Journal of Environmental Law, 2021, 00, 1–13
https://doi.org/10.1093/jel/eqab035
Analysis

The Intergenerational Effect of Fundamental Rights: A Contribution of the German Federal Constitutional Court to Climate Protection

Gerd Winter *

ABSTRACT

By a recent judgment, the German Federal Constitutional Court enhanced the concept of fundamental rights to climate protection in three dimensions: their number, content and temporal reach. While previously fundamental rights to health, occupation and property have been trialled in domestic climate litigation, the Court here propounds almost all fundamental rights to being inflicted insofar as their enjoyment hinges upon the availability of fossil energy and thus the emission of greenhouse gases. Developing an intertemporal dimension of those rights, the Court finds an imbalance of permissible greenhouse gas emissions in that most of the emission budget available within a temperature increase of well below 2°C will be spent by 2030, leaving only a minimum use of fossil fuels for subsequent years and generations. This analysis summarises the Court's legal reasoning, positioning it in the broader spectrum of fundamental rights doctrine, and reflects on the contribution of the case to the growing number of transnational climate jurisprudence.

KEYWORDS: climate protection, greenhouse gas emissions, intergenerational dimension of human rights, constitutional complaint, German Federal Constitutional Court

1. INTRODUCTION

On 24 March 2021, the German Federal Constitutional Court (BVerfG) decided on four constitutional complaints ('Verfassungsbeschwerden') concerning the German climate protection policy.[1] The claimants were both minors and adults, with different occupations and living in a range of different jurisdictions—most in Germany and some in Bangladesh and Nepal. They alleged to already now suffer from climate

* Professor of Public Law, Research Unit for European Environmental Law (FEU), University of Bremen, Germany (gwinter@uni-bremen.de)

1 BVerfG 24 March 2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20 ('the BVerfG judgment'). The Court published an English translation of most of the reasons, see <https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2021/03/rs20210324_1bvr265618en.html> accessed 22 September 2021.

change-induced heatwaves, droughts and flooding, and to increasingly suffer in the future. Two environmental associations joined in with the individual applicants.

The action challenged the German Climate Protection Act 2019 (CPA) that determines the reduction pathway of yearly greenhouse gas (GHG) emissions. The overall reduction target, as per CPA, was 55% of the 1990 emissions to be reached by 2030. In an annexed table, the allowed yearly emission quantities from 2021 to 2030 were specified for each of the six main GHG source sectors, including energy, industry, buildings, transport, agriculture and waste. These determinations are legally important in two ways: they describe what emission quantities are forbidden (the 55% target) and what quantities are allowed (the remaining 45%).

The claimants argued that in view of applicable fundamental rights, the reduction target is too low, or, vice versa, that the allowable GHG emission quantities (45%) are too high. The Court decided that the CPA is unconstitutional insofar as it lacks provisions updating targets for the time after 2030, and that the legislator must enact updating provisions by the end of 2022.

The reasons given by the Court are outlined in a lengthy judgment in which the Court takes great care to explain its proposed new legal concept—fundamental rights having an intertemporal advance effect—in each of the four sections of the judgment. It therefore helps to understand the new concept if the various stages of the judgment are kept in mind as a whole. More precisely, in section 1 of the judgment, a summary of the facts of the case is outlined, including the relevant legal bases, factual bases of climate change and of climate action, facts about the applicants' life conditions and legal arguments brought by them and commented by interveners. In section 2, the Court clarifies points of admissibility, including reliefs claimed, scope and structure of relevant fundamental rights, legal standing of the applicants and exhaustion of other remedies. In section 3, it examines the merits of the case with a focus on obligations to protect and the intertemporal guarantee of freedoms. In the final part, section 4, it lays out the Order.

The following analysis will focus on the admissibility and merits of the case. Subsequently, some core propositions of the Court will be highlighted and commented.

