

## SYMPOSIUM ARTICLE

# *Should Judges Make Climate Change Law?*<sup>†</sup>

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### Abstract

What scholars referred to as a climate change litigation ‘explosion’ in 2015 has today become an established movement which is unlikely to stop in the near future: worldwide, over a thousand lawsuits have been launched regarding responsibility for the dangers of climate change. Since the beginning of this trend in transnational climate litigation scholars have warned that the separation of powers is threatened where judges interfere with the politically hot issue of climate change. This article uses Jürgen Habermas’s political theory on deliberative democracy to reconstruct the tension between law and politics generated by these lawsuits. This reconstruction affords a better understanding of the implications of climate change litigation: while the role of the judiciary as such remains unchanged, the trend is likely to influence the democratic legitimacy of judicial lawmaking on climate change, as it indicates an increasing realization that a sound environment is a constitutional value and is therefore a prerequisite for democracy.

**Keywords:** Habermas, Deliberative democracy, Judicial lawmaking, Democratic legitimacy, Climate change litigation, Environmental constitutionalism, Separation of powers

‘What motivates me, is that I believe I am right.’

Roda Verheyen, lawyer for Saül Lliuya,  
on the climate case against German energy giant RWE

## 1. INTRODUCTION: CLIMATE, LAW AND POLITICS

This article addresses the question of whether it befits the role of the judiciary in constitutional democracies to adjudicate on climate change – a question of increasing importance

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given the global trend of climate change litigation. Using deliberative democracy theory, this article argues that while the role of the judiciary as such remains unchanged, the global climate change litigation trend is likely to influence the democratic legitimacy of judicial lawmaking on climate change, as it indicates an increasing realization that a sound environment constitutes a constitutional matter and is therefore a prerequisite for democracy.

The judiciary's role in adjudicating climate change-related issues is contentious: 'We believe that climate change is a complex societal challenge that should not be addressed by courts', said oil and gas giant Royal Dutch Shell (Shell) in response to the threat by the non-governmental organization (NGO) Milieudefensie (Friends of the Earth Netherlands) to initiate a lawsuit in the Netherlands.<sup>1</sup> Milieudefensie is arguing that Shell is committing a tort by contributing to dangerous climate change.<sup>2</sup> That is, although Shell acknowledges the need to reach net zero emissions by the year 2050 to prevent global warming above the dangerous tipping point of 2°C, based on Shell's current business strategy, 50% of all energy in 2050 will still be produced by burning fossil fuels, leading to much greater greenhouse gas (GHG) emissions.<sup>3</sup> This behaviour is tortious, according to Milieudefensie, which therefore seeks an injunction to require Shell to pursue climate-friendly business plans globally.

The case against Shell is far from unique. What scholars described in 2015 as a 'climate litigation explosion'<sup>4</sup> has become an established movement which is unlikely to stop in the near future. Worldwide, over 1,000 lawsuits have been launched on the responsibility for the dangers of climate change.<sup>5</sup> This transnational trend encompasses different types of lawsuit. Climate cases have been initiated against states<sup>6</sup> and private parties;<sup>7</sup> under administrative,<sup>8</sup> civil<sup>9</sup> and even criminal<sup>10</sup> law; and pursued at either the

<sup>1</sup> Shell first raised this point in the media: P. Lutikhuis, 'Milieudefensie begint zaak tegen Shell om milieuschade', *NRC Handelsblad*, 4 Apr. 2018, available at: <https://www.nrc.nl/nieuws/2018/04/04/zaak-tegen-shell-om-milieuschade-a1598077> (translation by the author). On 28 May 2018 Shell repeated this response in an official letter, saying, inter alia, that courts are not the right forum to advance the global energy transition, available at: <https://milieudefensie.nl/actueel/reactie-shell>.

<sup>2</sup> Milieudefensie's letter holding Shell liable is available at: <https://milieudefensie.nl/publicaties/brieven/brief-van-milieudefensie-aan-shell>. Milieudefensie's summons was presented in the spring of 2019 and is available at: <https://milieudefensie.nl/actueel/volledige-dagvaarding-shell.pdf>.

<sup>3</sup> Ibid.

<sup>4</sup> J. Peel & H.M. Osofsky, *Climate Change Litigation* (Cambridge University Press, 2015), p. xi.

<sup>5</sup> Cf. the following databases: Climate Change Litigation Databases, available at: <http://climatecasechart.com>, and Climate Change Laws of the World, available at: <http://www.lse.ac.uk/GranthamInstitute/climate-change-laws-of-the-world>.

<sup>6</sup> E.g., in the Netherlands the case of *Urgenda Foundation v. State of the Netherlands*, in which two judgments so far have been delivered: Court of First Instance, The Hague, 24 June 2015, *Stichting Urgenda / Staat der Nederlanden*, ECLI:NL:RBDHA:2015:7145 (*Urgenda*, The Hague Court of First Instance); Court of Appeal of The Hague, 9 Oct. 2018, *Stichting Urgenda / Staat der Nederlanden*, ECLI:NL:GHDHA:2018:2591 (*Urgenda*, The Hague Court of Appeal).

<sup>7</sup> E.g., in Germany, the case of *Lliuya v. RWE AG*, Higher Regional Court of Hamm, 30 Nov. 2017.

<sup>8</sup> E.g., the case against the municipality of Vienna on a new landing-strip at the airport of Vienna: *Anti-Aircraft Noise Society and Others v. Vienna Airport AG*, Austrian Constitutional Court, 29 June 2017.

<sup>9</sup> E.g., the case of *Klimaatzaak v. Kingdom of Belgium and Others*, launched in 2015, no substantive judgments yet.

<sup>10</sup> The late Polly Higgins called for making ecocide (genocide on the ecosystem) an international crime: see, inter alia, Polly Higgins, *Eradicating Ecocide* (Shepherd-Walwyn (Publishers) Ltd, 2015).

national,<sup>11</sup> regional,<sup>12</sup> or international level.<sup>13</sup> Furthermore, claimants can seek either reparation damages,<sup>14</sup> or injunctions to prevent future polluting activities or to mandate 'greener' action.<sup>15</sup>

Academics have praised the judgments delivered so far for making climate change 'tangible and routine',<sup>16</sup> and for contributing to 'cosmopolitan justice'.<sup>17</sup> Others enthusiastically described the Dutch *Urgenda* judgment as 'law-finding 3.0'.<sup>18</sup> The court of first instance in this case used European and international law to interpret national law and concluded that the Dutch state had committed a general tort because its GHG reduction goal was not sufficiently ambitious.<sup>19</sup> The ruling was confirmed on appeal,<sup>20</sup> where the Court of Appeal relied on the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).<sup>21</sup> The Deputy Procurator General and Advocate General advised the Dutch Supreme Court to uphold this decision (a final judgment will be rendered after completion of the present contribution).<sup>22</sup> Some scholars have suggested that cases like *Urgenda* could serve as a model or inspiration.<sup>23</sup>

At the same time, climate cases have been heavily criticized. A constant point of criticism concerns the separation of powers principle, which Shell raised to argue that

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Environmental activists have pleaded the 'climate necessity defence' when tried for civil disobedience offences (see Section 3, n. 75 below).

<sup>11</sup> See nn. 6–10 above.

<sup>12</sup> E.g., the People's Climate Case against the EU: Case T-330/18, *Armando Ferrão Carvalho and Others v. The European Parliament and the Council*, 8 May 2018, ECLI:EU:T:2019:324 (*People's Climate Case*); see also G. Winter, 'Armando Carvalho et al. v. European Union: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation' (2020) 9(1) *Transnational Environmental Law* (forthcoming).

<sup>13</sup> E.g., the complaint launched by 16 young people, including Greta Thunberg, before the United Nations (UN) Committee on the Rights of the Child, 23 Sept. 2019, available at: <https://earthjustice.org/sites/default/files/CRC-communication-Sacchi-et-al-v.-Argentina-et-al.pdf>.

<sup>14</sup> E.g., *Lliuya v. RWE*, n. 7 above.

<sup>15</sup> E.g., the Dutch *Urgenda* case (n. 6 above) and the claim of Milieudefensie against Shell (n. 2 above).

