Climate justice and responsibility – rethinking climate protection and constitutional requirements

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Prof. Dr. Sabine Schlacke had the great honour and pleasure to work with Dirk Messner for the Advisory Council on Global Change of the German Government (WBGU) from 2008 to 2020. The first product of their collaboration in the WBGU was the report on "Solving the climate dilemma: The budget approach". Together, they launched the idea of distributing the remaining global amount of CO_2 emissions to stay below the 2°C guard rail as a budget among the states using a per capita approach. The Federal Constitutional Court used this budget approach, as further developed by the German Advisory Council on the Environment (Sachverständigenrat für Umweltfragen), as a decisive argumentation support for its decision. This contribution now examines this WBGU impact and, above all, the consequences of the decision of the Federal Constitutional Court. Sabine Schlacke stated: "Dirk has always impressed me with his vision for global governance in the sustainability area, his wise geopolitical view of the North-South and East-West conflicts, his enthusiasm and his commitment."

In its – to put it cautiously – startling decision on the constitutionality of the emission reduction targets of the Federal Climate Protection Act, the German Federal Constitutional Court added a constitutional layer to political decision-making for coping with climate change. This gives reason to consider what German constitutional law (Article 20a of the Basic Law) refers to as "responsibility for future generations" in the light of the main content and course set by the decision: Who will bear the legal responsibility for achieving effective climate protection in the future? The answer to this question cannot be found only at the national level. It must include the European level and the international involvement of the legislature.

Mobilising the German constitution for climate protection: The Federal Constitutional Court's climate decision

On the 24th of March 2021, the German Federal Constitutional Court has taken a historic decision: It significantly upgrades the value and the impact of the state objective of environmental protection from Article 20a of the Basic Law, which has so far remained pale (Bundesverfassungsgericht 2021). It takes from it the duty of the legislature to distribute the reductions in CO_2 emissions necessary for effective climate protection, up to and including climate neutrality, in a forward-looking manner that protects fundamental rights. This creates nothing less than an individual fundamental right to intertemporal freedom protection. Incorporated into the fundamental right of general freedom of action of future generations that is to be derived from Article 2 (1) of the Basic Law, Article 20a of the Basic Law gives rise to a legislative mandate to cushion the risk of serious future environmental burdens in such a way that their encroachment-like advance effects are mitigated. In other words: Current and future generations must not be saddled with the risk of significant, climate change-related loss of freedom due to a legislative failure in the here and now. Therefore, the German Climate Protection Act enacted in 2019, which at the time of the Constitutional Court's decision provided for reduction targets only until 2030, must be amended insofar as a concrete emissions reduction path until climate neutrality in 2050 was missing, i.e., the fundamental-rights-protecting design of climate-protection measures was omitted from that point onwards (for a more in-depth analysis of the Constitutional Court's decision, see Schlacke 2021).

What is remarkable about the decision is that it explicitly relies on an approach developed in the scientific community for determining the amount of anthropogenic greenhouse gas emissions still available, which is the so-called budget approach. It was introduced in 2009 by the German Advisory Council on Global Change (WBGU 2009) and – with differences in the criteria of the distribution key – further developed by the German Advisory Council on the Environment. The budget approach aims to measure the required ambition level of national greenhouse gas emission contributions on the basis of a global CO_2 budget, which is broken down to emitting countries in the form of individual contributions. It allows to translate the scientifically determined planetary temperature limits into concrete mitigation efforts. On this basis, it is possible to calculate by what date which reduction efforts are required, so that the budget approach simultaneously makes the responsibility derived from Article 20a of the Basic Law measurable for the future. The Federal Constitutional Court

recognises both these advantages and the uncertainties inherent in the budget approach. It adopts the approach in a scientifically informed and constitutionally reflective manner, lending persuasive force to the findings resulting from the application of the budget approach, which concern in particular the need for reduction after the budget has been used up.

