us of the burden to morally reflect on all aspects of our behaviour: because of law we can, out of self-interest, act in the general interest, that is, in line with collectively designed laws. *ibid* 114–115.

public autonomy in the (formal and informal) democratic process, instead of through violence.<sup>90</sup>

## **2. Two boundaries to the task of the judiciary in European private law**

For the judiciary, the consequence is that it may apply existing law in what Habermas calls ‘discourses of application’,<sup>91</sup> but it should not devise new law. After all, we citizens want to create the law together and not live under a tyranny of judges.<sup>92</sup> Moreover, we know what is expected from us, thanks to our laws. This legal certainty is endangered when judges prescribe on their own what should happen.<sup>93</sup> One boundary to Justitia’s role is the obligation to apply the laws enacted through the People’s Power.

Therefore, the task of judges is commonly described as ‘*rechtsvinding*’ in Dutch and as ‘*Rechtsfindung*’ in German: judges ‘find’ the law that is already there. Such is not to say that law would exist independently from human beings. Law is a human construct – a city built by politics. Citizens make its streets and erect its houses. Judges can then find their way there.

I find it important to add that this boundary to the role of the judiciary in European private law *actualises* in those laws that govern private legal disputes in Europe: the applicable statutes and civil (procedural) codes, as influenced by European and international law. These are the laws supposedly enacted through the people’s power. I write ‘supposedly’, because in social reality, civil codes were often quite elitist projects,<sup>94</sup> and the democratic character of European and international law is often questioned.<sup>95</sup> Nevertheless, in the self-understanding

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<sup>90</sup> *ibid* 89. On resistance through peaceful but illegal means, see section D.

<sup>91</sup> *ibid* 162.

<sup>92</sup> The term *gouvernement des juges* – to designate too intrusive judicial activities – was coined by the French jurist Édouard Lambert in his 1921 book *Le Gouvernement des juges et la lutte contre la législation sociale aux États-Unis* (Marcel Giard & Cie.).

<sup>93</sup> Habermas, *Between Facts and Norms* (n 51) 198.

<sup>94</sup> For example, the French *code civil* was commissioned by Napoléon and drafted by four experts.

<sup>95</sup> Cf eg Daniel Bodansky, ‘The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?’ (1999) 93 *American Journal of International Law* 596; Andreas Follesdal and Simon Hix, ‘Why There Is a Democratic Deficit in the EU: A Response to Majone and Moravcsik’ (2006) 44 *Journal of Common Market Studies* 533; Jack Ernest Shalom Hayward, *The Crisis of Representation in Europe* (Taylor & Francis 1995); Eric Stein, ‘International Integration and Democracy: No Love at First Sight’ (2001) 95 *The American Journal of International Law* 489.



of the legal system, the role of the judiciary applying private law can only be led by civil (procedural) legal rules, which lend their democratic legitimacy from the legitimate constitutional democracy in which they are enacted or implemented, not least because this system allows to challenge these laws in a democratically legitimate manner.<sup>96</sup>

The laws and statutes regulating the climate lawsuits are different in each country, but in private law proceedings, judges usually rely on the facts put forward by the parties; they deem true those facts presented to them that were not (convincingly) disputed. It is for the parties to delimit the boundaries of the legal dispute.<sup>97</sup> This is true for civil procedure throughout Europe.<sup>98</sup> Although there is no specific term for this in English,<sup>99</sup> other languages designate it as a concept: *lijdelijkheid* in Dutch, for example, or the *principe dispositif* in French, the *Dispositionsmaxime* in German, *disposisjonsprinsippet* in Norwegian.<sup>100</sup> The boundaries of legitimate law-making by the judiciary in European private law thus is not only *legally* limited by democratic laws enacted by the people, but also *factually* by the propositions of the litigating parties.

Perhaps superfluously: with this ‘legal boundary’ I merely mean that the judiciary is allowed to only apply those *laws* that were endorsed by the citizens, whereas with the ‘factual boundary’ I aim to designate the private law rule, that the judge can use for its reasoning only *facts* that were brought forward by the parties (though the judge of course makes a selection of legally relevant facts) and has to

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<sup>96</sup> Hesselink likewise argues that even if the (debate about) the civil code is given form by experts only, private law can still be democratically legitimate, as long as the experts’ circles remain open to the political periphery, in MW Hesselink, ‘Democratic Contract Law’ (2015) 120–122.

<sup>97</sup> See Florence Brus, ‘Le principe dispositif et le proces civil. Thèse présentée et soutenue publiquement pour l’obtention du grade de Docteur en Droit le 26 mars 2014’ (Université de Pau et des Pays de l’Adour 2014); Frédérique Ferrand, ‘Le principe contradictoire et l’expertise en droit comparé européen’ (2000) 52 *Revue internationale de droit comparé* 345.

<sup>98</sup> Cf Mauro Cappelletti, R David and International Association of Legal Science, ‘Civil Procedure 6 - Ordinary Proceedings in First Instance’, *International encyclopedia of comparative law / under the auspices of the International Association of Legal Science ; editorial committee: R. David ... [et al.]. Vol. 16 Civil procedure / Mauro Cappelletti, chief ed* (Mohr, Nijhoff 1973) 59–63, 105–106, 190–192.

<sup>99</sup> Saskia Velde, van der, ‘An Annotated Lexicon Dutch to English’ (Leiden University 2014) 26–27

<<https://openaccess.leidenuniv.nl/bitstream/handle/1887/35821/Thesis%20Saskia%20van%20der%20Velde%20-%20Final%20version%2024-10-14.pdf?sequence=2>>

accessed 24 January 2019.

<sup>100</sup> Cf also Rolf Stürner, ‘Procédure civile et culture juridique’ (2004) 56 *Revue internationale de droit comparé* 797.

accept as true those facts on which the parties agree (to the extent the judge deems these facts relevant for the legal dispute), meaning that the judge cannot ask for factual evidence *unless* a fact is disputed.

### **3. Legal and factual boundaries reflected in the Urgenda debate**

In European private law we can thus decipher an ideal of *Justitia* being limited by at least two boundaries: legally by democratically legitimately enacted law (*legal* boundary), and factually to propositions of the parties (*factual* boundary). This ideal explains many of the critical reactions to the climate cases. The criticism towards the *Urgenda* case, for example, can be read in this light.

In line with the legal boundary, the Dutch Supreme Court determined in an earlier judgment that civil courts cannot order the legislature to adopt an act of parliament.<sup>101</sup> Several commentators have asked whether the District Court of The Hague went against this ruling in the *Urgenda* case. They are unconvinced by the Court's justification that it 'only' orders a goal (25% reduction of greenhouse gas emissions by 2020, compared to the levels of 1990), without specifications on how this goal should be reached; these authors maintain that the goal is so specified that it amounts to an order to adopt an act of parliament.<sup>102</sup>

The legal boundary to the role of the judiciary is also echoed in another worry expressed in the literature about *Urgenda*: private legal procedures are not designed to consider the public interest, because they typically concern individual cases between private parties.<sup>103</sup> Appropriate climate policy is, however, very much a matter of public interests. This concern is extra salient in light of the *factual* boundary to the role of the judiciary in civil disputes: Authors expressed the reservation that courts might not have sufficient expertise to solve complicated technical or scientific matters, like the environment in the *Urgenda* case,<sup>104</sup> especially in private law, where judges cannot of own motion complement the facts, like in other branches of law.<sup>105</sup>

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<sup>101</sup> Supreme Court of the Netherlands, Civil division (Hoge Raad, civiele kamer) *Waterpakt* 21 March 2003 ECLI:NL:PHR:2003:AE8462.

<sup>102</sup> Cf. Boer, de (n 7); Boogaard (n 7); Graaf, de and Jans (n 7); Veen, van der and Oztürk (n 7); Voermans (n 7); Zeben, van (n 7).

<sup>103</sup> Boer, de (n 7).

<sup>104</sup> Elbert De Jong, 'Urgenda: rechterlijke risicoregulering als alternatief voor risicoregulering door de overheid?' [2015] *Nederlands Tijdschrift voor Burgerlijk Recht* 319; Bergkamp (n 7); Liesbeth Enneking and Elbert de Jong, 'Regulering van onzekere risico's via public interest litigation?' (2014) 2014 *Nederlands Juristenblad* 1542.

<sup>105</sup> Cf. Elbert De Jong (n 104); Enneking and de Jong (n 104).

The effects could extend well beyond this one case, it was said: although the Court in *Urgenda* might only have cared about settling this particular dispute (like it should in a private legal dispute), the judgment has had exemplary power, enabling other public debates to be decided in private law court rooms.<sup>106</sup> Thus, not only the judges adjudicating *Urgenda* are said to overstep the boundaries of their discretion in this particular case, also the fear has arisen that this could alter the role of the judiciary in civil disputes at large, which could ultimately disrupt the balance between the governmental powers and thus present a danger for democracy.

As said, generally academics were more positive about the appeals judgment than about the District Court judgment, even if the Court of Appeal maintained the 25% reduction order.<sup>107</sup> Also, the Procurator General and Advocate General advised the Supreme Court to uphold the decision of the Court of Appeal.<sup>108</sup> The next two sections of this chapter, therefore, centre around the dynamic character of democratically legitimate (judicial) law-making.

## **C. JUDICIAL DISCRETION AND HABERMAS' CO-ORIGINALITY THESIS**

Bearing in mind the legal boundaries to the role of the judiciary in European private law, one would reason that as long as no law exists about responsibility for the dangers of climate change, judges should not meddle in this issue. However, another condition of democratic legitimacy is that the law can be changed; after all, if we ourselves decide what our laws look like, we should be able to change them.<sup>109</sup> We are not entirely bound to what former generations prescribed. For example, the once instituted criminal offence of homosexuality has been reversed in many countries. Apart from legislative changes, law can also change through new interpretations made by the judiciary.

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<sup>106</sup> Saskia Fikkers, 'Urgenda, de zorgplicht en toekomstige generaties' [2015] *Nederlands Juristenblad* NJB 2289; Schutgens (n 7); Voermans (n 7).

<sup>107</sup> Cf. eg Barkhuysen and Emmerik (n 73); Besselink (n 73); Bleeker (n 73); Burgers and Staal (n 73); Gillaerts and Nuninga (n 73); Emaus (n 73); Kreeftmeijer (n 73); Spier (n 73).

<sup>108</sup> Opinion in *Foundation Urgenda v. State of the Netherlands*, Deputy Procurator General Langemeijer and Advocate General Wissink 13 September 2019, ECLI:NL:PHR:2019:887.

<sup>109</sup> Even if changes come about too late in the eyes of the forerunners.