<sup>16</sup> C. Vallejo, 'Suing the State for Climate Change; Empirical Assessment of Climate Change Jurisprudence in Cases against Governments', PhD thesis, Los Andes University, Bogota (Colombia), 2018 (forthcoming).

<sup>17</sup> E. Colombo, 'The Quest for Cosmopolitan Justice in Climate Matters' (2017) 2 *Nordisk Miljörättslig Tidskrift*, pp. 25–39.

<sup>18</sup> M. Loth & R. van Gestel, 'Urgenda: Roekeloze Rechtspraak of Rechtsvinding 3.0?' (2015) 1849(37) *Nederlands Juristenblad*, pp. 2598–605, at 2598 (translation by the author).

<sup>19</sup> *Urgenda*, The Hague Court of First Instance, n. 6 above. See J. van Zeben, 'Establishing a Governmental Duty of Care for Climate Change Mitigation: Will *Urgenda* Turn the Tide?' (2015) 4(2) *Transnational Environmental Law*, pp. 339–57.

<sup>20</sup> *Urgenda*, The Hague Court of Appeal, n. 6 above. See B. Mayer, *The State of the Netherlands v. Urgenda Foundation: Ruling of the Court of Appeal of The Hague* (9 October 2018) (2019) 8(1) *Transnational Environmental Law*, pp. 167–92. For an overview of both cases see also L. Burgers & T. Staal, 'Climate Action as Positive Human Rights Obligation: The Appeals Judgment in *Urgenda v. The Netherlands*', in R.A. Wessel, W. Wouter & B. Boutin (eds), *Netherlands Yearbook of International Law 2018* (T.M.C. Asser Press, 2019) forthcoming.

<sup>21</sup> Rome (Italy), 4 Nov. 1950, in force 3 Sept. 1953, available at: <http://www.echr.coe.int/pages/home.aspx?p=basictext>.

<sup>22</sup> *Foundation Urgenda v. State of the Netherlands*, Opinion of Deputy Procurator General Langemeijer and Advocate General Wissink, 13 Sept. 2019, ECLI:NL:PHR:2019:887.

<sup>23</sup> J. Peel & H.M. Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7(1) *Transnational Environmental Law*, pp. 37–67.

courts should not decide matters relating to climate change.<sup>24</sup> Since the beginning of the climate change litigation trend, scholars have warned that the balance between the branches of democratic government will be threatened when judges interfere with the political issue of climate change. The objection that the judiciary has overstepped its powers was articulated by many in reaction to the Dutch *Urgenda* decision.<sup>25</sup> In other climate cases, political sensitivity associated with climate change has led courts to abstain from delivering judgment.<sup>26</sup> This was the basis of the decision of a Norwegian judge, in January 2018, not to consider a claim issued by the youth organization *Natur og Ungdom* (Nature and Youth) against oil extraction authorizations in the context of the global climate change problem.<sup>27</sup> The separation of powers argument has also been used by corporate actors confronted with climate change-related claims.<sup>28</sup> Some argue that these ‘politically motivated lawsuits’ would be ‘misusing the legal system’.<sup>29</sup>

Clearly, climate change raises a tension between law and politics. Environmental activists resort to the judiciary to address climate change-related issues. Although this strategy is applauded by some, many reject it because they believe the issue of climate change belongs to the political domain, subject to the power of the people rather than to the discretion of a court.

Indeed, how to tackle climate change raises political challenges. Although states have recognized the dangers of climate change since at least 1992 – which marked the birth of the United Nations Framework Convention on Climate Change (UNFCCC)<sup>30</sup> – it has been difficult for states to implement adequate policies. Economic wealth globally

<sup>24</sup> See n. 1 above.

<sup>25</sup> Cf. L. Bergkamp, ‘Het Haagse Klimaatvonnis: Rechterlijke Onbevoegdheid En de Negatie van Het Causaliteitsvereiste’ (2015) 1676(33) *Nederlands Juristenblad*, pp. 2278–88; N. de Boer, ‘Trias Politica Niet Opofferen voor Ambitieuze Klimaatpolitiek’ (2016) 73(1) *Socialisme en Democratie*, pp. 40–8; G. Boogaard, ‘Urgenda en de Rol van de Rechter: Over de Ondraaglijke Leegheid van de Trias Politica’ (2016) 65(1) *Ars Aequi*, pp. 26–33; K. de Graaf & J. Jans, ‘The Urgenda Decision: Netherlands Liable for Role in Causing Dangerous Global Climate Change’ (2015) 27(3) *Journal of Environmental Law*, pp. 517–27; M. Peeters, ‘Europees klimaatrecht en nationale beleidsruimte’ (2014) 2014(41) *Nederlands Juristenblad*, pp. 2918–25; R. Schutgens, ‘Urgenda en de Trias’ (2015) 1675(90) *Nederlands Juristenblad*, pp. 2270–7; G. van der Veen & P. Oztürk, ‘Onrechtmatige daad en gevaarstelling: reflexwerking en zorgplicht bij milieukwesties’ (2015) 51(4) *Overheid en Aansprakelijkheid*, pp. 157–60; W. Voermans, ‘Staat Moet Wél in Hoger Beroep Gaan’, *Volkscrant*, 28 Aug. 2015, available at: <https://www.volkscrant.nl/columns-opinie/staat-moet-wel-in-hoger-beroep-gaan~bd2a74ec?referer=https%3A%2F%2Fwww.google.com%2F>; Van Zeben, n. 19 above; Mayer, n. 20 above.

<sup>26</sup> In the United States (US), tort claims were rejected because of the political question doctrine; cf. C. Vallejo & S. Gloppen, ‘Red-Green Lawfare? Climate Change Narratives in Courtrooms’, in L. St. Clair & S. Gloppen (eds), *Climate Talk: Rights, Poverty and Justice* (Juta Law, 2013), pp. 208–35.

<sup>27</sup> *Greenpeace Norway v. Norwegian State*, Oslo District Court, 4 Jan. 2018, Case No. 16-166674TVI-OTIR/06, para. 5.2.7.

<sup>28</sup> Cf., e.g., the reaction of Chevron to the lawsuit of municipalities in California: A. Mulkern, ‘Chevron Asks Judge to Toss Lawsuits, Unveils Strategy’, *Energy and Environment News*, 20 Mar. 2018, available at: <https://www.eenews.net/greenwire/stories/1060076839>.

<sup>29</sup> T. Weatherhead, ‘Climate Change Lawsuits Are Ineffective Political Stunts’, *The Hill*, 1 Mar. 2018, available at: <https://thehill.com/opinion/energy-environment/376307-climate-change-lawsuits-are-showy-ineffective-political-stunts>.

<sup>30</sup> New York, NY (US), 9 May 1992, in force 21 Mar. 1994, available at: <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

is based on extractive industries. We are all GHG emitters to some extent – if not by driving a car and burning gasoline, then indirectly by consuming products that lead to the creation of emissions through their production, packaging, storage, and transportation. Acting against climate change usually involves sacrifices that are difficult to negotiate in politics. This was painfully illustrated in France during the 2018–19 autumn and winter, when people dressed in yellow vests (the *gilets jaunes*) blocked highways to demonstrate against a fuel price increase. This measure had been put in place to discourage driving and reduce traffic emissions but it had significant financial consequences for many entrepreneurs and commuters. The protests led the French government to postpone the introduction of this environmental measure.<sup>31</sup>

In December 2015, the conference of the parties (COP) to the UNFCCC negotiated the Paris Agreement,<sup>32</sup> stipulating that global warming should remain ‘well below 2°C’ and kept preferably at 1.5°C to prevent climate change-related dangers such as heat-waves, rise in sea level, desertification, and wildfires. Under the Paris Agreement, countries determine their own contributions to achieve this goal. To date, these nationally determined contributions (NDCs) are by far insufficient, again indicating how politicians struggle with regulating which polluter should pay for what, and prefer to leave the response to such questions for the next elected government.<sup>33</sup>

Notwithstanding politics, a judge *must* deliver a decision when confronted with a legal claim. As Hans Petter Graver remarks in his book *Judges against Judges*, with reference to Hannah Arendt, ‘there is no neutral choice – either judges enforce the (possibly unjust) law, or they do not’.<sup>34</sup> Thus, the climate change litigation trend globally imposes the question *how* the judiciary should respond to the claims without violating their democratically determined role in accordance with the separation of powers. Can the judiciary affirm the environmentalist claims without infringing the political power of the people? As indicated by the phrase ‘power of the *people*’, this article understands politics as democratic politics – the role of the judiciary in undemocratic political regimes falls outside its scope.

