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The German Federal Constitutional Court: Climate protection is a human right!

Decision of the First Senate of 24 March 2021

- 1 BvR 2656/18 -
- 1 BvR 78/20 -
- 1 BvR 96/20 -
- 1 BvR 288/20 - (represented by Attorneys at Law Günther pp.)

Short evaluation by Dr. Roda Verheyen and Dr. Ulrich Wollenteit

1.
The Federal Constitutional Court has set a hugely important precedent with its decision, handed down on 24 March 2021 and comprises 127 pages, but was only published today.

It has interpreted the German Constitution, *Grundgesetz* (Basic Law) in a way that works for all generations, in a particular stated the following:

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Hamburger Sparkasse
IBAN DE84 2005 0550 1022 2503 83
BIC HASPDEHHXXX

Commerzbank AG
IBAN DE22 2008 0000 0400 0262 00
BIC DRESDEFF200

GLS Bank
IBAN DE61 4306 0967 2033 2109 00
BIC GENODEM1GLS

- Climate change is real and the legislator must act to mitigate
- Climate protection is a human right.
- Climate protection is justiciable, today and in the future
- Legislators must take their lead from science and present coherent concepts of credible reduction pathways that lead to greenhouse neutrality
- Today's generations are encroaching on the civil liberties of future generations by assigning and allowing themselves too many greenhouse gas emissions until 2030: The Climate Protection Act has inadmissibly shifted reduction burdens to the future and to those who will then be responsible.
- That is why section 3(1) sentence 2 and section 4(1) sentence 3 of the Federal Climate Protection Act of 12 December 2019, in conjunction with Schedule 2, are incompatible with fundamental rights. This is also how we had requested it to be determined.
- The legislator must make improvements by 31.12.2022.

The decision was unanimous - no member of the Senate disagreed.

2.

The Senate does not dwell on admissibility. Unlike the ECJ in the European Climate Action (the People's Climate Case), the complainants have standing. "The mere fact that a very large number of people are affected does not prevent an individual fundamental right from being affected" - with reference to the climate complaint before the Administrative Court of Berlin, which we also represented.

3.

The core is contained in guiding principle (*Leitsatz*) 4 of the judgement:

"Under certain conditions, the Basic Law obliges the state to safeguard the freedom protected by fundamental rights over time to assign the proportionate distribution of opportunities for freedom over the generations. In terms of subjective law, fundamental rights, as an intertemporal safeguard of freedom, protect against a unilateral shift of the greenhouse gas reduction burden imposed by Article 20a of the Basic Law into the future. The objective-law protection mandate of Article 20a of the Basic Law (*Staatszielbestimmung*) also includes the necessity to treat the natural foundations of life with such care and to leave them to posterity in such a condition that future generations could not continue to preserve them only at the price of radical abstinence of their own.

The protection of future freedom also requires that the transition to climate neutrality be initiated in good time. In concrete terms, this requires that transparent standards for the further development of greenhouse gas reduction are formulated at an early stage, which provide orientation for the necessary development and implementation processes and give them a sufficient degree of development pressure and planning certainty".

The unconstitutionality is therefore not based on the violation of protection obligations yet, but on the violation of civil liberties (Article 2 (2) sentence 1 of the Basic Law) after 2030, which has already been created by insufficiently defined annual emission quantities in the climate protection law (KSG). In this respect, the court speaks of an "inescapable, encroachment-like preliminary effect" (para. 187). The press release states:

"Fundamental rights are, however, violated by the fact that the emission quantities permitted under § 3 para. 1 sentence 2 and § 4 para. 1 sentence 3 KSG in conjunction with Annex 2 until the year 2030 considerably reduce the emission possibilities remaining after 2030, thereby endangering practically any freedom protected by fundamental rights."

4.

The decision has implications for all other environmental issues:

Guiding Principle 2 e.

"Article 20a of the Basic Law obliges the state to protect the climate. This also aims at achieving climate neutrality.

Article 20a of the Basic Law is a justiciable legal norm which is intended to bind the political process in favour of ecological concerns, also with a view to future generations."

The Constitutional Court does not confirm that 1.5°C global warming is the only permissible level of protection. It does, however, provide the legislature with a variety of firm guidelines:

Paragraph 192:

"It is true that even serious infringements of freedom may be proportionate and justified in the future in order to protect the climate; it is precisely this future justifiability that poses the danger of having to accept considerable infringements of freedom in the future (paras. 117, 120 above). However, because the course for future encroachment on freedom is already set by the current regulation of permissible emission levels, their impact on future freedom must be proportionate from today's perspective and at the present time - when the course can still be changed." (para 192)

Paragraph 193:

"The protection mandate of Article 20a of the Basic Law includes the necessity to treat the natural foundations of life with such care and to leave them to posterity in such a condition that subsequent generations could not continue to preserve them only at the price of radical abstinence of their own."

And the discretion of any lawmaker becomes smaller the more severe the impacts and risks.

Paragraph 194:

“The regulations at stake would be unconstitutional if they allowed so much of the remaining budget to be consumed that the future loss of freedom would inevitably assume unacceptable proportions from today's perspective, because there would be no time left for mitigating developments and transformations. If, in view of the manifold uncertainties as to how large the remaining CO2 budget will actually be in the future (para. 220 ff. below), it cannot be determined with certainty or ruled out that there will have to be such losses of freedom that are unacceptable from today's perspective, measures may nevertheless be required today that at least limit such a risk. If laws accept a risk of considerable impairment of fundamental rights, fundamental rights may, depending on the nature and severity of the consequences, require that legal regulations be designed in such a way that the risk of violations of fundamental rights also remains contained (fundamentally BVerfGE 49, 89 <141 f.>). In any case, the principle of proportionality does not only protect against absolute unreasonableness, but also requires a sparing use of freedom protected by fundamental rights beforehand. (para. 194)”

Just like the Dutch courts in the Urgenda decision, the Federal Constitutional Court requires that each state contributes its fair share to climate protection:

Guideline 2c)

“The national climate protection obligation is not precluded by the fact that the global character of climate and global warming precludes a solution to the problems of climate change by one state alone. The climate protection obligation requires the state to act internationally to protect the climate globally and to work towards climate protection within the framework of international coordination. The state cannot evade its responsibility by referring to greenhouse gas emissions in other states.”

The formal construct of the law is also not in conformity with the constitution for other reasons.

Guiding principle 5

The legislature must itself make the necessary regulations on the size of the total emission quantities permitted for certain periods. ... The challenge is not to keep pace with developments and knowledge in order to protect fundamental rights, but rather to make further developments possible in the first place in order to protect fundamental rights.

Therefore, it is inadmissible and unconstitutional that the Climate Protection Act has so far left further measures to a legal ordinance (*Verordnung*).

5.

Our conclusion:

The decision is groundbreaking. It continues the path that Dutch, French and Irish courts and also the Berlin Administrative Court, as well as international human rights bodies, have been paving for years. The complainants can be proud and happy.

The legislator must now present a coherent reduction pathway that achieves greenhouse gas neutrality quickly and not at the expense of the younger generations. The inevitable consequence: the targets for 2030 must be significantly strengthened. The current federal government should make proposals quickly. Waiting for the EU's Green Deal implementation package is not enough.

The decision will have an impact on the proceedings before the European Court of Human Rights, where several climate lawsuits are currently pending, also against Germany.

The decision will forever have considerable significance for environmental law proceedings of all kinds. Article 20a of the Basic Law, with its state objective of protecting the natural foundations of life for future generations, has been given teeth.
