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INSIGHT

TACKLING THE CLIMATE CRISIS WITH COUNTER-MAJORITARIAN INSTRUMENTS: JUDGES BETWEEN POLITICAL PARALYSIS, SCIENCE, AND INTERNATIONAL LAW

CHRISTINA ECKES*

ABSTRACT: The climate crisis is – as far as we can see in 2021 – the greatest challenge of the 21st century. The existence of global warming as a human-made problem and the abstract need of transiting away from fossil energy sources is largely accepted. The question, however, of how to best achieve this transition is a major bone of contention – internationally, within the European Union (EU), and in many EU Member States. However, the issue will only become more pressing and political struggle will only become more forceful as the negative impacts of climate change increasingly affect our lives and livelihoods. Until now, national legislatures and executives have failed to take measures anywhere close to what would be needed to reduce emissions sufficiently to mitigate the climate crisis. The consistent failure of “politics” in different contexts – international, European, and national, or even regional and local – has motivated a growing share of citizens and civil society actors to pursue what is necessary via counter-majoritarian instruments, most prominently through climate litigation. In this *Insight*, I analyse these growing counter-majoritarian pressures in the context of climate change. My primary focus lies with broader questions of separation of powers, the role of the judiciary in constitutional democracies, and how legally enforceable reduction standards could and should be determined.

KEYWORDS: climate litigation – counter-majoritarianism – separation of powers – democracy – climate science – international law.

I. CLIMATE LITIGATION: A TOOL TO OVERCOME MAJORITARIAN PARALYSIS?

The climate crisis is – as far as we can see in 2021 – the greatest challenge of the 21st century. The existence of global warming as a human-made problem and the abstract need of transiting away from fossil energy sources is largely accepted. The question, however, of how to best achieve this transition remains a major bone of contention – internationally, within the European Union (EU), and in many EU Member States. We can witness this in October and November 2021 at the 26th Conferences of the Parties (COP26)

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within the United Nations Framework Convention on Climate Change, the adoption of the European Green Deal, German elections of 2021, as well as the (lack of) implementation of the successful climate litigation case (*Urgenda* case) in the Netherlands – to name but a few examples. It is only reasonable to expect that steep emission reduction becomes even more pressing and the political struggle becomes more forceful as the negative impacts of the climate crisis increasingly affect our lives and livelihoods.¹

Until now, politics have failed to take legal measures anywhere close to what would be needed to reduce emissions sufficiently to mitigate climate change. The consistent failure of politics in different contexts – international, European, and national, as well as regional and local – has motivated a growing share of citizens and civil society actors to pursue what is necessary via counter-majoritarian instruments, most prominently through climate litigation.²

In this *Insight*, I analyse these growing counter-majoritarian pressures in the context of climate change. My primary focus lies with broader questions of separation of powers, the role of the judiciary in constitutional democracies, and how legally enforceable reduction standards could and should be determined. The underlying guiding question is: *how can normative choices be reserved for politics in the face of such a complex, uncertain, urgent, and – at least with regard to what specific measures should be taken – highly controversial question of how to mitigate the climate crisis?*

My starting point is the emerging case law within Europe that concerns general obligations to reduce carbon emissions. In my analysis, I have considered all court decisions in systemic mitigation cases within Europe so far. I here discuss all cases that brought new relevant considerations for the role of judges in climate litigation. I necessarily have to treat the presented cases very concisely. So far, states have been required by national courts to reduce their overall national emissions in the Netherlands (*Urgenda*³), Ireland (*Friends of the Irish Environment – FIE*⁴), France (*Grande-Synthe* case⁵), and Germany (*German Climate Protection Act* case⁶), as well as in other countries that I do not discuss in what

¹ Intergovernmental Panel on Climate Change (IPCC), Sixth Assessment Report, Climate Change 2021 – The Physical Science Basis, 7 August 2021 www.ipcc.ch.

² See M Burger and D Metzger, 'Global Climate Litigation Report: 2020 Status Review' (UNEP 2020) wedocs.unep.org; J Setzer and C Higham, 'Global Trends in Climate Change Litigation: 2021 Snapshot' (July 2021) Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy www.lse.ac.uk.

³ Supreme Court of Netherlands judgment of 20 December 2019 n. 19/00135 *The State of Netherlands v Stichting Urgenda* ECLI:NL:HR:2019:2007.

⁴ Supreme Court of Ireland appeal of 31 July 2020 n. 205/19 *Friends of the Irish Environment CLG and The Government of Ireland*.

⁵ Conseil d'État judgment of 1 July 2021 n. 427301 *Commune de Grand-Synthe et autre*. More information in English: climate-laws.org. See also C Rinaudo, 'CP/Climat : l'État condamné à agir avant avril 2022' (1 July 2021) *Affaire du Siècle notreaffaireatous.org*.

⁶ German Federal Constitutional Court (BVerfG) order of 24 March 2021 BvR 2656/18 (*Klimaschutzgesetz – KSG*) ECLI:DE:BVerfG:2021:rs20210324.1bvr265618 1-270.

follows.⁷ The Court of Justice of the European Union (CJEU) rejected a general mitigation case on standing.⁸ The European Court of Human Rights (ECtHR) will be ruling on the (in)adequacy of domestic legal remedies in a pending strategic mitigation case (*Portuguese School Children* case⁹). Other cases, which I also do not include in this analysis, are pending before national and European courts.¹⁰ Besides these cases against States, for which the label “strategic mitigation cases” was coined,¹¹ the *Shell* case in the Netherlands, decided in first instance, demonstrates that also multinational companies are not beyond reach.¹² Other cases against companies are also pending.¹³

I first highlight that many of these cases demonstrate above all where and how politics are failing (section I.1) and then identify different legal tools used in these cases (I.2). Section II builds on these findings and addresses the main issue: faced with a growing number of climate cases, how can judges protect democratic decision-making? What should judges do to preserve separation of powers?