2. ADMISSIBILITY

In German law, a constitutional complaint is admissible if a person alleges that a fundamental right of hers was violated by the exertion of public power ('Ausübung von öffentlicher Gewalt').[2] As specified by legislation and judicial decisions, this means that the applicants must substantiate which fundamental rights are potentially violated, that they are personally, directly and presently affected by the exertion of public power and that other remedies have been exhausted. For those living outside Germany, the applicants must show that they are included in the protective reach of German fundamental rights.

In this case, the Court found it plausible that the fundamental rights to health and property may be affected, but not the right to occupation, which the Court

2 art 90(1) Act on the Federal Constitutional Court of 1993.

understood, in this case, to be covered by the fundamental right to property.[3] In addition, it found a broad range of so-called 'freedom rights', explained below, worth examining but not the right to an ecological minimum standard of living ('ökologisches Existenzminimum'), which the applicants argued stems from the constitutional right to human dignity.[4] Although the Court concluded that such a right is not violated in the present case, it seems to have left the door open to the application of such a right in the context of future natural disasters.[5] Likewise, the Court rejected the submission that a right to a liveable environment can be derived from the substantive legal obligation established by Article 20a of the German Constitution that obligates the state to preserve 'the natural life conditions' in the interest of both present and future generations. The Court explained that this requirement is seen as an objective obligation, which does not entail a subjective right and so is not applicable here.[6]

In relation to legal standing, the Court set out the following important findings. First, and with regard to the requirement to show 'present' concern, it held this to include *future* concern when it is foreseeably affected by irreversible causal chains, such as by GHG emissions permitted under the CPA. Regarding the need to prove 'personal' concern, the Court noted that it may be fulfilled even when more than one person is affected.[7] Finally, with regard to the requirement to show 'direct' concern, the Court found it unnecessary to dwell on which measure is relevant to challenge, as long as it can be shown that GHG emissions are permissible by law.

Ultimately, the Court found the action spearheaded by the individual applicants to be admissible. The actions brought by the environmental associations, on the other hand, were denied standing on the basis that German Law, including the German Constitution and the Act on the Federal Constitutional Court, does not provide for a class action.

3. MERITS

The Court examined two sets of fundamental rights: the rights to health and property, on one hand, and the so-called 'freedom rights', on the other. Generally speaking, the difference between the two is clear when drawing causality between GHG emissions and the interference with each of these two sets of rights. With regard to the rights of health and property, the Court would examine the links between GHG emissions, rising atmospheric temperatures and heatwaves, increased mortality, and/or droughts and flooding. In the context of 'freedom rights', the Court would instead focus on causal links between GHG emissions, scarcity of fossil fuels and risks to socio-economic life that depends on energy use.[8] The Court's reasoning on each set of these rights is explained next.

3 BVerfG judgment (n 1) [100].
4 art 1(1) Federal Constitution.
5 BVerfG judgment (n 1) [114].
6 ibid [112].
7 ibid [110], [131].
8 Considering that the rights to health and property are also freedom rights, it may be preferable to speak of two different scopes of fundamental rights, one protecting specific interests such as health and property and the other protecting the interest in energy availability.

3.1 The Right to Health

The right to health is laid out in Article 2(2)(1) of the German Constitution. According to general doctrine, it primarily establishes a *status negativus*,[9] which is a negative obligation of the state to abstain from interferences with human health. Here, however, the Court focused on the duty of *status positivus*—the right to health as a positive obligation of the state.

