Lecture at SNU Law School

30 November 2023

Fundamental Rights to climate protection
The example of the climate order of the German Federal Constitutional Court

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Judicial responses to climate change have surged over the last decade and taken many forms. My presentation will concentrate on actions brought by citizens against states, focussing on actions contesting legislation (or omission of the same) for violating fundamental rights. I shall take the decision of the German Federal Constitutional Court of march 2021 for illustration purposes.[1] The claimants were minors and adult persons with different occupations including farmers with particular exposition to climate change, most of them living in Germany but some in Bangladesh and Nepal. They alleged that the emission reduction target set by the German Climate Protection Act (CPA) was insufficient thereby violating their fundamental rights to health and property.[2]

I shall first summarise the reasons given by the Court and then discuss comments made on them.

I. The Court's reasoning

Admissibility

For legal standing the Court commonly checks whether claimants are personally, presently and directly affected. The Court accepted that they were personally concerned. It found it irrelevant that there is a multitude of persons harmed by climate change. As for present concern the Court held that present action or omission irreversibly predetermines the future. Concerning direct concern, the Court found that the Climate Act although requiring adoption of many implementing acts nevertheless has direct effect by allowing an overall quantity of greenhouse gases to be emitted.

Merits

The Court did not assume a general right to a healthy environment. The German constitution only establishes specific rights, such as the rights to health and property, which nevertheless are interpreted to involve an environmental dimension insofar as the specific right depends on acceptable environmental conditions.

Art. 20a GG does establish a general obligation of the state to protect the natural conditions of life, and also for future generations, but it is interpreted as an objective duty only, not entailing a subjective right. Interestingly, the Court regards it to be justiciable, although granting the responsible institutions a broad margin of appreciation. The obligation even though objective is important as a standard applicable in interinstitutional proceedings. In addition, as will be mentioned later on, it

[1] Order of 21 March 2021, 1 BvR 2658/18, 78, 96, 288/20, BVerfGE 157, 30.

[2] According to the CPA the yearly greenhouse gas emissions (GHG) were to be gradually reduced by at least 55% in 2030 compared to the year 1990. The law breaks this overall target down to precise GHG quantities that are annually allowed to be emitted by the six main emission sectors from 2021 to 2030. These sectors are energy generation, industry, buildings, traffic, agriculture and waste management. The law does not include in its scope emissions from land use, land use change and forestry (LULUCF), nor emissions from international air and sea transport attributable to Germany.

does play a role in the interpretation of subjective rights, strengthening their weight if interferences with them are balanced against other public interests.

Two settings of fundamental rights are discussed by the Court: a positive obligation of the state to ensure environmental conditions of human health and property, and a negative obligation to avoid future restrictions of energy use. I shall explain the two types in turn, adding a third when commenting on the decision.

Rights to health and property

Concerning the first setting the court construes the rights to health and to property as subjectivised positive obligations of the state to protect persons from harmful climate change effects. These obligations extend to the future life conditions of present younger generations.

The Court concedes that Germany cannot alone provide such protection. But that does not alleviate the responsibility of the state. Quite to the contrary the obligation triggers a duty of the state to engage in international climate protection policies.

However, the court practices judicial self-restraint acknowledging latitude of the political branches of government. In effect, it does not regard the margin of discretion to be exceeded, considering that the Climate Act has in fact introduced measures that are not totally inappropriate, and that adaptation measures could be taken.

In conclusion the Court finds the obligation to protect not to be violated.

Freedom rights in general

While positive obligations are familiar ground the second setting is new. It helps to understand the concept if one notes that the Court here focusses on the availability of energy including related greenhouse gas emission as a precondition of enjoyment of fundamental rights. It opens up the concerned rights to almost any freedom of action. The focus on natural conditions of rights is hence shifted from a healthy environment to availability of energy resources.

By setting reduction targets and limiting emission quantities for the main emission sectors the Climate Act implicitly authorises actors to release greenhouse gases. By allowing emissions at present the state reduces future emission possibilities forcing it to drastically restrict them in future times. In order to prevent such dire future the present emissions must be curbed. This is called an advance effect of future interferences.

In the Court's words:

> "The annual emission quantities permitted by (...) the Climate Protection Act thus have an unavoidable, intervention-like advance effect on the possibilities remaining after 2030 to actually make use of the freedom protected by fundamental rights." (n 187)

This advance effect is supported by other constitutional principles. At this point, Art. 20a GG with its protection of the natural life conditions comes in as interpretive guidance adding up to the weight of rights to preserving future life conditions.