⁷ United Kingdom Administrative Court of 2 January 2018 Claim No. CO/16/2018 on *Plan B Earth and Others v The Secretary of State for Business, Energy, and Industrial Strategy*; European Council Sharing Decision of 2019 406/2009/EC *Family Farmers and Greenpeace Germany v. Germany*; Swiss Supreme Court of 20 May 2020 No. A2992/2017 *Union of Swiss Senior Women for Climate Protection v. Swiss Federal Council and Others*; Austria Constitutional Court of 20 February 2020 *Greenpeace et al. v Austria* on Greenpeace sued to invalidate tax credits on air travel, arguing that GHGs pose a threat to human rights; Belgium Court of First Instance of 17 June 2021 *VZW Klimaatzaak v. Kingdom of Belgium and Others*; Administrative Court of Paris of 2021 *Notre Affaire à Tous and Others v. France*.

⁸ Case T-330/18 *Carvalho and Others v Parliament and Council* ECLI:EU:T:2019:324 and C-565/19 *P – Carvalho and Others v Parliament and Council* ECLI:EU:C:2021:252. See also a climate case from the US on this point: Court of Appeal for the Ninth Circuit of 2020 n. 18-36082 SC n. 6:15-cv-01517-AA *Juliana v United States*.

⁹ ECtHR *Duarte Agostinho et autres v Portugal et autres* App n. 39371/20 [13 November 2020]; see also C Heri, ‘The ECtHR’s Pending Climate Change Case: What’s Ill-Treatment Got To Do With It?’ (22 December 2020) EJIL:Talk! www.ejiltalk.org.

¹⁰ Pending cases in: Spain, *Greenpeace v Spain*; France, *External Contribution to the French Constitutional Council*; UK, *Plan B Earth and Others v Prime Minister*; Czech Republic, *Klimatická žaloba ČR v Czech Republic*; Italy, *A Sud et al. v Italy*; Poland, *Górska et al. v Poland*; ECtHR of 21 September 2021 App n. 53600/20 *Verein KlimaSeniorinnen Schweiz and Others v Switzerland*; more details about these cases can be found here <http://climatecasechart.com>.

¹¹ L Maxwell, S Mead and D van Berkel, ‘Standards for Adjudicating the Next Generation of *Urgenda*-style Climate Cases’ in M Alabrese, A Savaresi and J Scott (eds), ‘Climate Change Litigation and Human Rights: Stock-taking and a Look at the Future’ (2021 forthcoming) *Journal of Human Rights and the Environment*.

¹² The Hague District Court Judgment of 26 May 2021 case n. C/09/571932 ECLI:NL:RBDHA:2021:5337.

¹³ E.g. *Greenpeace v VW* filed on 9 November 2021, English summary available at www.greenpeace.org.

1.1. ONE SHARED CONCLUSION: POLITICS IS FAILING

All general emission reduction cases decided by national courts¹⁴ confirm one point: politics are failing to take adequate measures addressing the climate crisis. Plans are too insufficiently ambitious, remain vague, and lack justification.

In the first successful strategic mitigation case (*Urgenda*), three instances, including the Dutch Supreme Court in 2019,¹⁵ determined that the Dutch State was required to reduce emissions by at least 25 percent by 2020 against 1990 levels. The case is a landmark case in international climate litigation for three reasons: it was the first of its kind; the court formulated a specific minimum reduction of emissions that the State has to comply with; and it exposed in public court proceedings for the first time the untenable reasoning of a State, aiming to justify inaction in face of an existential threat.

In the words of the Dutch Supreme Court, instead of providing “insight into which measures it intends to take in the coming years, [...] the State has confined itself to asserting that there “are certainly possibilities” in this context”.¹⁶ The State acknowledged the fact that “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”.¹⁷ Postponement makes the necessary measures hence “increasingly far-reaching and costly”, as well as “riskier”.¹⁸ This part of the reasoning demonstrates in particular how the judiciary takes issue with the *lack of consideration of the long-term future in the State’s arguments*. In addition, the Dutch Supreme Court specifically pointed out that the State’s duty of “due diligence” required it to substantiate that emissions reduction measures were “responsible”.¹⁹ Yet, the Dutch State failed to offer such substantiation. This duty to substantiate is an inherently democratic requirement and an attempt to hold the State to a right to justification.²⁰

In Ireland (*FIE*), a national law required the Government to draw up a plan to reduce emissions. Irish courts were called to review this plan. The plan stated that Ireland was committed to achieving by 2050 an aggregate reduction in carbon emissions of at least

¹⁴ The cases decided by the CJEU and the case pending before the EctHR are not analysed in this section, as they do not address the failure of politics.

¹⁵ The Hague District Court of 24 April 2015 case n. C/09/456689 ECLI:NL:GHDHA:2018:2591; Gerechtshof Den Haag of 9 October 2018 case n. 200.178.245/01 ECLI:NL:HR:2019:2006; Hoge Raad of 20 December 2019 case n. 19/00135 ECLI:NL:HR:2019:2007.

¹⁶ *Urgenda* cit. para. 7(4)(6).

¹⁷ *Ibid.* paras 7(4)(5).

¹⁸ *Ibid.* paras 7(4)(3).

¹⁹ *Ibid.* para. 7(2)(1).

²⁰ C Eckes, ‘The Courts Strike Back – The Shell Case in Light of Separation of Powers’ (15 June 2021) [Verfassungsblog verfassungsblog.de](https://www.verfassungsblog.de).

80 per cent in some sectors and zero net emissions in others (both compared to 1990 levels).²¹ However, the plan allowed Ireland's emissions first to increase further.²²

Two instances, including in 2020 the Irish Supreme Court, held that the proposed trajectory was deficient and that the national law required the government to specify the manner in which they were going to achieve their reduction target. The courts were not convinced by the government's response that not all the steps to achieve the envisaged reduction could be known already.²³ It was in particular the postponement of (political responsibility for) emission reduction (by being insufficiently specific and by allowing in the short-term a further increase in emissions) that the courts did not accept and that reveals the failing of (the short-termism of) politics in the face of a long-term existential threat.

