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The Climate Protection Order of the Federal Constitutional Court of Germany and the North-South Divide

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Abstract

The Federal Constitutional Court (FCC) in Germany has issued a landmark ruling with regard to climate change. It opens its jurisprudence for a new dimension of human rights: The intertemporal guarantee of freedom. It argues that the legislature has violated fundamental rights by failing to take sufficient precautionary measures today for the time after 2030. The emissions allowed in the Federal Climate Change Act until 2030 will nearly exhaust Germany's remaining CO₂ budget. After 2030, drastic legislative measures, which curtail nearly all activities that emit CO₂, might be necessary. If emission reductions are delayed until 2030, the costs of climate protection will increase for future generations, and with it the risk that emission reductions will only be possible at the price of serious losses of freedom. Therefore, the legislature needs to act now and take the time after 2030 into consideration. The order might eventually influence climate change litigation in other areas of the world. The article will demonstrate the main arguments of the FCC order. The combat of climate change is an international task, which cannot be solved by Germany alone. The FCC takes this fact to some extent into account. It argues for international cooperation to combat climate change. Unfortunately, it does not fully evolve a jurisprudence which takes the core principle of common but differentiated responsibility (CBDR) seriously and addresses the questions of equity. The CBDR principle is one of the core principles which should solve the North-South divide and which should bring together the efforts of rich as well as poor countries to combat climate change. It is enshrined in the Paris Agreement. The FCC engages with this principle on the surface but misses the opportunity to truly and deeply engage.

Keywords: Federal Constitutional Court; Federal Climate Change Act; Common But Differentiated Responsibility (CBDR); Paris Agreement; North-South Divide

A. Introduction

The topic of climate change litigation is gaining more and more awareness. Initially, the climate law and policy community was skeptical about the role courts could play in fostering mitigation and adaptation measures. Instead, they focused more on regulatory efforts.¹ This skepticism has

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¹Jaqueline Peel & Hari M. Osofsky, *Climate Change Litigation*, 16 ANN. REV. OF L. & SOC. SCI. 21 (2020).

mainly vanished.² Courts are mainly seen as one actor capable of fostering and strengthening climate change policies. This rising interest in and awareness of courts, and the growing attention towards them, is in no small part due to the frustration with the inaction of national governments. This is also true for the German case.³ The legislative act under question, the Federal Climate Change Act, was, by itself, a very unambitious law. The FCC argued that the legislature has violated fundamental rights by failing to take sufficient precautionary measures today for the time after 2030. The emissions allowed in the Federal Climate Change Act until 2030 will nearly exhaust Germany's remaining CO₂ budget. After 2030, drastic legislative measures, which curtail nearly all activities that emit CO₂, might be necessary. If emission reductions are delayed until 2030, the costs of climate protection will increase for future generations, and with it the risk that emission reductions will only be possible at the price of serious losses of freedom. After the FCC published its order,⁴ it seemed that even the political parties, who enacted the law, were glad having the chance to improve their own legislative act.

Initially, Germany has not taken part in the climate change litigation scene. Despite the case *Luciano Lliuya v. RWE AG*,⁵ there have not been any judgements from Germany that gained international traction.⁶ This is mainly due to the very restrictive jurisprudence of the FCC regarding the duty to protect and positive obligations claimed in constitutional proceedings. This passive role of the FCC in climate protection cases has been considerably changed through the recent decision of the FCC⁷ regarding the National Climate Change Act of Germany. Nationally, this decision has been labelled far-reaching,⁸ a historical success,⁹ ground-breaking, international and epoch-making,¹⁰ as well as post-colonial.¹¹ Hardly anyone in Germany foresaw the outcome of this case.¹²

²For a recent critical accounts of the role of courts pushing for climate, see Bernhard Wegener, *Urgenda – Weltrettung per Gerichtsbeschluss – Klimaklagen testen die Grenzen des Rechtsschutzes*, ZEITSCHRIFT FÜR UMWELTRECHT, 2019 at 3; Gerhard Wagner, *Klimaschutz durch Gerichte*, 74 NEUE JURISTISCHE WOCHENZEITUNG [NJW] 2256, 2258 (2021).

³Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Order of the First Senate of Mar. 24, 2021, 1 BvR 2656/18, [hereinafter Order of Mar. 24, 2021], http://www.bverfg.de/e/rs20210324_1bvr265618en.html.

⁴Order of Mar. 24, 2021.

⁵Landgericht Essen [LG] [District Court of Essen], Dec. 15, 2016, 2 O 285/15, <https://openjur.de/u/943890.html>. This case involved a Peruvian farmer, Saúl Luciano Lliuya, who lives in Huaraz, Peru, filing a claim for damages in November 2015 in a German civil court against RWE. RWE is Germany's largest electricity producer. Lliuya argued that RWE has some responsibility for the melting of mountain glaciers near the town of Huaraz because they emitted substantial volumes of greenhouse gases and this has added to climate change. After losing in the court of first instance, upon appeal, the court recognized the arguments and the claim is currently in the evidentiary phase which were on hold due to Covid. See also Oberlandesgericht Hamm [OLG Hamm] [Higher Regional Court of Hamm], Nov. 30, 2017, Az. 5 U15/17, <https://www.juris.de/jportal/prev/KORE558662018>.

⁶The climate chart which collects all climate litigation only mentions 11 cases in total. See *Climate Change Litigation Database*, SABIN CENTER FOR CLIMATE CHANGE LAW, (2021) <http://climatecasechart.com/climate-change-litigation/non-us-jurisdiction/germany/>. The Grantham Research Institute on Climate Change and the Environment lists ten cases. See *Archive of Climate Litigation Cases*, GRANTHAM RESEARCH INSTITUTE ON CLIMATE CHANGE AND THE ENVIRONMENT, https://climate-laws.org/litigation_cases?geography%5B%5D=66.

⁷Order of Mar. 24, 2021.

⁸Eric Brandmayer, *Weitreichende Entscheidung: Das Bundesverfassungsgericht stärkt den Klimaschutz und das Recht auf Eigentum*, VDIV AKTUELL, Ausgabe 4/21, (July 21, 2021), <https://archiv.vdivaktuell.de/blog/weitreichende-entscheidung-das-bundesverfassungsgericht-staerkt-den-klimaschutz-und-das-recht-auf-eigentum>.

⁹Germanwatch, *Historischer Erfolg für Klima-Verfassungsbeschwerde*, (Apr. 29, 2021), <https://germanwatch.org/de/20134>.

¹⁰Helen Arlin & Birgit Peters, *Ein Puzzleteil für Klimaklagen weltweit*, L. TRIB. ONLINE, (Aug. 5, 2021), <https://www.lto.de/recht/hintergruende/h/bverfg-1bvr2656-18-klimaklage-grundrechte-internationale-dimension-schutzpflichten-gegenueberpersonen-im-ausland-egmr/>.

¹¹Matthias Goldmann, *Judges for Future: The Climate Action Judgment as a Postcolonial Turn in Constitutional Law?*, VERFASSUNGSBLOG, Apr. 30, 2021, <https://verfassungsblog.de/judges-for-future/>.

¹²Sabine Schlacke, *Klimaschutzrecht – Ein Grundrecht auf intertemporale Freiheitssicherung*, 40 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 912, 912 (2021).

