

# Order of the First Senate of the Federal Constitutional Court of Germany (FCC)

24 March 2021 – 1 BvR 2656/18, et al.

## (Climate Change)

\* This is an unofficial shortened version of the judgment of the FCC. For the full version of the judgment in English and German, visit the website of the FCC: [https://www.bverfg.de/e/rs20210324\\_1bvr265618en.html](https://www.bverfg.de/e/rs20210324_1bvr265618en.html)

\*\* Citations to further cases and paragraphs were left out due to a better reading experience

### 1. NOTABLE PROVISIONS

Provisions from the federal constitution (*Grundgesetz*, transl. Basic Law; GG)

#### **Article 2 GG [Personal freedoms]**

(1) Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.

(2) Every person shall have the right to life and physical integrity. Freedom of the person shall be inviolable. These rights may be interfered with only pursuant to a law.

#### **Article 20a GG [Protection of the natural foundations of life and animals]**

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.

### 2. SHORT SUMMARY

The judgment by the FCC concerns constitutional complaints that were lodged by multiple complainants. These were complainants from Germany, Nepal, Bangladesh and also environmental associations, whereas only the fundamental rights from German citizens were later found to be violated.

One of the issues challenged were the provisions of an act, the so-called Federal Climate Change Act (KSG). Those provisions in the version contested, set a climate neutrality goal for 2050. As an interim goal, the government should undertake measures to reach a carbon emission reduction of 55 % by the year 2030 compared to the annual carbon emissions of 1990. Since those provisions do not set an annual goal of carbon reduction after 2030, the claimants feared that the carbon budget has been exhausted in great parts until the year of 2030 and they must tolerate violations of their fundamental right in course of reducing the carbon emissions rapidly after 2030. Those contested provisions are set out in § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 but are referred to as the provisions of the KSG below.

### 3. NOTABLE PARTS OF THE JUDGMENT

#### On *locus standi* of the complainants and the possibility of violated rights

[paras. 102-117] [The provisions of the KSG] might be incompatible with the duties of protection arising from fundamental rights. With these provisions, the legislator might have given permission for excessive amounts of CO<sub>2</sub> to be emitted until 2030 – something that would contribute towards further climate change and thereby jeopardise the health, in some cases even the lives, (...) of the complainants. (...)

(...) It cannot be ruled out from the outset that the complainants will see climate change advancing to such a degree in their own lifetimes that their rights protected under Art. 2(2) first sentence GG (...) will be impaired. The possibility of a violation of the Constitution cannot be negated here by arguing that a risk of future harm does not represent a current harm and therefore does not amount to a violation of fundamental rights. Even provisions that only begin posing significant risks to fundamental rights over the course of their subsequent implementation can fall into conflict with the Basic Law. This is certainly the case where a course of events, once embarked upon, can no longer be corrected. (...)

With regard to their fundamental freedoms, [the complainants] have standing to lodge constitutional complaints insofar as they challenge [the provisions of the KSG], because under these provisions they may be faced with substantial burdens to reduce greenhouse gas emissions from the year 2031 onwards. The scale of the ensuing restrictions on fundamental rights is already partially determined by the aforementioned provisions. This advance effect on future freedom might have violated the fundamental rights of the complainants.

Freedom might be jeopardised in an unconstitutional manner by [the provisions of the KSG] if these provisions were to allow overly generous amounts of CO<sub>2</sub> to be emitted in the near term, thereby offloading the necessary reduction burdens onto the future at the expense of future freedom. It is true that no reduction burdens deemed constitutionally unreasonable may be imposed on the complainants even in the future; their fundamental rights will continue to protect them against unreasonable impairments of freedom. However, the definition of reasonable (*zumutbar*) will to some extent be determined in light of the constitutional obligation to take climate action (Art. 20a GG). This, reinforced by similar protection obligations arising from fundamental rights, will demand greater reductions in greenhouse gas emissions than is presently the case and will therefore justify more severe restrictions on freedom if the risk posed by climate change does indeed increase.

#### On the state's obligation to protect the right to life and health

[paras. 144-156] (...) The fundamental right to the protection of life and health enshrined in Art. 2(2) first sentence GG obliges the state to afford protection against the risks of climate change. (...)