One core point of the Irish Supreme Court was that the public need to be able to hold their government to account.²⁴ Citizens need to understand whether the government is doing its job (well enough). This is a broad and fundamental democratic argument that carries weight much beyond the narrow legal basis on which the Irish courts ruled, namely that the government failed to comply with the specificity requirements of the national climate law.

In March 2021, the German Constitutional Court (GCC) held that the national climate protection act 2019 (*Klimaschutzgesetz*) violated fundamental rights protected under the German Constitution. The GCC dedicated several paragraphs to describing *how and why politics fails to address the climate crisis* in any form or manner that could be considered adequate. It emphasised how the day-to-day political process, with short intervals between elections, makes it structurally difficult to pursue long term ecological interests.²⁵

The GCC emphasized, on the one hand, that the legislature enjoys a particular prerogative to specify the emission reduction objectives and, on the other, that the requirement of climate protection under art. 20(a) GG limits the legislature's margin of discretion.²⁶ The legislature cannot simply refrain from action or omit to develop a suitable plan of how to reduce emissions. This is why the legislature failed to stay within its margin of discretion, the boundaries of which are determined by the Constitution. In this context, the GCC acknowledged that it is not the task of the judiciary to concretise open textured constitutional norms in the place of the legislature but that it falls to the judiciary to ensure that these norms' outer boundaries are respected.

In July 2021, France's highest Administrative Court (*Conseil d'État*), ruled that in the *Grande-Synthe* case, the Government had failed to pursue effective climate action. The

²¹ *Friends of the Irish Environment CLG and The Government of Ireland* cit. para. 5(25).

²² *Ibid. inter alia* para. 4(3).

²³ *Ibid.* para. 6(43): the plan spoke of "endeavouring to improve our understanding"; "further investigation will also be necessary"; "we cannot be sure what future technologies will deliver".

²⁴ *Ibid.* para. 6(47).

²⁵ Federal Climate Protection Act of 12 December 2019 *Klimaschutzgesetz – KSG* para. 206.

²⁶ *Ibid.* para. 205.

Court concluded that the Government's efforts and measures were inadequate and incompatible with international commitments and the 2030 climate targets set in national law. It gave the Government nine months (until March 2022) to take the measures necessary for reducing emissions produced on French territory to a level that complies with France's climate targets under the 2010 Paris Agreement.²⁷

The *Grande-Synthe* case is a relevant contribution to the growing international body of case law, in which highest national courts expose the inaction of their States, failing to take adequate executive or legislative actions. It also highlights a (growing) polarization of views within public governance structures that leads to internal political conflicts which cannot be resolved in the political arena. The plaintiff Grande-Synthe is a municipality and its mayor challenging national climate policy. The case is hence an example of the sub-national executive challenging the national executive over emission reductions.

Finally, the *Shell* case in the Netherlands,²⁸ while directed at a multinational company rather than a state, nonetheless highlights how politics is failing. One should understand climate litigation against selected, particularly powerful private actors as *complementing* cases against states. It is a rationale similar to the complementing rationale that justifies EU competition law. EU competition law (addressing private actors) complements internal market regulation (directed at EU member states) by ensuring that companies do not re-erect the obstacles to free trade that member states legally committed to dismantle. Big multinationals emit more than some states. By creating the supply side, they shape the demand side (consumer behaviour) and hence influence what is called scale 3 emissions. They are – within certain limits – able to shift their own emissions (scale 1 emissions) from one territory to another. Politics struggle to rein big multinationals in.²⁹

All the discussed cases illustrate the illegal paralysis of politics. They highlight how the climate crisis is the perfect storm. It brings together several fundamental challenges to democracy: first, the short-termism and limited constituency focus of politics does not allow the representation of those most affected and overrepresents polluters. The consequences of global warming are most strongly felt by those who do not have a voice in the political process, namely today's children/future generations and people in the global South. The decarbonizing and the connected change in behaviour is first and foremost demanded of those who are – at this point in time – well-represented in politics, namely the adult population, entrepreneurs, and the industry. Second, the climate cases expose the problem of responsibility shifting. This is the case because the emissions of today heat the planet for decades to come. Cause and effect are hence spread out over time. This is also the case because the climate challenge is a truly global one and can ultimately

²⁷ Conseil d'État *Commune de Grand-Synthe et autre* cit.

²⁸ The Hague District Court judgment of 26 May 2021 n. C/09/571932 *Royal Dutch Shell Plc*.

²⁹ This point is exacerbated by the regularly visible entanglement between politics and strong economic actors, see e.g., B Lindsey and ST Teles, *The Captured Economy: How the Powerful Enrich Themselves, Slow Down Growth, and Increase Inequality* (Oxford University Press 2017).

only be met in a global effort. Hence, any national or even regional efforts could be considered a drop in the ocean,³⁰ while inaction will definitely lead to disaster. Both points invite responsibility shifting into the future and to the international community.

It is well-established that “[c]urrent [Nationally Determined Contributions] remain seriously inadequate to achieve the climate goals of the Paris Agreement and would lead to a temperature increase of at least 3°C by the end of the century”.³¹ Election-focussed short-term thinking and the unwillingness to take unpopular measures are structural flaws of politics that cut across all political parties, including those that advocate the need for climate action. In light of the failing of politics, in a democracy, the move towards counter-majoritarian instruments is a logical one. The next section briefly sketches a selection of the very different procedural and substantive legal tools that activists draw on to move climate action further.

1.2. DIFFERENT WAYS LEADING TO A SIMILAR CONCLUSION: HUMAN RIGHTS, TORT, POLICY OBJECTIVES, NATIONAL LEGAL OBLIGATIONS, AND ALWAYS INTERNATIONAL AGREEMENTS AND SCIENCE

The different cases were brought on the basis of very different legal claims. Depending on the specific national legal context, arguments relied on human rights, policy objectives, and obligations under ordinary national law. All cases relied on international law and climate science for the evaluation of the claims brought before them.