The case gained traction both nationally and internationally. The case has been mentioned in the Washington Post.¹³ It has been labelled a victory for the youth by the New York Times which in their article include a citation from Christoph Bals. He says that this ruling will be a key reference point for all climate lawsuits pending around the world.¹⁴ In Canada, a sixteen-year-old plaintiff in a similar case against the Canadian government stated that the German verdict has been “a big source of optimism” for him.¹⁵ Joana Setzer, of the Grantham Research Institute, is of the opinion that the order of the FCC will influence dozens of other climate lawsuits around the world, especially those brought by children.¹⁶ This assumption is in line with the hypotheses of convergence formulated by Joyeeta Gupta. The formation of a transnational epistemic community of legal scholars and lawyers, which will promote certain principles and concepts, will lead to similar court orders in “national courts in different parts of the world using similar principles, doctrines and often referring to case law in other countries.”¹⁷

The order of the FCC quite frequently refers to the Paris Agreement.¹⁸ The Paris Agreement is the internationally agreement dedicated to climate change, with its goal of holding the increase in the global average temperature to well below 2 degrees Celsius above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5 degrees Celsius above pre-industrial levels.¹⁹ With its multilevel governance framework, it opens a room for national or supranational courts to engage in questions of climate litigation. Jaqueline Peel and Hari Osofsky reach the conclusion that rights-based climate claims may be a candidate on the rise to enhance the Paris goals.²⁰ The decision of the FCC falls into this category and clearly demonstrates a push for the Paris Agreement, however, as will be argued, only for certain aspects of the Paris Agreement, leaving mostly aside the principle of common but differentiated responsibility.

Taking the hypothesis for granted that the ruling will be a reference point for other climate litigation cases, the aim of the article is twofold: First, a descriptive one and second, a criticism. It is not only time to explain the ruling and the historical context as well as the jurisprudence of the FCC, but also to discuss the shortcomings of the case. One of the shortcomings in the case is the treatment of the North-South divide by the FCC. This divide is still very present in climate change politics and in the international climate change regime and it is argued that it should have taken more seriously by the FCC.

This article is structured as follows: First, as a background, the earlier jurisprudence of the FCC with regard to environmental protection will be described. Second, the order of the FCC will be described. It will be analyzed in which way the FCC evolves a new dimension for human rights. Before criticizing the decision, the establishment of the North-South divide and its prominent role in international climate change law will be outlined. This is followed by the question whether the FCC took this North-South divide seriously. I conclude by arguing that the FCC saw the divide but only engaged with it on a very shallow level.

¹³Jeremy Hodges, *Will Judges Have the Last Word on Climate Change*, WASH. POST, (May 28, 2011), https://www.washingtonpost.com/business/energy/will-judges-have-the-last-word-on-climate-change/2021/05/27/94d7d3de-bf02-11eb-922a-c40c9774bc48_story.html.

¹⁴Melissa Edy, *German High Court Hands Youth a Victory in Climate Change Fight*, N.Y. TIMES, (Apr. 29, 2021), <https://www.nytimes.com/2021/04/29/world/europe/germany-high-court-climate-change-youth.html?searchResultPosition=1>.

¹⁵Evan Dreyer, *Young Climate Activists Beat Germany's Government in Court. Could it Happen Here?*, CBC NEWS, (May 23, 2021), <https://www.cbc.ca/news/politics/climate-change-emissions-carbon-canada-germany-youth-1.6029642>.

¹⁶*Red in Robe, Green in Thought: A Court Ruling Triggers a Big Change in Germany's Climate Policy*, ECONOMIST, (May 8, 2021), <https://www.economist.com/europe/2021/05/08/a-court-ruling-triggers-a-big-change-in-germanys-climate-policy>.

¹⁷Joyeeta Gupta, *Legal Steps Outside the Climate Convention: Litigation as a Tool to Address Climate Change*, 16 REV. OF EUR., COMPAR. & INT'L ENV'T L. 76, 85 (2007).

¹⁸Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104, https://unfccc.int/paris_agreement/items/9485.php.

¹⁹*Id.* at art. 2(1)(a).

²⁰Lennart Wegener, *Can the Paris Agreement Help Climate Change Litigation and Vice Versa?*, 9 TRANSNAT'L ENV'TL. 17 (2020).