To fully grasp the tension between law and politics apparent in the climate litigation trend, this article needs to consider the boundaries of democratically legitimate judicial lawmaking in a constitutional democracy. It considers that all judicial decisions fall under the heading of ‘judicial lawmaking’ because when speaking of the work of judges, it is impossible to make a clear-cut distinction between the application of law and lawmaking. However, the focus of the article is on the boundaries of

<sup>31</sup> Cf. M. Rescan & V. Malingre, ‘Gilets Jaunes: sous pression, Macron lance un appel à l’aide’, *Le Monde*, 6 Dec. 2018, available at: [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).

<sup>32</sup> Paris (France), 12 Dec. 2015, in force 4 Nov. 2016, available at: [http://unfccc.int/paris\\_agreement/items/9485.php](http://unfccc.int/paris_agreement/items/9485.php).

<sup>33</sup> Cf. Y.R. du Pont & M. Meinshausen, ‘Warming Assessment of the Bottom-up Paris Agreement Emissions Pledges’, *Nature Communications*, 16 Nov. 2018, p. 7, available at: <https://doi.org/10.1038/s41467-018-07223-9>.

<sup>34</sup> H.P. Graver, *Judges against Justice: On Judges When the Rule of Law Is under Attack* / Hans Petter Graver. (Springer 2015) pp. 289, 292.

democratically legitimate judicial lawmaking, which implies the possibility of democratically *illegitimate* judicial lawmaking.

Because the criticism towards judicial lawmaking in climate change litigation boils down to a democratic argument, this article starts at the general level with the question of democracy and then turns to the role of the judiciary (Section 2). It uses Jürgen Habermas's political theory on deliberative democracy to sketch the role of the judiciary in a constitutional democracy. This allows the article to reconstruct the tension between law and politics apparent in the climate change litigation trend. It is reasoned that climate cases seem to go against majority decisions, and therefore appear to be of questionable democratic legitimacy. However, the judiciary may oppose the majority when fundamental rights are at stake because these guarantee democracy as such, following the co-originality thesis of Habermas.

The reasoning in Section 2 understands lawmaking as a dynamic, ongoing process. To clarify the dynamics and self-understanding of the environmentalists in launching climate law suits, Section 3 draws a parallel with activists who engage in civil disobedience. The actions of both civil disobedience and climate lawsuits are contributions to the public sphere, which are directed primarily to law rather than to politics and lean on dynamic constitutional interpretation. Section 4 then considers how environmentalists articulate their view in climate cases that the environment represents a constitutional matter – what scholars conceptualize as (global) environmental constitutionalism. Throughout the article, I draw on *Urgenda*, as this case is the high-water mark for successful climate change litigation commenced by environmentalists.

By providing a theoretical understanding of the climate litigation trend, and operationalizing deliberative democracy theory in light of present-day conditions, the article answers calls for 'thorough normative reflection' on climate cases,<sup>35</sup> and allows for a better comprehension of its implications. The central claim of the article is that while the role of the judiciary as such remains unchanged, the climate litigation trend is likely to influence the democratic legitimacy of judicial decisions on climate change, as it indicates a growing recognition that a sound environment constitutes a constitutional matter and is therefore a prerequisite for democracy to be protected by judges (Section 5).

## 2. THE ROLE OF THE JUDICIARY IN A CONSTITUTIONAL DEMOCRACY

In his 1992 masterpiece *Faktizität und Geltung*<sup>36</sup> (*Between Facts and Norms*),<sup>37</sup> German philosopher Jürgen Habermas analyzes the 'self-understanding' of

<sup>35</sup> Boogaard, n. 25 above; L. Enneking & E. de Jong, 'Regulering van onzekere risico's via public interest litigation?' (2014) 23 *Nederlands Juristenblad*, pp. 1542–51; E. Fisher, E. Scotford & E. Barritt, 'The Legally Disruptive Nature of Climate Change' (2017) 80(2) *The Modern Law Review*, pp. 173–201.

<sup>36</sup> J. Habermas, *Faktizität und Geltung: Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (Suhrkamp, 1998).

<sup>37</sup> In this article I cite from this translation: J. Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (Wiliam Reig tr., John Wiley & Sons, 2015).

constitutional democracies:<sup>38</sup> when do citizens themselves deem the law legitimate such that they will comply with it? His elaborate answer to this question clarifies the distinction between law and politics, and links that distinction to the role of the judiciary in a constitutional democracy.

In constitutional democracies, we continuously engage in political conversations about how our society should be shaped. We do this via television and social media, in newspapers, pubs, and on the street; in so doing we maintain a so-called ‘public sphere’. These conversations and debates seep into our political institutions, where parliament and government leaders make final decisions. Once society-wide deliberations have resulted in the enactment of a new law, political discussions on the issue may (temporarily) die down and the law may be enforced.

According to Habermas’s 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>39</sup> It *can* meet with the assent: not every citizen has to participate, and definitely not everybody participates in the same manner. Citizens often leave legal decision making to the formal legislative process within the political institutions. However, the debates in society are essential because they create a public sphere allowing citizens to influence the outcome of the political process,<sup>40</sup> or to interfere where the institutions seem to make the wrong decisions: legislation that has been passed might lead to renewed debates.<sup>41</sup> It is crucial that people are able to be involved in the discussion of what the law should look like, whether this is within an official institution – the ‘political centre’<sup>42</sup> – or outside it<sup>43</sup> – the ‘periphery’.<sup>44</sup>

Habermas calls this ability to participate in the democratic legislative process ‘public’ or ‘political’ autonomy.<sup>45</sup> Through public autonomy we decide together which laws bind us and we agree that everyone should comply with them.<sup>46</sup> Even if one is opposed to a particular legal provision, one endorses the democratic procedures that brought it about. This is the essence of democratic legitimacy.<sup>47</sup> The legitimacy of the law lies in the general agreement among citizens that they can and must challenge the laws they

<sup>38</sup> With ‘constitutional democracy’, I refer to the German term ‘*Demokratische Rechtsstaat*’: a democratic state guided by the rule of law.

<sup>39</sup> Habermas, n. 37 above, p. 110. *Zustimmung* could also be translated as ‘approval’ or ‘endorsement’.

<sup>40</sup> *Ibid.*, p. 371.

<sup>41</sup> *Ibid.*, p. 380.

<sup>42</sup> *Ibid.*, p. 381.

<sup>43</sup> *Ibid.*, p. 171.

<sup>44</sup> *Ibid.*, p. 381.

<sup>45</sup> *Ibid.*, p. 104.

<sup>46</sup> *Ibid.*, p. 32.

<sup>47</sup> We comply with a law either because we agree with it or because we fear the legal consequences of not complying. Law therefore frees us from the burden to reflect morally 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.*, pp. 114–5.

dislike through their public autonomy in the (formal and informal) democratic process, rather than through violence.<sup>48</sup>

For the judiciary, the consequence of this is that it may apply existing law in what Habermas calls ‘discourses of application’,<sup>49</sup> but it should not devise new law. After all, citizens want to create the law together and not live under the tyranny of judges. Moreover, citizens know what is expected of them as a result of the laws. This legal certainty is endangered when judges independently prescribe what should happen.<sup>50</sup>

Therefore, the task of judges is described as ‘*rechtsvinding*’ in Dutch and as ‘*Rechtsfindung*’ in German: judges ‘find’ the law that is already there. This is not to say that law would exist independently of 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.

It could therefore be reasoned that for as long as no law exists that determines 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; we are not bound entirely by what former generations have prescribed. For example, the former criminal offence of homosexuality has been reversed in many countries. Apart from legislative changes, law can also change through new interpretations. The judiciary must interpret laws dynamically to fit present-day conditions; Habermas notes that apart from offering legal certainty, judicial decisions must also be rationally acceptable, or right.<sup>51</sup> To give an example from my own jurisdiction, it was undisputedly legitimate for the Dutch Supreme Court to decide in the 1920s that electricity constitutes a ‘good’ in order to make the criminal provision of theft applicable to a dentist who covertly stole it.<sup>52</sup>

Constitutional principles, including fundamental rights, are usually the least susceptible to change, at least formally: depending on the system, constitutions cannot be changed or only with great difficulty. According to Habermas, a firm constellation of fundamental rights – a ‘system of rights’ – is needed to warrant public autonomy.<sup>53</sup> Fundamental rights protect the individual: they guarantee that individuals are able to lead their lives in the way in which they themselves deem to be good. Fundamental rights are focused traditionally on warranting private autonomy.