From the point of view of constitutional dogma, the Federal Constitutional Court's decision may be criticised for not clearly separating the defensive and protective dimensions of fundamental rights. It has created a new obligation to coordinate both dimensions (see Schlacke 2021) and did not take the opportunity to give contours to the still underdeveloped dogma of the duty to protect (see Calliess 2021). The decision is characterised by a will to judicial activism and by the methodological departure from traditional argumentation patterns in the sense of a progressive-effective activation of constitutional law in the name of developing climate protection law standards. Self-authorisations of this kind are in latent tension with those tasks that are assigned to the parliamentary legislature according to the functional order of the Basic Law, even though applying a provision of the kind of Article 20a of the Basic Law necessarily implies a certain margin of appreciation. However, these aspects might as well be the strengths of the decision. First, it does not seek false compromises but is open to debate. The jurisprudential debate has picked up a record speed just a few weeks after the publication of the decision in April 2021, and in practice, too, a possible influence on the interpretation of current environmental and climate protection law is being intensively discussed. It stands to reason that legal doctrinal and argumentative potential will be uncovered in this way, which could be of value for future legal debate on the requirements of a constitutionally compliant climate-protecting provision for freedom. This also applies to the question of the transferability of the new constitutional standards to other areas, such as the protection of biodiversity. Second, the decision is unambiguous. It formulates a clear and explicit mandate to the legislature and clearly expresses its responsibility. Testimony to this clarity is the fact that the German Climate Protection Act was amended on 18th of August 2021 in a very short time, with its scope being extended to the period after the year 2030 (BGBl. I, 2021, p. 3905). In this way, the constitutional upgrading of climate protection has already developed practical significance. However, the legislator limits itself to setting targets – such as increasing the reduction target from 55% to 65% by 2030 and achieving climate neutrality by 2045 – and annual emission budgets for different sectors until 2040. The actual operationalisation of these targets and budgets is still missing.

The European level: The European Climate Law and the 'fit-for-55' package of the European Commission

However, the now verified German constitutional dimension of climate protection law must not be viewed in isolation. The legal efforts to reduce greenhouse gas emissions are based to a considerable extent on the activity of the European legislator. At the centre of these efforts is the European Climate Law, which was recently signed by the European Parliament and the European Council on June 30, 2021 (COM/2020/80 final). At its heart and, at the same time, marking the benchmark for the future design of climate protection law is the increase in the EU's greenhouse gas emissions reduction target from 40% to 55% by 2030; climate neutrality is then to be achieved by 2050. In order to operationalise the ambitious targets of the European Climate Change Act, the Commission has issued on the 14th of July 2021 a series of proposals for new and to be amended legal acts with the so-called 'fit-for-55' package. The package includes, for example, the extension of emissions allowance trading to maritime transport, the first-time introduction of emissions allowance trading in the buildings and transport sectors, or modifications to energy tax law and in the area of land use, land use change and forestry (LULUCF), revising the entire climate protection target architecture of the European Union. This is not the place to go into detail on the individual topics (for a more in-depth analysis of the European Climate Law, see Schlacke et al. 2021). The decisive point is that the ambitious target architecture that the EU sets and that it seeks to achieve through a mix of different instruments, including not least the Governance Regulation, which acts as an overarching framework, also places responsibility on the member states' legislators. The German legislator does not only have to revise the national emission reduction targets upward – this was already appreciated by the last amendment of the German Climate Protection Act. It is also crucial that instruments and strategies are installed in order to translate the EU-wide reduction targets into concrete member states' plans, measures and projects and, thus, make them operable.

It should be mentioned that Europeanised responsibility can take on yet another form in a mediated manner: Through the European Council, the German government has the opportunity to influence international trade agreements between the European Union and third countries. In this context, the confidence of other countries in the realisation of climate protection can be strengthened by responsible conduct and action in the spirit of sustainability and intergenerational justice. In concrete terms, this can mean actively working towards sustainability obligations in new agree-

ments and consistently enforcing such obligations in existing agreements of the European Union.

The responsibility: What are the German legislator's obligations?

The responsibility assigned to the German legislator by the various levels of climate protection law is (at least) twofold: it takes place both at the constitutional level and at the European and international level.