B. The “Old” FCC Jurisprudence with Regard to Environmental Concerns and Climate Change

Within the German legal discourse, the FCC has not played an important role in environmental protection or climate change policy.²¹ This was mainly due to its very restrictive jurisprudence with regard to environmental protection. More general, the FCC has always been very reluctant towards the possibility to demand positive obligations *vis-à-vis* the legislature through courts. All of this has changed with the new FCC decision. Before going into the details of the new jurisprudence, this section will describe briefly the general concept of human rights and their different functions in German legal discourse as well as their application in environmental protection cases.

Germany’s Basic Law, the name of the German Constitution,²² does not entail a substantive human right to a “clean,” “sustainable,” or “favourable” environment like other constitutions in the world.²³ So like for example in India, the right to life—codified in Germany as Article 2 (2) Basic Law—but sometimes also the right to property—Article 14 of Basic Law—are applied in environmental law cases before the FCC.²⁴ In addition, the Basic Law entails a state duty to protect the environment laid down in Article 20a²⁵ Basic Law. Article 20a Basic Law cannot be used on its own as a basis for a constitutional complain. Until the recent climate protection order, the FCC jurisprudence had not given any meaningful content to Article 20a Basic Law.²⁶

Generally, the constitutional jurisprudence in Germany prescribes different functions to human rights. The first and foremost function of human rights is a negative one. Human rights shall protect the individual from governmental action which violates their individual freedom—the so-called *abwehrrechtliche Dimension*.²⁷ In environmental law cases this function of a negative right has been difficult to argue in the past, as generally in these cases an action from the state is required and not an omission. The negative right is only violated when the state already acted.

Another dimension prescribed to human rights is a positive one, the obligation of the state to protect human rights—the so-called *Schutzpflichtdimension*.²⁸ The FCC has developed this dimension in its first abortion case²⁹ and has further developed it with regard to environmental protection. It has argued that the state has the duty to protect its citizens from possible serious dangers from nuclear power plants,³⁰ aircraft noise,³¹ road traffic noise,³² ozone, as well as electro

²¹Andreas Vofkühle, *Umweltschutz und Grundgesetz*, 32 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 1 (2013).

²²For historical reasons, the constitution of Germany is called Basic Law for the Federal Republic of Germany.

²³For an overview of the inclusion of substantive human rights with regard to a healthy environment in other nations’ constitutions, see JAMES R. MALY & ERIN DALY, *GLOBAL ENVIRONMENTAL CONSTITUTIONALISM*, Appendix A (2015).

²⁴India Const., art. 21. See also P. LEELAKRISHNAN, *ENVIRONMENTAL LAW IN INDIA* 223, 228 (3d ed. 2008).

²⁵Grundgesetz [GG] [Basic Law], art. 20(a) (“[m]indful 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.”).

²⁶Jörg Berkemann, “*Freiheitschancen über die Generationen*” (Art. 20a GG) - *Intertemporaler Klimaschutz im Paradigmenwechsel*, DIE ÖFFENTLICHE VERWALTUNG 701, 704 (2021).

²⁷Hans D. Jarass, *Funktionen und Dimensionen der Grundrechte*, in 2 HANDBUCH DER GRUNDRECHTE 626 (Detlef Merten & Hans-Jürgen Papier eds., 2006).

²⁸For an overview of the state’s obligation to protect human rights, see Cristian Calliess, *Schutzpflichten*, in 2 HANDBUCH DER GRUNDRECHTE 626 (Detlef Merten & Hans-Jürgen Papier eds., 2006).

²⁹Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] May 28, 1993, 2 BvF 2/90, paras. 1–434.

³⁰Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Aug. 8, 1978, 49 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 89; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Dec. 20, 1979, 53 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 30.

³¹Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Jan. 14, 1981, 56 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 54, 78.

³²Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Nov. 30, 1988, 79 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 174, 201 f.

smog.³³ In all of these cases the FCC highlighted the margin of appreciation of the legislature and found no violation of the duty to protect. The argument for the margin of appreciation in cases in which an action by the state is demanded has been reiterated in the FCC climate protection order.