## 1. Judicial law-making through interpretation

The judiciary must dynamically interpret laws to fit present-day conditions; apart from offering legal certainty, judicial decisions must also be rationally acceptable, or right.<sup>110</sup> Hence it was legitimate, for example, that the Dutch Supreme Court decided in the 1920s that electricity qualifies as a property (*goed*), in order to make the criminal provision of theft applicable to a dentist who covertly took it away.<sup>111</sup>

Constitutional principles, among which fundamental rights, are usually the least susceptible to change – constitutions cannot be changed or only with difficulty, through specific procedures depending on the system. According to Habermas, a firm constellation of fundamental rights – a ‘system of rights’ – is needed to warrant public *and* private autonomy.<sup>112</sup>

Fundamental rights protect the individual: they guarantee that individuals are able to lead their lives in the way they themselves deem good. Fundamental rights are traditionally focused on warranting private autonomy.<sup>113</sup> Yet merely by protecting individuals’ private autonomy through fundamental rights, Habermas says it is guaranteed that these individuals can participate as full members of society, so that their public autonomy is also protected and, by that, democracy as such is safeguarded.<sup>114</sup> This link between private and public autonomy constitutes Habermas ‘co-originality thesis’.<sup>115</sup> ‘[P]rivate and public autonomy’ or ‘human rights and popular sovereignty, mutually presuppose one another’.<sup>116</sup> Likewise, it is only the medium of *law* that can guarantee *political* power of the people.<sup>117</sup> Without the fundamental rights to freedom of conscience, to bodily integrity, or to property, for instance, a citizen cannot fully participate in the debate on the law; somebody who can be prosecuted for their opinion, who suffers from injuries, or who lacks housing, has better things to do than to concern themselves with some proposed new statute.

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<sup>110</sup> Habermas, *Between Facts and Norms* (n 51) 199.

<sup>111</sup> HR 23 May 1921, NJ 1921/564

<sup>112</sup> Habermas, *Between Facts and Norms* (n 51) 122–123.

<sup>113</sup> *ibid* 134–135.

<sup>114</sup> *ibid* 417.

<sup>115</sup> *ibid* 104.

<sup>116</sup> *ibid* 84.

<sup>117</sup> *ibid* 132–133.

Therefore, according to Habermas, a (constitutional) court may oppose the democratic majority when the democratic system itself is brought into danger.<sup>118</sup> Such is the case when the system of rights is endangered, in other words when the private or public autonomy of citizens is undermined, which could jeopardize the collective aspect of the democratic process.<sup>119</sup> When the violation of a fundamental right violates democracy, Habermas says that the judge may intervene.<sup>120</sup> Therefore, a dynamic judicial interpretation that *opposes* democratic majority decisions should always be built on a fundamental right.<sup>121</sup>

## 2. Determining the scope of fundamental rights

Thus the next question is when are fundamental rights at stake?<sup>122</sup> According to Habermas, it is for the citizens to determine the definition and scope of fundamental rights.<sup>123</sup> Judges can only intervene in the case of a violation of that definition and scope. Thus, judges are still aware of the legal boundaries to their role, dictating they can only apply the laws made by the people; the judge's decision always echoes the deliberations of the citizens taking place in the public sphere (at least in the self-understanding of legitimacy within our democratic system).

The racial debate in the USA can serve to illustrate this, be it somewhat superficial due to the limits of the present chapter. Still, this debate is a clear example where judges turned 180° while today it can be hardly questioned that this was the 'right thing' to do. The American Supreme Court, in its 1896 decision *Plessy v. Ferguson*, deemed that racial separation in public schools was in line with the constitution.<sup>124</sup> However, the same court overturned this judgment in its 1954 *Board of Education v. Brown* decision by interpreting the fundamental right to equal protection of the law as forbidding the statutory segregated public schools.<sup>125</sup> This not only means that the American Supreme Court judges proved themselves less racist than in 1896; the whole of society had become less racist (even if many opposed the Supreme Court's decision). It may seem as if the

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<sup>118</sup> *ibid* 263–264.

<sup>119</sup> *ibid*.

<sup>120</sup> *ibid* 263.

<sup>121</sup> A wholly different debate exists on how to balance two competing fundamental rights. This book however focusses on the question to what extent the judiciary may oppose majority decisions in climate change litigation – see further section E.

<sup>122</sup> In this book, 'fundamental rights', 'constitutional rights' and 'human rights' are used more or less interchangeably as they all cover the normative content of Haberm's' system of rights.

<sup>123</sup> Habermas, *Between Facts and Norms* (n 51) 123.

<sup>124</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>125</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

Supreme Court changed the meaning of the constitutional right to equal legal protection in 1954 but, in reality, this new interpretation was already accepted in great parts of society. Judges do not prescribe the law; they apply the law that is 'presupposed as valid'.<sup>126</sup> Where it is ambiguous, they follow an interpretation that is sufficiently accepted in society, in the 'demos'. Thus, judicial decisions represent the voice of democracy; they confirm a societally changed interpretation of the law not (yet) made explicit by legislatures.<sup>127</sup> Their authoritative interpretation subsequently flows back into society, making such an interpretation even more widely accepted.

In summary, based on Habermas, I define *politics* as the societal debates, inside and outside political institutions, such as parliament and government, on how the law should be shaped. These political institutions form the centre, people (whether or not organised in associations that form civil society) outside this centre form the periphery. From the periphery, anyone can communicate to activate the public sphere and stimulate society-wide deliberations. As soon as consensus emerges, we leave the political domain and enter the legal domain: this consensus is then confirmed as being *law* either by means of legislation or by means of judicial interpretation of earlier legislation. However, the *legitimacy* of the law lies not with the institutions of the legislature or judiciary, but with the intersubjective debates among citizens – the official institutions merely provide the most authoritative articulation of legitimate law. The added value of law as opposed to politics is that, as the political debate has resulted in law, these rules may be enforced. Furthermore, the judiciary can interpret any legal rule dynamically to fit present-day conditions but where an interpretation goes against democratic majority decision-making, it must be built on a fundamental right to count as democratically legitimate, as only democracy itself (i.e. the protection of private and *thereby* public autonomy) can serve as a justification for judges to oppose a democratically established opinion.

### **3. Relevance for the judiciary in European private law**

It must be noted that the analysis of Habermas, concerning the judiciary legitimately opposing democratic majorities only when basing itself on fundamental rights, relates to the institution of judicial review. That is, the analysis applies to the practice of a *constitutional* court instituted exactly to

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<sup>126</sup> Habermas, *Between Facts and Norms* (n 51) 261.

<sup>127</sup> To be clear, these reflections are a Habermasian reconstruction of judicial law-making with which some judges on the USA Supreme Court would not agree, as they adhere to originalism: the idea that the Constitution should be interpreted as closely as possible to its original meaning in the eyes of the USA's founding fathers.

guard the constitution and the fundamental rights enshrined in it. This sometimes executed on an abstract level where proposed statutes are controlled on their constitutionality by the constitutional court before they enter into force. In contrast, the topic of this PhD thesis is the role of the judiciary in European *private law*, often sitting in *civil courts*<sup>128</sup> and always concerned with a specific dispute, never with constitutional questions in the abstract. At the same time, due to the constitutionalisation of private law<sup>129</sup> – also the judiciary in European private law sometimes needs to apply fundamental rights, possibly even in a civil claim against a government, as occurred in the *Urgenda* case.<sup>130</sup>

Therefore, Habermas' theory holds relevance for courts applying European private law cases as well. After all, although the factual boundary to their role prevents them from searching for *facts* of their own motion, the judiciary in private law proceedings usually does have the obligation to supplement the *law* invoked by the parties with all relevant legal rules. It is the task of the European private law judiciary to apply the law as it stands. Thus, even while the factual boundaries of the legal dispute are determined by the parties, the European private law judiciary has the adjudicative responsibility to apply the law following interpretations that are most widely accepted in the demos.

The theoretical picture sketched above offers a partial explanation for why academic attitudes towards the *Urgenda* case seem to be shifting throughout time. That is, in 2015, District Court of The Hague reinterpreted the national legal doctrine of hazardous negligence,<sup>131</sup> stating that climate change could fall within this doctrine and held it was hazardously negligent of the Dutch State to set a greenhouse gas reduction goal for the year 2020 at a percentage lower than 25% compared to 1990 levels.<sup>132</sup> The government – put in place to represent the Dutch people – had lowered its reduction goal to 20% (initially it had been 30%), so this judicial decision went against a democratic majority decision. Yet the legal basis of the *Urgenda* judgment was not a fundamental right. Fundamental rights were only invoked indirectly, to provide shape to the primary legal basis: the duty of care flowing from the private legal doctrine of hazardous negligence. As it was

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<sup>128</sup> Not every European State has the specific institution of civil courts.

<sup>129</sup> Cf *inter alia* Barkhuysen and Emmerik (n 41); Ciacchi, Brüggemeier and Commandé (n 41); Mak, *Fundamental Rights in European Contract Law* (n 41).

<sup>130</sup> Habermas also alludes to this development: '...the democratic constitution links private law to the expanded catalog of basic rights...' Habermas, *Between Facts and Norms* (n 51) 403.

<sup>131</sup> The Dutch Supreme Court read this doctrine in Article 6:162 Dutch Civil Code in *Lindenbaum / Cohen*, 31 January 1919, ECLI:NL:HR:1919:AG1776.

<sup>132</sup> The Hague Court of First Instance *Urgenda* (n. 61)

not directly based on a fundamental right, it is unsurprising that the judgment generated such critical reactions regarding its democratic legitimacy.<sup>133</sup>

As said, in 2018, the Court of Appeal of The Hague agreed that a 25% target is the absolute minimum, but this time it based its decision directly on Articles 2 (right to life) and 8 (right to private and family life) of the European Convention of Human Rights (ECHR).<sup>134</sup> Therefore, whereas the District Court needed no less than nine paragraphs to justify its decision in the light of the separation of powers,<sup>135</sup> the Court of Appeal could deal with the issue in merely three sentences, pointing to its constitutional duty to directly apply provisions from the ECHR.<sup>136</sup> Indeed, though in the media and academic commentaries some scholars still critiqued the decision for *inter alia* expanding the scope of these Articles too much,<sup>137</sup> generally the opinion among legal experts was that as such, fundamental rights as the primary legal basis strengthened the democratic legitimacy of the *Urgenda* case.<sup>138</sup>

Now the legitimising effect of this constitutional element of the climate cases is essential for the thesis I unfold in this book. Before delving deeper into what is often referred to as ‘environmental constitutionalism’, however, it is necessary to devote a section on the question of *when* public opinion becomes law so the judiciary can legitimately rely on it when rendering decisions with legally binding force.

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<sup>133</sup> Cf n.71 above.

<sup>134</sup> In Chapters III and IV, the *Urgenda* case will be described in more detail.

<sup>135</sup> The Hague Court of First Instance *Urgenda* (n.61), §§4.94-102.

<sup>136</sup> The Hague Court of Appeal, *Urgenda* (n.62), §69.

<sup>137</sup> Wiebe Hommes, ‘Het Hof Bedrijft Politiek Met de Urgenda-Uitspraak’ *De Volkskrant* (16 October 2018).

