

The background of the slide is a light gray gradient, decorated with numerous realistic water droplets and bubbles of various sizes. Some are large and prominent, while others are small and scattered. The droplets have highlights and shadows, giving them a three-dimensional appearance.

JUDGES BETWEEN CLIMATE SCIENCE, NORMATIVE CHOICES, AND POLITICAL PARALYSIS: AN INTERNATIONAL COMPARISON

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CLIMATE LITIGATION: A TYPOLOGY I

	States	Private Actors
sectorial litigation	<ul style="list-style-type: none">• environmental impact assessment cases• challenging government authorisation for third party activities	<ul style="list-style-type: none">• corporate liability• payment for climate adaptation projects
overall emission reduction	<p><i>37 systemic mitigation cases</i></p> <ul style="list-style-type: none">• Dutch Supreme Court, <i>Urgenda</i>, 2019• Irish Supreme Court, <i>Friends of the Irish Environment</i>, 2020• BVerfG, <i>Klimaschutzgesetz</i>, 2021• Conseil d'État, <i>Grande-Synthe</i>, 2021	<ul style="list-style-type: none">• Dutch District Court, <i>Shell</i>, 2021

CLIMATE LITIGATION: A TYPOLOGY II

Country/legal instruments	HRs	tor t	State policy objective	National legislation	Int. law (Paris Agreement)	Science (IPCC; national bodies)
NL	X	X			X	X
IE				X	X	X
DE	X		X	X	X	X
FR	X			X	X	X
IT <i>(pending)</i>						
FR <i>(pending)</i>						



URGENDA (2015–2019): THE BIG BANG OF CLIMATE LITIGATION

- ‘THE GENUINE THREAT OF DANGEROUS CLIMATE CHANGE’ ‘CONSTITUTES A “REAL AND IMMEDIATE RISK”’; ‘THE *LIVES AND WELFARE OF DUTCH RESIDENTS COULD BE SERIOUSLY JEOPARDISED*’; THIS IS ‘AN *EXCEPTIONAL SITUATION*’
- SPECIFIC ‘ABSOLUTE MINIMUM’ REDUCTION OF EMISSIONS: 25% IN 2020 COMPARED TO 1990 LEVELS
- EXPOSURE OF LACK OF REASONABLE EXPLANATION
- SPECIFIC SEPARATION OF POWERS REQUIREMENTS: PROHIBITION TO ORDER LEGISLATION
- STANDING OF PUBLIC INTEREST ORGANISATIONS

ROYAL DUTCH SHELL

- SUBSTANTIVE FINANCIAL RISK AS A RESULT OF CLIMATE CHANGE
- UNWRITTEN STANDARD OF CARE
- SCOPE 3 EMISSIONS
- ‘INTANGIBLE, UNDEFINED AND NON-BINDING PLANS FOR THE LONG-TERM’

- VAGUE NORMS OF PARIS AGREEMENT
- DIRECT APPLICATION OF IPCC (‘SCIENTIFIC’ AND ‘INTERGOVERNMENTAL ORGANISATION’)
 - 50% CHANCE TO STAY BELOW 1,5 DEGREES; STILL 15% CHANCE TO END UP ABOVE 2 DEGREES

IRELAND; GERMANY; FRANCE

- **IR:** NATIONAL LAW REQUIRED THE GOVERNMENT TO DRAW UP A PLAN TO REDUCE EMISSIONS; TRAJECTORY OF EMISSION REDUCTION
- **BVERFG:** FR & STATE POLICY OBJECTIVE; FUTURE GENERATIONS; CUMULATIVE CARBON EMISSIONS IN LIGHT OF A NATIONAL CARBON BUDGET
- **FR:** NATIONAL LAW WITH CLIMATE TARGETS FOR 2030

ECTHR, *PORTUGUESE CHILDRENS CASE*,
PENDING
ECJ, *CARVALHO, 2019 (2021)*

- EMISSION REDUCTION BY 50–60% BY 2030 (COMPARED TO 1990)
- ADMISSIBILITY CRITERIA UNDER ART 263 TFEU ('INDIVIDUAL CONCERN')
- NO DOMESTIC REMEDY REASONABLY AVAILABLE
- COMMISSION THIRD PARTY INTERVENTION: PRELIMINARY RULINGS