The court specifies the obligation to distribute emissions over time by applying the so-called budget approach. Drawing on scientific advice it calculates as follows: A global budget of emissions that are from 2020 onwards allowable is derived from a warming limit of 1.75°C which marks the ceiling of "well below 2°C" fixed by the Paris Agreement. Germany's national share in the global budget is

counted using the “present per capita” criterion. This results in only 6,7 Gt remaining for Germany in 2020 which assuming current spending practices will leave only 1 Gt for the years after 2030.

Nevertheless, somewhat surprisingly the Court does not conclude that the emission quantities presently allowed by the Climate Act are too large. It deems it to be within the margin of political discretion to calculate the available budget more generously considering also the uncertainty of scientific assessments.

The final anker the court then drops is the principle of proportionality. The court argues that the available budget must be allocated balancing the interests in present and future living conditions. In order to avoid the future encroachments, the affected rights demand that emissions must be cut back today, and substantial quantities of allowable emissions must be reserved for the time after 2030. As a corollary effect, such early action provides for the necessary learning time for the transformation of law and society.

However, the court does not itself specify how the budget is to be shared over time. Practicing self-restraint it only states that the Climate Act does not provide emission quantities for the time after 2030, leaving the details to the determination by parliamentary law and executive measures framed by law.

II. Comments

I shall now discuss a number of problems that have been raised in the aftermath of the court decision.

1. Law and politics

Many commentators argued that climate protection is too complex and universal a problem to be solved by applying fundamental rights. Others pointed to the fact that after all fundamental rights exist and must be respected also by the political institutions. My own answer would add two observations: First, the judicial branch has its genuine source of legitimation as an independent non-majoritarian arena of deliberation, in this way being a corollary of the democratically legitimated institutions. Second, in search of a line between legal and political questions the so-called Baker test suggested by the US SC helps which simply asks if for the question (quote) “judicially discoverable and manageable standards for resolving it” (unquote) are available. I believe both of the settings of fundamental rights I have reported do constitute such standards.

2. Negative and positive obligations

Many commentators regretted that the Court when examining the positive obligation did not conclude that the margin of legislative discretion was overstepped, or, in constitutional terms, that there was a violation of the prohibition of inactivity (Untermaßverbot). However, the Court has always been reluctant in pushing the legislator to action. It feels more comfortable with examining negative obligations because in such cases the Court has a specific measure to examine and is not compelled to decide about a broad scope of options. Nevertheless, I submit that climate change effects are sufficiently grave and exceptional to nevertheless justify a declaration of violation of positive obligations in states in which the reduction target is utterly insufficient.

My own approach would be a third setting. By allowing and allocating emission allowances the state is itself intervenor because it entitles actors to emit greenhouse gases. This has an indirect effect on human health, property, occupation and in fact virtually all freedoms of action because it jeopardises

the entire natural conditions of life, including both climate conditions and energy supply. I believe that approach is doctrinally easier to handle both in relation to testing interference and justification of the same.

3. Differentiation of basic determinations

In a follow up decision of January 2022[3] the Court was asked to take the budget approach further and break the overall budget of Germany down into sub-budgets of the Laender, possibly by applying the per capita criterion. The Court denied this arguing that the fundamental rights only guarantee an overall level of climate protection leaving undetermined by whom and by what measures it shall be implemented. This was, according to the Court, a matter for the legislature and executive branches to decide. Nevertheless, as members of the court reminded in subsequent publications[4], all public institutions, also those on lower levels, such as licensing authorities or local communities, must ensure climate protection as a requirement of both fundamental rights and the objective obligation to preserve the natural conditions of life. Although emissions reduction does not have absolute priority over other concerns its weight increases with the further shrinking of the allowable budget, and especially so if the national budget is exceeded.

In that respect, two recent decisions of the German Federal Administrative Court are illustrative. Upholding the construction authorisation for a new motor highway the court rated the additional emissions less weighty than the facilitation of transportation.[5] I believe this is a misbalance although it is admittedly difficult to define limits for sectoral emissions out of an overall national budget. In any case, a powerful tool would be the testing of alternatives which allows to conclude that if transportation shall be facilitated there may be alternatives to motor highways that emit less GHG.

4. The budget approach

As already explained the court relies on the budget approach. It regards the budgeting of emissions as a way to concretise the objective obligation under Art. 20a GG as well as of the subjective negative and positive rights. The court is cautious enough not to take such budgeting as precise constitutional command. It rather acknowledges that the constitution accepts the legislator to apply the approach.