In further interpreting the right to health, the Court first construed an ambitious level of duties, including that the state must contribute to mitigating climate change and take adaptation measures.[10] The Court found the obligation to cover present, as well as future generations, although the latter are only protected in an objective sense that does not entail entrusting these with subjective rights.[11] Considering that Germany only commands a limited contribution to climate change globally, the Court found an obligation of the German state to engage in international activities tackling climate change.[12] The Court, however, accorded broad discretion to the state as to *how* to protect human health, explaining that the Court's review is more restrained in relation to positive obligations, as compared with negative ones.[13] More specifically, the Court laid out that it would find a violation of a positive obligation to protect only in four situations: if no measure has been taken; if the measures taken are manifestly unsuitable; or completely inadequate; or if they fall short of the protection goal.[14]

Subsuming the measures provided by the CPA, the Court found them neither manifestly unsuitable nor fully inadequate, as they set up a significant trajectory of decreasing GHG emissions. With regards to the question whether the measures, nevertheless, fall short of the protection requirements of the right to health, the Court found it within the state's discretion to opt for the Paris targets of well below 2°C, and preferably 1.5°C.[15]

In addition, and more fundamentally, the Court found that the obligation to protect human health has a narrower scope than the obligation to protect the climate in general because the latter, based on Article 20a of the Constitution, extends to the environment at large, which necessitates more stringent measures than if only human health were to be protected. In particular, the Court explained, human health could also be safeguarded by appropriate adaptation strategies, such as by designating unobstructed fresh air channels and green spaces in cities, and taking passive safety measures preventing flooding in river basins and protecting from stark rain events.[16]

9 The distinction between *status negativus* and *positivus* goes back to the German constitutional lawyer Georg Jellinek, *Das System der öffentlichen Rechte* (JCB Mohr/Paul Siebeck 1892). While Jellinek applied the status positivus only to rights to the observance of ordinary laws (109–29), the BVerfG upgraded it to the level of fundamental rights that may trigger better legislation. See (for environmental cases) BVerfG 8 August 1978, 2 BvL 8/77, BVerfGE 49, 89, 141–42.

10 BVerfG judgment (n 1) [144].

11 ibid [146].

12 ibid [149]

13 ibid [152].

14 ibid.

15 ibid [159]–[162].

16 ibid [163]–[164].

3.2 The Right to Property

The Court followed the same line of argument, as above, in relation to positive obligations in the context of the right to property. It acknowledged that agricultural and real estate interests may suffer damage from flooding and sea level rise caused by climate change, and that even entire communities are at risk of losing their settled land. Yet, due to uncertainties of predictions and the possibility of adaptation measures that the state could take, it was not found to be in breach of its obligations under this particular right.[17]

3.3 External Reach of Fundamental Rights

As a next step, the Court addressed the question of external reach of German fundamental rights, examining whether positive obligations to protect the rights to health and property were violated in relation to the applicants who live in Bangladesh and Nepal. Relying on the textual formulation of the fundamental rights, it ascertained that Article 1(3) of the German Constitution, which makes fundamental rights binding on the German state, is not expressly confined to German territory. The Court did not discuss external jurisdiction, as required by Article 1 European Convention of Human Rights (ECHR) and understood to mean effective control of a state in a foreign territory[18]; a requirement that would necessitate examination whether GHG emissions originating from a state establishes a variant of control. Instead, the Court looked at the content of the right. It indicated that the level of protection may be different for the internal and external reach but did not elaborate this further. It concluded that the obligation of protection was not breached, as the German state did not have jurisdiction in the foreign states to take climate adaptation measures protecting the applicants.[19]

3.4 'Freedom Rights'

As a parallel inquiry to the applicability of rights to health and property, the Court developed a new concept, which it called, in direct translation, 'advance interference-like effect on freedom rights' ('eingriffsähnliche Vorwirkung auf Freiheitsrechte'). It provided useful reasoning on the scope and what could count as the interference of such rights, as well as constitutional compatibility of possible interference, as explained next.

3.1.1 Scope and interference

It is the availability of energy, the Court explained, that characterises the scope of 'freedom rights'. This includes access to fossil fuels as long as these have not been replaced by renewables.[20] The range of relevant 'freedom rights' that thus may be breached by the lack of energy availability is not listed by the Court, but these can be deducted from its reasoning. In paragraph 37, eg, the Court discussed how 'freedom

17 ibid [171]–[172]

18 See in that respect *Borka Bankovic and others v Belgium and others*, App no 52207/99 (ECtHR 12 December 2001) para 71.