In the Netherlands, a clean environment is not protected by a binding constitutional state objective. Nor did the Netherlands have a specific climate act or statutory determined reduction targets. The duty to reduce emissions was based on the rights to life and to private and family life, under arts 2 and 8 of the European Convention on Human Rights (ECHR), and a breach of the duty of care by the Dutch State in tort law. Based on international human rights obligations and national tort law, the Dutch Supreme Court confirmed that “the genuine threat of dangerous climate change [...] constitutes “real and immediate risk”” and “that the *lives and welfare of Dutch residents could be seriously jeopardised*”,³² and that the Dutch State was *individually* responsible “to do “its part” in order to prevent dangerous climate change, even if it is a global problem”.³³ The Dutch Court also relied on the 25-40 percent emission reduction target by 2020 formulated by the IPCC for developed countries, necessary for holding temperature increase to *a target of no more than 2°C*, as agreed in the Paris Agreement.³⁴

³⁰ The drop in the ocean argument has explicitly been rejected by several courts: e.g. *Klimaschutzgesetz* – KSG cit. para. 206.

³¹ UN Environment Programme, ‘Emissions Gap Report 2020’ (09 December 2020) www.unep.org 11; Climate Action Tracker, see climateactiontracker.org.

³² *Urgenda* cit. para. 5(6)(2).

³³ *Ibid.* para. 5(7)(1).

³⁴ *Ibid.* paras 7(2)(8) and 7(2)(9). The generally agreed target temperature is now 1,5 °C.

In Ireland, the Irish Supreme Court could narrowly focus on the legal obligations of the Government under ordinary national law. However, the ruling has nonetheless broader relevance. It rejected the Government's unreasonable position of aiming for a determined reduction percentage in the far-future of 2050, while first allowing emissions to increase. The Court's emphasis on *developing a trajectory* sensibly focusses on overall emissions rather than emission targets at a given moment.

In addition, the Court importantly rejected the argument that the Government was not able to sketch a reduction trajectory because of all the uncertainties of future developments. This focusses the discussion on *science as it is known* at the moment of planning/judgment, rather than hypothetical technical developments in the future.

The Irish Supreme Court mentioned the Paris agreement 2015 and the UN Framework Convention on Climate Change only in passing when simply pointing out that "[t]here is [...] a general consensus in climate science that, if the effects of global warming are to be mitigated or reduced, the rise in global temperatures should not exceed 2°C above pre-industrial levels".³⁵

In the *Climate Protection Act* case, the GCC held that the challenged legal provisions violated the constitutionally protected fundamental rights of the complainants (art. 2(2) s.1 GG) by irreversibly offloading major emission reduction burdens into the future, namely to after 2030. The specific reduction needs were taken from a combination of ordinary domestic law in light of the leading national expert body, which heavily relied on the leading, politically endorsed international expert body (IPCC).

The case is interesting, among other things, because of the GCC's approach to science. Most importantly, the German court focused for the first time explicitly on the State's cumulative carbon emissions in light of a *national carbon budget*. In terms of scientific authorities, the GCC avoided carrying out its own assessment by relying on the temperature goal stipulated in the Climate Change Act – a norm of ordinary law enjoying the usual democratic legitimation of the legislative process.³⁶ The Court then translated this temperature goal into a *national carbon budget* based on the advice of the expert council for environmental questions, which in turn had relied for its calculations of the national budget on the work of the IPCC establishing a *global* carbon budget.³⁷ This move towards thinking in terms of total carbon budgets is crucial. Emissions, once released into the atmosphere, have a long-term impact on the climate. Hence, logically, the total amount of emissions is determinative of our climate and not the reduction percentage in a given year.

In addition, the GCC could rely on a state policy objective in the German Constitution (art. 20(a) GG), which obliges the state to take climate action. While this objective does

³⁵ *Friends of the Irish Environment CLG and The Government of Ireland* cit. para. 3(4).

³⁶ *Klimaschutzgesetz – KSG* cit. para. 209.

³⁷ Sachverständigenrat für Umweltfragen, 'Zur Entscheidung des Bundesverfassungsgerichts zum Klimaschutzgesetz' (29 April 2021) www.umweltrat.de.

not create subjective rights, it is directly justiciable.³⁸ Indeed, it obliges the state to protect the interests of *future generations* and aim for *climate neutrality*.³⁹ The Court also noted that the German Climate Protection Act aimed to give effect to the Paris Agreement.⁴⁰

The approaches of the plaintiffs, as well as the courts differ considerably.⁴¹ This is largely due to the different national circumstances, such as whether national climate legislation exists; whether the constitution contains relevant state policy objectives; whether the ECHR can directly be relied on; and how duties under national tort law are formulated. What comes back in all cases is the reliance on international law and science, in form of the Paris agreement and mostly the work of the IPCC. Many climate cases (attempt to) use non-binding international norms together with overwhelming science of what is necessary in order to give meaning to legally enforceable national or international obligations. This is the case because so far States have shied away or failed to make more concrete international legal commitments concerning emission reduction targets that could directly – without relying on general national or other general international norms, e.g., human rights – be enforced before courts.

Judicial review of state action is a counter-majoritarian instrument in democracies. It protects minority interests, often through human rights review. This is already controversial in light of the doctrine of separation of powers and the basic democratic commitment that rules should be determined by those who are subject to them.

In the context of climate litigation, this point becomes even stronger where courts rely on science and (non-binding) international law. Both can equally be framed – to different degrees – as counter-majoritarian instruments. Science, often brought into decision-making through expert bodies, is a technocratic means to achieve a certain level of rationality. It makes no claim to democratic legitimacy. International law makes a claim to indirect democratic legitimacy via national ratification; however, this democratic legitimacy is considerably weaker than that of ordinary domestic law. In addition, lofty political commitments are usually made in the executive-dominated world of international relations (and non-binding law). These political commitments are often even more weakly democratically legitimized. This reliance on instruments with frail democratic credentials in legal reasoning that sets boundaries to much more strongly democratically legitimized state action appears likely to increase concerns about separation of powers.

