

# The German Federal Constitutional Court's decision on the Climate Change Act

Order of 24 March 2021 - 1 BvR 2656/18 and others

Policy Brief  
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Dr. Ralph Bodle  
Dr. Stephan Sina

## Key findings of the court

- 1 The fundamental right to life and physical integrity in the constitution (Article 2 (2), first sentence) also includes a duty of the state to actively protect life and health from the dangers of climate change. This is not a fundamental right of future generations, but of persons alive now and during their lifetime. However, the state has a wide margin of discretion, which the Climate Change Act does not overstep.
- 2 The provision on environmental protection in Article 20a of the constitution is not a fundamental right enforceable by individual persons. But it does impose a constitutional duty on the state to achieve climate neutrality. This duty to protect the climate is justiciable and limits political discretion. It does not take precedence over other constitutional rights and principles, but the legal weight in the balancing process increases as climate change progresses.
- 3 The Climate Change Act is unconstitutional insofar as it does not sufficiently protect persons against future curtailing of their rights that could become necessary as climate change progresses. Based on Germany's targets, the emission levels that the Climate Change Act allows until 2030 would use up a large part of the total emissions budget that is available until 2050. Therefore, there is a risk that fundamental rights will be severely curtailed from 2030 onwards. The Climate Change Act does not sufficiently mitigate this risk.
- 4 The state has a duty to take precautions today in order to protect fundamental rights post 2030 as well. It has to initiate the transition to climate neutrality sufficiently early so that those concerned by the measures can plan ahead. It also has to set emission levels for the time after 2030 earlier than 5 years ahead, periodically and transparently.

## Background to the case

The **Federal Climate Change Act** ("Klimaschutzgesetz" - KSG), which has been in force since the end of 2019, sets **binding climate targets for the first time**. For the period *until* 2030, it requires reductions in greenhouse gas emissions of 55 % compared to 1990, as well as decreasing annual emission budgets for certain economic sectors. It expressly provides for greenhouse gas neutrality by 2050, which is regarded as its core. However, climate targets *after* 2030 were dropped during the legislative process. The Climate Change Act merely requires the federal government to set, by statutory instrument in 2025, annually decreasing emission budgets for periods after 2030.

Several individuals and environmental associations consider these provisions insufficient to fight climate change and raised legal challenges against the Climate Change Act at the Federal Constitutional Court (Bundesverfassungsgericht - BVerfG). They claimed that the Climate Change Act violated their fundamental rights and was unconstitutional. The court has the power to declare such laws void or require amendments.

## Key findings

The Court's decision<sup>1</sup> exclusively concerns whether the Climate Change Act violates fundamental rights. The case is not about assessing German climate policy in general. The court examines three reasons why the Climate Change Act could be unconstitutional:

## No violation of the duty to actively protect fundamental rights from the present until 2030

First, the court addresses the constitutional right to life and physical integrity. The decision also mentions the right to property.

The court explicitly leaves open whether there is a constitutional "right to an ecological minimum standard of living" or a "right to a humane future", because they would not have been violated in any case. Moreover, other fundamental rights already protect the "minimum ecological standards that are essential to fundamental rights".<sup>2</sup>

The legal challenge against the Climate Change Act is not about fending off state intrusion. It is about whether the state is in breach of a duty to *actively protect* the fundamental rights concerned.

**In principle, the state also has a constitutional duty to actively protect life, health and property from the risks and impacts of climate change, including through adaptation measures.**

Because Germany cannot stop climate change on its own, but only with international involvement, it is under an obligation to also seek a solution at the international level.<sup>3</sup>

This is **not a fundamental right of future generations**. Although the state is *generally* obliged to protect them as well, the constitution does not provide them with a fundamental right and legal standing to enforce it.<sup>4</sup> Instead, the duty is to protect

<sup>1</sup> BVerfG, order of 24. March 2021, - 1 BvR 2656/18 and others, [http://www.bverfg.de/e/rs20210324\\_1bvr265618.html](http://www.bverfg.de/e/rs20210324_1bvr265618.html). English press release at <https://www.bundesverfassungsgericht.de/Share>

dDocs/Pressemitteilungen/EN/2021/bvg21-031.html

<sup>2</sup> Para 113-114 of the decision.

<sup>3</sup> Para 148-150.

<sup>4</sup> Para 146.

the fundamental rights of those who are now alive during their lifetimes.<sup>5</sup>

The state has a wide margin of discretion for fulfilling its duty to protect. That duty is breached only if the state remains inactive or its measures are completely inadequate or fall considerably short of the objective.<sup>6</sup> This is not the case: the Climate Change Act stays within the margin of discretion by pursuing the goal of the Paris Climate Agreement of limiting climate change to well below 2 °C and, if possible, to 1.5 °C.<sup>7</sup> The Climate Change Act aims at achieving **greenhouse gas neutrality, which is constitutionally required**, and sets annual emission budgets until 2030, which must be further reduced thereafter. Moreover, adaptation to unavoidable climate change is still possible.<sup>8</sup>

### No violation of the constitutional duty to protect the environment

The Climate Change Act does not violate Article 20a of the Constitution, which imposes a duty on the state to protect the environment.<sup>9</sup> No violation of fundamental rights results from Article 20a GG either. This legal objective ("Staatszielbestimmung") is **not an individually enforceable fundamental right**.

However, the court makes important statements on the legal significance of Article 20a GG: It imposes a constitutional duty on the state to achieve climate neutrality, because climate change is irreversible.<sup>10</sup>

<sup>5</sup> Para 108.

<sup>6</sup> Para 152.