Habermas asserts that protecting the private autonomy of individuals through fundamental rights is necessary to guarantee that these individuals can participate as full members of society, so that their public autonomy is protected and, as a result, democracy itself is safeguarded.<sup>54</sup> This link between private and public autonomy constitutes Habermas’s ‘co-originality thesis’.<sup>55</sup> ‘[P]rivate and public autonomy’ or ‘human rights

<sup>48</sup> Ibid., p. 89.

<sup>49</sup> Ibid., p. 162.

<sup>50</sup> Ibid., p. 198.

<sup>51</sup> Ibid., p. 199.

<sup>52</sup> HR 23 May 1921, NJ 1921/564.

<sup>53</sup> Habermas, n. 37 above, pp. 122–3.

<sup>54</sup> Ibid., p. 417.

<sup>55</sup> Ibid., p. 104.



and popular sovereignty, mutually presuppose one another'.<sup>56</sup> Similarly, it is only the medium of *law* that can guarantee *political* power of the people.<sup>57</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 her opinion, who suffers from injuries, or who lacks housing may be unable to concern herself with some proposed new statute.

Therefore, according to Habermas, a judge may oppose the democratic majority when the democratic system itself is brought into danger.<sup>58</sup> Such is the case when the system of rights is threatened – when the private autonomy of citizens is undermined, which would jeopardize the collective aspect of the democratic process.<sup>59</sup> When the breach of a fundamental right violates democracy, Habermas agrees that the judge may intervene.<sup>60</sup> Therefore, a dynamic judicial interpretation that *opposes* democratic majority decisions should always be built on a fundamental right.

The next question, then, is when are fundamental rights at stake? According to Habermas, it is for the citizens to determine the definition and scope of fundamental rights.<sup>61</sup> Judges can intervene only in the case of a violation of that definition and scope. Thus, judges always act responsively: the judge's decision always echoes the deliberations of the citizens (at least in the self-understanding of legitimacy within our democratic system).

The racial debate in the United States (US) illustrates this and offers a strong example of a judicial U-turn which today can hardly be questioned as the 'right thing' to do. The US Supreme Court, in its 1896 decision *Plessy v. Ferguson*, held that the racial separation of public schools was consistent with the US Constitution.<sup>62</sup> However, it 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 statutorily segregated public schools.<sup>63</sup> This not only means that US Supreme Court justices were less racist than in 1896; the whole of society had become less racist. It may seem as if the 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 many parts of society. Judges do not prescribe the law; they apply the law that is 'presupposed as valid'.<sup>64</sup> Where it is ambiguous, they follow an interpretation that is sufficiently accepted in society, in the 'demos'. Judicial decisions therefore represent the voice of democracy: they confirm a societally changed interpretation of the law not (yet) made explicit by legislators. Their authoritative interpretation subsequently

<sup>56</sup> *Ibid.*, p. 84.

<sup>57</sup> *Ibid.*, pp. 132–3.

<sup>58</sup> *Ibid.*, pp. 263–4.

<sup>59</sup> *Ibid.*

<sup>60</sup> *Ibid.*, p. 263.

<sup>61</sup> *Ibid.*, p. 123.

<sup>62</sup> *Plessy v. Ferguson*, 163 U.S. 537 (1896).

<sup>63</sup> *Brown v. Board of Education of Topeka*, 347 U.S. 483 (1954).

<sup>64</sup> Habermas, n. 37 above, p. 261.

flows back into society, often causing the interpretation to become even more widely accepted.

In short, based on Habermas, I define *politics* as the societal debates on how the law should be shaped, conducted in the public sphere and in the political institutions such as parliament and government. As soon as a consensus emerges, we enter the legal domain: this consensus is then confirmed as being *law* either by means of legislation or by a judicial interpretation of earlier legislation. However, the legitimacy of the law lies not within the institutions of the legislature or judiciary, but in the inter-subjective debates among citizens – the official institutions merely provide the most authoritative articulation of the law. The added value of law compared with politics may be summarized as ‘stop talking, start acting’; once the political debate has resulted in law, these rules may be enforced. Furthermore, the judiciary may interpret any legal rule dynamically to fit present-day conditions; however, where an interpretation goes against democratic majority decision making, it must be built on a fundamental right to count as democratically legitimate, as only democracy itself (namely, the protection of private and *thereby* public autonomy) can serve as a justification for judges to oppose a democratically established opinion.

Let us now superimpose this theoretical picture on the *Urgenda* case and scholarship.<sup>65</sup> In 2015, the Hague Court of First Instance reinterpreted the national legal doctrine of hazardous negligence – which provides that one can commit a tort by unnecessarily creating a dangerous situation<sup>66</sup> – by finding that climate change could fall within this doctrine.<sup>67</sup> More precisely, the Court found it hazardously negligent of the Dutch state to set a GHG reduction goal for the year 2020 at a percentage *lower* than 25% compared with 1990 levels. To reach this conclusion, the Court was guided by climate science, which read that developed nations (the so-called ‘Annex I countries’, including the Netherlands) should reduce between 25% and 40% to prevent dangerous global warming. Since 2007, this finding was annually endorsed in statements of the UNFCCC COP, with the Netherlands signing every time. The Dutch state, in the *Urgenda* proceedings, therefore could do nothing but acknowledge the validity of these scientific findings. Furthermore, the Court relied on constitutional, European, and international (human rights) norms stipulating that the state has a duty to care for life and a healthy living environment.

Yet, the legal basis of the *Urgenda* judgment was not a fundamental right. Fundamental rights were invoked *indirectly*. The primary legal basis was the private law doctrine of hazardous negligence based on Article 6:162 of the Dutch Civil Code (*Burgerlijk Wetboek*), which prescribes behaviour according to ‘what is deemed fit in societal interrelations’. As it was possible for the Dutch state to maintain a target of 25%, and as the state acknowledged that a less than 25% reduction by developed nations would result in dangerous climate change, the Court determined that a goal

<sup>65</sup> See Section 3 and Section 4 for detailed discussion of some of the other cases.

<sup>66</sup> The Dutch Supreme Court read this doctrine in Art. 6:162 Dutch Civil Code in *Lindenbaum v. Cohen*, 31 Jan. 1919, ECLI:NL:HR:1919:AG1776.

<sup>67</sup> *Urgenda*, The Hague Court of First Instance, n. 6 above.

of less than 25% amounted to hazardous negligence (behaviour not in accordance with what is deemed fit in societal interrelations). The government – elected to represent the Dutch people – had lowered its GHG emissions reduction goal to 20% from an initial target of 30%, so this judicial decision went against a democratic majority decision. As it was *not* directly based on a fundamental right, it is unsurprising that the judgment generated vehement criticism for its alleged lack of democratic legitimacy.<sup>68</sup>

In 2018, the Hague Court of Appeal agreed that a 25% target is the absolute minimum, but it based its decision directly on Articles 2 (right to life) and 8 (right to family life) of the ECHR.<sup>69</sup> Therefore, whereas the Court of First Instance needed no fewer than nine paragraphs to justify its decision in the light of the separation of powers,<sup>70</sup> the Court of Appeal could deal with the issue in merely three sentences, pointing to its constitutional duty to directly apply provisions of the ECHR.<sup>71</sup> Although the decision on appeal, too, has been criticized in the media and in academic commentaries for, inter alia, excessively expanding the scope of Articles 2 and 8 ECHR,<sup>72</sup> generally the opinion among legal experts was that relying on fundamental rights as the primary legal basis strengthened the democratic legitimacy of the *Urgenda* case.<sup>73</sup>

In this context it is important to emphasize that the judges in the case did not consider all matters pertaining to climate change to be within the Court's competence. On the contrary, they explicitly left to the government *how* to implement the 25% goal.<sup>74</sup> The Dutch state has numerous options for achieving compliance, including reducing maximum speeds on highways, imposing a carbon tax, encouraging solar panel use or rooftop gardening, and improving energy efficiency. Only the minimum requirement

<sup>68</sup> N. 6 above.

