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Cautious scrutiny: The Federal Climate Change Act case in the German Constitutional Court

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In a unanimous decision of 24 March 2021, the German Federal Constitutional Court declared certain provisions of the Federal Climate Change Act (FCCA) unconstitutional. The Court upheld the greenhouse gas emission targets for the period until 2030 but found the outlined review procedure for the following years lacking: it failed to adequately specify targets, thereby violating the fundamental rights of the applicants. Despite the at times exuberant reception, this case note argues that the decision stopped well short of a legal revolution. Ultimately, the Court embraces an orthodox doctrine on positive obligations that emphasises deference to the legislature on climate change policy. Nonetheless, there are some genuine, albeit subtle legal innovations: (1) extending legal standing to applicants resident outside of Germany; (2) specifying general constitutional commitments to tackling climate change through the Paris Agreement, and (3) relying on a concept of intergenerational equity in the distribution of emission reduction burdens.

Keywords: climate change, German Constitutional Court, fundamental rights, future generations

INTRODUCTION

In a unanimous decision of 24 March 2021, the German Federal Constitutional Court declared certain provisions of the Federal Climate Change Act (FCCA – *Bundes-Klimaschutzgesetz*) unconstitutional.[1] The Court upheld the emission reduction targets and measures adopted under the Act for the period until 2030 but found the review procedure for the following years lacking. The decision gave the legislature until 31 December 2022 to enact fresh legislation.[2]

According to the decision, the FCCA failed to provide a transparent and adequate review mechanism for specifying the emission reduction targets and measures after 2030.[3] A fresh review must be conducted earlier than envisioned and at more frequent intervals so as to keep pace with the development of

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1 Federal Constiutional Court, 1 BvR 2656/18, 24 March 2021, NJW 2021, 1723, an abridged translation of the decision is available at http://www.bverfg.de/e/rs20210324_1bvr265618en.html; a translation of the FCCA is available at https://www.gesetze-im-internet.de/englisch_ksg/index.html.
2 *ibid* at [268]; the ruling is a decision, as opposed to a judgment, because the Court did not conduct an oral hearing, instead deciding on the basis of the written submissions only.
3 *ibid* at [252] and [256].

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scientific evidence and modelling on climate change.[4] The Court also insisted that the legislature must have greater influence on the reduction targets, requiring it to either provide these in primary legislation, or at least outline the relevant criteria more clearly.[5]

Doctrinally, the decision is notable for its innovations on legal standing and its intergenerational equity themed interpretation of fundamental rights. The argument draws and elaborates on the previously underdeveloped doctrine on Article 20a of the German Basic Law (GG) – the constitutional mission statement committing Germany to sustainable development and environmental protection: it now also serves as a basis for a general obligation to decarbonise the economy and was fashioned into a constitutional conduit for the Paris Climate Change Agreement (Paris Agreement) in domestic law, notwithstanding the considerable leeway left to the legislature.[6]

The case note begins by briefly elaborating the background of the decision, as well as the legislative and initial scholarly reactions. It then focuses our attention on three key elements of the decision: (1) the innovation on the legal standing for natural persons, particularly applicants resident outside of Germany; (2) the embracing of a fundamental rights orthodoxy on positive obligations, that emphasises deference to the legislature, and (3) the reliance on a novel concept of inter-generational equity in the enjoyment of constitutional rights.

BACKGROUND

The complaints were brought by mostly young people from Germany and applicants from Nepal and Bangladesh, as well as two environmental NGOs. They alleged violations of the right to life and physical integrity (Article 2 paragraph 2 GG), property (Article 14 GG) and invoked an unspecified fundamental right to a dignified future, as well as to a minimally sound environment.

The challenged FCCA was enacted in December 2019 to codify the German contribution towards achieving the Paris Agreement goals of significantly below two degrees and ideally 1.5 degrees warming compared to pre-industrial levels. The Act sets out the German roadmap to climate neutrality (net zero) by 2050 (§ 1 FCCA) and outlines specific targets and measures for the years leading up to 2030. The Act provides an emissions budget for a host of broadly defined sectors (energy, industry, transportation and construction) (§ 4 paragraph 1 and Annex 2) as well as an overall 55 per cent reduction target of emissions compared with 1990 levels (§ 3 paragraph 1) by 2030.