(...) In view of the considerable risks that increasingly severe climate change may also entail for the legal interests protected under Art. 2(2) first sentence GG – for example through heat waves, floods or hurricanes – the state is obliged to afford this protection to the current population and also, in light of objective legal requirements, to future generations. (...)

There is an essential difference between the subjective, defensive rights against state interference that arise from fundamental rights on the one hand, and the state's duties of protection that result from the objective dimension of fundamental rights on the other. In terms of purpose and content, defensive rights are aimed at prohibiting certain forms of state conduct, whereas duties of protection are essentially unspecified. It is for the legislator to decide how risks should be tackled, to draw up protection strategies and to implement those strategies through legislation. Even where the legislator is under obligation to take measures to protect a legal interest, it retains, in principle, a margin of appreciation and evaluation as well as leeway in terms of design. (...) The Federal Constitutional Court will find a violation of a duty of protection if no precautionary measures whatsoever have been taken, or if the adopted

provisions and measures prove to be manifestly unsuitable or completely inadequate for achieving the required protection goal, or if the provisions and measures fall significantly short of the protection goal. (...) This is ultimately not the case here. (...)

A manifestly unsuitable protection strategy would be one that concerned itself with reducing greenhouse gas emissions without pursuing the goal of climate neutrality (...). Global warming can only be stopped if greenhouse gas emissions are kept down to climate-neutral levels. The Federal Climate Change Act is not oblivious to this fact. It is based on the commitment to pursue the goal of greenhouse gas neutrality by 2050 (...). The specified reduction quota of at least 55% by 2030 compared to 1990 levels (...) is clearly just an interim goal on the path towards climate neutrality.

However, the goal of neutrality by a specific year and the reduction target (...) would not in themselves be suitable for guaranteeing compliance with a particular temperature limit because there would be nothing to specify how much greenhouse gas may be emitted in the intervening period. (...) [Yet,] the Federal Climate Change Act does more than merely set down reduction quotas and climate neutrality goals to be reached by a particular year. [The] KSG specifies that greenhouse gas emissions must be reduced in gradual steps. This requirement of continuous reduction is not confined to a specific target year but remains effective until greenhouse gas neutrality has been achieved. Furthermore, [the KSG] quantifies and limits the exact amount of emissions allowed in Germany until 2030, albeit with figures not covering all greenhouse gas emissions. (...) In principle, this legislative technique is suitable for guaranteeing compliance with a particular temperature limit and thus for affording protection against the risks posed by climate change.

## On the advance interference-like effect on the freedom of the complainants

[186-187, 243] (...) [P]rovisions that allow CO<sub>2</sub> emissions in the present pose an irreversible legal risk to future freedom because every amount of CO<sub>2</sub> that is allowed today irreversibly depletes the remaining budget that was predetermined in accordance with constitutional law, and any exercise of freedom involving CO<sub>2</sub> emissions will be subject to more stringent restrictions that will be necessary under constitutional law. (...)

This risk is specifically caused by the provisions that determine the amount of presently allowed CO<sub>2</sub> emissions. In the currently applicable climate change legislation, these are [the challenged provisions of the KSG]. Consuming the annual emission amounts that these provisions allow until 2030 inevitably and irreversibly uses up portions of the remaining CO<sub>2</sub> budget. These (...) provisions thus play a role in determining how much time is left for the transformations necessary to safeguard freedom while at the same time honouring the obligation to take climate action. The annual emission amounts allowed by [the KSG] thus have an unavoidable, advance interference-like effect on the opportunities still available after 2030 for actually making use of the freedom protected by fundamental rights. This advance effect operates not only de facto but also de jure. As the finite CO<sub>2</sub> budget is increasingly consumed, it is constitutional law itself which makes it all the more urgent to prohibit any further exercise of freedom involving CO<sub>2</sub> emissions. Constitutional justification for this legal interference-like effect of the current emissions legislation is already required now because, as things currently stand, the allowed emissions have a largely irreversible impact once they have been released into the Earth's atmosphere. (...)

[Hence, the challenged provisions of the KSG] are unconstitutional insofar as they give rise to risks of future impairments of fundamental rights that are not sufficiently contained at present. In this respect, the legislator has violated its duty, arising from the principle of proportionality, to ensure that the reduction of CO<sub>2</sub> emissions to the point of climate neutrality that is constitutionally necessary under Art. 20a GG is spread out over time in a forwardlooking manner that respects fundamental rights.