<sup>69</sup> N. 21 above. See Mayer, n. 20 above. For a short overview, see L. Burgers, 'Historic Moment in European Private Law', *Judges in Utopia blog*, 9 Oct. 2018, available at: <https://judgesinutopia.eu/historical-moment-in-european-private-law-urgenda-decision-upheld-by-dutch-court-of-appeal-and-provided-with-stronger-legal-ammunition>.

<sup>70</sup> *Urgenda*, The Hague Court of First Instance, n. 6 above, paras. 4.94–4.102.

<sup>71</sup> *Urgenda*, The Hague Court of Appeal, n. 6 above, para. 69.

<sup>72</sup> C. Backes & G. van der Veen, 'Klimaatverdrag; Nederlandse Reductiedoelstelling Onvoldoende; Strijd Art. 2 En 8 EVRM. Staat Moet Uitstoot CO2 Eind 2020 Ten Minste Met 25% Reduceren Ten Opzichte van 1990 Om Te Voldoen Aan Zorgplicht Uit Art. 2 En 8 EVRM' (2018) 417(43) *AB Rechtspraak Bestuursrecht*, pp. 2761–80; G. Boogaard, 'Laten We de Democratie Niet Onder Curatele Stellen', *De Volkskrant*, 11 Oct. 2018; L. Breebaart, 'Hoogleraar: Urgenda Zadelst Regering op met Onmogelijke Last', *Trouw*, 9 Oct. 2018; W. Hommes, 'Het Hof Bedrijft Politiek Met de Urgenda-Uitspraak', *De Volkskrant*, 16 Oct. 2018.

<sup>73</sup> L. Besselink, 'De Constitutioneel Meer Legitieme Manier van Toetsing, Urgenda Voor Het Gerechtshof Den Haag' (2019) 93(41) *Nederlands Juristenblad*, pp. 3078–82; T. Bleeker, 'Hof Den Haag: Nederlands Klimaatbeleid in Strijd Met Het EVRM' (2018) 39(9/10) *Nederlands Tijdschrift voor Burgerlijk Recht*, pp. 289–94; Burgers & Staal, n. 20 above; L. Burgers, 'Critici van Het Urgenda: Vonnis Zien de Privaatrechtelijke Dimensie over Het Hoofd', *De Volkskrant*, 17 Oct. 2018; C. Eckes, 'De Urgenda Uitspraak Doet Juist Recht Aan Het EVRM', 27 Oct. 2018, available at: <http://euexplainer.nl/?p=520>; P. Gilaerts & T. Nuninga, 'Privaatrecht en Preventie: Urgenda in Hoger Beroep' (2019) 9(2) *Aansprakelijkheid, Verzekering en Schade*, pp. 41–9; F. Jensma, 'Drie Hoeraatjes Voor de Rechter in Urgenda 2', *NRC Handelsblad*, 13 Oct. 2018; T. Öztürk & G. van der Veen, 'Onrechtmatige Daad Bij Het Behalen van Klimaatdoelstellingen: Schending Zorgplicht Ex Artikelen 2 En 8 EVRM' (2018) 51(4) *Overheid en Aansprakelijkheid*, pp. 157–60.

<sup>74</sup> *Urgenda*, The Hague Court of First Instance, n. 6 above, para. 4.53.

of a 25% reduction of GHGs by 2020 had become law. How this reduction should be achieved was left for politics to decide.

### 3. EVOLVING LAW: CIVIL DISOBEDIENCE AND CLIMATE LAWSUITS

The previous section presented lawmaking as an ongoing, intersubjective and dynamic process, in which changes can be confirmed authoritatively by either the legislature or the judiciary. This section aims to elaborate on how such changes come about. Self-evidently, law does not change itself: society-wide debates are necessary. Any individual can stimulate these debates, for example, by talking with others, publishing opinions in newspapers, exhibiting awareness-raising art, or 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 in associations forming civil society.

Civil disobedience is helpful in this context in understanding the significance of climate change litigation. Lawsuits – *invoking* the law – are, of course, markedly different from civil disobedience protests, which deliberately *break* the law. Yet, the two are practically and theoretically linked. Civil disobedience is practically linked to the climate litigation trend, as a recent wave of civil disobedience action ended up in courts and activists pleaded the ‘climate necessity defence’. They stated that the imminent dangers of climate change left them with no reasonable legal alternative to their action.<sup>75</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 climate lawsuits: both constitute contributions to the public sphere, which are directed primarily to law rather than politics, as will now be explained.

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>76</sup> Those who commit an offence of civil disobedience claim that a current (interpretation of a) rule is not right. Despite the legality of the rule, it does not, in their view, align with constitutional principles of justice, and therefore cannot be legitimate.<sup>77</sup>

Acts of civil disobedience can be *direct* when they break the protested rule itself. Rosa Parks refused in 1955 to give up her seat in a bus for a white person, to protest against the rule dictating that black people should do so. They can also be *indirect*: breaking one rule (A) to protest against the other (B). The so-called ‘mass grave action’ serves as an example. This protest was undertaken by American activists in the summer of 2016. They responded to the news that in Pakistan mass graves had been dug for all

<sup>75</sup> For an extensive case overview see Climate Defense Project, available at: <https://climatedefenseproject.org/wp-content/uploads/2018/05/CDP-Climate-Necessity-Defense-Case-Guide-May-22-2018.pdf>.

<sup>76</sup> Cf. K. Brownlee, ‘Civil Disobedience’, in E. Zalta (ed.), *The Stanford Encyclopedia of Philosophy*, Fall 2017 edn, available at: <https://plato.stanford.edu/archives/fall2017/entries/civil-disobedience>.

<sup>77</sup> Habermas, n. 37 above, p. 383.

of the deaths that were certain to occur as the result of a forthcoming heatwave.<sup>78</sup> Activists in America laid down in a trench that had been 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 not only that the new gas pipeline created significant risks for the neighbourhood in which it was constructed, but also that using the gas as fuel would generate pollution, which exacerbates climate change and causes more dangerous heatwaves in countries like Pakistan. Thus, the activists were protesting against the authorization of the pipeline (rule B) but were charged with trespassing and disorderly conduct (rule A).<sup>79</sup>

An act of civil disobedience questions a legal rule and thereby contributes to the public debate on what the law should be. Yet the action is not directed primarily at the political institutions that *make* the law. Contrary to newspaper opinions and protest marches, the civil disobedience offenders do not directly address the legislative branch of government. Instead, they confront the institutions that *enforce* the law: the police and, ultimately, the judiciary. They break a rule they find unjust in order to be caught by the police and adjudicated by the judiciary. Their action might spur political debate, but this is only a *secondary* target for civil disobedience activists. As 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.

Climate cases also make an indirect political contribution to the public sphere as the high levels of media attention bestowed upon them boost public discussion. As a result, climate cases may influence the centre of political decision making from the periphery. Yet, as with civil disobedience, political change is the *secondary* target of the litigating environmentalists. They *primarily* address law rather than politics. While the claimants might be happy to raise environmental awareness in *political* debates, their success is complete only when a judge confirms their claim as *law*.

A key difference between civil disobedience and climate litigation is that NGOs like Urgenda do not break rules, but invoke existing law and ask a court to enforce it. The activists imitating dead bodies put forward the idea that we need *to get rid of* the pipeline authorization in order to align with constitutional principles. Urgenda argues that, if existing law is *coherently interpreted*, the Dutch state should reduce GHG emissions by at least 25% by 2020 compared with the year 1990. The first instance and appeal courts both agreed.<sup>80</sup>

This difference may seem more significant than it is at times, because civil disobedience activists may be proved right retroactively. Rosa Parks was part of the civil rights movement that successfully influenced public opinion. A year after her protest, the US Supreme Court held in *Browder v. Gayle* that racial segregation, in this case on a bus,

<sup>78</sup> Cf. D. Jorgic & S. Raza Hassan, 'Pakistan City Readies Graves, Hospitals, in Case Heat Wave Hits Again', *Reuters*, 20 May 2016, available at: <https://www.reuters.com/article/us-pakistan-heatwave-idUSKCN0YB0TU>.