II. SEPARATION OF POWERS AT STAKE: WHAT ROLE FOR COUNTER-MAJORITARIAN FORCES?

Separation of powers issues loom large in the debate on whether counter-majoritarian instruments should be deployed to achieve objectives that the elected political actors are

³⁸ *Klimaschutzgesetz – KSG* cit. para. 112.

³⁹ *Ibid.* paras 193 and 194, respectively.

⁴⁰ *Ibid.* paras 3 and 4.

⁴¹ In light of the limited wordcount, this section focusses on Germany, the Netherlands, and Ireland.

unable or unwilling to pursue. In the words of the Dutch Supreme Court: “[D]ecision-making on the reduction of greenhouse gas emissions is a power of the government and parliament. They have a large degree of discretion to make the political considerations that are necessary in this regard. It is up to the courts to decide whether, in availing themselves of this discretion, the government and parliament have remained within the limits of the law by which they are bound”.⁴²

In constitutional democracies, the legitimacy of public policy making rests on the doctrine of separation of powers. Yet, there is no one legal or conceptual blueprint of separation of powers. It is different in every state, in the EU. The separation of powers in a particular legal system is necessarily related to the values and specific understandings of the institutional set up of that system. Yet, this does not mean that one cannot identify and explain the underlying rationale and the purpose that rationale serves.

The separation of powers is not a goal in itself. The starting point of the discussion should hence be the question: “separating powers on behalf of what”?⁴³ Christoph Möllers has offered a conceptualisation of the doctrine of separation of powers and its purpose that seems well suited for liberal democracies that have a strong commitment to the rights and freedoms as individuals. He identifies individual and collective self-determination as the central elements of the justification of public authority and links their protection back to separation of powers.⁴⁴

Drawing from Möllers, we have developed elsewhere how separation of powers in a *functional* and *relational* conceptualisation that emphasises institutional interactions between the branches according to their different functions rather than their isolation from each other serves the two main purposes of separation of powers, namely enable democratic will-formation and control the exercise of public power.⁴⁵ The continuous ability of democratic will-formation is preserved by allocating different functions to the three branches, executive, legislature, and judiciary. In this understanding, separation of powers first and foremost aims to exclude sustained domination of one form of legitimation over the others.

On the contrary, it aims to avoid a concentration of power in one branch, be it the judiciary or even the legislature, that excludes changes in governance. Its core purpose is to ensure that the tension between law, as a past commitment of politics/constituent powers, and politics, as day-to-day struggles for majoritarian positions, is perpetuated.

⁴² Supreme Court of the Netherlands of 20 December 2019 n. 19/00135 *State of the Netherlands (Ministry of Economic Affairs and Climate Policy) v Stichting Urgenda* ECLI:NL:HR:2019:2007 para. 8(3)(2).

⁴³ B Ackerman, ‘The New Separation of Powers’ (2000) HarvLRev 633 and 640.

⁴⁴ C Möllers, *The Three Branches: A Comparative Model of Separation of Powers* (Oxford University Press 2013) 51.

⁴⁵ C Eckes, P Leino-Sandberg and A Wallerman Ghavanini, ‘Conceptual Framework for the Project “Separation of Powers for 21st Century Europe (SepaRope)”’ (2021) Amsterdam Law School Research Paper papers.ssrn.com.

This ensures a continuous legitimation from different sources and a continuous struggle of the different views and powers to prevail and win the day.

In a simplified sketch, the executive makes a claim to particular expertise, flexibility, and speed; it is either directly or indirectly democratically legitimated. The legislature draws its legitimacy first and foremost from regular democratic elections. It is therefore thought to be the best forum for political struggle and (temporary) reconciliation of conflicting interests. The judiciary relies for its legitimacy on constitutionally and legally enshrined rights and procedures. To protect the political prerogatives and the creative leeway of the legislature, the judiciary should practice self-restraint vis-à-vis conceptual decisions on behalf of a general people.⁴⁶ At the same time, the judiciary has a rationalising function in constitutional democracies, also on highly politicized terrain. Following rather rigid procedural and substantive legal rules in judicial proceedings, judges necessarily determine some aspects as legally relevant and exclude others a legally non-relevant grounded in the predetermined constitutional and legal choices of the polity. While being far from apolitical,⁴⁷ this imposes a particular procedural and substantive rationality on the decision-making. What the particular contribution of this type of legal rationality could be and should be in the context of the climate crisis requires significant further investigation.

Climate litigation is the result of a strategic choice of taking a disagreement to court that could not be resolved politically. It is an expression of a political struggle taken to the realm of rights. Panu Minkkinen, drawing on the work of Claude Lefort, speaks of “agonistic separation” that allows democracy to resist or oppose totalitarian tendencies of modern capitalism through rights.⁴⁸ Agonistic separation allows for institutionalised conflict. It creates the “potentiality” of judicial intervention that creates stability through mutual deterrence.⁴⁹

Climate litigation is also an expression and the result of an increasingly active role of courts – active, both in quantity (more cases) and quality (more politicised issues decided by courts).⁵⁰ In parallel with this “judicialization”, we are witnessing a deep and sustained power shift towards the executive through internationalisation, through crisis management, and through an ever-growing complexity and technicality of the issues to be addressed. In the functional and relational understanding of separation of powers, such shifts call for a redefinition of the relational boundaries between the branches, necessary

⁴⁶ BverfGE judgment of 20 April 2016 ECLI:DE:BverfG:2016:rs20160420.1bvr096609, opinion of Judge Schluckebier 125, 260. See however: AR Brewer-Carías, *Constitutional Courts as Positive Legislators. A Comparative Law Study* (Cambridge University Press 2011).

⁴⁷ M Loughlin, *The Idea of Public Law* (Oxford University Press 2003) 129.

⁴⁸ P Minkkinen, “‘Enemies of the People’? The Judiciary and Claude Lefort’s ‘Savage Democracy’” in M Arvidsson, L Brännström and P Minkkinen (eds), *Constituent Power: Law, Popular Rule and Politics* (Edinburgh University Press 2020) 38.

