Bundesverfassungsgericht

Constitutional complaints against the Federal Climate Change Act partially successful

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Order of 24 March 2021
1 BvR 2656/18, 1 BvR 96/20, 1 BvR 78/20, 1 BvR 288/20, 1 BvR 96/20, 1 BvR 78/20

In an order published today, the First Senate of the Federal Constitutional Court held that the provisions of the Federal Climate Change Act of 12 December 2019 (*Bundes-Klimaschutzgesetz* – KSG) governing national climate targets and the annual emission amounts allowed until 2030 are incompatible with fundamental rights insofar as they lack sufficient specifications for further emission reductions from 2031 onwards. In all other respects, the constitutional complaints were rejected.

The Federal Climate Change Act makes it obligatory to reduce greenhouse gas emissions by at least 55% by 2030 relative to 1990 levels and sets out the reduction pathways applicable during this period by means of sectoral annual emission amounts (§ 3(1) and § 4(1) third sentence KSG in conjunction with Annex 2). It cannot be ascertained that the legislator, in introducing these provisions, violated its constitutional duty to protect the complainants from the risks of climate change or failed to satisfy the obligation arising from Article 20a of the Basic Law (*Grundgesetz* – GG) to take climate action. However, the challenged provisions do violate the freedoms of the complainants, some of whom are still very young. The provisions irreversibly offload major emission reduction burdens onto periods after 2030. The fact that greenhouse gas emissions must be reduced follows from the Basic Law, among other things. The constitutional climate goal arising from Article 20a GG is more closely defined in accordance with the Paris target as being to limit the increase in the global average temperature to well below 2°C and preferably to 1.5°C above pre-industrial levels. For this target to be reached, the reductions still necessary after 2030 will have to be achieved with ever greater speed and urgency. These future obligations to reduce emissions have an impact on practically every type of freedom because virtually all aspects of human life still involve the emission of greenhouse gases and are thus potentially threatened by drastic restrictions after 2030. Therefore, the legislator should have taken precautionary steps to mitigate these major burdens in order to safeguard the freedom guaranteed by fundamental rights. The statutory provisions on adjusting the reduction pathway for greenhouse gas emissions from 2031 onwards are not sufficient to ensure that the necessary transition to climate neutrality is achieved in time. The legislator must enact provisions by 31 December 2022 that specify in greater detail how the reduction targets for greenhouse gas emissions are to be adjusted for periods after 2030.

Facts of the case:

The Federal Climate Change Act responds to the need – as seen by the legislator – for greater climate action efforts and has the purpose of affording protection against the effects of global climate change (§ 1 first sentence KSG). Pursuant to § 1 third sentence KSG, the basis of the Act is the obligation under the Paris Agreement – which entered into force on 4 November 2016 – to limit the increase in the global average temperature to well below 2°C and preferably to 1.5°C above pre-industrial levels, as well as the commitment made by the Federal Republic of Germany to pursue the long-term goal of greenhouse gas neutrality by 2050. Pursuant to § 3(1) KSG, greenhouse gas emissions must be gradually reduced by the target year 2030 by at least 55% relative to 1990 levels. § 4(1) third sentence KSG in conjunction with Annex 2 sets out the annual allowable emission amounts for various sectors in line with the reduction quota for the target year 2030. Provisions applicable beyond 2030 are not contained in the Act. Rather, § 4(6) KSG provides that in the year 2025 the Federal Government must set annually decreasing emission amounts for further periods after the year 2030 by means of ordinances.

With their constitutional complaints, the complainants primarily claim that the state, in enacting § 3(1) and § 4(1) third sentence KSG in conjunction with Annex 2, has failed to introduce a legal framework sufficient for swiftly reducing greenhouse gases, especially carbon dioxide (CO_2) – a legal framework they claim is necessary to limit the increase in the Earth's temperature to 1.5°C, or at least to well below 2°C. They deem this to be necessary because a temperature increase of more than 1.5°C would place millions of lives in danger and would risk the crossing of tipping points with unforeseeable consequences for the climate system. They claim that the reduction of CO_2 emissions as laid down in the Federal Climate Change Act is not sufficient to stay within the remaining CO_2 budget that would correspond to a temperature increase of 1.5°C. In their constitutional complaints, the complainants – some of whom live in Bangladesh and Nepal – rely primarily on constitutional duties of protection arising from Art. 2(2) first sentence GG and Art. 14(1)

GG, as well as on a fundamental right to a future in accordance with human dignity and a fundamental right to an ecological minimum standard of living (*ökologisches Existenzminimum*), which they derive from Art. 2(1) GG in conjunction with Art. 20a GG and from Art. 2(1) GG in conjunction with Art. 1(1) first sentence GG. With regard to future burdens arising from the obligations to reduce emissions for periods after 2030 – which they describe as an "emergency stop" – the complainants rely on fundamental freedoms more generally.