The constitutional concerns centred on the review procedure for the as yet unspecified targets between 2031 to 2050 (§ 4 paragraph 6), which the FCCA envisions will be implemented through delegated legislation, subject to only limited parliamentary scrutiny. Specifically, the decision found § 3 paragraph 1,

4 *ibid* at [212] and [266].
5 *ibid* at [261].
6 Paris Agreement to the United Nations Framework Convention on Climate Change FCCC/CP/2015/10/Add.1.

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second sentence and § 4 paragraph 1, third sentence of the FCAA in conjunction with Annex 2 unconstitutional, insofar as they 'lack provisions that satisfy the requirements of fundamental rights on the updating of reduction targets from 2031 until the point when climate neutrality is reached as required by Art. 20a GG.'[7]

Despite the at times exuberant reporting from activists and media outlets,[8] the Constitutional Court stopped well short of proclaiming a legal revolution. Indeed, the decision embraces an orthodox doctrine on positive obligations that emphasises deference to the legislature. Under this standard, only a complete absence or the adoption of *evidently* insufficient targets for tackling climate change entail a violation. As we shall see, this standard was also applied to other aspects of the fundamental rights analysis, and precluded a successful challenge against the targets specified in the FCCA. The decision also notably declined to rule on the existence of a fundamental right to a 'minimally sound environment',[9] and did not endorse the idea that future generations are entitled to protection.[10]

LEGISLATIVE RESPONSE

The German legislature reacted quickly to the decision and amended the FCCA. The amendments bring forward the year for the review from 2025 to 2024, and instead of specification through delegated legislation, the general emission reduction targets are now provided directly in the FCCA in the same manner as for the years before 2030.[11] While a tightening of the targets for the years before 2030 was not expressly required, the legislation was also amended in this respect. The reduction target was increased from 55 per cent to 65 per cent lower greenhouse gas emissions (compared to 1990 levels) and a new intermediary target of 88 per cent lower emissions by 2040 was introduced. Additionally, the year for climate neutrality was moved forward to 2045, and the sector specific shares of the carbon budget were reduced accordingly. The amendments entered into force on 31 August 2021.[12]

7 n 1 above at [266].
8 K. Connolly, 'Historic German ruling says climate goals not tough enough' *The Guardian* 29 April 2021 at https://www.theguardian.com/world/2021/apr/29/historic-german-ruling-says-climate-goals-not-tough-enough; 'German climate change law violates rights, court rules' *BBC News* 29 April 2021 at https://www.bbc.co.uk/news/world-europe-56927010; M. Eddy, 'German High Court Hands Youth a Victory in Climate Change Fight' *New York Times* 29 April 2021 at https://www.nytimes.com/2021/04/29/world/europe/germany-high-court-climate-change-youth.html.
9 n 1 above at [113].
10 *ibid* at [109].
11 *Gesetzesbeschluss eines Ersten Gesetzes zur Änderung des Bundes-Klimaschutzgesetzes* Drucksache 576/21, 2021 at https://dserver.bundestag.de/brd/2021/0576-21.pdf.
12 'Verfahrensgang - Erstes Gesetz zur Änderung des Bundes-Klimaschutzgesetzes' *Deutscher Bundestag* 25 June 2021 at https://dip.bundestag.de/vorgang/erstes-gesetz-zur-%C3%A4nderung-des-bundes-klimaschutzgesetzes/277959.

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SCHOLARLY REACTION

Early scholarly reactions predominantly view the decision as an important milestone that potentially lends further credibility to similar litigation recently dismissed by the High Court (appeal pending before the Court of Appeal) and before the European Court of Human Rights.[13] Anna-Julia Saiger highlights the role that potential future fundamental rights violations played in the decision and proclaims that the German Constitution will now 'speak in the future tense',[14] while Mathias Goldmann muses over a potential 'post-colonial' turn in the jurisprudence of the court in light of its reliance on international treaties to specify constitutional obligations.[15]

Felix Ekardt is perhaps the most enthusiastic supporter of the decision, hailing it as a landmark ruling and 'probably the most far-reaching decision ever made by a supreme court worldwide on climate protection.' He argues it will force the state to revisit its policies and impose '… much more ambitious climate targets – and above all more ambitious instruments – even before 2030.'[16] Even with the entirely understandable satisfaction that must be felt by an academic directly representing the applicants in the proceedings, that appears an overly optimistic assessment. There are some genuine legal innovations in the decision, but these are overall more subtle and modest than the headlines would suggest.