19 BVerfG judgment (n 1) [176]–[181].

20 ibid [184].

rights' may be violated in a variety of sectors, including production, transportation and consumption, thereby inferring that constitutional rights, such as the rights to occupation, property, health, housing and free movement may be called on, as well as the right to free development of the human personality, found in Article 2(1) of the German Constitution. The latter the Court understands as the right underlying all other freedoms and so it provides a fall-back position where the specific rights do not provide protection.

With regards to what could count as interference with 'freedom rights', the Court explained that by allowing GHG emissions to continue, the state will need to take ever more restrictive measures aiming at managing shrinking GHG emission opportunities, meaning that the CPA essentially jeopardises future life chances of the applicants. The significance of this is that the Court thus allowed current GHG emissions to be counted towards future interference with 'freedom rights'.[21]

3.1.2 Compatibility with constitutional requirements

In line with general fundamental rights doctrine, the Court subsequently examined whether the interference of freedom rights is compatible with relevant constitutional law, which permits restrictions of fundamental rights if deemed necessary for public interest. The Court did not examine which public interests may speak in favour of continuing to allow GHG emissions and thereby risk future GHG emission restrictions, even if it could have considered the loss of jobs, high costs and other adverse effects of early action. Instead, the Court focused on the obligation to protect 'the natural life conditions', as found in Article 20a of the German Constitution, and the principle of proportionality.

3.1.1.1 The obligation to protect 'the natural life conditions'. In examining whether the obligation to protect 'the natural life conditions' prohibits infringement of 'freedom rights', the Court relied on what, in German constitutional law, is called the *Elfes*-test. The test demands that any interference with basic rights must be compatible with the entire constitutional order, including objective requirements that do not entail subjective rights.[22] This meant that the Court had to examine whether the basic obligation of the state to protect 'the natural life conditions' in the interest of present and future generations, as found under Article 20a of the German Constitution, was infringed by allowing too large quantities of GHG emissions.

Article 20a states (my own translation):

> The state protects, also in responsibility for the future generations and within the framework of the constitutional order, the natural bases of life and the animals through legislation and, in accordance with law and justice, through executive power and the judiciary.

The Court first determined the content of this obligation and then applied it to the present case. Concerning the content, the Court found that the state is obliged to

21 ibid [187].

22 BVerfG 16 January 1957, 1 BvR 253/56 (*Elfes*), BVerfGE 6, 32, at 40–41.

take action to protect the climate and aim at climate neutrality of GHG emissions.[23] Apart from taking national measures, it held that the state must engage in international negotiations aimed at reducing global GHG emissions,[24] and implement its international climate change obligations in order to build mutual trust, and not to give other states any excuse to do less than what they could.[25]

Moreover, the Court explained that Article 20a permits the legislature wide prerogative powers but that the legislature is subject to judicial review.[26] In the context of the CPA, this meant that the targets that are set out—including the temperature limits of well below 2°C, and, if possible, an 1.5°C increase—fall within the boundaries of legislative discretion, even though the Court noted that if new scientific findings push for further reductions, the legislator may be obliged to reconsider the CPA targets.[27] The prerogative of the legislature to specify the obligations under Article 20a is grounded on its capacity of balancing climate protection against other interests in a transparent and thus legitimate fashion. Such public process, the Court explained, is all the more important in a time of reorientation of the fundamental objectives of climate law.[28]