Key considerations of the Senate:

The constitutional complaints are partially successful.

I. Where the complainants are natural persons, their constitutional complaints are admissible. The two environmental associations, however, have no standing to lodge a constitutional complaint. As "advocates of nature", they claim – on the basis of Art. 2(1) GG in conjunction with Art. 19(3) GG and Art. 20a GG in the light of Art. 47 of the EU Charter of Fundamental Rights – that the legislator has failed to take suitable measures to limit climate change and has thereby disregarded binding requirements under EU law to protect the natural foundations of life. The Basic Law and constitutional procedural law make no provision for standing of this kind.

II. It cannot be ascertained that duties of protection arising from Art. 2(2) first sentence GG and Art. 14(1) GG are violated due to the risks posed by climate change.

The protection of life and physical integrity under Art. 2(2) first sentence GG encompasses protection against impairments caused by environmental pollution, regardless of who or what circumstances are the source of the impairment. The state's duty of protection arising from Art. 2(2) first sentence GG also encompasses the duty to protect life and health against the risks posed by climate change, including climate-related extreme weather events such as heat waves, forest fires, hurricanes, heavy rainfall, floods, avalanches and landslides. It can furthermore give rise to an objective duty to protect future generations. Since climate change can moreover result in damage being caused to property such as agricultural land or real estate (e.g. due to rising sea levels or droughts), the fundamental right to property under Art. 14(1) GG also imposes a duty of protection on the state with regard to the property risks caused by climate change.

Given the leeway afforded to the legislator in fulfilling these duties of protection, no violation of these duties can be ascertained. Any protection strategy that failed to pursue the goal of climate neutrality would have to be considered manifestly unsuitable for affording the protection against the risks of climate change – a protection required by fundamental rights. Global warming would then be impossible to stop, given that every increase in the concentration of CO_2 in the atmosphere contributes to global warming and, once CO_2 is released into the atmosphere, it mostly stays there and is unlikely to be removable in the foreseeable future. Another entirely inadequate approach would be to allow climate change to simply run its course, using nothing but so-called adaptation measures to fulfil the constitutional duty of protection. Neither scenario is the case here. Ultimately, it cannot be ascertained either that the legislator has exceeded its decision-making scope by basing its approach on the Paris target, according to which the increase in the global average temperature must be limited to well below 2°C and preferably to 1.5°C. Another important point here is that, in principle, additional protection can be provided in the form of adaptation measures in order to protect fundamental rights against the risks posed by climate change.

There is no need to decide at this point whether duties of protection arising from fundamental rights also place Germany under an obligation vis-à-vis the complainants living in Bangladesh and Nepal to take action against impairments – both potential and actual – caused by global climate change. Ultimately, no violation of a duty of protection arising from fundamental rights could be ascertained here either.

III. However, fundamental rights are violated by the fact that the emission amounts allowed until 2030 under § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 substantially narrow the remaining options for reducing emissions after 2030, thereby jeopardising practically every type of freedom protected by fundamental rights. As intertemporal guarantees of freedom, fundamental rights afford the complainants protection against comprehensive threats to freedom caused by the greenhouse gas reduction burdens that are mandatory under Art. 20a GG being unilaterally offloaded onto the future. The legislator should have taken precautionary steps to ensure a transition to climate neutrality that respects freedom – steps that have so far been lacking.