There are two methods how to calculate budgets, one is equity based and the other feasibility based. Equity based is the one applied by the Constitutional Court. It is usually called the fair share of a state. As said a global budget is derived from the warming up limit of 1.75°C and distributed among states according criteria such as equal per capita. Feasibility based are budgets that are derived from modelling word-wild reduction potentials of states. For instance, the phasing out of fossil fuels of all states is modelled and allocated to states according to cost-effectiveness criteria. This means that those states take the burden that are able to reduce emissions at least costs. The gap that will arise in industrialised states between the small fair share and the larger modelled pathways shall be closed by the duty of states to financially support the states where the measures can be taken at lower costs.

I nevertheless have a more fundamental concern with the budget approach. This has to do with the fact that serious damage has already been caused at present and before an average of 1.5°C or even

[3] Order 1 BvR 1565/21 et al. , ZUR 2022, 215

[4] Josef Christ, der Klimabeschluss des BVerfG – mögliche Konsequenzen und Handlungsalternativen, NVwZ 2023, 1193; Gabriele Britz, Klimaschutz in der Rechtsprechung des Bundesverfassungsgerichts, NVwZ 2022, 825; Stephan Harbarth, Empirieprägung von Verfassungsrecht, JZ 2022, 157

[5] BVerwG, judgment of 4 May 2022, 9 A 7.21, BVerwGE 175, 312; BVerwG, judgment of 7 July 2022, 9 A 1.21, BVerwGE 176, 94

2°C will be reached. Therefore, in terms of fundamental rights interference has already occurred. Fundamental rights are not subjected to but prevalent over treaty law.

As interference does exist the only escape from having to stop any further emission immediately is to examine whether there are prevailing public interests necessitating interferences, such as, as in our case, the further use of fossil energy. The weighing up structure of such justification suggests that on the one side public interests are examined with scrutiny and on the other side that emissions are reduced to the minimum that is technically and economically possible. It appears to me that the transnational debate about budgets somewhat distracts from the simple task that any state must do its homework, researching and implementing whatever it can. Budget reasoning may still be applied in this respect but only if budgets are calculated as emergency reserve, not as merited resource.

5. Influence of international law

One of the doctrinal challenges of the judgment is the relationship between international and national law. In general, German law construes international treaty law as being situated on the level of ordinary laws if it is directly applied. The Court was criticised to give the Paris agreement higher status when measuring the CPA against the temperature limits. In fact, however, the Court perceives the temperature limits as a commitment of the CPA legislator which takes the Paris limits into account but does not subsume the CPA to the Convention. But if the emission quantities allocated to sectors by the CPA are assessed against the temperature limits set by the same CPA would that not mean that a law is measured against itself? I believe, that's not the case: the legislatory commitment to the temperature limits can be construed to have semi-constitutional status which is acknowledged by Art. 20a GG with its mandate of the legislator to concretise the general obligations contained in it.

Surprisingly, though, the court did not take a much simpler path that is – I believe - available to apply the Paris warming ceilings, namely the boundedness of member states to treaties concluded by the EU. The EU respects precise and unconditional provisions of international treaties as applicable directly and with higher rank than ordinary law. Such "monist" track extends to member state law (Art. 216 TFEU). There are reasons to acknowledge that the Paris temperature ceilings are indeed "precise and unconditional".

6. Transnational reach of fundamental rights

As citizens of foreign countries were among the applicants, claiming harm caused by German emissions, the court had to take position on the external reach of German fundamental rights. It did acknowledge this, relying on the fact that the wording of the pertinent fundamental rights does not limit their reach to the German territory. However, it held the level of protection to be lower considering that German regulation of energy use or adaptation measures do not reach out to foreign countries. I do not find this convincing because German emissions can well contribute to also making other states restrict energy use. Likewise, Germany could well support adaptation measures abroad.

III. Conclusion

Concluding and referring back to the overall theme of this panel I believe in the present climate crisis all public powers must play their part. The part of the judiciary simply is to ensure that fundamental rights and constitutional principles are respected. The German Federal Constitutional Court has made a step in that direction, as have done several other courts, and I very much hope that the Korean Constitutional Court will join in based on its own brand of fundamental rights construction.

Notwithstanding national doctrinal peculiarities I believe transnational agreement can be achieved on the following observations:

(1) Damage to livelihoods and nature has already been caused by climate change before the Paris temperature limits will be achieved.

(2) Damage will severely be aggravated in future. Emergencies will multiply that will force states to curb many freedom rights.

(3) By insufficiently restricting and even authorising greenhouse gas emissions states have interfered with fundamental rights.

(4) Any further interference can only be justified if each and every state explores and takes all technically and economically feasible measures to minimise further emissions.

(5) The budget approach should be employed for the putting together of emergency reserves rather than for calculating with resources that are merited.

(6) This result can be achieved no matter if the fundamental rights are construed as positive obligations, advance effect of future restrictions or shields against the allocation of emission allowances.