<sup>138</sup> Barkhuysen and Emmerik (n 73); Besselink (n 73); Bleeker (n 73); Burgers and Staal (n 73); Laura Burgers, ‘Critici van Het Urgenda-Vonnis Zien de Privaatrechtelijke Dimensie over Het Hoofd’ *De Volkskrant* (17 October 2018); Christina Eckes, ‘De Urgenda Uitspraak Doet Juist Recht Aan Het EVRM’ (27 October 2018) <<http://euexplainer.nl/?p=520>>; Emaus (n 73); Gillaerts and Nuninga (n 73); Folkert Jensma, ‘Drie hoeraatjes voor de rechter in Urgenda 2’ *NRC Handelsblad* (Amsterdam, 13 October 2018) <<https://www.nrc.nl/nieuws/2018/10/13/drie-hoeraatjes-voor-de-rechter-in-urgenda-2-a2417799>> accessed 4 January 2019; TG Oztürk and GA van Veen, ‘Onrechtmatige Daad Bij Het Behalen van Klimaatdoelstellingen. Schending Zorgplicht Ex Artikelen 2 En 8 EVRM.’ (2018) 51 *Overheid en Aansprakelijkheid* 157; Spier (n 73).



## D. THE DELIBERATIVE POWER OF LAWSUITS

The former section presented law-making as an ongoing, intersubjective and dynamic process, in which changes can be authoritatively confirmed by either legislature or judiciary. This section aims to elaborate on how such changes occur. Self-evidently, law does not change itself; society-wide debates are required. Any individual can stimulate these debates, for example by: talking with others, publishing opinions in newspapers, exhibiting awareness-raising art, sharing an important documentary on social media. These are all contributions that maintain the public sphere – the communicative space where people conduct public debates, whether contributing individually or organised in the associations that form civil society.

### 1. Civil disobedience and climate change litigation

In this context, civil disobedience is helpful for understanding the significance of climate change litigation. Lawsuits – *invoking* the law – are of course highly different from civil disobedient protests, which deliberately *break* the law. Yet the two are both practically and theoretically linked. Civil disobedience is practically linked to the climate litigation trend, as a recent wave of civil disobedience action in the USA ended up in courts and activists plead the ‘climate necessity defence’. They stated that the imminent dangers of climate change left them no reasonable legal alternative to their action.<sup>139</sup> Thus, we face climate lawsuits that are atypical, in the sense that the environmentalist party is on the defending side instead of the claiming side. Moreover, civil disobedience shares a theoretical characteristic with the climate lawsuits: both form contributions to the public sphere, which are primarily directed at law rather than politics, at least this is what I will argue in this section.

Civil disobedience is usually defined as breaking a legal rule in a non-violent manner, with the aim of signalling a perceived injustice to the public.<sup>140</sup> Those committing an offence of civil disobedience claim that a current rule, or interpretation thereof, is not a right. Despite the rule’s legality, it does not, in

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<sup>139</sup> An extensive case overview is available at Climate Defense Project, ‘Climate Necessity Defense Case Guide’ <<https://climatedefenseproject.org/wp-content/uploads/2018/05/CDP-Climate-Necessity-Defense-Case-Guide-May-22-2018.pdf>>.

<sup>140</sup> Cf. Kimberley Brownlee, ‘Civil Disobedience’ in Edward N Zalta (ed), *The Stanford Encyclopedia of Philosophy* (Fall 2017, Metaphysics Research Lab, Stanford University 2017) <<https://plato.stanford.edu/archives/fall2017/entries/civil-disobedience/>> accessed 28 May 2018.

their view, align with constitutional principles of justice, and therefore cannot be legitimate.<sup>141</sup>

Acts of civil disobedience can be *direct*, breaking the protested rule itself. In 1955 Rosa Parks refused to give up her seat in a bus for a white person to protest the rule dictating that black people should do so. They can also be *indirect*, breaking one rule (A) to protest the other (B). The so-called ‘mass grave action’ undertaken by American activists in the summer of 2016 serves as an example. They responded to the news that in Pakistan mass graves were dug for all the deaths that would certainly occur due to an upcoming heatwave.<sup>142</sup> In America, the activists laid down in a trench dug for a new high-pressure gas pipeline. By imitating dead bodies and refusing to move, they aimed to communicate that this trench was similar to the Pakistani mass graves. The activists reasoned that not only the new gas pipeline put great risks at the neighbourhood where it was constructed, but also the burned gas would generate pollution, exacerbating climate change, and creating more dangerous heat waves in countries such as Pakistan. Thus, the activists protested the authorization for the pipeline (rule B) but were charged with trespassing and disorderly conduct (rule A).<sup>143</sup>

### **Civil Disobedience**

The term ‘civil disobedience’ was coined in 1849 by the American philosopher Henri David Thoreau. In an essay entitled *Civil Disobedience* (originally published as *Resistance to Civil Government*), he explained that he refused to pay taxes to a government that would spend his money on the Mexican war and on enforcing the Fugitive Slave Act. This was an act of ‘indirect’ civil disobedience: protesting warfare and a legal act (Rule B), breaking the legal obligation to pay taxes (Rule A). Thoreau’s action led him to spend a night in jail, until someone – reportedly his aunt – paid his taxes for him, without his approval.

Thoreau is also the author of the famous book *Walden, or life in the woods*, in which he celebrates a simple life close to nature.

An act of civil disobedience questions a legal rule and thereby contributes to the public debate on what the law should look like. Thus, Habermas notes that acts of civil disobedience stimulate ‘the communicative processes of the public sphere’

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<sup>141</sup> Habermas, *Between Facts and Norms* (n 51) 383.

<sup>142</sup> Cf. Drazen Jorgic and Syed Raza Hassan, ‘Pakistan City Readies Graves, Hospitals, in Case Heat Wave Hits Again’ *Reuters* (20 May 2016) <<https://www.reuters.com/article/us-pakistan-heatwave-idUSKCN0YBoTU>> accessed 4 January 2019.

<sup>143</sup> Cf. ‘Sometimes Fighting Climate Change Means Breaking the Law | The New Yorker’ <<https://www.newyorker.com/tech/elements/sometimes-fighting-climate-change-means-breaking-the-law>> accessed 29 May 2018. *The New Yorker* 3 April 2018.

so as to ‘appeal to officeholders and parliamentary representatives to reopen formally concluded political deliberations’.<sup>144</sup>

## 2. Addressing law rather than politics

I would like to add to this that civilly disobedient action is not primarily directed at the political institutions that *make* the law. Contrary to public sphere contributions such as newspaper opinions and protest marches, the civilly disobedient do not directly address the legislative branch of government. Instead, they confront the institutions that *enforce* the law: the police and, ultimately, the judiciary. That is, they break a rule they find unjust in order to be caught by the police and adjudicated by the judiciary. It might be that they aim to spur a political debate, but they choose to reach out to the public sphere only *secondarily*. Since the disputed rule is already in force, they no longer regard political debate as a viable option. They feel the need to violate instead of debate existing rules.

Similarly, the climate cases form, to some extent, a political contribution; all the media attention makes them subject of debate and boosts public discussion. Thereby, they may influence the centre of political decision-making from the periphery, generating communicative pressure in the public sphere. Yet politics is the *secondary* target of the litigating environmentalists, as they go to court to achieve their green goals. They *primarily* address law rather than politics. Although the claimants might be happy to raise awareness about the environment in *political* debates, their success is only full when a judge confirms their claim as *law*.

The difference is that an environmentalist organisation such as Urgenda does not break rules, but invokes existing law and asks a court to enforce it. The activists imitating dead bodies put forward that we need *to remove* the pipeline authorisation in order to align with constitutional principles. Association Urgenda says that if existing law is *coherently interpreted*, the Dutch State should reduce greenhouse gas emissions by at least 25% by 2020 compared with the year 1990; an argument accepted by both district court and court of appeal.

This difference may seem larger than it sometimes is, as civilly disobedient activists are sometimes proved right retroactively. Rosa Parks was part of the civil rights movement that successfully influenced public opinion. A year after her sit-in, this led the American Supreme Court to recognise in *Browder v. Gayle* that

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<sup>144</sup> Habermas, *Between Facts and Norms* (n 51) 383.

racial segregation, in this case in buses, violated the constitutional right to equal legal protection.<sup>145</sup> In hindsight, Parks could, therefore, also rely on existing law, being the constitution interpreted in alignment with the latest views of the demos, similar to *Board v. Brown* mentioned above.

Actions of civil disobedience mostly ‘fail’ in the sense that they are not deemed to be based on the common conception of justice, as laid down in the constitution. ‘The fools of today are not always the heroes of tomorrow; many will remain tomorrow the fools of yesterday.’<sup>146</sup> Squatters, for instance, may invoke the right to housing, but are mostly evicted from the houses they occupy. Apparently, society attaches more importance to the property rights of the house owner. Likewise, most of the environmentalists engaging in civil disobedience are eventually convicted. Their necessity defence based on the importance of the climate normally fails.<sup>147</sup>

However, for the mass grave action’s goal there was broad societal support. The local city council also unanimously opposed the pipeline, and people in the neighbourhood reportedly protested against it on a daily basis for over a year.<sup>148</sup> The prosecution had presumably also taken this into account, as it changed its criminal charges into civil ones at the very last moment. The activists were ultimately proved right by the judge, as on 27 March 2018 she accepted the climate change necessity as the justification for their illegal action.<sup>149</sup> Poignantly, the pipeline had become operational in the meantime.

### 3. Summary

Summing up, it is helpful to envisage a timeline to assess the transformative capacity of various contributions to the public sphere. A ‘normal’ contribution states we need to change law in the *future* and is directed at politics. A single contribution, say on Twitter, is unlikely to have a legitimising effect for political action. However, if many individuals contribute the impact is likely to be greater. For example, upon long and vivid protests by people dressed in yellow safety vests

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<sup>145</sup> *Browder v. Gayle*, 142 F. Supp. 707 (1956).

<sup>146</sup> Jürgen Habermas, ‘Civil Disobedience: Litmus Test for the Democratic Constitutional State’ (1985) 30 *Berkeley Journal of Sociology* 95, 105.

<sup>147</sup> Cf. Climate Defense Project (n 139).

<sup>148</sup> Cf. Wen Stephenson, ‘The Boston Climate Trial That Might Have Been’ (*CommonWealth Magazine*, 28 March 2018) <<https://commonwealthmagazine.org/opinion/the-boston-climate-trial-that-might-have-been/>> accessed 29 May 2018.