INNOVATION ON STANDING

The Court introduced some changes on legal standing to benefit natural persons, and particularly applicants that are not resident in Germany. The admissibility section also foreshadowed the reliance on inter-generational equity that is further developed in the discussion of the merits.[17]

Generally, in order to establish legal standing before the Constitutional Court, applicants must demonstrate that an infringement of their fundamental rights is arguable.[18] The court was satisfied that at least the natural persons had standing based on potential positive obligations, and crucially, the possibility of future infringements through intrusive greenhouse gas reduction measures.[19] Conversely, the decision refused standing to two non-governmental organisations.[20]

13 *R (Plan B)* v *Prime Minister* [2021] EWHC 3469 (Admin); App no 39371/20 *Duarte Agostinho and others* v *Portugal* (ECtHR, pending) and App no 53600/20 *Verein Klimaseniorinnen Schweiz* v *Switzerland* (ECtHR, pending).

14 A.-J. Saiger, 'The Constitution Speaks in the Future Tense' *Verfassungsblog* 29 April 2021 at https://verfassungsblog.de/the-constitution-speaks-in-the-future-tense/.

15 M. Goldmann, 'Judges for Future – The Climate Action Judgment as a Postcolonial Turn in Constitutional Law?' *Verfassungsblog* 30 April 2020 at https://verfassungsblog.de/judges-for-future/.

16 F. Ekardt, 'Climate Revolution with Weaknesses' *Verfassungsblog* 8 May 2021 at https://verfassungsblog.de/climate-revolution-with-weaknesses/.

17 n 1 above at [96]-[136].

18 *ibid* at [96].

19 *ibid* at [90].

20 *ibid* at [128].

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While not completely surprising, affording standing to the natural persons is a notable development. As recently as 2019, the Berlin Administrative Court refused standing to three farmers that claimed violations of their fundamental rights through the projected failure of Germany to meet its 2020 emission reduction targets.[21] It is likely that the decision will cause a greater number of applicants to succeed at the admissibility stage.

The real innovation came with respect to the applicants from Bangladesh and Nepal. They were afforded standing because it is conceivable, so argues the Court, that the positive obligations owed by the German state could extend to them and thus entail an obligation to combat climate change on their behalf.[22] However, unlike the residents of Germany, they could not rely on the novel concept of inter-generational equity in fundamental rights enjoyment. This is because they would not be subject to potentially invasive restrictions enacted by the German state.[23] Nonetheless, Germany may in principle owe positive obligations to citizens from other countries that are affected by its policies, even if the German contributions to global emissions are small in the grand scheme of climate change.[24]

This expansion of standing provides a potential avenue for constitutional litigation for individuals currently limited to civil actions against private companies, such as in the case of the Peruvian farmer Lliuya.[25] The proceedings were brought in German civil courts against the energy conglomerate RWE over its contribution to global greenhouse gas emissions, and the allegedly causally linked thawing of a glacier that threatens the applicant's property and livelihood in Peru. The case is currently at the evidentiary stage, with the court considering a visit to Peru to establish relevant facts on-site, but delayed due to the Covid pandemic.[26]

It remains an open question in private law whether RWE can be held responsible for the melting of a glacier in Peru based on its (entirely lawful) emissions of greenhouse gases in Germany. A key challenge is that the modelling of climate change effects is focused on what we may term a macro view – identifying and establishing correlations between global trends in emissions, average temperature increases and climate phenomena over time for broadly defined geographic regions. Applying this type of modelling to the micro view, the specific relationship between greenhouse gas emissions in Germany from one specific energy company and the melting of a specific glacier in Peru is complex and tentative at best.