⁴⁹ *Ibid.* 41.

⁵⁰ See e.g. A Rosas, ‘The European Court of Justice: Do all Roads Lead to Luxembourg?’ (3 February 2019) CEPS Policy Insights www.ceps.eu.

to ensure that the particular version of separation of powers can still serve the deeper underlying purpose of allowing for will-formation and mutual control.

In the following subsections, I first highlight a few examples of how courts have so far engaged with separation of powers (II.1) and then conclude that politics must take the underlying normative decisions (II.2).

II.1. DIFFERENT CONTEXTS LEAD TO DIFFERENT SEPARATION OF POWERS CONCERNS

Because of the lack of a generally applicable blueprint for arranging the legal conditions for separation of powers, the concerns that arise in the different legal systems also differ in nature and focus. Yet they all relate to the underlying question of whether the judiciary may have transgressed the boundaries of the powers of the legislature.

In the Dutch context, the question arose whether the *Urgenda* ruling was an exception in terms of the extent and specificity of the obligations imposed on the state. Dutch courts may not, on the basis of their constitutional position, intervene in the process of formal legislation. They are prohibited from giving an injunction to legislate.⁵¹ Therefore, the *Urgenda* ruling was criticized by some to go against this particular limitation of judicial power and hence against separation of powers under Dutch law.⁵²

In EU Member States, where the judiciary is not subject to a specific prohibition to give an injunction to legislate the *Urgenda* case would likely have raised less eyebrows. The GCC, for example, more regularly identifies a duty of the legislature to adopt a law (*Gesetzgebungspflicht*) or gives the national parliament an order to regulate (*Regelungsauftrag*).⁵³ The GCC gives orders to regulate either where a declaration of nullity of the

⁵¹ Dutch Supreme Court of 21 March 2003 n. C01/327HR ECLI:NL:HR:2003:AE8462 para 3(5). See C Eckes, 'The Urgenda Case is Separation of Powers at Work' in N de Boer, BM Aernout Nieuwenhuis and J-H Reestman (eds), *Liber Amicorum Besselink* (Amsterdam Law School Research Paper 2021).

⁵² L Besselink, 'Rechter en Politiek: Machtenscheiding in de Urgenda-zaak' (2020) *Tijdschrift voor Constitutioneel Recht* p. 128-151. I however conclude here that this is not the case (see *infra*).

⁵³ At BVerfG judgment of 24 June 1992 1 BvR 459/87, 1 BvR 467/87 p. 379 ff., the German Constitutional Court gives an overview of different forms of legislative orders. See in particular: German Constitutional Court judgment of 28 May 1993 2 BVF 2/90, 2 BVF 4/92, 2 BVF 5/92 (*Abortion II*) ECLI:DE:BVerfG:1993:fs19930528.2bvf000290 p. 203: "If the prohibition to drop below the minimum level of protection (*Untermaßverbot*) is not to be violated, minimum requirements must be met. This includes that the abortion for the entire duration of the pregnancy is fundamentally regarded as unlawful and therefore prohibited by law (...)". On further requirements for the protection of fundamental rights see the decision of the Federal Constitutional Court on the non-smoker protection regulations of the states in German Constitutional Court judgment of 24 January 2012 1 BvL 21/11 ECLI:DE:BVerfG:2012:1s20120124.1bvl002111 p. 362 ff. By contrast, the German Constitutional Court did not numerically indicate a minimum subsistence level required by human dignity but asked the legislature to determine the scope of entitlement by assessing all expenses necessary for subsistence in a transparent and appropriate procedure in a realistic and comprehensible manner on the basis of reliable figures and conclusive calculation procedures (German Constitutional Court judgment of 9 February 2010 1 BvL 1/09 n. 1-220 (*Urteil des Ersten Senats vom*) ECLI:DE:BVerfG:2010:1s20100209.1bvl000109).

challenged law would bring about an intolerable gap in regulation or where the specific other legal situation (absence of the nullified law) would also be a form of regulating, which – pursuant to the Court’s own position – is a choice that the legislature should take, rather than the GCC by annulling the law.⁵⁴ One could hence argue that in the latter case it is precisely the intention to protect the legislature’s room for manoeuvre that motivates the GCC to require the legislature to regulate the situation in a manner that is compatible with the constitution. The detailed instructions that the GCC occasionally derives from the German Constitution and gives the German legislature however are not uncontroversial.⁵⁵

In the *Climate Protection Act* case, the GCC – at least also – directly strengthened separation of powers and political deliberation. It imposed on the legislature an obligation to decide on the fundamental choice of distributing the national carbon budget itself. The decision on when to reduce emissions and by how much could not, according to the GCC, be left to the executive.⁵⁶

Besides the climate cases, decided by national courts, the European courts in Luxembourg (*Carvalho*) and Strasbourg (*Portugese School Children*) have been asked to rule on systemic mitigation cases. Both cases are notable for how the particular legal context in which they are brought relates to separation of powers.

In the *Carvalho* case before the General Court of the EU,⁵⁷ the applicants asked the court to annul a legislative package regarding greenhouse gas emissions in so far as it sets targets that are too low and instead “order the Council and the Parliament to adopt measures [...] requiring a reduction in greenhouse gas emissions by 2030 by at least 50% to 60% compared to their 1990 levels, or by such higher level of reduction as the Court shall deem appropriate”.⁵⁸ The case was dismissed based on the failure to establish *individual concern*. On appeal, the European Court of Justice confirmed the General Court’s ruling.⁵⁹

Individual concern is a – much criticized⁶⁰ – specific standing requirement under EU law intended to protect the EU legislature when adopting generally applicable norms from legal challenges of non-privileged applicants, *i.e.* private persons.⁶¹ This choice of

⁵⁴ See for the latter case: German Constitutional Court judgment of 22 June 1995 2 BvL 37/91 (*Property Tax*) ECLI:DE:BVerfG:2006:rs20060118.2bvr219499.