<sup>149</sup> *Massachusetts v. Gore* (Boston Mun. Ct., Mass., No. 1606CR000923, Mar. 27, 2018).

in the fall and winter of 2018-2019, the French government had to postpone an environmental measure making fuel more expensive.<sup>150</sup>

An act of civil disobedience states the law should be changed *right now* – for example eliminate racial segregation in buses or revoke the authorisation for an oil pipe line – and is directed at law. Civil disobedience is only successful when convincingly relying on a changed, common, constitutional conception of justice, which may justify the judge’s decision to indeed set aside the protested law – racial segregation in buses – or to accept this conception of justice as a defence against criminal charges – as the court did in the case of the mass grave action. Thus, civil disobedience ‘relies on a dynamic understanding of the constitution as an unfinished project’.<sup>151</sup> A court needs strong societal signals to hold such a constitutional conception against a rule adopted by political institutions, such as years of action of the civil rights movement, or broad societal support for the mass grave action, resulting in a new consensus present in the public sphere.

Lastly, a climate lawsuit claims the law *has already changed*, and as such needs only to be confirmed by the judiciary. However, to the extent climate claims oppose majority decisions, they need to lean on dynamic constitutional interpretation in a similar fashion to successful civil disobedience claims. The following section elaborates upon this further.

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<sup>150</sup> Cf eg Manon Rescan and Virginie Malingre, ‘« Gilets jaunes » : sous pression, Macron lance un appel à l’aide’ *Le Monde* (6 December 2018)

<[https://www.lemonde.fr/politique/article/2018/12/06/sous-pression-macron-lance-un-appel-a-l-aide\\_5393562\\_823448.html](https://www.lemonde.fr/politique/article/2018/12/06/sous-pression-macron-lance-un-appel-a-l-aide_5393562_823448.html)> accessed 3 January 2019.

This example demonstrates how democracy and the environment can sometimes oppose each other: while the Macron government presented the increase of taxes on car fuel as an environmental measure, it meant a great burden to many lower and middle class people, often dependent on transport by car for making a living. These people therefore showed their power and disapproval by engaging in the yellow vest movement.

<sup>151</sup> Habermas, *Between Facts and Norms* (n 51) 384.

## E. ENVIRONMENTALISATION OF LAW AND ENVIRONMENTAL CONSTITUTIONALISM

Unlike civilly disobedient activists, litigating environmentalists do not find it necessary to escalate the debate by breaking the law. Instead, they claim the law is already on their side. According to them, the accepted interpretation of the law has changed and the court merely needs to confirm this. ‘What motivates me, is that I think that I am right,’ said Roda Verheyen, the lawyer who litigates in Germany on behalf of a Peruvian farmer against the energy company RWE for damages allegedly resulting from climate change.<sup>152</sup> She is now also acting for the families that initiated a climate case against the European Union,<sup>153</sup> and represents three German families and Greenpeace in a case against the German government on its climate policy.<sup>154</sup>

### 1. Environmentalisation of law

The climate lawsuits use a transnational development, which I generally label as the ‘environmentalisation’ of the law. Since the 1970s, environmental awareness has led to an increasing number of environmental laws, and to environmental concerns being taken up in or read into existing laws. This is true for law at the international level, the European level and the national level. Of course, these three are interrelated: international law is often implemented at regional and national levels. The result is that provisions from these environmental laws can be invoked before national and supranational courts.<sup>155</sup>

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<sup>152</sup> Verheyen was interviewed in: Jelmer Mommers, ‘Advocaten in actie tegen klimaatverandering: deze golf rechtszaken verandert de wereld’ (*De Correspondent*, 16 March 2018) <<https://decorrespondent.nl/8048/advocaten-in-actie-tegen-klimaatverandering-deze-golf-rechtszaken-verandert-de-wereld/886962032-c29274df>> accessed 12 April 2018. See also District Court of Essen (Zivilkammer des Landgerichts Essen) 15 December 2016, *Lliuya v RWE AG*, and Higher Regional Court of Hamm (Oberlandesgericht Hamm) 30 November 2017, *Lliuya v RWE AG*

<sup>153</sup> Action brought on 23 May 2018 *Carvalho and Others v Parliament and Council* (“*People’s climate case*”) Case T-330/18, 2018/C 285/51. The General Court declared the case inadmissible in an order of 8 May 2019, but the claimants intend to appeal. Cf. press release available at <https://peoplesclimatecase.caneurope.org/2019/05/peoples-climate-case-court-acknowledges-climate-change-is-affecting-everyone-but-dismisses-the-case/>.

<sup>154</sup> Cf. Rodrigo Estrada Patiño, ‘Greenpeace Germany and Families File Lawsuit Against Government Over Inaction on Climate Change’ (*Greenpeace USA*, 29 October 2018) <<https://www.greenpeace.org/usa/news/greenpeace-germany-and-families-file-lawsuit-against-government-over-inaction-on-climate-change/>> accessed 4 January 2019.

<sup>155</sup> Depending on their justiciability.

## The United Nations Framework Convention on Climate Change

In 1992, an environmental summit taking place in Rio de Janeiro adopted the United Nations Framework Convention on Climate Change (the **UNFCCC** – often pronounced as ‘UN F Triple C’). This Convention entered into force two years later. It is ratified by 197 countries, so almost every nation on earth.

The UNFCCC aims at ‘stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’ (Article 2). In Article 3, it reiterates international environmental law principles as guidance for achieving this goal, such as intergenerational equity, common but differentiated responsibilities (i.e. developed nations should take the lead), the principles of precaution and prevention and the principle of sustainable development.

The UNFCCC sets up a framework for the international coordination of climate action. The members come together yearly in so-called Conferences of the Parties (**COPs**). They are informed by reports of the Intergovernmental Panel on Climate Change (**IPCC**), which does not do research itself but collects all available science on climate change.

At the 1997 COP, the **Kyoto Protocol** was adopted, curving out specific measures to be taken, among which an emissions trading scheme. Since the COP’s 2007 **Bali Action Plan**, the parties agreed that global warming should be kept below 2°C. Since then, the COPs yearly endorsed a scenario unfolded by the IPCC, saying that to achieve this goal, developed nations should reduce between 25-40% by 2020. The 2015 COP adopted the **Paris Agreement**, which increased Bali’s ambition: Article 2 stipulates that global warming should be kept ‘well below 2°C’, preferably at 1,5°C.

The UNFCCC and its ensuing agreements are instruments of international law, so they contain international obligations for States. In principle, this means that firstly, they do not contain direct obligations for private parties; and secondly, only States can call each other to account for not living up to their obligations, which are non-justiciable in national legal proceedings initiated by private parties.

For example, all European States signed the 1979 Geneva Convention on Long-Range Transboundary Air Pollution. At approximately the same time, the European Union also took policy measures on air quality, and adopted a first Directive on air quality standards in 1985,<sup>156</sup> which was followed by a series of Directives, some of which are still in force today.<sup>157</sup> These Directives were subsequently implemented in the national laws of the EU member states. This has largely been a successful process in the sense that air pollution has

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<sup>156</sup> Council Directive 85/203/EEC of 7 March 1985 on air quality standards for nitrogen dioxide.

<sup>157</sup> For an extensive oversight of European legislation on air pollution, cf. the website of the European Commission available at [http://ec.europa.eu/environment/air/quality/existing\\_leg.htm](http://ec.europa.eu/environment/air/quality/existing_leg.htm).

diminished overall. Where authorities failed to live up to their obligations, the Directives led to a movement similar to the climate litigation trend. Over thirty lawsuits were conducted in EU Member States by environmental organisations, challenging local authorities for not remaining within the limits of air pollution determined by the European rules. The Directives being very clear on maximum allowed concentrations of air pollution; the environmentalists generally win these cases.

As for the environmental problem of climate change, national laws are often still underway. For instance, a Dutch and Belgian national climate law were going through the legislative process at the moment of writing this thesis.<sup>158</sup> EU laws on the matter of climate change do exist, but precisely these are challenged for being too little ambitious in one of the cases to be discussed in Chapters III and IV hereafter: the so-called *People's Climate Case*.

Still, global consensus on the necessity to act against the environmental problem of climate change has already existed for a long time. The 1992 UN Framework Convention on Climate Change (UNFCCC) has been ratified by almost every nation on earth. This was confirmed in December 2015 by its ensuing Paris Agreement, which was signed by nearly every State as well. The climate lawsuits use this international law to substantiate their claims. The *Urgenda* case,<sup>159</sup> the Swedish *Magnolia* case,<sup>160</sup> the Norwegian case of *Natur og Ungdom*,<sup>161</sup> the Swiss *Klimasenerioninnen* case,<sup>162</sup> the Irish climate case against the government,<sup>163</sup> to name just a few, all invoke ratification of the UNFCCC to underline the salience of the climate problem. Outside Europe, the American case of *Juliana v. USA*

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<sup>158</sup> The Dutch climate law entered into force on the 1st of January 2020.

<sup>159</sup> *Urgenda* (n. 19 and 20)

<sup>160</sup> *Magnolia* was launched on 15 September 2016 by two youth organizations and 176 individuals in the District Court of Stockholm (*Stockholms Tingsrätt*), which rejected the claim on 30 June 2017. On 23 January 2018, the Court of Appeal (*Hovrätt*) declined the appeal. Due to this assessment and to resource shortages, the plaintiffs decided not to appeal to the Supreme Court.

<sup>161</sup> The claim in the case of *Natur of Ungdom & Greenpeace* against the Norwegian State (or *The People v Arctic Oil*) was filed on 18 of October 2016. The claim was dismissed by the District Court of Oslo (*Oslo Tingrett*) on the 4 January 2018. The appeal will take place in November 2019 before the Court of Appeals (*Borgarting*) of Oslo, as a direct appeal to the Supreme Court failed: Norwegian Supreme Court (Norges Nøyesterett) 12 April 2018 *Natur og Ungdom & Greenpeace v Staten*, case number 18-043328SIV-HRET, *Arctic Oil*

<sup>162</sup> Cf the *Klimaseneriorinnen* claim at [https://klimaseneriorinnen.ch/wp-content/uploads/2017/05/request\\_KlimaSeniorinnen.pdf](https://klimaseneriorinnen.ch/wp-content/uploads/2017/05/request_KlimaSeniorinnen.pdf).

<sup>163</sup> Cf. <https://www.climatecaseireland.ie/>.



proceeds on similar lines,<sup>164</sup> and like in many of these cases,<sup>165</sup> the High Court of Lahore in the Pakistani case of *Leghari* relies on international environmental principles, such as the principle of precaution and intergenerational equity.<sup>166</sup>

## 2. Environmental constitutionalism

Nonetheless, the climate cases are controversial, as they appear to go against majority decisions taken in the democratic process, which makes them suspicious when it comes to democratic legitimacy. For example, at stake in the *Urgenda* case was the greenhouse gas reduction target decided by the Dutch government.<sup>167</sup> The case against the EU likewise concerns its reduction target,<sup>168</sup> and the Norwegian case concerns a governmental decision to authorize drilling in certain sea areas. Similarly, the Swedish case turned around a governmental sale of lignite assets to an allegedly unsustainable operator.<sup>169</sup> For cases against corporate actors, the opposition against majority decisions is slightly subtler. That is, corporations (normally) operate with governmental authorizations and, so far, no explicit statutes seem to exist that would articulate their responsibilities related to climate change. Corporations sued in Europe (e.g. Shell or RWE),<sup>170</sup> therefore rely on a lack of legality of the climate claims, and assert this legality should originate in democratic majority decisions.<sup>171</sup>

As has been illustrated in section C, following Habermas' co-originality thesis, the judiciary's only reason to oppose the democratic majority is democracy itself as secured in the system of fundamental rights. This means that, if a judicial decision defends environmental interests against majority decisions, this can only be done if constitutional value is attached to the environment. As long as democratic majorities fail to enact effective climate laws, only fundamental rights – the protection of democracy as such – may create legitimate operational space for the judiciary to provide remedies against climate change.

