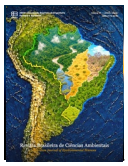
Viewpoint

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Legal Action for Climate Protection — impulses on the international level from the German Federal Constitutional Court: the Court Order from March 2021 on the Unconstitutionality of the Federal German Climate Protection Act

Ação Jurídica para a Proteção do Clima — Impulsos em Nível Internacional do Tribunal Constitucional Federal Alemão: a ordem do tribunal de março de 2021 sobre a inconstitucionalidade da Lei Federal de Proteção Climática da Alemanha

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ABSTRACT

Against the background of the international climate protection aim deriving from the "Paris Agreement" of December 2015, demanding a limitation of global warming to 1,5° Celsius at best, the public discussion and anger on the mid- and longterm consequences of a constantly growing greenhouse effect have clearly risen. Along with that, "climate litigation" has turned into serious means to sue governments for inadequate measures to reach international and domestic climate protection goals. In a line of several legal actions and high court decisions in different countries during the last years is the court order of the Federal German Constitutional Court from March 2021. The judges considered the German Federal Climate Protection Act unconstitutional due to a lack of clearing a reliable legal path to reach the CO_2-reduction goals and this decision was seen as a milestone in climate litigation. Combined with the obligation of the state to protect the natural resources by legislation, the court invented the "advance interference-like effect"on future generations and the "intertemporal guarantees of freedom", two legal figures which could be possibly applied to constitutional law abroad and thus fertilize argumentation in climate litigation outside of Germany, too.

Keywords: Paris agreement of 2015; climate litigation; greenhouse gases; global warming; CO_2-emissions; German federal climate protection act; constitutional law; legislation; sustainability; natural resources; future generations.

RESUMO

No contexto do objetivo internacional de proteção do clima decorrente do Acordo de Paris, de dezembro de 2015, que exige uma limitação do aquecimento global a, no máximo, 1,5° Celsius, a discussão pública e a raiva relativas às consequências em médio e longo prazo de uma estufa em constante crescimento efeito aumentaram claramente. Além disso, o "litígio climático" transformou-se em um meio consistente de processar os governos por medidas inadequadas para atingir as metas internacionais e domésticas de proteção climática. Na linha de várias ações legais e decisões de tribunais superiores em diferentes países durante os últimos anos, está a ordem judicial do Tribunal Constitucional Federal alemão de março de 2021. Os juízes consideraram a Lei Federal de Proteção Climática da Alemanha inconstitucional por não abrir um caminho confiável para se atingirem as metas de redução de CO_2. Essa decisão é vista como um marco no litígio climático. Ela soma-se à obrigação do Estado de proteger os recursos naturais pela legislação que o tribunal criou com "efeito de interferência antecipada" sobre as gerações futuras e às "garantias intertemporais de liberdade" — duas figuras jurídicas que poderiam ser aplicadas ao direito constitucional no exterior e, assim, poderiam fertilizar a argumentação sobre litígios climáticos fora da Alemanha também.

Palavras-chave: Acordo de Paris de 2015; litígio climático; gases de efeito estufa; aquecimento global; emissões de CO_2; lei federal de proteção climática da Alemanha; lei constitucional federal alemã; legislação; sustentabilidade; recursos naturais; gerações futuras.

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Introduction and Background of International Climate Litigation

The ongoing rising emission of greenhouse gases, especially CO_2, in the atmosphere keeps on contributing to accelerated global warming. This has not only generated international protests against insufficient national and international policymaking, strongly expressed by organizations such as "Fridays for future", "Greenpeace", "Extinction rebellion" and other environmental and climate protection groups. In the public discussion, frequently accompanied by frustration and anger, are mid- and longterm consequences of a constantly intensified greenhouse effect such as sea-level rise, shrinking of groundwater restoration, increase of draught etc., foreseeably causing migration and escape from regions in the world severly struck by climate change[1]. Within these dynamics of the climate discussion, initial steps have also been taken in the field of "climate litigation", i.e. attempting to sue governments for inadequate measures to reach official climate protection goals.[2] In the cases mentioned as follows, litigation was mainly targeted at governments and the legal leverage was mostly applied with regard to domestic law. In doing so, it was usually attempting to reflect the goals deriving from agreements on international climate conferences, especially focusing on the aim of limiting global warming to 1,5° Celsius in the "Paris Agreement" of December 12, 2015. In that agreement a global framework was set up to avoid dangerous climate change by limiting global warming to well below 2° Celsius and pursuing efforts to preferably limit it to 1.5° Celsius.[3]