Applying this outline of requirements demanded by Article 20a, the Court then observed that the calculation of the global budgets under CPA is based on sound scientific analysis, even if uncertainties remain concerning the correlations between cumulative GHG emissions and climate change.[29] Also, it pointed out that the calculation of the GHG emission share of Germany in the global budget can be based on different criteria. While Article 20a does not give precise guidance in this respect, it nevertheless requires that the chosen criterion is based on justifiable grounds, and seeks to create trust amongst international parties. The Court considered that on the basis of the criterion of 'present equal per capita', the German Expert Council for Environmental Questions calculated 6,7 gigatonnes CO_2eq per 2020as being the German budget, meaning that less than 1 gigatonne would remain for the period following 2030, as set out in the CPA. While this calculation was based on a temperature limit of 1.75°C, the Court added that a calculation of the global budget based on a limit of 2°C would also be possible, as would an allocation of the EU share by other criteria than 'equal per capita'.

In sum, considering the uncertainties and evaluations involved in setting climate targets, the Court found that the legislator had not overstepped its margin of discretion. This means that the CPA, with its trajectory of allowed GHG emissions, does not violate the obligation of Article 20a to preserving 'the natural life conditions'.[30] To put it more bluntly, allowing high quantities of GHG emissions now, and thus burdening future generations in terms of their energy use, was not found to violate Article 20a of the German Constitution.

23 BVerfG judgment (n 1) [197].
24 ibid [200].
25 ibid [202]–[203].
26 ibid [204]–[206].
27 ibid [208]–[211].
28 ibid [212].
29 ibid [222].
30 ibid [223]–[237].

3.1.1.2 Proportionality. Next, the Court proceeded with the test of proportionality. The Court did not specify which public interest is applied as a counterweight to the encroachment of basic rights, but one can infer from the context that it is the interest of present generations to consume fossil energy, which is balanced against the interest of future generations in having a share of GHG emission saved for them. The Court examined this relationship by once again applying the budget approach. The CPA, supported by Article 20a, commits to the Paris-based temperature limits,[31] and from those limits, global budgets can be calculated and allocated to states, including Germany. The Court again concluded that the way in which GHG emission budgets are planned under the CPA would mean that most permissible GHG emissions would have been used by 2030, leaving only a minimum GHG available to be emitted in the future.[32] Comparing present and subsequent generations, it found the distribution of advantages and burdens between the two incompatible with the principle of proportionality[33]:

> It follows from the principle of proportionality that one generation must not be allowed to consume large portions of the CO2 budget while bearing a relatively minor share of the reduction effort, if this would involve leaving subsequent generations with a drastic reduction burden and expose their lives to serious losses of freedom – something the complainants describe as an 'emergency stop'.

The Court added an important consequence of improved distribution of GHG emission quantities, namely that by cutting back GHG emission possibilities early, time will be saved for the necessary transformation and pressure exerted inciting new developments.[34]

> If, for example, the legislator specifies at an early stage that the transport sector will only have small annual emission amounts at its disposal from a certain point in time, this may provide incentives and pressure for the development and adoption of alternative technologies and the related infrastructure.

In conclusion, the Court declared the challenged provisions of the CPA unconstitutional and mandated the state to update the allowable emissions in accordance with the proportionality principle. The Court did not determine the quantities that shall be available over time, as this is a matter of political discretion. The Court insisted that according to the essentiality requirement ('Wesentlichkeitstheorie'), the essential components of CPA must be clarified by legislation. Concerning the allowable emissions, this can either be done by parliament or by delegation to executive regulation.[35]

31 ibid [245].
32 ibid [246].
33 ibid [192].
34 ibid [249].
35 ibid [262]–[264].

4. COMMENTARY

The most important legal innovation in the judgment has three components: first, the Court widens the spectrum of affected rights to almost all freedom rights; secondly, it brings availability of energy supply into their protective scope; and, thirdly, it looks into the future conditions of their exercise construing an advance effect on the present. Applying this concept the Court found the state to already now encroach on the freedom rights by allowing an unproportionally large share of GHG emissions to be spent today rather than be saved for the future.

Having set out the key legal points made by the Court, it is useful to reflect on the content and legal impact of the BVerfG decision. I will do so by focusing on issues that (1) demand further clarification, (2) concern separation of powers and (3) refer to transnational discourse of climate jurisprudence.