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<sup>164</sup> All case documents available at <http://climatecasechart.com/case/juliana-v-united-states/?cn-reloaded=1>.

<sup>165</sup> E.g. in *Urgenda* (n. 19 and 20), *Arctic Oil* (n. 88), *Magnolia* (n. 87).

<sup>166</sup> Lahore High Court 14 Sep. 2015 *Ashar Leghari v Pakistan* W.P. No. 25501/2015.

<sup>167</sup> *Urgenda* (n. 19 and 20)

<sup>168</sup> Cf. *The People's Climate Case* claim available at <https://peoplesclimatecase.caneurope.org/wp-content/uploads/2018/05/application-delivered-to-european-general-court-1.pdf>

<sup>169</sup> *Magnolia*, n. 87.

<sup>170</sup> See Chapters III and IV for elaborate evaluations of all these cases mentioned.

<sup>171</sup> See Shell above n. 1, summaries of RWE's statements re Lliuya available at <https://germanwatch.org/de/14198>.

Hence it may not surprise that a ‘rights turn’ has been signalled in global climate change litigation, in other words, that those environmentalists winning their climate lawsuits were relying on fundamental rights.<sup>172</sup> In this vein, the Lahore High Court remarked in the *Leghari* case that the constitutional rights to life, human dignity and information, together with the constitutional values of political, economic and social justice ‘provide the necessary judicial toolkit to address and monitor the Government’s response to climate change’.<sup>173</sup> Likewise, cases from both North- and South America invoke constitutional human rights, and also the cases from Europe rely on human rights enshrined in their constitutions and the ECHR.

We now see certain judges deciding climate cases differently from others. For example, the Dutch Court in the *Urgenda* case deemed there to be enough of a legal basis on which to found its judgment, whereas the Norwegian judge in the *Arctic Oil* case said the climate is something to be dealt with by politics.<sup>174</sup> This does not point to judicial arbitrariness, but indicates we are facing a legal transition. Climate change clearly was a political subject, but that is shifting, as not only the body of law on the environment is growing, but also as *the environment is constitutionalising*, something scholars conceptualised as (global) environmental constitutionalism.<sup>175</sup>

The constitutionalisation of the environment has been taking place for some time, predominantly by means of legislative procedures. An ‘environmental rights revolution’ occurred in the 20<sup>th</sup> century, in both international human rights law and national constitutional law.<sup>176</sup> A 2017 survey noted a degree of environmental constitutionalism in 148 of 196 constitutions worldwide.<sup>177</sup> In France, for example, an ‘Environmental Charter’ (*Charte de l’environnement*)

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<sup>172</sup> J. Peel & H.M. Osofsky ‘A Rights Turn in Climate Change Litigation?’ (2018) 3 *Transnational Environmental Law* 37-67. Ve

<sup>173</sup> Lahore High Court 4 Sep. 2015 *Ashar Leghari v Pakistan* W.P. No. 25501/2015, §7.

<sup>174</sup> See Chapters III and IV for more elaborate evaluations of this case.

<sup>175</sup> Cf. *inter alia* J. May & E. Daly *Environmental Constitutionalism* (CUP 2015), L. Kotzé *Global Environmental Constitutionalism in the Anthropocene* (Hart 2016) – also touched upon in Geetanjali Ganguly, Joana Setzer and Veerle Heyvaert, ‘If at First You Don’t Succeed: Suing Corporations for Climate Change’ (2018) 38 *Oxford Journal of Legal Studies* 841.

<sup>176</sup> David R Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press 2012).

<sup>177</sup> R. O’Gorman, ‘Environmental Constitutionalism: A Comparative Study’ (2017) 6 *Transnational Environmental Law* 435.

with constitutional value was adopted in 2004.<sup>178</sup> Although constitutional recognition of the importance of the environment does not automatically lead to better environmental protection, a correlation with superior environmental performance was found.<sup>179</sup> More importantly for this book, recognition does communicate a self-understanding that deems the environment essential to constituting the State as such. The constitution ‘constitutes’ the State; to include the environment as a fundamental right means it is understood as one of the State’s foundations.<sup>180</sup>

Apart from these explicit recognitions, environmental entitlements are also increasingly read into other fundamental rights, such as the right to life,<sup>181</sup> the right to private life,<sup>182</sup> and the right to personal integrity<sup>183</sup> – both at national and international levels. This practice is known as ‘greening’ existing fundamental rights. It led UN Special Rapporteur on human rights and the environment John Knox to observe that all the content of an international human right to the environment is already present, even without explicit references to this right being made in the core international human rights treaties.<sup>184</sup> Similarly telling is the mere existence of the UN program on human rights and the environment, and the academic *Journal of Human Rights and the Environment*. In September 2019, five UN treaty bodies issued a joint statement stipulating that States’ human rights obligations require them to act against climate change, including the reduction of greenhouse gasses and the phasing out fossil fuels.<sup>185</sup>

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<sup>178</sup> This piece of constitutional legislation plays a role in one of the climate cases to be discussed in chapters III and IV in subsections B.11.

<sup>179</sup> Boyd (n 176) 273, 275.

<sup>180</sup> Legal-theoretical literature on the necessity to acknowledge the environment as fundamental to the State includes M. Kloepfer *Umweltstaat: Ladenburger Diskurs* (Springer Verlag 1989); K. Bosselmann *In Namen der Natur: Der Weg zum ökologischen Rechtsstaat* (Scherz 1992); J. Verschuuren ‘The Constitutional Right to Environmental Protection’ (1994) 12(2) *Current Legal Theory* 23-36; these sources are nicely summarized in L. Kotzé (n. 102), 138-143.

<sup>181</sup> E.g. ECHR 20 Mar. 2008 *Budayeva v Russia* nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02.

<sup>182</sup> E.g. ECHR 27 Jan. 2009 *Tătar v Romania* no. 67021/01; ECHR 9 Dec. 1994 *López Ostra v Spain* no. 16798/90.

<sup>183</sup> E.g. Inter-American Court of Human Rights 15 November 2017 *Advisory Opinion requested by the Republic of Colombia* OC-23/17.

<sup>184</sup> John H Knox and Ramin Pejan, *The Human Right to a Healthy Environment* (Cambridge University Press 2018).

<sup>185</sup> Committee on the Elimination of Discrimination Against Women, Committee on Economic, Social and Cultural Rights, Committee on the Protection of the Rights of All Migrant Workers and Members of their Families, Committee on the Rights of the Child, Committee on the Rights of Persons with Disabilities *Joint Statement on “Human Rights and Climate Change”* 16

Therefore, the climate cases will not ‘change’ the world, as some have suggested.<sup>186</sup> They are rather a signal that the world is changing, that is, a sign of a transnationally evolving legal opinion. Every time a climate lawsuit is launched, this legal opinion is firmly emphasised: the climate has passed the stage of political debate, as environmental protection is a constitutional – a legal - matter. The letter in which Milieudéfense holds Shell liable puts it this way: ‘the global opinion is clear and univocal: dangerous climate change should be prevented.’<sup>187</sup>

Interestingly, within the movement of attaching constitutional value to the environment in general, we can see moves to constitutionalise the specific matter of the climate. Academics speak of ‘the climatisation of human rights’ when it comes to reading climate related concerns into existing human rights law by the judiciary.<sup>188</sup> In the case of a group of youngsters against the USA government, for example, a judge recognised the right to a climate system ‘capable of sustaining human life’, to which she added that ‘a stable climate system is quite literally the foundation of society, without which there would be neither civilization nor progress’.<sup>189</sup> Also certain legislative bodies see the need to constitutionalise the climate specifically. For example, in the USA, two separate towns have adopted ordinances recognising the right to a healthy climate.<sup>190</sup>

### **3. The public sphere, a multi-level system of rights and different forms of environmental constitutionalism**

One (Habermasian) question that arises in this regard is whether this transnational movement of environmental constitutionalism and the environmentalisation of law in general has implications for the scope of the concept of the ‘public sphere’. As *Between Facts and Norms* is concerned with democratic legitimacy of law-making within the nation state, likewise, the public

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September 2019, available at <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>.

<sup>186</sup> Mommers (n 152).

<sup>187</sup> [Translation LB] Available at <https://milieudéfense.nl/publicaties/brieven/brief-van-milieudéfense-aan-shell>.

<sup>188</sup> Christel Cournil and Camila Perruso, ‘Réflexions sur “l’humanisation” des changements climatiques et la “climatisation” des droits de l’Homme. Émergence et pertinence.’ (2018) 14 La Revue des droits de l’homme.

<sup>189</sup> American District Court for the District of Oregon 10 November 2016 *Juliana et al. v United States of America* No. 6:15-cv-01517-TC.

<sup>190</sup> Press releases available at <https://celdf.org/2019/03/media-release-first-right-to-climate-law-adopted-in-new-hampshire/> and <https://celdf.org/2019/03/media-release-2nd-right-to-a-healthy-climate-law-adopted-in-new-hampshire/>.

sphere Habermas addresses seems confined to national boundaries.<sup>191</sup> Surely, he has theorised on how to expand deliberative democracy to the level of the European Union, but also acknowledges this is not yet a reality.<sup>192</sup> Nevertheless, he also notes that ‘all the partial publics constituted by ordinary language remain porous to one another,’ also when ‘scattered across large geographic areas, or even around the globe’, and that these could be brought together by mass media.<sup>193</sup>

This is helpful when speaking of a transnational, or trans-European, public sphere that will probably never be exactly the same as a national public sphere, if only for reasons of scale and language. A public sphere is to be maintained by people through their deliberations, people who can be open to deliberations from elsewhere. Different publics form separate public spheres, which may be connected to each other with small lines of interaction. Environmentalism is a global, largely uncoordinated movement in which people communicate *ad hoc* through (social) networks, or inspire each other through messages and actions that become known through attention on traditional and social media. As will be shown in Chapters III and IV, climate cases have inspired one another.<sup>194</sup> There is empirical research indicating that in the area of environmentalism, indeed a public sphere can be seen to emerge across Europe.<sup>195</sup> Also in other areas scholars have noted (elements) of a public sphere in Europe, when it is conceptualised as a communication network.<sup>196</sup>

However, as Nancy Fraser has splendidly explained, the public sphere plays a role in Habermas’ work qua *critical* theory.<sup>197</sup> Reconstructing the self-understanding of the legitimacy of our legal-political system provides us with a benchmark against which we can test our social reality. This means that the public sphere cannot be equated to a communication network – it has two qualities that need

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<sup>191</sup> Cf the analysis of Nancy Fraser in Nancy Fraser and Kate Nash, *Transnationalizing the Public Sphere* (Polity 2014).