In the meantime, several supreme or highest courts especially in the USA, Australia, New Zealand and in the European Union (EU) have decided on cases of climate litigation, often with great national and international attention. Already in 2007, the US Supreme Court decided on the case "Massachusettes vs. EPA", on the competence of the Environmental Protection Agency (EPA) to rule greenhouse gases as air pollutants (U.S. Department of Justice, 2007).

A climate case of worldwide attention was set in Europe in the year 2015: In the "Urgenda Climate Case", citizens claimed that the Dutch government had a legal duty to prevent dangerous climate change (Urgenda, 2022).[4] In June 2015, the District Court of The Hague ruled that the government must cut its greenhouse gas emissions by at least 25% by the end of 2020 (relative to 1990).[5] The court found the government's existing approach to reduce emissions by 17% insufficient, as a consequence of the Dutch contribution towards the United Nations goal of keeping global temperature rise within 2° Celsius. Due to the severity of the consequences of climate change and the great risk of climate change occurring, the court ordered the government to immediately take more effective actions on climate change.

More recently in the year 2021, several high courts in different nations had to deal with climate protection litigation: For example[6] the Federal Court of Australia (2021) pointed out in the case "Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment [2021] FCA 774 (No 2) " that the 'government has the duty to take reasonable care under the relevant environmental law to avoid causing personal injury or death to persons who were under 18 years of age and ordinarily resident in Australia arising from emissions of carbon dioxide into the Earth's atmosphere'.In New Zealand the group "Lawyers for climate action" has moved a legal action in the summer of 2021 against the Climate Change Commission to the New Zealand high court, pleading that the country's emission budgets and reduction targets are inconsistent with the Paris Agreement goal to limit global warming to 1,5° Celsius (Corlett, 2021).

As far as the situation in the EU is concerned, the "Conseil d'État", the highest administrative court in France, ordered the French government in March 2021 to take 'all necessary and additional steps to reach its climate targets or face possible sanctions, including substantial fines'[7] in the case of "Notre Affaire à Tous and Others v. France", where the the court finally pointed out that France is not on the right track to meet its CO_2-reduction-goals of 40 % by the year 2030.

Distinctly from the climate lawsuits mentioned above, directed at national governments, another sensational legal action in the Netherlands triggered worldwide attention by changing the target to a big private company: The case of "Milieudefensie et al. v. Royal Dutch Shell plc."[8] was taken up to "The Hague District Court" through an action of more than 17.000 Dutch citizens suing the huge oil enterprise Royal Dutch Shell. To the plaintiff's point of view, Shell's oil-related business was violating its obligation to reduce the aggregate annual volume of CO_2. emissions into the atmosphere. Amongst other claims, the plaintiffs demanded the withdrawal of Shell from the fossile energy business. The Hague District Court ordered Shell in May 2021 to reduce its

[1] See the impressive and somewhat frightening description of IPCC (2021).

[2] Find more on climate litigation in courts at Setzer/Bangalore (2017).

[3] See more on the Paris Agreement under (United Nations, 2022).

[4] find a good summary oft he dutch decision under http://climatecasechArticlecom/climate-change-litigation/non-us-case/urgenda-foundation-v-kingdom-of-the-netherlands/

[5] The District Court's decision was upheld both by the Court of Appeal in 2018 and the Dutch Supreme Court in 2019.