In the constitutional context, responsibility can be anchored in the constitutional text better than ever in the light of the Federal Constitutional Court's decision. Article 20a of the Basic Law speaks – and has spoken before – of the protection of the natural foundations of life and of animals "in responsibility for future generations". This has always been read as a substantive responsibility of the state for the future, as a duty to take effective measures, which the legislator may not evade (see Schulze-Fielitz 2015). With the constitutional court's decision, however, responsibility understood in this way becomes justiciable. In the future, its content will no longer be reduced to that of a political programmatic guideline with little binding legal effect. Rather, Article 2 (1) in conjunction with Article 20a of the Basic Law now gives rise to a constitutionally binding and, above all, judicially reviewable mandate to protect the climate (Aust 2021), noticeably limiting the legislator's prerogative. Responsibility for future generations is now part of the constitutional and dogmatic toolkit that will significantly shape the legal dressing of climate protection in the future.

However, even in the European and international context the responsibility of the German legislator is not limited to the mere technical implementation of the requirements of higher-ranking law. The Federal Constitutional Court elaborates that the climate protection requirement of Article 20a of the Basic Law contains an international obligation that requires the state to act internationally to protect the climate globally. It is therefore a matter of responsible behaviour also in the context of the international involvement of the state, which is currently determined to a large extent by the Paris Agreement. At the same time, this prohibits the argumentative retreat to the reference to a possible inactivity of other states (Aust 2021), not least because this would halt the Paris Agreement's spiral of ambition, which is based on a responsive, reciprocal increase in Nationally Determined Contributions (von Landenberg-Roberg 2021). Climate protection responsibility requires nothing less than the effective implementation of existing commitments, the search for new solutions,

which are then given legal form by means of international law, and – even below the threshold of legal formality – an overall committed effort to achieve international climate protection efforts. The international dimension of climate protection responsibility thus has a legal side, but there is more to it than that. Responsibility for climate protection means taking an active, exemplary role within the internationally understood framework of Article 20a of the Basic Law. It can and must be expressed in the enactment of climate-protecting legislation; it must also demonstrate the state's awareness of and efforts to reach out to and implement its responsibility for climate protection. It is to the great credit of the Federal Constitutional Court that it has clearly elaborated this mandate. Its implementation in the light of European and international obligations will be the central task across legislative periods in the coming years and decades.

References

Aust, Helmut Philipp, 2021: Klimaschutz aus Karlsruhe – Was verlangt der Beschluss vom Gesetzgeber?, in: Verfassungsblog, 05.05.2021, accessible online: https://verfassungsblog.de/klimaschutz-aus-karlsruhe-was-verlangt-das-urteil-vom-gesetzgeber/.

Bundesverfassungsgericht, 2021: Verfassungsbeschwerde gegen das Klimaschutzgesetz teilweise erfolgreich, 29.04.2021, accessible online: https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2021/bvg21-031.html.

Calliess, Christian, 2021: Das „Klimaurteil" des Bundesverfassungsgerichts: „Versubjektivierung" des Art. 20a GG?, in: Zeitschrift für Umweltrecht, 32(6), 355–357.

Schlacke, Sabine, 2021: Klimaschutzrecht – ein Grundrecht auf intertemporale Freiheitssicherung, in: Neue Zeitschrift für Verwaltungsrecht, 40(13), 912–917.

Schlacke, Sabine, Miriam Köster, Eva-Maria Thierjung, 2021: Das „Europäische Klimagesetz" und seine Konsequenzen, in: Europäische Zeitschrift für Wirtschaftsrecht, 32(14), 620–626.

Schulze-Fielitz, Helmuth, 2015: Kommentierung des Art. 20a GG, in: Dreier, Horst (ed.), Grundgesetz-Kommentar. Band 2: Artikel 20–82. 3rd ed., Tübingen: Mohr Siebeck, 1–116.

von Landenberg-Roberg, Michael, 2021: Die Operationalisierung der ‚Ambitionsspirale' des Pariser Übereinkommens, in: Archiv des Völkerrechts, 59(2), 119–163.

WBGU, 2009: Solving the climate dilemma: The budget approach, Special Report, accessible online: https://www.wbgu.de/fileadmin/user_upload/wbgu/publikationen/sondergutachten/sg2009/pdf/wbgu_sn2009_en.pdf.