21 Berlin Administrative Court, VG 10 K 41218, 31 Oktober 2019, unpublished.
22 n 1 above at [101].
23 *ibid* at [132].
24 *ibid* at [202].
25 Higher Regional Court Hamm, 5 U 15/17, case pending.
26 'OLG Hamm prüft Ortstermin in Peru' *Legal Tribune Online* 29 January 2020 at https://www.lto.de/recht/nachrichten/n/olg-hamm-5-u-15-17-klage-klimafolgen-rwe-beweisaufnahme-ortstermin-peru/.

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FUNDAMENTAL RIGHTS ORTHODOXY

The Court then proceeds to discuss the merits of the case, beginning with positive obligations under Articles 2 para 2 (Right to life and physical integrity) and 14 para 1 (Right to property) GG.

The applicants had argued that the measures and targets Germany adopted under the FCCA violated fundamental rights, and that stricter targets and reduction measures were required because: (1) the global, less than two degree warming target set out in the Paris agreement, even if implemented, is insufficiently ambitious, (2) the national reduction target envisioned by the FCCA is insufficient to meet the Paris requirements, and finally (3) the specific measures adopted by the FCCA are in turn insufficient to meet the national reduction target.[27]

The Court distinguishes between the obligations owed towards the applicants residing in Germany and those from Nepal and Bangladesh.[28] With respect to the German residents, the Court acknowledged that Article 2 paragraph 2 GG contains a positive obligation to protect individuals from the dangers of climate change, but concluded that the right was not violated.[29] The measures adopted under the FCCA were not *evidently* insufficient, and thus present no violation under one of the established standards of review for positive obligations.

The standards of review on positive obligations were developed through several cases, including the decision of the Constitutional Court in *Lagerung chemischer Waffen* concerning the storage of chemical weapons on German territory in US military depots.[30] To the extent that the applicants demanded the removal of the weapons due to their (potentially) hazardous nature, the Court was not persuaded that this was the only means of living up to the positive obligation.[31] It only required that the measures to protect the public from these weapons are not entirely unsuitable or evidently insufficient.

The Constitutional Court generally resists the idea that the right to life and physical integrity mandates any specific welfare obligations,[32] and under most circumstances, affords the state broad discretion in determining appropriate regulatory actions.[33] By the standard of evident insufficiency, it is difficult to see how the provisions of the FCCA could ever fall foul of positive obligations. The provisions may not be comprehensive, the targets and measures may not be optimal or indeed sufficient, but they are undoubtedly not *evidently* insufficient to tackle climate change.

27 n 1 above at [158].
28 *ibid* at [143]-[172] and [173]-[181], respectively.
29 *ibid* at [152].
30 Federal Constitutional Court, 2 BvR 624/83; 2 BvR 1080/83; 2 BvR 2029/83, 29 October 1987, BVerfGE 77, 170.
31 *ibid* at [112].
32 A notable exception is the existential minimum, where Art 2 (2) GG functions in conjunction with Art 1 (1) GG (human dignity), see Federal Constitutional Court, 1 BvL 1/09; 1 BvL 3/09; 1 BvL 4/09, 9 February 2010, BVerfGE 125, 175 (223).
33 Federal Constitutional Court, BVerfGE 77, 170 (214); Federal Constitutional Court, 1 BvR 1301/84, 30 November 1988, BVerfGE 79, 174 (202); Federal Constitutional Court, 1 BvR 1025/82, 1 BvL 16/831, 1 BvL 10/91, 28 January 1992, BVerfGE 85, 191 (212).

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However, it must be noted that in other cases, the Court has interpreted positive obligations more stringently, requiring that the state adopt 'sufficient measures' that ensure an 'appropriate and effective protection' – the so-called *Untermaßverbot* (prohibition of insufficient action). That standard was crucial to the Court's ruling on the balance of constitutional rights with respect to abortions: it justified that the state must generally prohibit abortions in the interests of the unborn life, subject only to limited exceptions.[34] This ultimately led the Court to declare unconstitutional changes to the Criminal Code which provided that abortions administered by a physician within 12 weeks, and following mandatory counselling, were generally not unlawful (*rechtswidrig*). The German state instead had a continuing and enduring duty to criminalise abortions, unless constitutionally acceptable exceptions applied.