[6] For a longer list of climate litigation cases see the blog of the Columbia Law School (2021).

[7] Find a good summary of the French decision in english under http://climatecasechArticlecom/non-us-case/notre-affaire-a-tous-and-others-v-france/?mc_cid=2ee16a4b8f&mc_eid=c70ad85e80

[8] Find a good summary of the Dutch decision in english http://climatecasechArticlecom/climate-change-litigation/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/?mc_cid=e15e769911&mc_eid=c70ad85e80

emissions by 45 % by 2030, relative to 2019, capturing all the company's activities, its subsidiaries and emissions in a broad understanding. Thus, for the the first time a non-state entity has been legally obliged to mitigate climate change in accordance with the goals of the Paris Climate Agreement. Shell will appeal to the decision, but as the Dutch court made its decision provisionally enforceable, the company will be required to meet its reduction obligations right away.

Apart from these court decisions, publications from other social sectors than climate, environmental policies or law reveal a growing perceptance, relevance and impact of climate litigation on other fields.[9] Even adjustments towards climate-awareness in the portfolio of major investment institutes has become visible (BlackRock, 2022).

The international context of the Paris Agreement and its consequences for domestic governmental responsibilties are also decisive when we look at the recent climate litigation in Germany. In order to grasp the content and relevance of the recent key decision made by the *German Federal Constitutional Court (Bundesverfassungsgericht – BVerfG)* on the unconstitutionality of the German Climate Protection Act from March 2021 (Bundesverfassungsgericht, 2021) which gained a worldwide echo, we also need to take a short look on some basic legal framework and principles of constitutional and administrative law in Germany in the following "Climate litigation under German constitutional and administrative law". The court decision itself will be explained in its major considerations and findings in "The decision of the German Federal Constitutional Court". The question if these major considerations of the German court decision are transferable to the international level will be an essential part of a summary and outlook in the final "Summary and outlook".

Climate Litigation Under German Constitutional and Administrative Law

In order to understand the in parts "epochal" oder "revolutionary"[10] findings of the German Federal Contitutional Court, it is necessary to at least outline the basic framework of German constitutional law in which the "climate protection" and "sustainability" topics are set. From the constitutional law perspective, these terms are situated in a surrounding of three important principles and rights of the German constitution, i.e. the "Basic Law" (Grundgesetz – GG): Firstly the "*state objective of protection of natural resources*" *(Article 20a GG)*, secondly the "*state duty of protection of basic constitutional rights*" (especially with regard to Article 2 (2) – right to physical integrity and life – and Article 14 – right to property) and thirdly the common "*principle of proportionality*" for state decisions and regulations.

Article 20a GG provides that the state protects the natural resources and the animals also in responsibility for future generations within the framework of constitutional law through legislation and through executive power and jurisdiction.

As far as the "state duties of protection of basic constitutional rights" are concerned, the Federal Constitutional Court rules in settled case law that the state is required to protect life and physical integrity under Article 2 (2) GG and property under Article 14 (1) GG against impairments, possibly in combination with a duty of care deriving from Article 20a GG.[11]

Finally the "principle of proportionality" (Verhältnismäßigkeitsgrundsatz) as an overall constitutional principle demands that state measures and legislation have to be suitable according to a legitimate aim, necessary as the mildest, equally suitable measure and in fair proportion considering and balancing public interests and losses of freedom rights of the concerned citizens.[12]

Before March 2021, the Federal Constitutional Court had not accepted claims of individuals referring to Article 20 a GG. This regulation was mereley seen as an *objective* duty of the German state to protect natural resources with responsibility for future generations, but not as a *subjective* right, which could be individually claimed in court. In advance of the climate-protection-order of the Federal Constitutional Court in March 2021, the Berlin Administrative Court also made this clear in a well-known decision during the year 2019: In this case, several plaintiffs were attempting to sue the Federal Government to come up with further measures in order to fulfill the goals of the "Federal Action Programme Climate Protection 2020".[13], however the Berlin Administrative Court had already denied the plaintiffs the standing for proceeding at court, arguing that the "Federal Action Programme Climate Protection 2020" was merely a political memorandum and not a legal regulation from which a standing for legal action in court could be derived from (Berlin Administrative Court, 2019).