<sup>192</sup> Cf. Jürgen Habermas, ‘The Postnational Constellation and the Future of Democracy’ in Max Pensky (tr), *The Postnational Constellation - Political Essays* (Polity Press 2001); Jürgen Habermas, *The Crisis of the European Union: A Response* (Ciaran Cronin tr, Polity 2012).

<sup>193</sup> Habermas, *Between Facts and Norms* (n 51) 374.

<sup>194</sup> Cf also Colombo (n 68).

<sup>195</sup> Anton Heijden, van der, *Social Movements, Public Spheres and the European Politics of the Environment. Green Power Europe?* (1st edn, Palgrave Macmillan 2010).

<sup>196</sup> Cf Marianne Steeg, van de, ‘Theoretical Reflections on the Public Sphere in the European Union: A Network of Communication or a Political Community?’ in Christiano Bee and Emanuela Bozzini (eds), *Mapping the European public sphere: institutions, media and civil society* (Ashgate 2010) 35–38.

<sup>197</sup> Fraser and Nash (n 191).

to be reconsidered when reflecting upon its transnationalisation. These qualities are on the one hand *normative legitimacy*, meaning that all affected can participate in the society-wide political deliberations, and on the other *political efficacy*, meaning the possibility to constrain governmental power.<sup>198</sup> Both are problematic when leaving the image of a public sphere tied to a Westphalian nation state, Fraser convincingly argues. For example, *normative legitimacy* will be difficult to achieve ‘if [interlocutors] are not fellow citizens, putatively equal in participation rights, status, and voice’.<sup>199</sup> As for political efficacy, governmental power is globally spread across so many institutions that it becomes difficult to concentrate the communicative power so that the public sphere can exercise its constraining function.<sup>200</sup> Also the climate cases in European private law (which will be analysed in full detail in the Chapters III-IV) are each situated in different legal systems, with their own particularities and arguably their own public spheres.

Thus, the core idea of environmental constitutionalism – ‘the environment presents a foundation to the constitutional democracy’ – might spread quite successfully through transnational communication networks, even if this does not happen in a true transnational or trans-European public sphere in the Habermasian sense, which presupposes the public sphere to be able to constrain a specific government.

The latter constraint is also reflected in Habermas’ notion of the ‘system of rights’, that is even more strongly linked to the nation state than the notion of the public sphere. After all, the system of rights is enshrined in a constitution of a nation state. National constitutions contain a system of fundamental rights that together enable deliberations among citizens in the public sphere to control and stimulate the political centre to have democratically legitimate laws entered into force. In practice, however, environmental constitutionalism occurs not only in different forms depending on the legal system at hand, but also at different levels of government. Fundamental rights are proclaimed in national constitutions, in international conventions, such as the ECHR, and non-binding but highly authoritative declarations such as the Universal Declaration of Human Rights.

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<sup>198</sup> *ibid.*

<sup>199</sup> *ibid.* 22.

<sup>200</sup> Moreover, many of the governmental institutions on our globe are not democratic at all, making them less receptive for pressure from the public sphere – in that regard, a European public sphere might be more in reach, given Europe’s democratic tradition.

To be more precise, when a constitution explicitly refers to the environment this may take the following forms: a constitution's preamble can mention the environment; the constitution might contain policy goals for the legislature relating to protecting the environment; the constitution may contain an individual right to the environment that is non-justiciable; and the constitution might contain an individual right to the environment that is justiciable.<sup>201</sup> Furthermore, practice shows different qualifiers for the right to the environment, to which slightly different (legal) meanings might be attached: a right to a *healthy* environment, a *sustainable* environment, a *clean* environment, for example.<sup>202</sup> Moreover, we can see that fundamental rights that do not explicitly mention the environment are nevertheless 'environmentalised': The Court of Appeal in the *Urgenda* case used the fundamental right to life and the right to private life of Articles 2 and 8 in the ECHR as the legal basis for its greenhouse gas reduction decision. Neither of these Articles mention the environment, but the European Court of Human Rights (ECtHR) has a long-standing tradition to apply these rights in situations where people's (private) lives were threatened due to environmental problems.<sup>203</sup>

In short, the law is environmentalising, meaning the legal boundary of to the role of the judiciary is being relocated; Justitia can legitimately adjudicate on some environmental matters. Also an international group of renowned lawyers confirmed the view that climate change belongs to the legal domain and is no longer up to politics only. In 2015, they presented their *Oslo Principles*, articulating the obligations of States to act against climate change under existing law.<sup>204</sup> Three years later, some of these experts published their *Principles on climate obligations for enterprises*, expressing that existing law contains

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<sup>201</sup> Cf Joshua C Gellers, *The Global Emergence of Constitutional Environmental Rights* (Taylor & Francis 2017) 5–7.

<sup>202</sup> Cf Erin Daly and James R May, 'Learning from Constitutional Environmental Rights' in John H Knox and Ramin Pejani (eds), *The Human Right to a Healthy Environment* (Cambridge University Press 2018) 51–53.

<sup>203</sup> Cf eg Malgosia Fitzmaurice and Jill Marshall, 'The Human Right to a Clean Environment—Phantom or Reality? The European Court of Human Rights and English Courts Perspective on Balancing Rights in Environmental Cases' (2007) 76 *Nordic Journal of International Law* 103; Barkhuysen and Emmerik (n 73).

<sup>204</sup> Expert Group On Global Climate Obligations, *Oslo Principles on Global Climate Change / Expert Group on Global Climate Obligations*. (Eleven International Publishing 2015) <<http://proxy.uba.uva.nl:2048/login?url=http://search.ebscohost.com/login.aspx?direct=true&db=nlebk&AN=1014906&site=ehost-live>> accessed 31 May 2018.

obligations for business to reduce greenhouse gas emissions.<sup>205</sup> The environment is thus pulled out of the political domain, into the legal domain.

More importantly in light of the legitimacy of judicial law-making, this development includes an *environmentalisation of fundamental rights* proclaimed at different levels of government (local, national, regional and international). This movement of environmental constitutionalism creates operational space for the judiciary to oppose democratic majorities in order to protect what is increasingly seen as one of the state's foundations: a healthy, clean, sustainable environment – a clean Earth.

#### **4. The climate cases maintain the public sphere**

Recently, environmental activists around the globe have been more successful in the climate lawsuits. This means that judges indeed believe they have firmer ground on which to reach their decisions. Indicative of this development is not only the *Urgenda* case, but also the American case in which the court accepted climate necessity to justify the mass grave action.<sup>206</sup> Of course, the adjudicative powers of courts are limited by their jurisdiction, so a step taken in one legal system does not mean the same step is taken in another. As with any evolutionary process, the pull of climate change out of the political domain, into the legal and constitutional domain occurs through small steps.

As noted, litigation is at the same time a strong means to stir societal debates. Even before a decision is rendered, the publicity surrounding lawsuits forces society to think through responsibility for the dangers of climate change. The debate can convince people of the new legal position and thus draw the climate further out of the political, into the legal domain. After all, the more widely the legal opinion is accepted, the more robustly judges can support their interpretations. Even in the absence of a trans-European public sphere in the Habermasian sense, this is a debate that surpasses national boundaries; media contributions often discuss both national and foreign climate cases and, as said, the various claims are explicitly inspired by one another.<sup>207</sup>

Once the judiciary *does* stipulate that an unchanged climate is a constitutional matter, this usually means regulatory duties for the other branches of

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<sup>205</sup> Expert Group on Climate Obligations of Enterprises, *Principles on Climate Obligations of Enterprises* (Eleven international publishing 2017).

<sup>206</sup> See section D above.

<sup>207</sup> For an account of how climate claimants inspire each other transnationally, see Colombo (n 68). I also substantiate this point for the European private law cases in Chapters III and IV.



government; the judiciary identifies fundamentals for the political branches to enact further climate law. The climate change litigation trend thus leads to judicial confirmation of constitutional duties related to climate change, forcing society-wide deliberations on how these duties will materialise (which is, as was illustrated in section D, the secondary goal of the litigating environmentalists). We see this happening in the cases. For example, in *Urgenda*, the judges did not draw the whole climate theme within the court's powers; on the contrary, they explicitly left to the government *how* to implement the 25% goal.<sup>208</sup> There are numerous options: reducing maximum speeds at highways, imposing a carbon tax, stimulating solar panel use or rooftop gardening, improving energy efficiency, and so on. It had become law that the 25% reduction of greenhouse gases in 2020 was the minimum – how this reduction should be achieved was left to politics to decide.

## 5. Summary

In sum, climate change litigation will not save the world. Primarily, it is not a driver, but rather a sign of the evolving opinion that a clean Earth (a healthy environment, an unchanged climate) forms a precondition for democracy. The climate lawsuits in European private law *operationalise* environmental constitutionalism. They seek ways to translate constitutional values into concrete legal obligations; at the ground they enforce a collective self-understanding of the climate as being existential to European constitutional democracies. Thus understood, we can see the judges in the *Urgenda* case as respecting the *legal* boundaries to their role, where they apply the constitutional rights, as well as the *factual* boundaries to the dispute as presented to it by the parties (as will be addressed in more detail in Chapters III and IV). This does not mean that the judiciary will become the primary regulator of climate change. Rather, the judiciary is protecting the minimal conditions under which the political actors must proceed to determine further actions to be taken.

## F. STRETCHING THE BOUNDARIES OF DEMOCRATICALLY LEGITIMATE JUDICIAL LAW-MAKING IN EUROPEAN PRIVATE LAW

Thus far, this chapter has reconstructed the climate cases and the movement of (global) environmental constitutionalism in Habermasian terms. This leads to the understanding that the climate cases are strong contributions to the public sphere, asserting that the climate belongs to the legal and constitutional domain,

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<sup>208</sup> The Hague Court of First Instance *Urgenda* (n.19), §4.53.

thus pushing the boundaries of democratically legitimate judicial law-making to include legitimate adjudication on climate change. This section aims to demonstrate the limits to the theory unfolded in *Faktizität und Geltung* when it comes to assessing the democratic legitimacy of judicial law-making on climate change.