⁵⁵ See for an internal critique of dissenting judges in the GCC’s decision on the Federal Criminal Police Office Act (German Constitutional Court judgment of 20 April 2016 cit.) and Court decision on data retention (German Constitutional Court judgment of 2 March 2010 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08 ECLI:DE:BVerfG:2010:rs20100302.1bvr025608).

⁵⁶ German Constitutional Court 1 BvR 256/08, 1 BvR 263/08, 1 BvR 586/08 cit. paras. 259-263.

⁵⁷ *Carvalho and Others v Parliament and Council (General Court)* cit.

⁵⁸ *Ibid.* para. 18.

⁵⁹ *Carvalho and Others v Parliament and Council (Court of Justice)* cit.

⁶⁰ See for a good impression of the critique: E Biernat, ‘The Locus Standi of Private Applicants under Article 230 (4) EC and the Principle of Judicial Protection in the European Community’ (Jean Monnet Working Paper 12/2003) jeanmonnetprogram.org.

⁶¹ Art. 263(4) TFEU.

keeping individuals out of court is directly linked to the model of separation of powers practised within the EU.⁶² However, the EU also offers another very particular way of challenging the EU's climate action, namely through a preliminary question addressed to the ECJ by Member States' courts. This was also emphasised by the European Commission in its third-party submission in the *Portuguese School Children* case before the ECtHR, discussed below. This particular indirect route for challenging the EU's climate action is a likely future channel for climate litigation.

Substantively, the applicants did not ask the EU courts to go further than the applicants in the earlier discussed climate cases: besides seeking annulment of legislation they asked for an injunction ordering the legislature to adopt a legislative package that would be in line with the Paris Agreement in light of the findings of the IPCC. What is different is that over time (e.g., between the *Urgenda* case that was launched in 2015 and the *Carvalho* case that was launched in 2018) science has evolved; states have continued to emit; more emissions have accumulated; and, as a result, both the temperature target changed (from 2 degrees to 1,5 degrees) and the necessary reduction targets increased (for states to stay within their national carbon budget). Hence, the specific demands in terms of reduction may *prima facie* seem higher⁶³ and therefore, the potential costs and distributive consequences of such laws are likely to be greater. This is, however, as explained the result of time passing without adequate climate action in combination with more accurate scientific insights. Any new climate case launched in future would have to ask for even higher reduction targets in an even shorter trajectory. This is the inherent consequence of political paralysis in face of the climate crisis.

In light of this urgency for climate action, the applicants before the ECtHR (*Portugese School Children*) argued that "there is no adequate domestic remedy reasonably available" to them because the alleged violation is caused cumulatively by the 33 respondents and domestic courts of one country could only find their own state in violation.⁶⁴ However, it is financially, logistically, and most importantly – in light of the urgency of climate change – timewise impossible to bring actions in all 33 states. Therefore, the applicants ask the ECtHR exceptionally to absolve them from the requirement to exhaust domestic remedies.⁶⁵ From a separation of powers perspective, this case is interesting because it essentially claims that domestic courts cannot offer adequate protection in face of the international nature and the extreme urgency of the climate crisis, considering in particular the limited reach of national jurisdictions.

Irrespective of the specific concerns relating to the doctrine of separation of powers, I would like to argue in favour of an obligation of the legislature and the executive to *give*

⁶² A Rosas, 'Separation of Powers in the European Union' (2007) *The International Lawyer* 1033-1038.

⁶³ This is not correct, e.g., for the *Klimaschutzgesetz – KSG* case before the BVerfG, where the applicants asked for a reduction of 65 per cent.

⁶⁴ *Duarte Agostinho et autres v Portugal et autres* cit. para. 32.

⁶⁵ *Ibid.*

reasons for their decisions that allow the public to hold politicians to account. I also argue that, in a functional understanding of separation of powers, it is precisely the task of the judiciary to allow citizens to demand justification for policies that interfere with human rights. This is a confirmation of a working system of separation of powers and vests human rights with effects within the political process.

In the words of the Irish Supreme Court: "...the public are entitled to know what current thinking is and, indeed, form a judgment [...] on whether the [pursued climate policies] are realistic...".⁶⁶ Under any separation of powers model, the government, when asked in court to justify its actions, is formally legally obliged to do so. In the *Urgenda* case, the Supreme Court explicitly found that the Dutch State failed to offer such justification. Due to this lack of giving reasons, even when legally required, the state was ordered to develop a different policy, one that meets what the government had itself repeatedly acknowledged to be the absolute minimum to prevent dangerous climate change.⁶⁷

II.2 WE CANNOT EXCLUDE (FAILING) POLITICS DESPITE OVERWHELMING CLIMATE SCIENCE

Arguing that the executive and legislative must give reasons for restricting rights and that the judiciary can legally demand such reasons is not a call to exclude politics from the required deeply controversial and redistributive issues that emerge from the climate crisis. As the Irish Supreme Court concluded: "[...] 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".⁶⁸

In the same case, the Irish Government rightly argued that "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".⁶⁹

In the same vein, the Dutch Supreme Court purely established an absolute minimum of action that could still be called reasonable. It emphasized that in light of the grave threat of dangerous climate change to the enjoyment of human rights the principle of effective legal protection in art. 13 ECHR entails that "the courts must examine whether it is possible to grant effective legal protection by examining whether there are *sufficient objective grounds from which a concrete standard can be derived*".⁷⁰

The Dutch Supreme Court came to the conclusion that such objective grounds could be derived from science and international law, not to determine what the State had to do

⁶⁶ *Friends of the Irish Environment CLG and The Government of Ireland* cit. para. 6(47).

⁶⁷ *Urgenda* cit. paras 7(2)(1) to 7(2)(10) and 7(4)(1).

⁶⁸ *Friends of the Irish Environment CLG and The Government of Ireland* cit. para. 4(5) emphasis added.

⁶⁹ *Ibid.* para. 5(16) emphasis added.