The Decision of the German Federal Constitutional Court

The order of the German Federal Constitutional Court from March 24, 2021 gained wide-spread attention, both on a national and international levels.[14] The key message that German federal climate protection law was considered insufficient to reduce greenhouse gas emissions and

[9] For the impact of climate litigation on the financial sector, see European Central Bank (2021).

[10] See out of the legal scientific community e.g. *Calliess*, Das "Klimaurteil" des Bundesverfassungsgerichts: "Versubjektivierung" des Article 20 a GG? ZUR 2021, pp. 355 et seq.; *Ekardt/Heß*, Bundesverfassungsgericht, neues EU-Klimaschutzrecht und das Klima-Ziel des Paris-Abkommens, NVwZ 2021, pp. 1421 et seq.

[11] See e.g. the rule on the Genetic engineering Act in Leitsätze (2010).

[12] For basics and principles of German Constitutional Law, see Bumke/Voßkuhle (2019).

[13] Check out the current and revised Federal Climate Protection Programme – now with a view to 2030 – (Germany, 2022).

[14] See also the summary of the court order by Talmon (2021) and Bodle and Sina (2021).

limit climate change especially with respect to future generations was called "epochal", "a milestone" or also "a slap in the face" (i.e. the face of the legislator).[15] According to German constitutional law, the court has the power to declare laws violating constitutional rights void or require legal amendments.

The legislation in focus was the Federal Climate Protection Act ("Klimaschutzgesetz" - KSG). This Federal law roots back to 2019 and established binding climate targets for the first time. As an overall goal, it requires reductions of greenhouse gas emissions of 55% compared to 1990 by the year 2030. Different key economic sectors such as the energy industry, agriculture or building and housing have to contribute to this goal by decreasing annual emission budgets provided for the relevant sector. The law demands greenhouse gas neutrality by the year 2050. However, the provisions taken up to court ruled the climate targets in form of decreasing greenhouse emissions up to 2030 but left the path after 2030 open without any legal concretization regarding the relevant economic sectors. The federal government was only required to set up annually decreasing emission budgets for periods after 2030 by statutory ordinance (and not by formal federal legislation in parliament) in 2025.

The plaintiffs' claims and arguments

The plaintiffs — partly children, adolescents and young adults, some of whom lived in Bangladesh and Nepal and were backed by environmental associations, contested legal inaction and failure of the federal legislator in four complaints. They claimed that several provisions of the The Federal Climate Protection Act ("Klimaschutzgesetz" — KSG) were insufficient to counter climate change, thus violating their fundamental rights in an unconstitutional way.[16] Primarily the complainants stated that Germany has failed to introduce a proper legal framework for the reduction of mainly CO_2 emissions and that current legislation under the Federal Climate Change Act is insufficient to stay within the remaining CO_2 budget that would correspond to a temperature increase of 2°C or preferably 1.5°C.

In the plaintiffs' legal opinion, the state must fulfil its constitutional duties of protection arising from Article 2 (2) GG — right to physical integrity — and from Article 14 (1) GG — right to property. Furthermore, they claimed a fundamental right to a future with human dignity and a fundamental right to an "ecological minimum standard of living" ("ökologisches Existenzminimum"), deriving the latter from Article 2 (1) GG — general freedom of action — in conjunction with Article 20a GG and Article 1 (1) GG — right to human dignity. With one further — and later to be seen as a decisive argument, the plaintiffs put forward that the Federal Climate Protection Act is insufficient in its mechanisms and in its path to distribute the future burdens arising from the obligations to reduce emissions for periods after 2030 in a fair way. Rather the law would lay these burdens on the shoulders of generations to come.