1. The challenged provisions have an advance interference-like effect (*eingriffsähnliche Vorwirkung*) on the freedom comprehensively protected by the Basic Law. The possibilities to exercise this freedom in ways that directly or indirectly involve CO_2 emissions come up against constitutional limits because, seen from today's perspective, CO_2 emissions make a largely irreversible contribution towards global warming and, under constitutional law, the legislator may not allow climate change to progress *ad infinitum* without taking action. Provisions that allow for CO_2 emissions in the present time constitute an irreversible legal threat to future freedom because every amount of CO_2 that is allowed today narrows the remaining options for reducing emissions in compliance with Art. 20a GG; any exercise of freedom involving CO_2 emissions will therefore be subject to increasingly stringent, and indeed constitutionally required, restrictions. It is true that any exercise of freedom involving CO_2 emissions would have to be essentially prohibited at some point anyway in order to halt climate change, because global warming can only be prevented if anthropogenic concentrations of CO_2 in

the Earth's atmosphere stop rising. However, if much of the CO_2 budget were already depleted by 2030, there would be a heightened risk of serious losses of freedom because there would then be a shorter timeframe for the technological and social developments required to enable today's still heavily CO_2-oriented lifestyle to make the transition to climate-neutral behaviour in a way that respects freedom.

In order to be constitutional, the advance interference-like effect of current emission provisions – an effect that arises not only de facto, but also de jure – must be compatible with the objective obligation to take climate action as enshrined in Art. 20a GG. An interference with fundamental rights can only be justified under constitutional law if the underlying provisions comply with the core precepts and general constitutional principles of the Basic Law, of which Art. 20a GG is a part. This also applies here with regard to the advance interference-like effect on freedom protected by fundamental rights. Another precondition of constitutional justification is that the provisions on the emission amounts do not lead to disproportionate burdens being placed on the future freedom of the complainants.

2. It cannot presently be ascertained that § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 violate Art. 20a GG.

a) Art. 20a GG places the state under an obligation to take climate action and is aimed at achieving climate neutrality. Climate action does not take absolute precedence over other interests. In cases of conflict, it must be balanced with other constitutional interests and principles. However, given that climate change is currently deemed to be almost entirely irreversible, any behaviour that leads to an exceeding of the critical temperature threshold for achieving the constitutional climate goal would only be justifiable under strict conditions – such as for the purpose of protecting fundamental rights. Within the balancing process, the obligation to take climate action is accorded increasing weight as climate change intensifies.

The obligation to take climate action arising from Art. 20a GG is not invalidated by the fact that the climate and global warming are worldwide phenomena and that the problems of climate change cannot therefore be resolved by the mitigation efforts of any one state on its own. The climate action mandate enshrined in Art. 20a GG possesses a special international dimension. Art. 20a GG obliges the state to involve the supranational level in seeking to resolve the climate problem. The state cannot evade its responsibility by pointing to greenhouse gas emissions in other states. On the contrary, the particular reliance on the international community here gives rise to the constitutional necessity to actually implement one's own climate action measures at the national level and not to create incentives for other states to undermine the required cooperation.

The open normative content of Art. 20a GG and its explicitly formulated reference to legislation do not preclude constitutional review of compliance with the obligation to take climate action; Art. 20a GG is a justiciable legal provision designed to commit the political process to a favouring of ecological interests, partly with a view to future generations who will be particularly affected.

In declaring under § 1 third sentence KSG that the Act is based on the Paris target, the legislator is exercising its mandate and prerogative to specify the constitution by formulating the climate goal of Art. 20a GG in a permissible manner, setting out that the increase in the global average temperature should be limited to well below 2°C and preferably 1.5°C above pre-industrial levels. This must also form part of the basis for constitutional review.

b) With the leeway afforded to the legislator taken into account, it cannot at present be ascertained that the provisions of § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 violate the obligation to take climate action arising from Art. 20a GG.

The constitutionally relevant temperature threshold of well below 2°C and preferably 1.5°C can in principle be converted into a remaining global CO_2 budget, which can then be allocated to states. The Intergovernmental Panel on Climate Change (IPCC) has defined specific remaining global CO_2 budgets for various temperature thresholds and different probabilities of occurrence, using a quality assurance process in which the degree of residual uncertainty is openly stated. On this basis, the German Advisory Council on the Environment has calculated a specific remaining national budget for Germany from 2020 onwards that would be compatible with the Paris target. Due to the uncertainties and assumptions involved in the approach, the calculated size of the budget cannot, at this point, serve as an exact numerical benchmark for constitutional review. Some decision-making leeway is retained by the legislator. However, the legislator is not entirely free when it comes to using this leeway. If there is scientific uncertainty regarding causal relationships of environmental relevance, Art. 20a GG imposes a special duty of care on the legislator. This entails an obligation to even take account of mere indications pointing to the possibility of serious or irreversible impairments, as long as these indications are sufficiently reliable.