<sup>79</sup> Cf. C. Kormann, 'Sometimes Fighting Climate Change Means Breaking the Law', *The New Yorker*, 3 Apr. 2018, available at: <https://www.newyorker.com/tech/annals-of-technology/sometimes-fighting-climate-change-means-breaking-the-law>.

<sup>80</sup> See Section 2 above for a full analysis of both judgments, and Burgers & Staal, n. 20 above.

violated the constitutional right to equal legal protection.<sup>81</sup> In hindsight, Parks therefore should have been able to rely on existing law – namely, the constitution interpreted in alignment with the current 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. Squatters, for instance, may invoke the right to housing but are most often evicted from the houses they occupy. It appears that society continues to attach more importance to the property rights of the house owner. Similarly, most environmentalists who engage in civil disobedience are eventually convicted. Their necessity defence based on the importance of the climate typically fails.<sup>82</sup>

In the case of the mass grave action, however, there was broad societal support. The local city council unanimously opposed the pipeline and people in the neighbourhood reportedly had been protesting against it on a daily basis for over a year.<sup>83</sup> The prosecution presumably took this into account as it converted its criminal charges into civil claims at the very last moment. Moreover, the activists were vindicated by the judge on 27 March 2018, when she accepted that climate change necessity justified their illegal action.<sup>84</sup> Poignantly, the pipeline had become operational in the meantime.

In conclusion, it is helpful to envisage a timeline when assessing the transformative capacity of various contributions to the public sphere. A ‘normal’ contribution states that law needs to change in the *future* and is directed at politics. A single such contribution, say on Twitter, is unlikely to have a legitimizing effect for political action, but a contribution by many individuals may have an effect, as in the case of the protests by the French *gilets jaunes*, which led to the enactment of a planned law being postponed.<sup>85</sup>

An act of civil disobedience signals that the law should change *right now* – for example, eliminating racial segregation on a bus or revoking the authorization for an oil pipe line – and is directed at the legal apparatus. Civil disobedience is successful only when it convincingly relies on a common, constitutional conception of justice, which may justify the judge’s decision to get rid of the contested law – racial segregation on a bus – or to accept this conception of justice as a defence against criminal charges – as did the judge in the case of the mass grave action. A judge 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.

Lastly, a climate lawsuit claims that the law *has already changed*, and as such needs only to be confirmed by the judiciary. However, to the extent that climate claims

<sup>81</sup> *Browder v. Gayle*, 142 F. Supp. 707 (1956).

<sup>82</sup> Cf. Climate Defense Project, n. 75 above.

<sup>83</sup> Cf. W. Stephenson, ‘The Boston Climate Trial that Might Have Been’, *CommonWealth Magazine*, 28 Mar. 2018, available at: <https://commonwealthmagazine.org/opinion/the-boston-climate-trial-that-might-have-been>.

<sup>84</sup> *Massachusetts v. Gore* (Boston Mun. Ct., MA., No. 1606CR000923, 27 Mar. 2018).

<sup>85</sup> See Introduction above.

oppose majority decisions, they need to draw on dynamic constitutional interpretation in the same way as successful civil disobedience does. The following section elaborates this aspect.

#### 4. DEVELOPMENT: CONSTITUTIONALIZATION OF THE ENVIRONMENT

Unlike civil disobedience activists, litigating environmentalists do not consider it necessary to pursue their cause by consciously breaking the law. Instead, they claim that the law is already on their side. The accepted interpretation of the law has changed and in their view the judge merely needs to confirm this. ‘What motivates me, is that I think that I am right,’ says Roda Verheyen, the lawyer who represents Saúl Lliuya, a Peruvian farmer suing energy company RWE in Germany for damages for harm allegedly resulting from climate change.<sup>86</sup> She now also acts for the families who initiated a climate case against the European Union (EU),<sup>87</sup> and represents three German families as well as Greenpeace in a case against the German government regarding its climate policy.<sup>88</sup>

There has long been a global consensus on the necessity to act against the environmental problem of climate change. The 1992 UNFCCC has been ratified by almost every nation on earth.<sup>89</sup> This was confirmed in December 2015 by the follow-up Paris Agreement, which was also signed by nearly every state.<sup>90</sup> The climate lawsuits use these instruments of international law to substantiate their claims. The *Urgenda* case,<sup>91</sup> the Swedish *Magnolia* case,<sup>92</sup> the Norwegian case of *Natur og Ungdom*,<sup>93</sup>

<sup>86</sup> Verheyen is interviewed in J. Mommers, ‘Advocaten in Actie Tegen Klimaatverandering: Deze Golf Rechtszaken Verandert de Wereld’, *De Correspondent*, 16 Mar. 2018, available at: <https://decorrespondent.nl/8048/advocaten-in-actie-tegen-klimaatverandering-deze-golf-rechtszaken-verandert-de-wereld/914457854992-a5320d7f>. See also *Lliuya v. RWE AG*, District Court of Essen (*Zivilkammer des Landgerichts Essen*), 15 Dec. 2016, and *Lliuya v. RWE AG*, Higher Regional Court of Hamm (*Oberlandesgericht Hamm*), 30 Nov. 2017.

<sup>87</sup> ‘Action Brought on 23 May 2018: *Carvalho and Others v. Parliament and Council (People’s Climate Case)*, (Case T-330/18) [2018] OJ C 285/51. The General Court declared the case inadmissible in an order of 8 May 2019, but the claimants intend to appeal. Cf. People’s Climate Case, ‘Court Acknowledges Climate Change is Affecting Everyone but Dismisses the Case’, Press Release, 22 May 2019, available at: <https://peoplesclimatecase.caneurope.org/2019/05/peoples-climate-case-court-acknowledges-climate-change-is-affecting-everyone-but-dismisses-the-case>.

<sup>88</sup> Cf. R. Estrada Patiño, ‘Greenpeace Germany and Families File Lawsuit against Government over Inaction on Climate Change’, *Greenpeace USA*, 29 Oct. 2018, available at: <https://www.greenpeace.org/usa/news/greenpeace-germany-and-families-file-lawsuit-against-government-over-inaction-on-climate-change>.

<sup>89</sup> N. 30 above.

<sup>90</sup> N. 32 above.

<sup>91</sup> *Urgenda*, n. 6 above.

<sup>92</sup> *Magnolia* was launched on 15 Sept. 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 Jan. 2018, the Court of Appeal (*Hovrätt*) rejected the appeal. As a result of this decision and resource shortages, the plaintiffs have decided not to appeal to the Supreme Court.

<sup>93</sup> The claim in the case of *Natur og Ungdom* and Greenpeace against the Norwegian State (*The People v. Arctic Oil*) was filed on 18 Oct. 2016. The claim was dismissed by the District Court of Oslo (*Oslo Tingrett*) on 4 Jan. 2018. The appeal will be heard in Nov. 2019 before the Court of Appeals (*Borgarting*) of Oslo as a direct appeal to the Supreme Court failed: Norwegian Supreme Court

the Swiss *Klimaseniorinnen* case,<sup>94</sup> the US case of *Juliana v. United States*,<sup>95</sup> the climate case against the Irish government,<sup>96</sup> to name but a few, all invoke ratification of the UNFCCC to underline the salience of the climate problem. The High Court of Lahore (Pakistan), in its *Leghari* judgment, relies on international environmental principles such as the principle of precaution and intra-generational equity,<sup>97</sup> which is also invoked in other cases.<sup>98</sup>

However, these claims do seem to go against majoritarian decisions taken in the democratic process, which makes their democratic legitimacy questionable. For example, at stake in the *Urgenda* case was the GHG reduction target decided by the Dutch government.<sup>99</sup> The case against the EU similarly concerns the EU's reduction target.<sup>100</sup> The Norwegian case concerns a governmental decision to authorize drilling in certain sea areas,<sup>101</sup> while the Austrian case is about the authorization for a third runway at Vienna airport.<sup>102</sup> Similarly, the Swedish case concerned the sale by the government of lignite assets to an allegedly unsustainable operator.<sup>103</sup> In cases against corporate actors the opposition against majoritarian decisions is slightly more subtle. Corporations typically operate with governmental approval and, so far, no explicit statutes seem to exist that articulate corporate responsibilities related to climate change. Challenged corporations like Shell and RWE therefore assert that the climate claims lack a legal basis and that this legality should originate in democratic majority decisions.<sup>104</sup>

As discussed in Section 2 above, following Habermas's co-originality thesis, the judiciary's only reason to oppose a democratic majority is to protect democracy itself as secured in the system of fundamental rights. If a judicial decision defends environmental interests against majority decisions, this is legitimate only if constitutional value is attached to the environment. As long as democratic majorities fail to enact effective climate laws, only fundamental rights – which are essential for the protection of democracy as such – may create legitimate operational space for the judiciary to provide remedies against climate change.