Another crucial point in the plaintiffs' argumentation is connected with Germany's "CO_2 budget"[17]: They claimed that if the emission reduction goal from the Paris Agreement, i.e. to limit the increase in the global average temperature to well below 2°C and preferably to 1.5°C, shall be met and if future burdens shall be distributed in a fair way between the generations, there would have to be an "emergency stop" for CO_2 emissions right now. The plaintiffs added that the state, in leaving the path of CO_2 reduction after 2030 open, the burden of carrying the consequences of costs and restrictions of rights to freedom would be shifted unfairly to the younger generations.

Key considerations of the German Federal Constitutional Court

The constitutional complaints had been partially successful. The key findings of the court order refer to the question of whether the German state neglected its constitutional protection duties, and whether it violated the state objective to protect the natural resources (Article 20a GG). However, the decisive part of the court order which founded the success of the plaintiffs was the invention of new constitutional figures, namely the "*advance interference-like effect*" and the "*intertemporal guarantees of freedom*", combined with the traditional constitutional "*principle of proportionality*", here applied to federal legislation.

The ruling on the constitutional protection duties of the state

After having approved the climate target from the Paris Agreement as a reasonable political goal including the resulting CO_2 budget, the Federal Constitutional Court examined the question of whether the legislator, by adopting the Federal Climate Protection Act, fulfilled its constitutional duties of protection arising from Article 2 (2) GG — right to physical integrity — and from Article 14 (1) GG — right to property. Even though the court acknowledged the scientific findings that an average global warming of more than 1.5°C would have significant climate consequences and even though it stated that the duties of protection include the obligation of the state to protect from the dangers and risks for life and health by climate change, the judges refrained from finding that Germany violated its protection duties.[18] Akin to a

[15] See the report of Deutsche Welle and the echo on the court decision (Deutsche Welle, 2021).

[16] For an overview of Germany's climate protection policies in english see Brohmer (2020).

[17] This residual emission budget was calculated as a "carbon budget" on an international level by the "Intergovernmental Panel on Climate Change (IPPC)" to clarify the necessary contributions to the reduction of greenhouse gases by the countries having signed the "Paris Agreement", for more information see MCC (2022); on the German national level the "Sachverständigenrat für Umweltfragen" (SRU, 2020) has also calculated a residual CO_2 budget which is stricter than the IPCC; find more on SRU (2020).

[18] Para. 148 et seq. of the order.

number of earlier decisions on constitutional protection duties, the Federal Constitutional Court granted a considerable leeway for the legislator in fulfilling the duty of protecting fundamental rights, especially since it must also reconcile the requirements of health protection with conflicting interests in considerable uncertainty. The court pointed out that the federal national climate protection law may be considered too politically unambitious but could not support the complainants' opinion that the legislator has exceeded this leeway by basing its action on the Paris target.

The judges did not see that Germany would follow a protection strategy that failed to pursue the goal of climate neutrality as a protection required by fundamental rights. The courts also did not consider the German climate protection legislation manifestly unsuitable for the protection against the risks of climate change. It did not judge the relevant German law as an entirely inadequate approach able to allow climate change to "simply run its course" or using nothing but so-called adaptation measures to fulfil the constitutional duty of protection.[19]

As several of the complainants were citizens of Nepal and Bangladesh, it was also at issue if Germany had violated its constitutional duties to protect their life, health, and property due to insufficient climate protection efforts. The Federal Constitutional Court left the question of whether a duty of protection also existed with regard to human beings living abroad. Apart from this, it stated that German climate protection policies would not violate such a duty as the state committed itself to the requirements of the Paris Agreement and is trying to pursue greenhouse gas neutrality by the year 2050.[20] In other words, the court found the serious political and legal approaches in Germany in order to meet the international climate protection aims sufficient with regard to the complainants from abroad.[21]

The ruling on the state objective to protect the natural resources (Article 20a GG)