It is curious that the Court did not mention the more exacting *Untermaßverbot* in the context of the FCCA. Admittedly, the decision exhibits a certain level of ambiguity on this point. At times, the Court appears to consider something like the *Untermaßverbot*, when it examines whether the FCAA provides adequate protection, determined at least partially through an evaluation of suitability and effectiveness of the measures.[35] The Court for instance states that it would find a violation of positive obligations '… if the provisions and measures fall significantly short of the protection goal.'[36] Had this standard been applied, a violation of positive obligations would at least have been arguable, and it does offer a stronger doctrinal basis for the conclusions the Court appears tempted to draw. As the decision elaborates, Germany could undoubtedly be doing more to limit greenhouse gas emissions, reach climate neutrality quicker, and in a more equitable manner.[37] Ultimately, however, the decision stayed true to its deferential standard of review based on evident insufficiency. It gives no explanation why the *Untermaßverbot* and its more exacting requirements were rejected. This constitutes a serious shortcoming and key weakness in the reasoning of the decision.

The Court did not expressly require Germany to adopt more ambitious emission reduction targets overall, nor were stricter measures deemed necessary than those already envisioned. This is justified, according to the decision, because of the high level of regional uncertainty in the IPCC global climate change models, and the implications for the remaining carbon budget allocated to Germany.[38] It is possible, albeit exceedingly unlikely, that the current emission targets and measures will meet the necessary domestic contribution to the Paris Agreement. That seemingly small level of uncertainty is sufficient to avoid a violation of positive obligations. This problematic approach to environmental

34 Federal Constitutional Court, 2 BvF 2/90; 2 BvF 4/90; 2 BvF 5/92, 28 May 1993, BVerfGE 88, 203.

35 A. Buser, 'Die Freiheit der Zukunft' *Verfassungsblog* 30 April 2021 at https://verfassungsblog.de/die-freiheit-der-zukunft/.

36 n 1 above at [152].

37 *ibid* at [195]-[242].

38 *ibid* at [224]-[237], especially [229].

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harm has long been a feature of constitutional doctrine that impedes meaningful judicial review.[39]

In principle, the Court found that the same positive obligations also apply to residents of other countries. However, the constitutional duty to protect individuals resident outside of Germany is modified and less demanding.[40] The point is that since the German state cannot control and implement mitigation measures in other countries, it cannot be held to the same (already quite limited) positive obligations that apply to applicants residing in Germany.[41] Even if positive obligations owed were ultimately equivalent, the deferential standard of review would likewise not have led to a violation.[42] However, the court adds that this does not preclude future obligations to finance mitigation measures in other countries.[43]

The Court further declined to decide whether the Constitution requires an 'ecological existential minimum' (Articles 1 in conjunction with 20a GG),[44] chiefly because such a right would only protect from particularly severe climate-based events: those that jeopardise the foundations of social, cultural, and political life.[45] Because the Court sees such a scenario as avoidable with the envisioned measures, it saw no need to rule on the matter. As Andreas Buser suggests, this is not necessarily a correct assessment.[46] Given the existence of global tipping points at which the cumulative impact of global warming causes fundamental and irreversible changes to the climate, the FCCA may well not ensure that catastrophic scenarios are averted.

While the overall treatment of positive obligations is therefore somewhat sobering, there are nonetheless some shifts on fundamental rights doctrine that are significant for future litigation. The Court strengthened the constitutional mission statement in Article 20a GG and notably developed a concept of inter-generational equity.

ARTICLE 20A AND INTER-GENERATIONAL EQUITY

Article 20a GG provides a constitutional mission statement[47] that commits the German state to the protection of 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.' The Court

39 For further details on the German doctrine and its implications particularly for measures to combat air pollution, see S. Theil, *Towards the Environmental Minimum* (Cambridge: Cambridge University Press, 2021) ch 9.
40 n 1 above at [176].
41 *ibid* at [178].
42 *ibid* at [180].
43 *ibid* at [179].
44 *ibid* at [113]-[115].
45 *ibid* at [115].
46 Buser, n 35 above.
47 On the terminology, see J. King, 'Constitutions as Mission Statements' in D.J. Galligan and M. Versteeg (eds), *The Social and Political Foundations of Constitutions* (Cambridge: Cambridge University Press, 2013).

