

The background of the slide is a light gray gradient with several realistic water droplets of various sizes scattered across it. The droplets have highlights and shadows, giving them a three-dimensional appearance.

# **STRATEGIC CLIMATE LITIGATION: JUDGES IN BETWEEN INTERNATIONAL LAW, CLIMATE SCIENCE, AND POLITICS**

CHRISTINA ECKES

# CLIMATE LITIGATION: A TYPOLOGY I

	States	Private Actors
sectorial litigation	<ul style="list-style-type: none"><li>• environmental impact assessment cases</li><li>• challenging government authorisation for third party activities</li></ul>	<ul style="list-style-type: none"><li>• corporate liability</li><li>• payment for climate adaptation projects</li></ul>
overall emission reduction	<p><b>More than 40 systemic mitigation cases</b></p> <ul style="list-style-type: none"><li>• Dutch Supreme Court, <i>Urgenda</i>, 2019</li><li>• Irish Supreme Court, <i>Friends of the Irish Environment</i>, 2020</li><li>• BVerfG, <i>Klimaschutzgesetz</i>, 2021</li><li>• Conseil d'État, <i>Grande-Synthe</i>, 2021</li><li>• ECJ, <i>Carvalho</i>, 2021 (rejected)</li><li>• ECtHR, <i>Portugese Childrens' Case</i> (pending)</li></ul>	<ul style="list-style-type: none"><li>• Dutch District Court, <i>Shell</i>, 2021</li><li>• Case against VW (pending)</li></ul>

# CLIMATE LITIGATION: A TYPOLOGY II

Country/legal instruments	HRs	Civil law	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 (hearing June 2022)	x	x			x	x

# 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

# IRELAND; GERMANY; FRANCE

- **IR:** NATIONAL LAW REQUIRED THE GOVERNMENT TO DRAW UP A PLAN TO REDUCE EMISSIONS; TRAJECTORY OF EMISSION REDUCTION; SUPPORTED BY URGENDA TEAM
- **BVERFG:** FR & STATE POLICY OBJECTIVE; FUTURE GENERATIONS; CUMULATIVE CARBON EMISSIONS IN LIGHT OF A NATIONAL CARBON BUDGET; RELIES HEAVILY ON URGENDA
- **FR:** NATIONAL LAW WITH CLIMATE TARGETS FOR 2030
- **IT:** CLIMATIC OBLIGATION; CIVIL PROCEDURE; SUPPORTED BY URGENDA TEAM

# EUROPEAN COURTS

- ECJ, *CARVALHO, 2019 (2021)*
  - EMISSION REDUCTION BY 50-60% BY 2030 (COMPARED TO 1990)
  - ADMISSIBILITY CRITERIA UNDER ART 263 TFEU ('INDIVIDUAL CONCERN')
  
- ECTHR, *PORTUGESE CHILDRENS CASE, PENDING*
  - NO DOMESTIC REMEDY REASONABLY AVAILABLE
  - COMMISSION THIRD PARTY INTERVENTION: PRELIMINARY RULINGS

# *(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'
  
- NON-BINDING TARGETS UNDER THE 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

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

- THREAT TO HUMANITY
- POLITICAL PARALYSIS
  - TRULY GLOBAL COLLECTIVE ACTION PROBLEM
  - THOSE MOST AFFECTED WHO HAVE NO POLITICAL SAY
- DIFFERENT OPEN-TEXTURED NORMS – HUMAN RIGHTS; DUTIES OF CARE; STATE POLICY OBJECTIVES
- NON-BINDING INTERNATIONAL NORMS
- SCIENTIFIC INSIGHTS



# POLITICAL PARALYSIS

- SHARED CONCLUSION BY ALL COURTS
- **NL/URGENDA:** THE STATE 'HA[D] *NOT BEEN ABLE TO PROVIDE A PROPER SUBSTANTIATION* OF ITS CLAIM THAT DEVIATING FROM THAT TARGET IS NEVERTHELESS RESPONSIBLE'
- '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.'
- **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
- **DE/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

# USE OF CLIMATE SCIENCE

- IPCC – 6<sup>TH</sup> ASSESSMENT REPORT OF 2021
  - UNIQUE IN ITS SCOPE
  - POLITICALLY ENDORSED
- NATIONAL SCIENTIFIC BODIES (*UMWELTRAT*)
- GIVING SUBSTANCE TO OPEN-TEXTURED NORMS – ALWAYS BASED ON EMPIRICAL INSIGHTS
- ANY SCIENTIFIC INQUIRY IS BASED ON NORMATIVE CHOICES (SCOPE; METHODS)
- REASONABLE AND RATIONAL DECISION-MAKING

# NORMATIVE CHOICES

- IRISH SUPREME COURT: ‘...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.’

# WHAT ROLE FOR THE JUDICIARY?

- SEPARATION OF POWERS IS NOT A VALUE AS SUCH - PURPOSE:
  - WILL-FORMATION & CONTROL
- 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 – CHANNELLING DISAGREEMENT – POLITICAL EXCHANGE
- RIGHT TO JUSTIFICATION (NL/URGENDA)
  - RESPONDING TO COUNTER-ARGUMENTS
  - BRINGING IN SCIENCE
- WHAT DID COURTS DO?
  - CALLING FOR LEGISLATIVE ACTION (DE/KLIMASCHUTZGESETZ)
  - PUBLIC MUST KNOW (IRELAND)
  - EXECUTIVE CHALLENGES EXECUTIVE (FRANCE)

# ENABLING POLITICS?

- NATIONAL CLIMATE LAWS; STATE POLICY OBJECTIVES; NATIONAL INTERPRETATIONS OF FUNDAMENTAL RIGHTS
- POLITICAL ENDORSEMENTS; INTERNATIONAL COMMITMENTS
- IPCC AS BOTH SCIENTIFIC AND INTERGOVERNMENTAL
- ABSTRACT V. CONCRETE REALISATION
- RED LINES; WHAT & HOW?
- INCREASING URGENCY LIMITS DISCRETION

# EPILOGUE

## PROTECTING SEPARATION OF POWERS BEYOND THE STATE

### ACTIONS AGAINST PRIVATE ACTORS

- LEGITIMATE EXPECTATIONS
- ENERGY CHARTER TREATY > FINANCIAL COSTS OF SUSTAINABILITY?
  - PROTECTION OF *STATUS QUO*
  - MAINLY INTRA-EU – KOMSTROY – NOT A STATIC DIVISION
  - RWE AND UNIPER CLAIMS AGAINST NL
  - MILLIONS AND BILLIONS – ALSO IN SETTLEMENTS