With regard to Article 20a GG, which obliges the state to protect the natural resources by legislation, mindful of its responsibility towards future generations, the Federal Constitutional Court provides important clarifications: For the first time, the court derives explicitly an objective legal obligation of the state *for climate action* from Article 20a GG, independent of the fact that climate change and global warming can only be solved on a global level. The court attests Article 20a GG a special international dimension, meaning that the constitutional objective forces the German state to grow active with national contributions and international cooperation in order to tackle the global climate challenge.[22] The court ads another important sentence: "The path to globally effective climate protection indicated by Article 20a GG currently leads primarily via the Paris Agreement."[23]

From the constitutional law perspective, this statement actually means a constitutional enrichment and upgrade of the climate protection aims of the Paris agreement incorprated in the state's obligation from Art. 20a GG. But again, the Federal Constitutional Court acknowledges Germany's efforts in climate protection policies and law: The court holds that the German legislator adopted the climate target of the Paris Agreement, aiming at a mitigation of the global average temperature increase to a limit of well below 2°C and preferably 1.5°C. The court also grants a wide legislative leeway to the federal legislator combined with a certain prerogative in its mandate to concretize the reduction targets under the obligation of Article 20a GG. Finally, the Federal Constitutional Court judged that by following the climate aims of the Paris agreement, the legislator did not currently exceed its leeway in an unconstitutional way.

Earlier in its order, the court left open a question of whether a basic constitutional right to an "ecological minimum standard of living", as claimed by the plaintiffs, existed in the German "Basic Law", since the court did not hold this aspect relevant for the decision.[24]

What's new: the "advance interference-like effect" and the "intertemporalguarantees of freedom"

After the Federal Constitutional Court had denied both a violation of the state duties of protection of life, health and property as well as a violation of the constitutional order to the state form Art. 20a GG, it was somewhat surprising how the court finally arrived at the result of the unconstitutionality of the Federal Protection Act. The reason why the complainants won the case was at least partially an invention under constitutional law: The Federal Constitutional Court created two new legal figures and combined them with the traditional "principle of propotionality".

In the decisive part of the order, the court held that the legal path of the Federal Climate Protection Act substantially narrows the remaining options for reducing emissions by leaving the concrete mitigation efforts open after 2030. In conjunction with a very small remaining CO_2-budget for the years after 2030 (see above in chapter "The plaintiffs' claims and arguments"), the court found that this legal effect would jeopardise nearly every type of freedom protected by fundamental rights for younger generations to come. In this context, the court invented a new characteristic of fundamental rights: It stated that these

[19] Para. 157 et seq. of the order.
[20] Para. 173 et seq. of the order.
[21] See a similar assessment of the decision from Talmon (2021).
[22] Para. 199 et seq. of the order.
[23] Para. 204 of the order.
[24] Para. 113 et seq. of the order.

rights are to be understood as "*intertemporal guarantees of freedom*", here in form of protection against comprehensive threats caused by the greenhouse gas reduction burdens shifted and loaded upon future generations. According to the obligation of the beforementioned Article 20a GG, the judges pointed out that the legislator should have taken sufficient precautionary steps to ensure a transition to climate neutrality. In doing so, the state must respect fundamental freedom rights of generations to come and must not shift the main burden caused by efforts of greenhouse gas reductions onto the future. The court stated a lack of constitutional respect for these freedom rights in the regulations of the Federal Climate Protection Act.[25]

As the relevant specific climate protection provisions left the concrete path of mitigation efforts after 2030 open, the Federal Constitutional Court noticed — and this is the second invention of the court — an *"advance interference-like effect"* of this law on the freedom rights of the younger generation. This includes and affects the freedom rights of the complainants comprehensively protected by the German constitution, the "Basic Law", *already today*. Then, the court drew the consequence of the described lack of regulations as follows: It acknowledged that any exercise of freedom will directly or indirectly involve CO_2 emissions. However, the more provisions the relevant federal climate protection allow for CO_2 emissions in present time, the bigger the irreversible legal threat to future freedom rights of the younger generations will be. The court clearly speaks out that every amount of CO_2 that is allowed today narrows the remaining options for reducing emissions in compliance with Art. 20a GG later on. Consequently, any exercise of fundamental freedom rights involving CO_2 emissions would have to be subjected to increasingly stringent, and constitutionally required restrictions by the state.[26]