4.1 Issues Inviting Further Explanation

Concerning standing of individuals, the Court made it clear that 'individual' concern means 'personal' concern, contrasting this to the Court of Justice of the EU's narrow requirement of uniqueness of concern.[36] This is of major importance in times of catastrophic and widespread damage from climate change to which government action, or omission, has contributed. Usefully, the Court explained that it does not matter whether more than one person is affected. Still, *actio popularis* in the sense of altruistic action for others remains unavailable.

Denying standing of environmental associations for constitutional complaints may (as the Court undertakes in this decision) be grounded on the 'objective' nature of the obligation to preserve 'the natural conditions of human life', as found in Article 20a of the German Constitution. To insist on this, however, misses the point of class actions: they seek to protect a *collective* right. As an alternative, the claimants could have tried the right to health, as the basis for a class action. The Court would probably have rejected this too, as this right also demands 'personal' involvement. However, according to Article 19(3) of the German Constitution, fundamental rights can be invoked by legal persons provided the pertinent rights are 'by their nature' ('ihrem Wesen nach') applicable to them. Accordingly, economic rights, such as the right to occupation, have been found 'by their nature' to apply to corporations. Why should then the right to human health not be applicable to an environmental association? It is true that the association as a legal construct does not suffer from environmental damage—but does the legal construct of a stock company invent, plan, manufacture and trade its products and services? There must be some equality of treatment of legal persons that represent collectives, be it the collective of the employees of a company, or the collective of members of an association.

Regarding extra-territoriality of claims, it is to be commended that the Court enables the possibility to extend the protection of fundamental rights to affected people outside of Germany. It is also understandable that it conceived differences in scope

36 Case C-565/19 P *Armando Carvalho & Others v EP and Council*, ECLI:EU:C:2021:252. For a critique, see the arguments summarised by the applicants in this case which the Court pushed aside for fear of opening up a flood gate for actions, cf Gerd Winter, '*Armando Carvalho and Others v EU*: Invoking Human Rights and the Paris Agreement for Better Climate Protection Legislation' (2020) 9 TEL 137.

and intensity of protection in relation to internal and external reach of German law. Yet, when subsuming the facts of the case, the Court should have realised the extremely dire conditions in the global South, especially considering the fact that the CPA may already have violated rights to health and property of the foreign claimants. It is thus to be asked whether the distinction between internal and external reach needs to be rethought.

As a further doctrinal challenge, the Court considers the relationship between international and national law. In general, German law construes international treaty law as ordinary laws, if directly applied. The Court was thus criticised for suggesting that the Paris Agreement enjoys higher status in considering the validity of the use of temperature targets under the CPA. However, more closely read, the Court saw the legislator rely on these as transposed into national law.[37] As such, there is no situation of national law being held in hierarchical reins by international law. Would that, nevertheless, mean that the Court assessed GHG emission quantities allocated to the various sectors under the CPA against temperature limits set under that same law meaning that it got trapped in circular reasoning? In my view, that is not the case because when committing to temperature limits, the CPA can be construed as having quasi-constitutional status in executing its mandate under Article 20a of the German Constitution.[38]

It is noteworthy that the Court does not recognise a general right to a healthy environment. Article 20a could have been the basis for such right but, as mentioned, the Court understood it as an objective obligation only. The German situation thus differs from many other legal systems that have recognised such a right.[39] The judgment, nevertheless, shows that rights that protect more concrete interests, such as the rights to health, property, occupation and energy availability can be interpreted to secure their structural preconditions, including appropriate climate conditions.

Although the obligation to protect 'the natural life conditions' under Article 20a is not thought of as a subjective right, it can be applied and will play a role in 'objective' constitutional litigation between the state and federal institutions. In such proceedings, it may become consequential that the Court construes the level of protection higher for the climate than for human health and property.