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(*Norges Nøyesterett*), 12 Apr. 2018, *Natur og Ungdom & Greenpeace v. Staten*, Case No. 18-043328SIV-HRET (*Arctic Oil*).

<sup>94</sup> Available at: [https://klimaseniorinnen.ch/wp-content/uploads/2017/05/request\\_KlimaSeniorinnen.pdf](https://klimaseniorinnen.ch/wp-content/uploads/2017/05/request_KlimaSeniorinnen.pdf).

<sup>95</sup> *Juliana et al. v. United States of America et al.*, No. 6:15-cv-01517-TC, 10 Nov. 2016, 217 F.Supp.3d 1224 (D. Or. 2016). All case documents are available at: <http://climatecasechart.com/case/juliana-v-united-states/?cn-reloaded=1>.

<sup>96</sup> *Friends of the Irish Environment v. Ireland*, High Court, 19 Sept. 2019, No. 793 JR.

<sup>97</sup> *Leghari v. Pakistan*, Lahore High Court, 14 Sept. 2015, W.P. No. 25501/2015.

<sup>98</sup> E.g. in *Urgenda*, n. 6 above; *Arctic Oil*, n. 93 above; *Magnolia*, n. 92 above.

<sup>99</sup> *Urgenda*, n. 6 above.

<sup>100</sup> *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>101</sup> *Arctic Oil*, n. 93 above.

<sup>102</sup> *Anti-Aircraft Noise Society v. Vienna Airport AG*, n. 8 above.

<sup>103</sup> *Magnolia*, n. 92 above.

<sup>104</sup> See *Shell*, n. 1 above. Summaries of RWE's statements in *Lliuya v. RWE* are available at: <https://german-watch.org/de/14198>.



It is therefore unsurprising that a ‘rights turn’ has been signalled in climate change litigation: environmentalists winning climate lawsuits are doing so by relying on fundamental rights.<sup>105</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>106</sup> Likewise, the European cases rely on human rights enshrined in their constitutions and the ECHR, and cases from both North and South America also invoke constitutional human rights.

We now see some judges deciding climate cases differently from others. For example, the Dutch court in *Urgenda* deemed there to be a sufficient legal basis on which to found its judgment, whereas the Norwegian judge held that the climate is something to be dealt with via politics. This does not point to judicial arbitrariness but instead indicates we are facing a legal transition. Climate change clearly was a political subject, but that understanding is shifting, as not only the body of law on the environment is growing but also as the environment is *constitutionalizing* – a development which scholars have conceptualized as (global) environmental constitutionalism.<sup>107</sup>

The constitutionalization of the environment has been taking place for some time, predominantly through legislative procedures. An ‘environmental rights revolution’ occurred in the late 20<sup>th</sup> century in both international human rights law and national constitutional law.<sup>108</sup> A 2017 survey noted a degree of environmental constitutionalism in 148 of 196 constitutions worldwide.<sup>109</sup> Although constitutional recognition of the importance of the environment does not automatically result in better environmental protection, a correlation with superior environmental performance was detected.<sup>110</sup> More importantly for this article, recognition communicates a self-understanding that deems the environment essential for 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>111</sup>

<sup>105</sup> Peel & Osofsky, n. 23 above.

<sup>106</sup> *Leghari v. Pakistan*, n. 97 above, para. 7.

<sup>107</sup> Cf., inter alia, J. May & E. Daly, *Environmental Constitutionalism* (Cambridge University Press, 2015); L. Kotzé, *Global Environmental Constitutionalism in the Anthropocene* (Hart, 2016) – also touched upon in G. Ganguly, J. Setzer & V. Heyvaert, ‘If at First You Don’t Succeed: Suing Corporations for Climate Change’ (2018) 38(4) *Oxford Journal of Legal Studies*, pp. 841–68.

<sup>108</sup> D. Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment* (UBC Press, 2012).

<sup>109</sup> R. O’Gorman, ‘Environmental Constitutionalism: A Comparative Study’ (2017) 6(3) *Transnational Environmental Law*, pp. 435–62.

<sup>110</sup> D. Boyd, n. 108 above, pp. 273, 275.

<sup>111</sup> Legal-theoretical literature on the necessity to acknowledge the environment as fundamental to the state includes M. Kloefer, *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*, pp. 23–36. These sources are nicely summarized in Kotzé, n. 107 above, pp. 138–43.

In addition to explicit constitutional recognition, environmental entitlements are increasingly read into other fundamental rights, such as the rights to life,<sup>112</sup> private life,<sup>113</sup> and personal integrity<sup>114</sup> – at both national and international levels. This led the then UN Special Rapporteur on Human Rights and the Environment, John Knox, to observe that the substance of an international human right to the environment is already present, even without explicit reference to this right in the core international human rights treaties.<sup>115</sup> Similarly telling are the very existence of a UN programme on human rights and the environment, and the academic *Journal of Human Rights and the Environment*.<sup>116</sup> In September 2019, five UN treaty bodies issued a joint statement stipulating that states’ human rights obligations require them to take action against climate change, including by reducing GHGs and phasing out fossil fuels.<sup>117</sup>

This means that unlike some have suggested,<sup>118</sup> the climate cases will not ‘change’ the world. They are, however, a signal that the world is changing and a sign of a transnationally evolving legal position. Every time a climate lawsuit is launched this legal position is reinforced: the climate has moved on from the stage of political debate, as environmental protection is a constitutional – a legal – matter. The letter in which Milieudefensie holds Shell liable puts it this way: ‘The global opinion is clear and univocal: dangerous climate change should be prevented’.<sup>119</sup>

In 2015, an international group of renowned lawyers confirmed the view that climate change issues belong within the legal domain. They presented the *Oslo Principles*, articulating the obligations of states to act against climate change under existing law.<sup>120</sup> By January 2018 some of them had continued the work and published their *Principles on Climate Obligations for Enterprises*, which state that existing law contains obligations for business to reduce GHG emissions.<sup>121</sup>

Environmental activists have been more successful recently in climate lawsuits. This suggests that judges believe they have firmer ground on which to deliver their verdicts. Of course, the adjudicative powers of courts are limited by their jurisdiction, so change

<sup>112</sup> E.g. ECtHR, 20 Mar. 2008, *Budayeva v. Russia*, App. Nos. 15339/02, 21166/02, 20058/02, 11673/02 and 15343/02.

<sup>113</sup> E.g. ECtHR, 27 Jan. 2009, *Tătar v. Romania*, App. No. 67021/01; ECtHR, 9 Dec. 1994, *López Ostra v. Spain*, App. No. 16798/90.

<sup>114</sup> E.g., Inter-American Court of Human Rights, 15 Nov. 2017, *Advisory Opinion requested by the Republic of Colombia*, OC-23/17.

<sup>115</sup> J.H. Knox & R. Pejan, *The Human Right to a Healthy Environment* (Cambridge University Press, 2018).

<sup>116</sup> Available at: <https://www.elgaronline.com/view/journals/jhrc/jhre-overview.xml>.

<sup>117</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 Sept. 2019, available at: <https://ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24998&LangID=E>.

<sup>118</sup> Mommers, n. 86 above.

<sup>119</sup> Available at: <https://milieudefensie.nl/publicaties/brieven/brief-van-milieudefensie-aan-shell> (translation by the author).

<sup>120</sup> Expert Group on Global Climate Obligations, *Oslo Principles on Global Climate Change / Expert Group on Global Climate Obligations* (Eleven International, 2015).