Although in *Faktizität und Geltung*, Habermas mentions ‘ecological preconditions’ as possibly occurring as rights in constitutions, he deems these justified *only relative to* the rights involving the elaboration of four categories in the system of rights: 1) rights to the greatest possible measure of equal individual liberties; 2) rights that guarantee membership of the political community; 3) remedies in case of rights violation; and 4) rights guaranteeing political autonomy (for example the freedoms of assembly and association).<sup>209</sup> Later on, he writes that issues of protection of animals and the environment are not of a moral, but of an ethical character.<sup>210</sup> This distinction reveals that he sees the environment not as a question of justice requiring universally valid justifications, but rather as a question of the good life, requiring justification only to a confined entity, such as one group or one person.<sup>211</sup> All this might not be surprising given he published the book back in 1992. At that time, scholars were still conducting a ‘search for environmental rights’,<sup>212</sup> grappling with how the right to the environment might fit in between more traditional rights, similar to the ones identified by Habermas.

Today, environmental constitutionalism goes further: it *does* regard the environment as fundamental to the State – as a question of justice. ‘What do we want? – Climate Justice! – When do we want it? – Now!’ is a common slogan in environmentalist demonstrations. This (rather new) vision goes hand-in-hand with scientific research showing the environment is of existential importance for human beings, and that climate change can pose an existential threat to our lives.<sup>213</sup> In *Faktizität und Geltung*, nature is presented as posing a matter external to human beings, which makes its protection an ethical rather than a moral matter. This idea is consistent with a tradition that gained enormous strength

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<sup>209</sup> Habermas, *Between Facts and Norms* (n 51) 122–123.

<sup>210</sup> *ibid* 165.

<sup>211</sup> At least at the time of writing *Between Facts and Norms*.

<sup>212</sup> Joseph L Sax, ‘The Search for Environmental Rights’ (1990) 6 *Journal of Land Use & Environmental Law* 93.

<sup>213</sup> Many scholarly works on environmental law start with underlining the importance of their subject-matter by enumerating environmental problems and their devastating impacts. For the sake of originality, I chose not to do so in this writing, at the risk of leaving some readers wondering why I am so concerned about the whole issue.

with both Christianity and throughout the Enlightenment, a tradition that sees humans as separate from nature, indeed, opposing culture and nature.<sup>214</sup> Among other thinkers, the French philosopher Bruno Latour criticises this opposition, in *Facing Gaia*, a book about the Anthropocene.<sup>215</sup> We no longer live in the Holocene, but in the Anthropocene, meaning humans became an independent factor influencing the earth's geology. The Anthropocene thus imposes a certain holism upon us; humans are not separate from, but part of nature. Moreover, nature is not a stable matter that we humans can conquer and exploit with impunity, because damage to something of which we are a part will inevitably result in damage to ourselves. Logically, then, the environment is no longer regarded as external to us, but existential for us, and it can be understood as being among the fundamentals of our societies – as a fifth, *self-standing* category in Habermas' system of rights. In an essay entitled 'Must democrats be environmentalists?', the author Michael Saward concludes by answering yes.<sup>216</sup>

## **1. Why national deliberative democracy fails to attain climate justice**

Proponents of environmental constitutionalism include a group of scholars who drafted the 'Declaration on Human Rights and Climate Change' in 2016. In an accompanying commentary published in the *Journal on Human Rights and the Environment*, they make a key observation when it comes to the existential threat posed by climate change, pointing to the distributive aspect of the concept of climate justice:

*Climate justice mandates the importance of recognizing that climate change impacts are unevenly and unfairly distributed in that the historical emissions of industrialized nations disproportionately affect the poor and vulnerable, including women and children, small island developing states, indigenous peoples, less developed countries, future generations and innumerable non-human organisms and living systems.*<sup>217</sup>

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<sup>214</sup> On anthropocentrism and the law, see eg Ngaire Naffine, 'Legal Personality and the Natural World: On the Persistence of the Human Measure of Value' (2012) 3 *Journal of Human Rights and the Environment* 68.

<sup>215</sup> Latour (n 21).

<sup>216</sup> Michael Saward, 'Must Democrats Be Environmentalists?' in Brian Doherty and Marius de Geus (eds), *Democracy and green political thought: sustainability, rights and citizenship* (Routledge 1996).

<sup>217</sup> Kirsten Davis and others, 'The Declaration on Human Rights and Climate Change: A New Legal Tool for Global Policy Change' (2017) 8 *Journal of Human Rights and the Environment* 217, 219.

Some are hit harder than others.<sup>218</sup> This uneven distribution of adverse climate change effects is one of the reasons why governments worldwide fail to implement appropriate measures. That is, even though nearly all nation states have recognised the need to address climate change by signing the UNFCCC, their territorially bounded, short-term oriented and highly anthropocentric legal-political institutions are not well suited to pick up the urgency of a polycentric, long-term and ecological problem like climate change. Such was for instance argued by political scientists John Dryzek and Jonathan Pickering in their book *The Politics of the Anthropocene*, where they analyse how our political institutions designed for the Holocene are on a ‘pathological path dependency’ towards economic growth, and unfit to address challenges posed by the Anthropocene.<sup>219</sup>

Similarly, Stephen Gardiner analyses beautifully how climate change presents a ‘perfect moral storm’, because of the spatial dispersion of its causes and effects, the fragmentation of agency when it comes to taking measures to prevent climate change, and the inadequacy of our political institutions.<sup>220</sup> He explains why it is ‘overtly optimistic’ to characterise climate change as a tragedy of the commons, or as a classic prisoner’s dilemma. That is, in such scenario’s, it is rational for an individual to act out of self-interest when other individuals do so as well, but if *all* act in the common interest everyone would be better off. In contrast, with regard to the problem of climate change it is in the *common* interest of the current community of human beings to act out of self-interest (in the sense of emitting greenhouse gasses). The problem is exactly that future generations and non-human beings are not seen as part of the community and are not deemed part of the ‘common’ interest. If we and the next few generations of humans keep extracting fossil fuels, at a certain point climatic change will lead to so many dangers that one of the following generations will have no choice but to use certain technologies to save their own lives, leading to even more extractions and emissions, further exacerbating climate change.<sup>221</sup>

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<sup>218</sup> As was also recognised by the UNFCCC, at least for human groups such as women, children and people in developing countries. NB: the term ‘climate justice’ is often used to point at distributive concerns with regard to *presently living humans*, cf eg Mary Robinson, *Climate Justice - Hope, Resilience and the Fight for a Sustainable Future* (Bloomsbury Publishing 2018) x.

<sup>219</sup> John S Dryzek and Jonathan Pickering, *The Politics of the Anthropocene* (Oxford University Press 2018).

<sup>220</sup> Stephen M Gardiner and David A Weisbach, *Debating Climate Ethics* (Oxford University Press 2016) 16–19.

<sup>221</sup> *ibid* 24–37.

Such observations can easily be translated in terms of the two democratic qualities of a public sphere that Nancy Fraser distilled from Habermas' work,<sup>222</sup> and tailored to the legal-political systems in which European private law is embedded. Firstly, let us look at the *political efficacy* of the public spheres within the EU, meaning their capacity to pressure governmental institutions with communicative power to take certain legislative action. The groups most affected by climate change – the poor, the vulnerable, children, people in developing nations, future generations and non-humans – certainly do not have the strongest voices in the public spheres of EU member states. National governments do not owe accountability to these groups in the way they do towards their currently living, human citizens with the right to vote. The latter group often has other priorities and interests than implementing measures against climate change. Even where they do put the need for such measures at the centre of the agenda, climate change's complexity makes it difficult to pinpoint where to start. Others have noted the 'legally disruptive nature' of climate change, pointing to its polycentric character:<sup>223</sup> its causes – the greenhouse gasses emissions – are spread across the globe, enabling any actor who is called to account to point the finger to someone else. As will be shown in Chapters III and IV, the defendant states and companies in the climate cases invariably either assert their contribution to global emissions is only minor,<sup>224</sup> or deny responsibility for certain emissions.<sup>225</sup> The 1992 UNFCCC's preamble already acknowledged that climate change 'calls for the widest possible cooperation by all countries'. Yet even though politics is globally organised enough to accept a convention against climate change, it lacks the capacity to implement 'the discursively formed will to which it is responsible';<sup>226</sup> implementation is after all a matter for national governments. In conclusion, when it comes to climate change, nation state deliberative democracy is clearly lacking political efficacy.

Secondly, let us look at the *normative legitimacy* that the public sphere provides to law-making in a deliberative democracy and relate it to the problem of climate change. Within the quality of normative legitimacy, Fraser further distinguishes two sub-qualities, being firstly the *participatory parity* of the public sphere,

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<sup>222</sup> Fraser and Nash (n 191).

<sup>223</sup> Elizabeth Fisher, Eloise Scotford and Emily Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80 *Modern Law Review* 173.

<sup>224</sup> This argument is at play in for instance the Urgenda case, the case of Mr Lliuya against RWE, *Milieudefensie v Shell* (see Chapters III and IV).

<sup>225</sup> As did the Norwegian State in the *Arctic Oil* case (see Chapters III and IV).

<sup>226</sup> Fraser and Nash (n 191) 31.

meaning everyone must have roughly equal chances to contribute; and the *inclusiveness* of the public sphere, meaning that ‘discussion must in principle be open to all with a stake in the outcome’.<sup>227</sup> Now, as mentioned in section B, Habermas’ democracy principle reads 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’.<sup>228</sup> Fraser responds: ‘Today, however, the idea that citizenship can be a proxy for affectedness is no longer plausible’.<sup>229</sup> This holds certainly true for climate change, which affects many groups of which the members are not citizens: people in other nations, future generations and many non-human beings such as animals and plants. Hence, the deliberative democracy model based in the European nation state spectacularly fails the normative legitimacy requirement, and therefore automatically the participatory parity requirement as well.

### **Discourse, democracy and morality in Habermas’ work**

In *Faktizität und Geltung*, Habermas asserts that our post-metaphysical world no longer allows us to determine an objective truth: we live in pluralist societies where people are no longer guided by the will of one sovereign or one God. The only thing left to us, is to describe when people together deem something as true when they are communicating to each other. Thus, we can pinpoint the conditions to reach conclusions on intersubjective validity. This is Habermas’ discourse principle: *Just those action norms are valid to which all possibly affected persons could agree as participants in rational discourses.*

The discourse principle forms the baseline of his theory. It can be translated into more specific forms. To determine whether an action norm is *moral*, the discourse principle needs to be universalized: only when everyone in the universe could agree with the action norm, it can claim moral validity. The democracy principle forms another branch of the discourse principle. When translating the discourse principle into the legal form, Habermas says we reach the democracy principle, *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.*

Two things are important to note here. Firstly, ‘democratically legitimate’ does not equal ‘morally sound’. Thus, secondly, Habermas does not necessarily deem it morally good that only the citizens determine what statutes may claim democratic legitimacy. His democracy principle is a reconstruction of why we deem certain laws democratically legitimate in the self-understanding of our legal system. His theory being a critical theory allows us to criticise our legal system on the basis of its own premises.