⁷⁰ *Urgenda* cit. para. 6(4) emphasis added.

but to set a minimum threshold of action that the State had to meet in order to act reasonable in light of “the risk of dangerous climate change”.⁷¹

Science does not directly lead to legal consequences. This is the step of translation that courts take. In principle, they do so from the opposite perspective, namely asking what legal obligations mean in light of science. Yet, scientific necessity alone cannot be enough to make courts require the executive or the legislature to act. This would allow enforcing the demand of rationality on politics through litigation. However, while scientific rationality cannot be expected from politics, the executive and the legislature can be held to give reasons and to act *reasonable*. In a recent contribution to the debate, an important attempt was made to argue in favour of a minimum standard of reasonableness, drawing from science and international law.⁷²

In addition, the translation of science into legal obligations is still different from the question of *what precise measures should be taken* in light of climate science. In a functional reading of separation of powers, this decision should be reserved to the legislature and by way of delegation – at least to a degree and potentially – to the executive. It would be difficult to justify a judicial determination of *how* a state should reduce carbon emissions, i.e., in which sector, prescribing specific behaviour. Time in combination with inaction will, however, necessarily reduce political discretion. At some point, only very few actions may be justified as reasonable.

III. A RESEARCH AGENDA

In this final section, I set out some ideas for future research on what role judges should play in democracies threatened by growing antagonism relating to the climate crises.

As long as politics fail, the second-best solution of climate litigation may appear the best available solution – at least in light of how to best tackle an existential threat. Ultimately, all other issues, including separation of powers and democracy, would fade in importance if we continue emitting as much as we currently do and planet Earth becomes uninhabitable. At the same time, we, as scholars, must further work on articulating and elucidating the normative considerations that should guide climate action. Demands for social justice and concerns about who decides on the distributive consequences of both the climate crisis and climate action are not only here to stay but will increase as the effects of global warming and emission reduction measures are felt more intensely. What we need is scholarship that brings the normative choices to the light and critically debates them.

This need for normative scholarship results from an understanding that social justice and democratic legitimacy remain relevant even in the face of an existential threat. How and to what extent such normative considerations remain leading even under prolonged,

⁷¹ *Ibid.* paras 5(6)(1) and 5(8).

⁷² L Maxwell, S Mead and D van Berkel, ‘Standards for Adjudicating the Next Generation of *Urgenda*-style Climate Cases’ cit.

complex, uncertain, and controversial emergency conditions require further investigation, including by legal scholars.

Some work has been done already. In the context of climate litigation, first research has been conducted into the issue of what judges should do, notably from a Habermasian perspective.⁷³ Habermas' discourse theory of law aims to establish an internal link between the state of law (*Rechtsstaat*) and democracy.⁷⁴ It is primarily a theory of democracy, aimed at the peaceful reconciliation of colliding positions and interests. Its focus is on the persuasive power of the better argument, the aim of identifying a normative truth/common interest in an ideal speech situation and make this truth/interest effective in society through law. This is why judicial review in general and climate litigation in particular are often seen from this perspective as contributing to the deliberation, as making voices heard.⁷⁵ However, as briefly sketched above separation of powers serves the purpose of perpetuating the possibility of political struggle, controversy, and even sustained dissensus. This precisely does not – at least not necessarily – procedurally contribute to or assume the possibility of establishing an intersubjectively binding standpoint on normative questions. To put it more briefly, the Habermasian approach misses the intrinsically agonistic nature of separation of powers.⁷⁶ Much more work is needed on extrapolating this in the context of climate litigation.

What can judges do to protect the functioning of democratic decision-making threatened by the climate crisis? Judges have no choice but to do something when asked to rule on climate cases. Certainly, they can decline jurisdiction but that also has consequences for the functioning of the democratic decision-making. I would like to end with highlighting five pressing questions that present themselves in a particular way in the context of the climate litigation discussed in this *Insight* and that require further fundamental research: *i)* what normative decisions should be reserved to the legislature even in the face of growing certainty of the disastrous consequences of their slow incrementalism? How could normative choices by politics be made possible within the complexity and urgency of the issue and the constraints of the system? *ii)* What should be the role of science in political decision-making and in judicial review? What is needed from science? *iii)* What are the

⁷³ See also L Burgers, *Justitia, the People's Power and Mother Earth: Democratic Legitimacy of Judicial Law-Making in European Private Law Cases on Climate Change* (unpublished thesis, University of Amsterdam 11 November 2020) on file with the author; L Burgers and T Staal, 'Climate Action as Positive Human Rights Obligation: The Appeals Judgment in *Urgenda v The Netherlands*' (2019) *Netherlands Yearbook of International Law* 1.

⁷⁴ J Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (1994) 664.

⁷⁵ See e.g. L Burgers, *Justitia, the People's Power and Mother Earth* cit.

⁷⁶ This also explains the very limited engagement of Habermas with separation of powers, see also: T Lieber, *Diskursive Vernunft and formelle Gleichheit: Zu Demokratie, Gewaltenteilung Und Rechtsanwendung in Der Rechtstheorie Von Jürgen Habermas* (Mohr Siebeck 2007) 170-173.

minimum requirements of a right to justification flowing from human rights?⁷⁷ Do we have a right to reasonable decision-making? iv) With growing executive powers,⁷⁸ separation of powers appears to move in practice from a tripartite model to a dualistic model. What does this mean in relative terms for the powers of the judiciary? v) How does the role of the judiciary and the boundaries of judicial action change depending on whether we start from the premises of separation of powers (intrinsically agonistic) or from discursive democracy (emphasis on the possibility of consensus)?⁷⁹

⁷⁷ C Eckes, 'Separation of Powers in Climate Cases – Comparing cases in Germany and the Netherlands' (10 May 2021) [Verfassungsblog verfassungsblog.de](https://verfassungsblog.de).

⁷⁸ D Curtin, *Executive Power of the European Union: Law, Practices, and the Living Constitution* (Oxford University Press 2009).

⁷⁹ See P Minkinen, "'Enemies of the People"?' cit.