At this point, no violation of the aforementioned duty of care can be ascertained. It is true that, because of this duty, estimates by the IPCC on the size of the remaining global CO_2 budget must be taken into account even though they involve uncertainties. Using the emission amounts stipulated in § 4(1) third sentence KSG in conjunction with Annex 2, the remaining budget calculated by the German Advisory Council on the Environment on the basis of the IPCC estimates would be largely used up by the year 2030. However, given the uncertainties presently involved in the calculation of the remaining budget, such a compliance breach is not sufficiently extensive to be considered objectionable under constitutional law by the Federal Constitutional Court.

3. § 3(1) second sentence and § 4(1) third sentence KSG in conjunction with Annex 2 do not, however, satisfy the requirement arising from the principle of proportionality that the reduction in CO_2 emissions to the point of climate neutrality that is constitutionally necessary under Art. 20a GG be distributed over time in a forward-looking manner that respects fundamental rights.

a) According to this requirement, one generation must not be allowed to consume large portions of the CO_2 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 comprehensive losses of freedom. At some point in the future, even serious losses of freedom may be deemed proportionate and justified under constitutional law in order to prevent climate change. This is precisely what gives rise to the risk of having to accept considerable losses of freedom. However, since the current provisions on allowable emission amounts have now already established a path to future burdens on freedom, the impacts on future freedom must be proportionate from today's perspective. Furthermore, the objective duty of protection arising from Art. 20a GG encompasses the necessity to treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to continue preserving these foundations are not forced to engage in radical abstinence.

The efforts required under constitutional law to reduce greenhouse gas emissions after 2030 will be considerable. Whether they will be so drastic as to entail unacceptable impairments of fundamental rights from today's perspective is impossible to determine. However, the risk of serious burdens is significant and can only be reconciled with the potentially affected fundamental rights if precautionary steps are taken to manage the reduction efforts anticipated after 2030 in ways that respect fundamental rights. This also requires initiating the transition to climate neutrality in good time. In specific terms, this means that transparent guidelines for the further structuring of greenhouse gas reduction must be formulated at an early stage, providing orientation for the required development and implementation processes and conveying a sufficient degree of developmental urgency and planning certainty. Here, it is imperative under constitutional law that further reduction measures are defined in good time for the post-2030 period, extending sufficiently far into the future. Moreover, further annual emission amounts and reduction measures must be defined in such detail that sufficiently specific orientation is provided.

b) In § 4(6) first sentence KSG, the legislator has provided for the updating of the reduction pathway for greenhouse gas emissions in a manner that is insufficient under constitutional law. While it cannot be expected that the decreasing emission amounts already be precisely defined from the present time until the date envisaged for achieving climate neutrality in 2050, it is nonetheless insufficient that the Federal Government is only obliged to draw up a new plan once – in 2025 – by means of an ordinance. It would at least be necessary to specify the intervals at which further plans must be transparently drawn up. Moreover, under the procedure set down in § 4(6) KSG, it is not guaranteed that the next reduction pathway will become apparent in good time. It already seems doubtful whether the first updated plan setting out annual emission amounts for periods after 2030 will allow enough time to act if it appears in 2025. Even beyond this first plan, there is no guarantee of timeliness because § 4(6) first sentence KSG does not ensure that the plans extend sufficiently far into the future. If the legislator continues to rely on the involvement of an executive authority for issuing ordinances, it would have to impose farther-reaching specifications on this authority; in particular, the legislator would have to place the authority under the obligation to come up with a first updated plan before 2025 or to at least adopt statutory provisions at a significantly earlier date specifying how far into the future the 2025 plans must extend. If the legislator takes on the full task of updating the reduction pathway, it must itself set down all the necessary aspects in good time, extending sufficiently far into the future.

c) § 4(6) KSG has also yet to satisfy the constitutional requirements of Art. 80(1) GG and the requirement of a statutory provision. The legislator must at the very least determine the size of the annual emission amounts to be set for periods after 2030 itself or impose more detailed requirements for their definition by the executive authority responsible for issuing the ordinance.