Concerning human rights as *status negativus* or *positivus* in the context of climate legislation, it could be argued that by allocating GHG emission rights to private actors, the state takes the responsibility for GHG emissions and the ensuing harmful effects. Such legal thinking was proposed in relation to sulphur dioxide emissions and their causation of forest disease, which the Court rejected, arguing that by regulating a polluting activity, the state does not enable but only limits emissions.[40] In

37 Seen from an international law perspective, this can be understood to imply that the German state accepts the 'Paris' targets as binding. This is a lesson to be learnt by those scholars who have classified the 'Paris' approach as merely voluntary and bottom up. See on the related discussion, Winter (ibid) 144–45.

38 See further on this issue that is much discussed by German commentators Claudio Franzius, Die Figur der eingriffsähnlichen Vorwirkung (2021) KritV (forthcoming).

39 For an overview, see John H Knox, 'Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment' (19 July 2018) UN-GA A 73/188. <https://undocs.org/A/73/188> accessed 18 July 2021.

40 BVerfG 26 March 1998, 1 BvR 180/88, para 17.

contrast, as outlined, the CPA defines allowable quantities that are allocated to different GHG source sectors—a system even more outspoken in the EU emissions trading system in which GHG emission allowances are allocated to emitters.[41] This means the state entitles emissions and thereby bears responsibility for the ensuing interference with fundamental rights. While the Court did not consider such *status negativus* in relation to the rights to health and property, it did consider it with regard to the interference with future 'freedom rights'. Such preference for checking laws in terms of *status negativus* corresponds with general practice of the Court, which, in the present decision, it explained as follows[42]:

> The subjective rights of defence against state interventions resulting from the fundamental rights, on the one hand, and the duties of protection resulting from the objective meaning of the fundamental rights, on the other hand, differ fundamentally from each other in that the aim and content of the right to defence prohibit certain state conduct, whereas the duty to protect is fundamentally undetermined.

The Court repeatedly employed the so-called budget approach. This is very helpful to understand the intergenerational distribution of scarce resources. There seems to be an inconsistency, however, in how the approach is handled. When depicting the obligations to protect health, and 'the natural life conditions', the Court points to the uncertainties and evaluations of budget calculations, concluding that the legislator did not overstep its margin of discretion when allocating GHG emission budgets to different source sectors. In contrast, in conducting the proportionality test, the Court takes the German budget as a conclusive basis when demanding a fairer intertemporal allocation.

Incidentally, if looked at in narrow procedural terms, the shift of focus, from health protection to energy availability, has side-lined the original pleas of the claimants. They wanted to be protected from the interference with their health, occupation and property, but the Court made them ask for better protection of their freedoms to consume energy. The Court had to rely on its competence—developed elsewhere—to bring in fundamental rights not invoked by the applicants in order to legitimate this shift of legal basis.[43] In any case, the claimants were happy with this, because the outcome—more stringent reduction of GHG emissions—was the same as the one they aimed at, albeit based on different doctrinal grounds.

The freedom rights turn initiated by the Court's decision is capable of alerting and guiding the broader constitutional discourse to dire situations that will expand in future: the increasing scarcity of natural resources and the unavoidability of rationing their use. New tools and procedures of governance will have to be introduced and

41 The point was raised in *Carvalho* (n 36) but not decided because the Court of Justice of the European Union - CJEU stopped the case short for inadmissibility. Cf Winter (n 36) 141–42.

42 BVerfG judgment (n 1) [152]. Contrastingly, the European Court of Human Rights does not see much difference in judicial checking of negative and positive obligations, see eg *Lopez Ostra v Spain*, App no 16798/90 (ECtHR 9 December 1994) para 51.

43 BVerfG judgment (n 1) [127].

the framework of fundamental rights to be accorded.[44] The contribution of the BVerfG decision is the obligation that scarce resources must be fairly distributed among generations.