An important factor for these court findings is the reference to the residual greenhouse emission budget assessed by the *IPCC* and the *German Advisory Council on the Environment* in order to meet the Paris Agreement goal to limit the increase in the global average temperature to well below 2°C, preferably 1.5°C (see above under "The plaintiffs' claims and arguments"). Referring to these evaluations, the Federal Constitutional Court held that much of the CO_2-budget will be already depleted by the year 2030. The court pointed out that provisions allowing CO_2 emissions irreversibly led to legal risks for future freedoms. Therefore, the reason was that any amount of emission admitted by law today would minimize the residual CO_2-budget for the future irreversibly and would inevitably lead to stronger freedom restrictions — constitutionally required by order of Article 20a GG — in the future.[27]

Thus, there would be an elevated risk to achieve the transition to climate-neutral behaviour in a way that respects the freedom of future generations in a fair way. There would also be the risk of serious losses of future freedom rights due to an apparently shorter timeframe for the technological and social developments required to compensate today's still heavily CO_2-oriented lifestyle. This risk to the future exercise of fundamental rights – so the court continues to say — has to be seen and treated by the legislator already at current time.[28] This means a legal framework has to be established early enough by taking sufficient precautions in order to ensure that fundamental rights will also be protected in future times.

Considering the described "advance interference-like effect" on the plaintiffs already today, the court demanded that the current federal emission provisions must be compatible with the objective obligation from Article 20a GG to take climate action. The court admitted that federal provisions could of course not rule and solve all the technological and social challenges related to the urgent climate change issue. But against the background of Article 20a GG and the "advance interference-like effect" it demanded from the state to pass a legislation setting up preconditions and giving incentives early enough in all relevant sectors — such as production, service, transport, infrastructure, administration, housing, agriculture, culture, consumption etc. Driven by the state obligation of Article 20a GG, this legislation must ensure a future development allowing the exercise of freedom, albeit increasingly on CO_2-free alternatives of action.[29]

The court stated that the beformentioned "advance interference-like effect" of the federal climate protection provisions on basic freedom rights requires a "constitutional justification". A precondition for this justification is that the provisions on the emission amounts do not lead to disproportionate burdens placed on the future freedom of the complainants. It is the legislator's responsibility on its way to climate neutrality today to set up a legal framework not fostering a strongly CO_2-oriented lifestyle further on for the present generation at the price of continence for future generations facing severe freedom restrictions against the background of a nearly expleted residual CO_2-budget.

Regarding these constitutional requirements, the Federal Constitutional Court finally ruled that the provisions of the Federal Climate Protection Act have an "*advance interference-like effect*" as comprehensive threats to the paintiffs' "*intertemporal guarantees of freedom*". These provisions would violate these fundamental freedom rights today by shifting the burdens of greenhouse gas reduction into the future and loading them upon future generations in a disproportional way. Therefore, the federal legislator violated its obligation rooting

[25] Para. 183 of the order.
[26] Para. 184 et seq. of the order.
[27] Para. 186 et seq. of the order.
[28] Para. 186 et seq. of the order.
[29] Para. 248 et seq. Of the order.

in the *principle of proportionality* to distribute the CO_2 reductions — as a constitutional duty deriving from Art. 20a GG – prospectively over time in a fair and transparent way considering the basic freedom rights carefully.[30]

Consequences of the court order

After the Federal Constitutional Court had declared that the provisions of the Federal Climate Protection Act lack a fair and transparent distribution of CO_2 emissions over time, it wasn't long until the federal legislator grew active. Its task was clear: The legislation had to be corrected in order to fulfill the legal duty to take precautions today in order to protect fundamental freedom rights after 2030. As a consequence from the court order, the altered law had to initiate a transition to climate neutrality early and transparently in order to enable the relevant economic and social sectors to plan ahead. This included — in shape of formal legislation and not merely on the basis of an executive ordinance — the previously lacking decreasing emission levels for the time after 2030 depending on each sector.[31]