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describes Article 20a GG as a 'protection mandate' and 'national objective' that impacts the interpretation of other constitutional provisions and ordinary legislation.[48] The provision thus imposes 'substantive constraints' on democratic decision-making, notwithstanding the considerable leeway left to the legislature.[49] However, Article 20a GG does not contain an individual right that applicants can invoke in isolation.[50]

The concept of inter-generational equity in the enjoyment of fundamental rights played a pivotal role in the decision.[51] The crucial move in the argument is that the state cannot simply 'use up' the vast majority of the remaining carbon budget today, and then enforce exceedingly tough restrictions tomorrow in an effort to compensate. The Constitution 'imposes an obligation to safeguard fundamental freedoms over time and to spread the associated opportunities proportionately across generations.'[52]

However, it is important to recall that while it is a potentially far-reaching innovation, the conclusions that the Court drew from the novel concept in this case were quite modest. Ultimately, the Court only held the FCCA unconstitutional to the extent that it did not require more frequent periodic review or provide sufficient specification of targets and measures for the years after 2030.[53] The targets and measures already specified until 2030 were not constitutionally objectionable.

The possibility of future infringements

Having previously rejected a violation of positive obligations, the court built this finding around a requirement of inter-generational equity in the enjoyment of fundamental rights, which entails an equitable allocation of the emission reduction burdens required by Article 20a GG. The Court began by explaining that future possible restrictions of fundamental rights are relevant to the current constitutional compliance of the FCAA.[54] This is unusual in German constitutional law doctrine, which conventionally requires applicants to claim current infringements of fundamental rights. However, the Court reasoned that as Germany has a limited carbon budget, any specification of reduction targets and measures necessarily and directly impacts on the freedoms enjoyed by society tomorrow. Hence, the targets and measures of the FCCA must be constitutionally justified, notably pursuant to the demands of Article 20a GG.[55] The foundation is the broad general right to freedom of action (Article 2 GG),

48 n 1 above at [205]-[207].
49 *ibid* at [206] and [207].
50 *ibid* at [112]; Federal Administrative Court, 6 C 996, 27 August 1997, NJW 1998, 843; R. Scholz, 'Artikel 20a' in T. Maunz and others (eds), *Grundgesetz Loseblatt Kommentar* (Munchen: CH Beck, 76th ed, 2016) [33]; H. Schulze-Fielitz, 'Artikel 20a' in H. Dreier (ed), *Grundgesetz Kommentar* vol 2 (Tübingen: Mohr Siebeck, 3rd ed, 2015) [82].
51 n 1 above at [182]-[265].
52 *ibid* at [183].
53 *ibid* at [266].
54 *ibid* at [184].
55 *ibid* at [195]-[213].

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which requires that virtually any state measure impacting on individuals must be justified and hence in principle comport even with programmatic provisions of the Constitution, such as Article 20a GG. As Christian Calliess persuasively argues, this construction has echoes of the earlier ruling in *Elfes* and allows the Court to individualise the requirements of provisions that could otherwise not be directly invoked by applicants.[56]

The requirements of Article 20a GG

The first innovation of the decision was to elevate the targets of the Paris Agreement to the level of constitutionally binding commitments. The Court achieved this by treating the FCCA provisions as specifications of general constitutional duties under Article 20a GG.

From the provisions, the Court derives a general commitment to take action on climate change and achieve climate neutrality in good time, as well as a duty towards seeking international cooperation.[57] The constitutional duties of Article 20a GG justify and indeed positively require, according to the Court, imposing proportionate limitations on the exercise of fundamental rights in the interest of tackling climate change. Indeed, the '… relative weight accorded to any climate-harmful exercise of freedom will steadily decrease as climate change intensifies'.[58] However, Article 20a GG does not itself specify interim reduction targets, nor determine precisely when (and how) climate neutrality must be achieved.[59]

Instead, Article 20a GG is used as a conduit that allows international agreements to specify general constitutional duties. In this case, it is chiefly the Paris Agreement and the codification of targets and measures under relevant EU law.[60] The crucial effect is that it allows for the calculation of an overall domestic emissions budget.