<sup>121</sup> Expert Group on Climate Obligations of Enterprises, *Principles on Climate Obligations of Enterprises* (Eleven International, 2017).

in one legal system does not mean the same step is taken in another. As with any evolutionary process, the pull of climate change into the legal and constitutional domain occurs incrementally. Still, the law *is* evolving transnationally.<sup>122</sup>

Litigation is, at the same time, a strong means for stirring societal debate. Even before a judgment is rendered, the publicity surrounding a lawsuit forces society to think about responsibility for the dangers of climate change. The debate can convince people of the new legal position and thus draw climate issues further out of the political domain. After all, the more widely the legal position is accepted, the more robustly judges can deploy it in legal interpretation. Even in the absence of a transnational public sphere in the Habermasian sense, this debate surpasses national boundaries: media contributions often discuss both national and foreign climate cases and the various claims are inspired explicitly by one another.<sup>123</sup>

Moreover, once the judiciary *does* stipulate that an undisrupted climate is a constitutional matter, this usually implies regulatory duties for the other branches of government: the judiciary lays foundations for the executive branches to build upon. 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 materialize. We see this happening in the climate cases.

In the *Urgenda* case, for instance, a 25% GHG reduction by 2020 was deemed to be legally required while the achievement of this target was left to politics. In November 2017, the Inter-American Court of Human Rights expressed in a legal opinion that a healthy environment is ‘a fundamental right for the existence of humankind’.<sup>124</sup> Moreover, the Court recognized that this right entails ‘extraterritorial responsibility’, which means states can be held accountable for violations abroad. Possibly, therefore, states could sue each other for excessive GHG emissions on a human rights basis, and states may be sued by individuals residing outside the state. As this was only an advisory opinion of the Inter-American Court, we do not yet know what concrete obligations would flow from such cases or how they are to be enforced.

Another interesting example is the case initiated in 2015 against the US government by litigants aged between eight and 19 years old, supported by the NGO Our Children’s Trust. The children allege their constitutional rights have been infringed by ineffective governmental policies regarding climate change. The US government submitted that the claim should be dismissed, as the separation of powers doctrine would prevent the judiciary from deciding the case. Yet, in 2016, Judge Aiken denied the government’s motions to dismiss:

I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the ‘foundation of the family,’ a stable climate system is quite literally the foundation ‘of society, without which there would be

<sup>122</sup> For an account of why some countries rather than others engage in environmental constitutionalism, see J. Gellers, *The Global Emergence of Constitutional Environmental Rights* (Routledge, 2017).

<sup>123</sup> For an account of how climate claimants inspire each other transnationally, see Colombo, n. 17 above.

<sup>124</sup> Inter-American Court of Human Rights, 15 Nov. 2017 *Advisory Opinion requested by the Republic of Colombia*, OC-23/17.

neither civilization nor progress.’ ... Even when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government.<sup>125</sup>

Judge Aiken therefore not only held that climate change could be dealt with by the judiciary when fundamental rights are implicated but also acknowledged ‘the right to a climate system capable of sustaining human life’, as such. The government disagreed and appealed against the decision to the federal level, again invoking the separation of powers. Yet, on 7 March 2018, the American Court of Appeals for the Ninth District ruled that it was not convinced by this objection and sent the case back for a substantive decision.<sup>126</sup> In doing so, it confirmed the view that climate change does not necessarily belong solely to the political domain and may also be a constitutional matter. Procedural battles in this case continue as at the time of writing this article. The merits of the claim are expected to be addressed in late 2019; at present, we do not know whether any concrete legal climate obligations will arise from this case or how the US government might implement them.

In conclusion, climate change litigation will not save the world. It is not a driver, but rather a sign of the evolving opinion that an unpolluted earth (a healthy environment, a stable climate) forms a precondition for democracy. Judicial decision making is a responsive mechanism, and is therefore always the second-best option for solving pressing societal problems compared with legislation enacted through democratic channels.<sup>127</sup> Climate science tells us that we need to make drastic changes within the next decade to prevent dangerous global warming.<sup>128</sup> Litigation is too slow a mechanism to account for that, even if environmentalists’ courtroom successes force governments to further implement their climate obligations. Notwithstanding political paralysis, however, the climate change litigation trend shows us how the environment is constitutionalizing transnationally.

## 5. CONCLUSION:

### ENVIRONMENT AS A PREREQUISITE FOR DEMOCRACY

The added value of law, as opposed to politics, is that once the political debate has resulted in legislation, rules may be enforced. Climate activists feel the urgency to undertake action now, and claim that we have moved beyond the stage of political debate. Where political institutions fail to implement adequate measures, they resort to the judiciary. However, the judiciary can legitimately oppose democratic majoritarian decisions only when fundamental rights are at stake. Therefore, the increasing success of litigating environmentalists can be understood only in combination with the ongoing constitutionalization of the environment. This environmental constitutionalism does not provide

<sup>125</sup> *Juliana v. United States of America*, n. 95 above.

<sup>126</sup> *In re United States of America*, No. 17-71692, US Court of Appeals for the Ninth District, 7 Mar. 2018.

<sup>127</sup> Cf. also C. Mak, ‘First or Second Best? Judicial Law-Making in European Private Law’, Centre for the Study of European Contract Law Working Paper Series No. 2016-12, Amsterdam Law School Research Paper No. 2016-48, 22 Sept. 2016, available at: <https://www.ssrn.com/abstract=2847586>.

<sup>128</sup> IPCC, ‘Summary for Policymakers of IPCC Special Report on Global Warming of 1.5°C Approved by Governments’, 8 Oct. 2018, available at <https://www.ipcc.ch/2018/10/08/summary-for-policymakers-of-ippc-special-report-on-global-warming-of-1-5c-approved-by-governments>.

the definitive answer to the climate problem, as enforcement and implementation are still tasks for the executive branches of government. Climate change litigation therefore demonstrates how the climate is pulled from the political towards the legal domain and, especially when successful, how this forces the climate to reappear in the political arena so as to be addressed more thoroughly.

My central claim is that the international climate litigation trend is indicative of the growing consensus that the environment is a constitutional matter and therefore a prerequisite for democracy. Although the role of the judiciary as such remains unchanged, this legal dynamic is likely to increase the democratic legitimacy of judicial lawmaking on climate change. This is a circular and ongoing process: as this perspective is shared more widely across society, more judges feel able to adopt it in their verdicts, which in turn leads to debate about those judicial decisions, which increases awareness of climate change and, at least at present, appears to result in an even greater acceptance of a constitutionalized environment.

It is important to acknowledge certain limitations with the argument put forward in this article. Firstly, it is naturally the case that factors other than constitutionalization also contribute to the different outcomes in climate cases. Differences between legal systems play a role, as do the particularities of each lawsuit. The transnational trend is not moving at the same pace in every country.

Secondly, most climate cases have been unsuccessful. For example, while the court of first instance in Austria agreed with the climate litigants, this decision was subsequently overturned. Certain US attorneys-general have said they will ‘aggressively fight a suite of lawsuits against fossil fuel companies over climate change damages’.<sup>129</sup> Moreover, climate sceptics slow down the climate change litigation trend by continuing to challenge the very existence and causes of global heating. Most climate lawsuits are conducted in the US, where a climate sceptic holds office in the White House.<sup>130</sup> Indeed, some US lawsuits *contest* rather than claim that climate change action should be taken.<sup>131</sup> Yet, at the same time, many local governments remain convinced of their obligation to comply with the Paris Agreement, even while the Trump administration withdraws from it.<sup>132</sup> Recently, two towns adopted ordinances recognizing the right to a healthy climate.<sup>133</sup> Whereas all this could be characterized as an extremely divisive political atmosphere, it also indicates that these local authorities have a deep conviction that climate change is no longer solely in the domain of politics and instead is a legal-constitutional matter. It remains to be seen whether this conviction will become as widespread and accepted as, for instance, our disapproval of racial discrimination.

<sup>129</sup> A. Reilly, ‘Red-State AGs Vow to Fight Climate Lawsuits’, *Greenwire*, 27 Apr. 2018, available at: <https://www.eenews.net/stories/1060080323>.

<sup>130</sup> Though the US government in the *Juliana* case (nn. 95 and 126 above) does not deny climate change as such.

<sup>131</sup> Cf. D. Adler, ‘U.S. Climate Litigation in the Era of Trump: Year One’, Working Paper, Sabin Center for Climate Change Law, Columbia Law School, Feb. 2018.

<sup>132</sup> Cf. report: America’s Pledge, available at: <https://www.americaspledgeonclimate.com/about>.

<sup>133</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>.