4.2 Separation of Powers

Has the Court overstepped the boundaries of separation of powers? It may appear so considering the many obligations placed on the state as designed by the Court. Prospectively, these obligations will not have much impact on the political branches of government because they are vague and allow wide political discretion. Maybe, though, the obligations will push the broader epistemic of constitutional law towards attention for environmental present and future concerns and will, as such, have an indirect legal impact. Contrastingly, what the Court determined *in concreto* is very much within the proper realm of the judiciary, if that is defined as any question for which 'judicially discoverable and manageable standards for resolving it' exist.[45] Such standards were indeed applied when the Court distinguished between personal and exclusive standing, delimited the external reach of human rights, discovered the energy basis of socio-economic freedom rights, developed the intertemporal dimension of fundamental rights, conducted the proportionality test for distributing burdens and advantages between generations, and issued an Order that is realisable and gives directions leaving the concrete implementation to the other branches of government.

4.3 Transnationalisation of the Judiciary

The judgment of the BVerfG is one of many judicial voices on climate protection across the globe. While during the first two decades of climate law, actions brought by GHG emitters against climate protection law prevailed, the legal scenery has, since the mid-2010s, changed and become dominated by actions brought by climate defenders pleading for more stringent climate protection. The resulting judgments are still far from forming a harmonious chorus, but it is clear that the courts listen to each other and adopt what fits, or enriches their own legal reasoning.

The BVerfG too seeks support from foreign courts. In this particular case, it did so on a range of issues, including on the questions whether the protection of life and health includes the protection against environmental pollution (European Court of Human Rights - ECtHR)[46]; whether human rights constitute a positive obligation to protect against environmental harm (ECtHR); if a society that is geared towards a CO_2-intensive lifestyle is forced to switch to climate-neutral behaviour within a short period of time, because otherwise the future restrictions on freedom are likely to be significant (Supreme Court of the Netherlands)[47]; whether, in applying only adaptation measures violates the protection mandate arising from fundamental rights (Rechtbank Den Haag, Supreme Court of the Netherlands)[48]; whether the reduction

44 See further Gerd Winter, 'Rationing the Use of Common Resources: Problems of Design and Constitutionality', in Dawn Oliver, Tony Prosser and Richard Rawlings (eds), *The Regulatory State: Constitutional Implications* (OUP 2010) 129.

45 Cite taken from the so-called Baker criteria of political questions, see *Baker*, 369 US 217 (1962).

46 BVerfG judgment (n 1) [99].

47 ibid [121].

48 ibid [157].

of GHG emissions is obligatory, even if a state's share in global GHG emissions is small (Gerechtshof Den Haag, High Court of New Zealand, US Court of Appeals for the Ninth Circuit)[49]; whether the budget approach is useful for translating temperature limits into available GHG emission quantities (Supreme Court of the Netherlands, Irish Supreme Court)[50]; and whether it is constitutionally imperative that further reduction targets beyond 2030 are specified in good time, extending sufficiently far into the future (Irish Supreme Court).[51]

While such cites served as source for inspiration, the legal concepts developed by the BVerfG will certainly also be referred to by other courts. For instance, its findings have already been offered to the European Court of Human Rights in the Duarte Agostinho proceedings, and to the South Korean Constitutional Court in a pending constitutional complaint.[52] How precisely the transnational discourse of courts works, and to what extent national traditions will remain intact or blend towards common transnational practices must be left to future commentary.[53]

ACKNOWLEDGEMENTS

My sincere thanks go to an anonymous reviewer for valuable comments, as well as to Sanja Bogojević for her careful and patient editing.

49 ibid [203].

50 ibid [218].

51 ibid [253].

52 Information from personal communication between the author and counsel.

53 There is already scholarship to be consulted, see eg Jacqueline Peel and Hari M Osofsky, 'A Rights Turn in Climate Change Litigation?' (2018) 7 TEL 37.