As we saw, the FCCA required Germany to reduce its emissions and to achieve climate neutrality by 2050. This goal affords Germany a quantifiable remaining carbon budget: the maximum amount of carbon that Germany may still emit if it is to achieve climate neutrality and meet its Paris Agreement commitments.[61] Given the absence of targets and measures beyond 2030, the Constitutional Court discovered a clearly skewed allocation of the remaining carbon budget: while the targets and measures until 2030 are specific and effective enough to satisfy positive obligations for the time being, they would see Germany use up the vast majority of its carbon budget, leaving less than 1/7 for the years between 2030 and 2050.[62] Given current emissions, Germany would therefore have to achieve climate neutrality almost immediately after 2030 in

56 C. Calliess, '„Elfes" Revisited? – Der Klimabeschluss des Bundesverfassungsgerichts' *Verfassungsblog* 25 May 2021 at https://verfassungsblog.de/elfes-revisited/.
57 n 1 above at [197] and [198].
58 *ibid* at [120].
59 *ibid* at [207].
60 *ibid* at [208]-[213].
61 *ibid* at [216].
62 *ibid* at [233].

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order to meet a target close to the aspirational 1.5 degree objective of the Paris Agreement – not a particularly likely prospect as the Court notes.[63]

Nonetheless, the Court affords the legislature significant deference given the level of uncertainty contained within the modelling of the IPCC, as well as the specific domestic budget calculated by the German Advisory Council on the Environment.[64] The Constitution does not determine where the overall target ought to be set within the range of between 1.5 and below 2 degrees of the Paris Agreement.[65] Accordingly, there was no violation of the Constitution on the grounds that the targets until 2030 are likely insufficient to achieve climate neutrality by 2050.[66]

Inter-generational equity

This is where the second doctrinal innovation, the concept of inter-generational equity in the distribution of emission reduction burdens is crucial.[67] The Court concluded that the allocation of the carbon budget envisioned by the FCCA risks a heavy burden being placed on younger generations. As the Court concisely stated earlier in the decision: '… one generation must not be allowed to consume large portions of the CO2 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'.[68]

In other words, given that virtually all human activity involves emitting greenhouse gases, the relatively generous share of the emission budget afforded to society before 2030 may have to be compensated later through ever more intrusive and radical measures.[69] The absence of targets and measures for the years after 2030 thus produced significant uncertainty and a high risk of future fundamental rights violations. These must be mitigated, but not necessarily, as one might have expected, by tightening existing targets. Instead, the Court requires only more frequent and detailed reviews that specify the burden on society after 2030 in primary legislation.[70]

The Court arrived at this conclusion through the familiar standard of review of *evident* insufficiency which hinges on the significant uncertainty over the remaining carbon budget.[71] The legislature is afforded broad discretion in specifying how the general commitments to emission reductions and climate neutrality should be achieved, as well as in equitably distributing the resulting burdens. It must only allocate the reduction measures across the generations in

63 *ibid* at [234].
64 *ibid* at [237].
65 *ibid* at [234] and [237].
66 *ibid* at [236].
67 *ibid* at [214]-[242].
68 *ibid* at [192].
69 *ibid* at [243]-[247].
70 *ibid* at [251]-[265].
71 *ibid* at [249].