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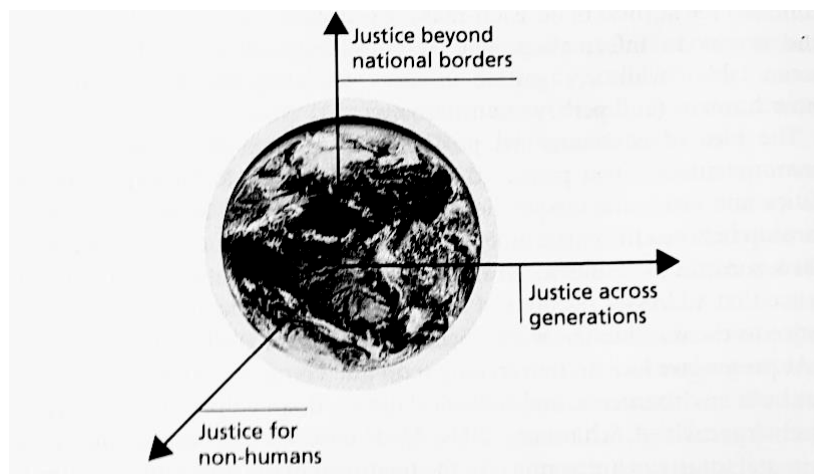
<sup>227</sup> *ibid* 28.

<sup>228</sup> Habermas, *Between Facts and Norms* (n 51) 110.

<sup>229</sup> Fraser and Nash (n 191) 30.

## 2. Planetary justice by extending the protective scope of fundamental rights

In later works, written after *Faktizität und Geltung*, Habermas theorised on expanding his deliberative democracy beyond the nation-state, yet although he deemed a global system desirable, he only saw a realistic possibility at the European level.<sup>230</sup> Dryzek and Pickering suggest that deliberative democracy should develop further, and that politics should henceforth be guided by ‘planetary justice’.<sup>231</sup> They write that the scope of planetary justice needs to reach beyond Holocene thinking in three ways: ‘by escaping state-centric accounts of justice; in extending justice to future generations; and through encompassing justice for non-humans’.<sup>232</sup> They use the following figure to illustrate three dimensions of their Anthropocene-proof version of planetary justice:<sup>233</sup>



Dyrzek and Pickering also note that this understanding of justice will not overthrow existing fundamental rights protecting basic interests, such as freedom from torture or arbitrary detention, but that it will likely broaden the scope of basic interests that are deemed necessary for humans to flourish, and require protection through fundamental rights.<sup>234</sup>

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<sup>230</sup> Cf Habermas, ‘The Postnational Constellation and the Future of Democracy’ (n 192); Habermas, *The Crisis of the European Union* (n 192).

<sup>231</sup> Dryzek and Pickering (n 219) 68.

<sup>232</sup> *ibid.*

<sup>233</sup> Also for instance Hans Petter Graver draws attention to these three dimensions in: Hans Petter Graver, ‘Judging for Utopia – Climate Change and Judicial Action’ [[forthcoming]] *European Review of Private Law*.

<sup>234</sup> Dryzek and Pickering (n 219) 79–80.

The drafters of the ‘Declaration of Human Rights and the Environment’ also argue that the scope of protection of environmental human rights encompasses more than the category of currently living, human citizens. The preamble explicitly reaffirms the interrelatedness of all life on Earth, and recognises how climate change disproportionately affects certain groups, including *people in developing countries* [i.e. people outside the territorial jurisdiction of European private law], *future generations* and *other living beings and systems*. The Declaration’s Articles mention the rights of future generations. Moreover, they stipulate that all human beings, animals and living systems have the right to a secure, healthy and ecologically sound Earth system, and the right to fairness, equity and justice in respect of responses to climate change.<sup>235</sup>

### **3. The climate cases in European private law**

In the following chapters it will become clear that the climate cases under study express visions of European private law that come close to meeting Dryzek and Pickering’s concept of planetary justice. Chapter III studies in-depth how the climate cases deal with the fact that many people in other countries are heavily affected by climate change, whilst they do not have the power to contribute to the democratic discussions in the EU on the measures to be taken against climate change. We will see that the following cases, in one way or another, try to take people abroad on board in the discussions on climate change: the Dutch *Urgenda* case; the German case of Mr. Lliuya against RWE; the Swedish *Magnolia* case; the Norwegian case *Arctic Oil*; the Dutch case of Milieudefensie against Shell; the case of French mayors against Total; and the European-level *People’s Climate Case*. Chapter IV subsequently addresses future generations, and analyses how the following cases make them central to the disputes at hand: the *Urgenda* case, the Belgium *Klimaatzaak*, the *Magnolia* case, the *Arctic Oil* case, the case against Shell and the *People’s Climate Case*. The epilogue in Chapter VI shows that even the interests of non-human peak through in some of these cases, most notably in the Belgian *Klimaatzaak*.

In conclusion, when using a Habermasian conception of deliberative democracy as a stepping-stone, and building on other authors including Fraser, Dryzek and Pickering, we see that the climate cases in European private law are accomplishing various things achieving various aims simultaneously. First of all, they maintain that the need to address climate change has become legally relevant and is no longer a question of politics. They do so, secondly, to the extent

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<sup>235</sup> Emphasis added.



that the environment is a constitutional matter, which legitimises judicial action against the democratic majority. Moreover, thirdly, in doing so, they are emancipating certain groups, of which the members are not citizens in our current national democracies, in order to ensure that they have a voice in the *legal* arena of the courts applying European private law. All of the courts point, at least implicitly, to the needs of people in other countries, most of them also point to future generations, and some of them refer to non-humans. Whilst these groups do not form minorities in absolute numbers, they certainly are minorities in terms of the representation of their interests in the national deliberative democracies across the EU. As the climate cases are - as has been illustrated in section D - secondarily also contributions to the public sphere, the climate cases thus claim space for these groups by representing their interests, asserting that the political branches of government should be led by these interests in implementing the judicial orders requested.

This means that the courts applying European private law are faced with an intellectually challenging task; the *legal* boundaries of their role, as we know it, are set by a national citizenry in a democratic law-making process. However, even within the national public sphere, contributions indicate that environmental rights are not only increasingly seen as fundamental to society, but also as including the protection of groups outside the polis of national democracies: people abroad, future generations and non-human beings. The *factual* boundaries to the European private law judiciary's role are set by the parties in the dispute, who, informed by climate science, happen to agree that climate change might have disastrous effects on people abroad, future generations and non-humans. Although the extent to which such facts are legally relevant remains for the court to determine, ever developing climate science and widespread consensus on environmental constitutionalism may well push the courts to confirm the legal views of the litigating environmentalists. The climate cases are thus operationalising environmental constitutionalism through European private law, and thereby stretching the boundaries of what is seen as democratically legitimate judicial law-making in this context.

## G. CONCLUDING REMARKS

This chapter has analysed the relationship between law and politics, following the deliberative democracy theory of the German scholar Jürgen Habermas. It has done so to reach an understanding of what democratically legitimate judicial law-making may mean for the judiciary applying European private law, and to explain how conceptions of democratically legitimate judicial law-making can shift over time, as happened for instance with regard to the Dutch *Urgenda* case.

We have seen that the role of the judiciary in European private law can be limited by at least two boundaries: a *legal* boundary, dictating the judiciary should only apply law as enacted by the citizenry, and a *factual* boundary, prescribing the judiciary to be dependent on the parties regarding the facts of the dispute. The chapter also showed the added value of law as opposed to politics: Once the political debate has resulted in law, rules may be enforced. Climate activists feel the urgency to undertake action now, and claim that we have passed the stage of political debate. Where political institutions fail to implement adequate measures, they resort to the judiciary, including through European private law.

However, following Habermas' co-originality thesis, the judiciary can only legitimately oppose democratic majority decisions when fundamental rights are at stake. Therefore, an increasing success of the litigating environmentalists can only be understood together with the ongoing constitutionalisation of the environment, a movement also called 'environmental constitutionalism', which can be operationalised in European private law. This does not provide the definitive answer to the climate problem, as enforcement and implementation of constitutional duties are still tasks for the political branches of government. Thus, the climate change litigation indicates how the climate is pulled out of the political, into the legal domain, and especially when successful, it forces the climate to reappear in the political arena so as to be addressed in more detail.

Interestingly, environmental constitutionalism can aim to protect certain groups that fall outside the polis of the national constitutional democracies in which European private law applies: people in other countries, future generations and non-human beings. The following chapters will demonstrate the extent to which the climate cases in European private law engage with these visions to environmental constitutionalism, which in their very essence form a fundamental critique, expressing the model of the national constitutional democracy is inapt to address the problem of climate change.

The reader may ask themselves what my own vision to environmental constitutionalism is. As I disclosed in the introduction to this thesis, I am indeed on the green side of the political spectrum. However, this is not very relevant in light of the methodology I aim to apply. In Habermas' conception, it can never be up to an individual, such as a PhD candidate like myself, to determine what is true or valid. We live in a post-metaphysical world, where truth or validity cannot be determined individually. The closest we can get to is by reconstructing what people deem true or valid intersubjectively. This is why Habermas, in his system of rights, does not enumerate specific rights, but only categories of rights that need to be in constitutions so as to facilitate deliberative democracies. It is up to the citizens to develop the rights in full. The political autonomy of the citizens requires constitution-making to be an ongoing, dynamic process. It has been my aim to, in this chapter, reconstruct the visions expressed by the climate cases in light of this dynamic process as the constitutional interpretation that the environment forms a prerequisite for democracy, which might force judges in European private law to not only protect their fellow citizens, but also people in other nations, future generations and non-human beings.

Now valid questions may be raised regarding the methodology of the judicial law-making described here: exactly *how* do judges determine that 'enough' consensus exists on a new interpretation of a fundamental right, such that they can base new decisions on this reinterpreted right? Judicial law-making is not an exact science, as it boils down to human persuasion based on available evidence. This chapter is not so much concerned with empirical (social) legitimacy of climate cases, but rather has attempted to reconstruct the self-understanding of environmentalist litigants and the courts upholding their claims against the legal development called environmental constitutionalism. The reconstruction of these claims and decisions in light of a Habermasian conception of democracy indicates that *they* deem there to be enough consensus, as will be explored in more detail in the subsequent chapters. It would be interesting to critically assess this opinion in future research, possibly relying on more empirical accounts of what judges do, or how legally external factors influence their decisions.

The central claims of this chapter are the following. The international climate litigation trend is indicative of the growing legal opinion that the environment is a constitutional matter, and therefore a prerequisite for democracy. Although the judiciary's role as such remains unchanged, this legal dynamic is likely to increase the democratic legitimacy of judicial law-making on climate change. This is a circular and ever-ongoing process. As legal opinion is increasingly shared across society, more judges feel able to confirm it in their decisions, which again leads

to debates on the judicial decisions that increase awareness of the problem of climate change and, at least at the time of writing this thesis, appear to lead to an even wider acceptance of a constitutionalised environment, future conceptions of which might also support encapsulation of the interests of people in other nations, future generations and non-humans.

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