POLITICAL PARALYSIS

- SHARED CONCLUSION BY ALL COURTS
- **URGENDA:** THE STATE 'HA[D] *NOT BEEN ABLE TO PROVIDE A PROPER SUBSTANTIATION* OF ITS CLAIM THAT DEVIATING FROM THAT TARGET IS NEVERTHELESS RESPONSIBLE'
- **IR:** THE PUBLIC ARE ENTITLED TO KNOW WHAT CURRENT THINKING IS AND, INDEED, FORM A JUDGMENT BOTH ON WHETHER THE PLAN IS REALISTIC AND WHETHER THE TYPES OF TECHNOLOGY CONSIDERED IN THE PLAN ARE APPROPRIATE AND LIKELY TO BE EFFECTIVE
- **BVERFG:** SHORT-TERM 'ELECTION CYCLES'; 'A STRUCTURAL RISK OF BEING LESS RESPONSIVE TO TACKLING THE ECOLOGICAL ISSUES'; 'FUTURE GENERATIONS – THOSE WHO WILL BE MOST AFFECTED – NATURALLY HAVE NO VOICE OF THEIR OWN IN SHAPING THE CURRENT POLITICAL AGENDA'
- **FR:** CHALLENGE OF THE SUB-NATIONAL EXECUTIVE CHALLENGING THE NATIONAL EXECUTIVE
- 'ANY POSTPONEMENT OF THE REDUCTION OF EMISSIONS THEREFORE MEANS THAT EMISSIONS IN THE FUTURE WILL HAVE TO BE REDUCED ON AN INCREASINGLY LARGE SCALE IN ORDER TO MAKE UP FOR THE POSTPONEMENT IN TERMS OF BOTH OF TIME AND SIZE.' (URGENDA)

USE OF CLIMATE SCIENCE

- IPCC – 6TH ASSESSMENT REPORT OF 2021
 - UNIQUE IN ITS SCOPE
 - POLITICALLY ENDORSED
- NATIONAL SCIENTIFIC BODIES (*UMWELTRAT*)
- GIVING SUBSTANCE TO OPEN-TEXTURED NORMS

- ANY SCIENTIFIC INQUIRY IS BASED ON NORMATIVE CHOICES (SCOPE; METHODS)
- REAL URGENCY

WHY IS CLIMATE LITIGATION A LIDMUS TEST OF SEPARATION OF POWERS?

- POLITICAL PARALYSIS
- OPEN-TEXTURED NORMS
- NON-BINDING INTERNATIONAL NORMS
- OVERALL EMISSION REDUCTION CASES – GENERALLY APPLICABLE OBLIGATION

- SCIENCE AND REASON: REASONABLE AND RATIONAL DECISION-MAKING
- INCREASING URGENCY LIMITS DISCRETION
- INCREASING IMPACT ON FRS / FUTURE GENERATIONS

NORMATIVE CHOICES

- ‘...WHILE THERE IS SIGNIFICANT SCIENTIFIC CONSENSUS BOTH ON THE CAUSES OF CLIMATE CHANGE AND ON THE LIKELY CONSEQUENCES, THERE IS *MUCH GREATER ROOM FOR DEBATE ABOUT THE PRECISE MEASURES* WHICH WILL REQUIRE TO BE TAKEN TO PREVENT THE WORST CONSEQUENCES OF CLIMATE CHANGE MATERIALIZING.’
- IRISH GOV: ‘THE FACT THAT IT ACCEPTS “THE SCIENCE” DOES NOT MEAN THAT IT MUST ALSO BE TAKEN TO ACCEPT THAT *THE LEGAL CONSEQUENCES OF THAT SCIENCE* INVOLVE THE SORT OF ACTIONABLE BREACH OF RIGHTS.’

DEMOCRACY IS NOT ENOUGH!

- SEPARATION OF POWERS IS NOT A VALUE AS SUCH
- LIMITING MAJORITARIANISM IS CRUCIAL TO THE FUNCTIONING OF A (CONSTITUTIONAL) DEMOCRACY
- PERPETUATES THE TENSION BETWEEN THE DIFFERENT BRANCHES/BETWEEN LAW AND POLITICS
 - DIFFERENT SOURCES OF LEGITIMACY
 - AGONISM
 - CONVERSION BETWEEN EXECUTIVE AND LEGISLATURE
- RIGHT TO JUSTIFICATION

POLITICAL CHOICES

- WHAT REMAINS A POLITICAL CHOICE? HOW CAN POLITICAL CHOICE BE REALISED?
- NATIONAL CLIMATE LAWS; STATE POLICY OBJECTIVES; NATIONAL INTERPRETATIONS OF FRS
- POLITICAL ENDORSEMENTS; INTERNATIONAL COMMITMENTS
- IPCC AS BOTH SCIENTIFIC AND INTERGOVERNMENTAL

SEPARATION OF POWERS IN ACTION

SYSTEMIC MITIGATION CASES

- REQUIRING JUSTIFICATION (URGENDA)
- CALLING FOR LEGISLATIVE ACTION (BVERFG)
- PUBLIC MUST KNOW (IRELAND)



EPILOGUE

PROTECTING SEPARATION OF POWERS

ACTIONS AGAINST PRIVATE ACTORS

- LEGITIMATE EXPECTATIONS

- ENERGY CHARTER TREATY
 - PROTECTION OF *STATUS QUO*
 - 60% INTRA-EU – KOMSTROY
 - RWE AND UNIPER CLAIMS AGAINST NL
 - MILLIONS AND BILLIONS – ALSO IN SETTLEMENTS