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a timely and transparent fashion, laying out a gradual reduction pathway that ultimately leads to climate neutrality.[72]

Should the legislature insist on empowering the government to set targets and measures through delegated legislation, then more specific guidance is required in the FCCA pursuant to Article 80 paragraph 2 GG.[73] The nominal inclusion of the legislature in the process of enacting delegated legislation as envisioned by § 4 paragraph 6 FCCA was insufficient to compensate for the absence of a full parliamentary deliberation.[74]

CONCLUSION

Overall, we are therefore left with a mixed picture. There are several potentially significant innovations in the decision that point towards greater constitutional scrutiny, especially as scientific understanding and the accuracy of modelling improves. Even though the implications of this particular decision are modest, the Court has established its jurisdiction to comprehensively review climate change legislation and policy. Extending standing to natural persons resident outside of Germany is remarkable and clears the path for future constitutional complaints. This point had been strongly resisted in the submissions by the Federal Government and the Bundestag.[75]

Most notable, however, is the prominent role of potential future limitations on fundamental rights and inter-generational equity. For instance, the decision raises the question how a constitutionally mandated decarbonisation of the economy (and the likely associated national debt increases it entails) can be balanced with Article 115 GG, the constitutional provision that caps the maximum debt allowance as a percentage of GDP for every fiscal year, barring exceptional circumstances.[76] The doctrinal shift also has the potential to affect policy beyond the direct impacts of climate change: budget and fiscal policy, taxation, and pensions all have significant and deep inter-generational dimensions.[77]

Katja Rath and Martin Benner point out that a dwindling number of young people are already contributing a much larger share of their income than previous generations to the state funded social security and pension schemes and yet are projected to accrue significantly lower benefits upon retirement than current pensioners. Does intergenerational equity perhaps require a fairer distribution

72 *ibid* at [251]-[255].
73 *ibid* at [259]-[265].
74 *ibid* at [265].
75 *ibid* at [110].
76 The so-called 'brake' on national debt, see L. Märtin and C. Mühöbach, 'Generationengerechtigkeit und Fiskalpolitik – Staatsverschuldung und Schuldenbremse im Lichte des Klima-Beschlusses des BVerfG' *Verfassungsblog* 18 May 2021 at https://verfassungsblog.de/generationengerechtigkeit-und-fiskalpolitik/.
77 K. Rath and M. Benner, 'Ein Grundrecht auf Generationengerechtigkeit? – Die Relevanz des Klimaschutz-Beschlusses des Bundesverfassungsgerichts für andere Rechtsgebiete mit intergenerationaler Bedeutung' *Verfassungsblog* 7 May 2021 at https://verfassungsblog.de/ein-grundrecht-auf-generationengerechtigkeit/.

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of burdens, and thus mandate a reduction of the current benefits payable to pensioners instead of the legislatively guaranteed annual increases? The answer may well lie in the scope of deference extended to the legislature.

Even if the expected developments and improvements of scientific understanding on climate change should come about, it seems unlikely they would ever provide the level of certainty the Court ostensibly requires: some doubts and leeway will almost inevitably remain.

Whether the Constitutional Court decision therefore indirectly challenges the targets and measures adopted for the pre-2030 period is a complicated question. Felix Ekardt and Helmut Aust are correct that the need to equitably balance the burden of emission reduction is ultimately difficult to square with the reviewed targets.[78] Indeed, the decision came exceedingly close to holding the pre-2030 targets unconstitutional due to the burden they impose on the post-2030 society. The Court ostensibly stopped short of this conclusion only because of lingering uncertainty over the remaining carbon budget. It will be interesting to see whether the European Court of Human Rights similarly concludes that climate change policy ought to benefit from a particularly broad margin of appreciation.

This legal assessment takes nothing away from the political momentum that the ruling has undoubtedly generated. Even though the decision did not expressly require stricter targets, these were nonetheless implemented in the revision of the FCCA. This speaks to the mounting political and social pressure, particularly on rich developed countries to do more on climate change. In such an environment, decisions from higher courts do not need to proclaim legal revolutions in order to inspire tangible improvements. For now, the German decision is a welcome, albeit tentative and cautious step towards greater judicial scrutiny of emission reduction policy: that may well prove to be good enough.

78 Ekardt, n 16 above, H.P. Aust, 'Klimaschutz aus Karlsruhe – Was verlangt der Beschluss vom Gesetzgeber?' *Verfassungsblog* 5 May 2021 at https://verfassungsblog.de/klimaschutz-aus-karlsruhe-was-verlangt-das-urteil-vom-gesetzgeber/.

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