The federal legislator also exacerbated the CO_2 emission aims for Germany in the Climate Protection Act: With its amendment already in August 2021, the German Federal Government enshrined in law the goal of achieving greenhouse gas neutrality by 2045. The current aim is to reduce CO_2 emissions by 65 % of the 1990 levels by 2030 and 88 % by 2040 — a very ambitious task for the new Minister of Economic Affairs and Climate Action from the Green Party after the elections in 2021 (Federal Ministry of Economic Affairs and Climate Action, 2022).

Summary and Outlook

The order of the German Federal Constututional Court from March 2021 on the Federal Climate Protection Act is in line with a growing number of other climate litigation cases especially during the last decade. Thus, it also reflects a trend to use the instrument of law to make the legislator sing the song of climate protection with a clearer voice. The Federal Constututional Court picked up the legitimate demands and complaints of the younger generation in the dilemma and crisis of climate change: The older generation has lived a heavily CO_2-oriented lifestyle for far too long. Politics and the law have sustained this way of producing and consuming for far too long as well, while also neglecting the fact that in truth we are exploiting our resources and emitting greenhouse gases in an excessive, unsustainable way — at the cost of younger, future generations. The German Federal Constututional Court — and this is a fascinating aspect of this court order — picked up these legitimate complaints and growing concerns of the civil society, here targeted at insufficient federal climate protection provisions, and poured them into a constitutional form, particularly with the figures of the "*advance interference-like effect*" and the "*intertemporal guarantees of freedom*". Combining these fundamental positions of constitutional law with the traditional "*principle of proportionality*", the road became clear for a substantial and successful action of the plaintiffs in court, considered legally affected in fundamental freedom rights by insufficient legislation.

With the court order from March 2021, the German Federal Constututional Court has taken a path which it probably can't leave or change substantially anymore. It is to be expected that further litigation is to come based on the "*intertemporal guarantees of freedom*" in cases where federal legislation apparently fails to tackle climate protection and global warming issues in a sufficient way. Indeed, this court decision is a milestone in Germany in making the constitutional duties of the legislator clear, as well as fundamental climate protection rights on constitutional grounds. Particularly if it should turn out that one or the other climate target is not met in nearer future, one does not need to be a prophet to foresee: A remarkable and likely growing part of the younger generation will not be willing to accept further failure on the legally required path to climate neutrality. We can be assured: More climate litigation is to come in Germany and likely in other countries, too.

An exciting question — not only for those studying or working in law — is whether this German court order may be transferred to the constitutional framework of other countries. This clearly depends on the system and structures of constitutional law in the relevant countries and the line of jurisdiction, probably often in case law, in their constitutional courts. An important aspect will also be whether domestic constitutional law offers a standing for proceeding at court for the plaintiffs by granting subjective legal claims and constitutional positions with regard to the climate protection issue. However, the decisive constitutional figures of the German court order, i.e. the "*advance interference-like effect*" and the "*intertemporal guarantees of freedom*", in conjunction with the traditional "*principle of proportionality*" are terms of a broad and overall range, which makes them possibly adaptable and manageable in other countries' constitutional law. The "*principle of proportionality*" is definitely a common constitutional principle for legislative, governmental and administrative measures in many countries. Furthermore the "Precautionary Principle" is an internationally accepted, prospective principle in environmental policies, particularly with a view to sustainability and future generations. All things considered, it does not seem so far-fetched that some of the Federal Constitiutional Court findings could be used in climate litigations outside of Germany. For the sake of sufficient climate protection legislation, it would be worth a try. Who knows, perhaps also in Brazil.

[30] Para. 243 et seq. of the order.

[31] See also Bodle and Sina (2021).

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