<sup>7</sup> Para 35: "It is a matter of climate policy whether and to what extent the concentration of CO<sub>2</sub> in the atmosphere and temperature rise have to be limited. It is not to be determined by science. However, scientific knowledge provide indications for which reductions are necessary in order to achieve a specific climate objective."

<sup>8</sup> Para 154-168.

Article 20a GG is justiciable and limits political discretion with regard to whether or not to take measures to protect the environment. The state has a duty to take measures which will ultimately limit fundamental rights. This explicitly named "duty to protect the climate" does not take precedence over other constitutional rights and principles, but must be balanced against them. However, **the more climate change progresses, the greater the legal weight of the duty to protect the climate** in the balancing process.<sup>11</sup> This is important for the following core of the decision.

### The Climate Change Act's inadequate protection of fundamental rights for the future is unconstitutional

The Climate Change Act is nevertheless partially unconstitutional. While the Climate Change Act fulfils the state's duty to actively protect fundamental rights from the consequences of climate change for the present (see above), the Federal Constitutional Court goes one step further, which is the core of the decision:

**The Climate Change Act is unconstitutional insofar as it does not sufficiently protect persons against *future* curtailing of their rights that could become necessary as climate change progresses.**

The state has to contain the risk that it will have to severely restrict fundamental rights in the future precisely because it is still sparing them in the present. The court calls this an "advance restrictive effect on

<sup>9</sup> Article 20a GG reads: "Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."

<sup>10</sup> Para 198.

<sup>11</sup> Para 185.

civil liberties" and "intertemporal safeguarding of liberties".<sup>12</sup>

It is precisely this risk that the current design of the Climate Change Act entails: Because greenhouse gas emissions contribute to global warming in a basically irreversible way, only a certain total amount of emissions is available in order to achieve the climate policy goal of limiting the temperature increase to well below 2 degrees and, if possible, to 1.5 degrees. The court derives this total emissions budget from scientific findings, including the reports of the Intergovernmental Panel on Climate Change (IPCC).

The court's central argument is as follows: The more Germany uses up its total emissions budget by 2030, the stricter the restrictions of freedoms that will be necessary to fulfil the constitutional requirement to protect the climate and achieve climate neutrality.

**The more emissions currently permitted until 2030, the greater the risk that from 2031 the state will have to intervene more quickly and strongly in fundamental rights.** The state would also be increasingly entitled to do so, because the legal weight of fundamental rights, when balanced against climate protection, decreases more and more as climate change progresses.<sup>13</sup>

**This risk to the future exercise of fundamental rights has to be justified by the legislator at the present time** by taking sufficient precautions to ensure that fundamental rights will also be protected later.

**There is a constitutional obligation not only with regard to climate neutrality, but also a timely transition towards this objective.**

This obligation is not about protection against the consequences of climate change, but about threats to fundamental freedoms when the state takes measures to combat climate change, as required by Article 20a of the constitution. The legal ratio is about the fundamental rights of the *present-day* claimants, and not, as the court explicitly states, about rights of future generations, although it is also for their benefit.

**The Climate Change Act does not sufficiently fulfil these constitutional requirements.** The court does not strike down the emission levels that the Climate Change Act allows until 2030. However, the court states that these emissions would consume a large part of the total emissions budget that is available to Germany until 2050, based on the climate targets it has legitimately set for itself.<sup>14</sup> Therefore, there is a risk that fundamental rights will be severely curtailed from 2030 onwards.<sup>15</sup> The Climate Change Act does not sufficiently mitigate this risk. The court lists constitutional requirements that the legislature must fulfil in order to exercise sufficient precaution:

### What legislation today has to provide for the future

In order to ensure that the burdens caused by climate protection measures after 2030 are compatible with the constitution, the state must take precautions now and have

<sup>12</sup> Para 183.

<sup>13</sup> Para 118-120, 185.

<sup>14</sup> Para 232-233. We do not address criticism with regard to the calculation of the emissions budget.

<sup>15</sup> Para 245: "The emission reductions required by Article 20a [of the constitution] will be

considerable. It is not possible to say [...] whether they will be so severe as to inevitably entail restrictions of fundamental rights that are unacceptable from today's perspective. However, there is a high risk of severe burdens."

more specific rules in place that address the period after 2030.<sup>16</sup>

In practical terms, this means that **the transition to climate neutrality must be initiated in good time.**<sup>17</sup> Emission reduction measures for the period after 2030 and beyond have to be defined in a timely and transparent manner.<sup>18</sup> The measures must enable those affected by them to redesign products and behaviour in a climate-neutral manner in good time, as well as enable long-term planning.<sup>19</sup>

In the view of the court, the Climate Change Act's approach of setting decreasing annual emission budgets for specific sectors is in principle suitable for providing such guidance. However, the specific manner in which the Climate Change Act determines the path beyond 2030 is insufficient. At minimum, it must set the intervals in which further determinations would be made. The planning period of 5 years prior, as provided for in the Climate Change Act for the time after 2030, is not sufficient.<sup>20</sup> In addition, the annual emission budgets have to be set either in an Act of Parliament or delegated by it to a statutory instrument on the basis of specific criteria.<sup>21</sup>

## Contact

Ralph Bodle  
Senior Fellow  
E-Mail: [ralph.bodle@ecologic.eu](mailto:ralph.bodle@ecologic.eu)

Stephan Sina  
Senior Fellow  
E-Mail: [stephan.sina@ecologic.eu](mailto:stephan.sina@ecologic.eu)

Ecologic Institute  
Pfalzburger Straße 43/44  
10717 Berlin

Germany

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<sup>16</sup> Para 244 ff.

<sup>17</sup> Para 248.

<sup>18</sup> Para 252-253.

<sup>19</sup> Para 254.

<sup>20</sup> Para 256-258.

<sup>21</sup> Para 160, 164.