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.³⁴

Due to this margin of appreciation, in none of the cases cited above regarding serious environmental dangers—and in all other cases in which the duty to protect has been argued—it has never been argued successfully in front of the FCC.³⁵ All of this led to the fact that the FCC has not been a very active court with regard to environmental or climate change matters. It also led to the assumption that the claimants in the climate change case would lose, which they did not.

The general structure of the merits of a constitutional complaint is threefold: First the FCC examines whether the claim of the claimant, a certain behavior, conduct or omission, falls within the scope of a human right or freedom granted by the Basic Law. Second, the FCC considers whether an act of a public authority has violated this right. If the FCC comes to the conclusion that the right has been violated, the FCC examines in a third step, whether this violation can be justified. In environmental law cases a violation of the right to life can be justified if the violation is proportionate and in accordance with other obligations in the Basic Law—for example, the obligations laid down in Article 20a Basic Law.

C. The New Dimension of Human Rights in the Climate Protection Order of the FCC

As the FCC has not played an active role in climate litigation or environmental litigation generally, the decision came as a mostly welcome surprise for the legal community in Germany.³⁶ In its decision, the FCC examined whether the Federal Climate Change Act violated the Basic Law. The Federal Climate Change Act was enacted on December 12, 2019.³⁷ The aim of the Act is to afford protection against the effects of worldwide climate change. This protection should be reached by ensuring that the national climate targets as well as the European targets are met. The legal basis of the Act is the obligation under the Paris Agreement to limit the increase in the global average temperature to well below two degree Celsius and preferably to 1.5 degrees Celsius above pre-industrial levels so as to minimize the effects of worldwide climate change, as well as the commitment made by the Federal Republic of Germany to pursue the long-term goal of greenhouse gas neutrality by 2050. To reach this goal the Act lays down a path to reduce greenhouse gas emission of at least fifty-five percent by the year 2030 in comparison with the levels in 1990.³⁸ The Act further specifies that the annual emission amounts for different sectors

³³Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Feb. 17, 1997, 38 NEUE JURISTISCHE WOCHENZEITUNG [NJW] 2509; Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], May 27, 2002, 22 NEUE JURISTISCHE WOCHENZEITUNG [NJW] 1638.

³⁴Order of Mar. 24, 2021, at para. 152.

³⁵Vofßkuhle, *supra* note 21.

³⁶Schlacke, *supra* note 12, at 912.

³⁷Bundesklimaschutzgesetz [Federal Climate Change Act], Dec. 12, 2019, BGBL. I S.at 2513 (Ger.).

³⁸*Id.* at § 3 (1).

for example the agriculture sector is allowed to emit seventy tons CO₂ in 2020, sixty-eight tons CO₂ in 2021, sixty-seven tons CO₂ in 2022 and so forth until fifty-eight tons CO₂ in 2030.³⁹ For the time after 2030 the Act only specifies that in 2025, the Federal Government will set annually decreasing emission levels by means of a statutory order for further periods after 2030.⁴⁰

The plaintiffs argued that the state has failed its duty to protect their life and health as well as their right to property. The Federal Climate Act is not sufficient. The reduction goals set out in the Act are not adequate to stay within a remaining CO₂ budget that correlates with a 1.5 degrees Celsius temperature limit. The defendants mainly responded that by enacting the Federal Climate Act they have fulfilled their duty to protect. They further argue that the national remaining CO₂ budget is not binding upon the German state. Neither this remaining budget nor the global budget calculated by the Intergovernmental Panel on Climate Change (IPCC) derived from a currently applicable national or international legal framework. The Paris Agreement only sets a target for all nations and does not break this down to any national remaining budgets. There is currently no legal obligation to stay within a certain budget.

The FCC in its order declared that the Federal Climate Change Act—particularly sections 3 (1) and 4 (1), sentence 3—violated the Basic Law especially because they don't include sufficient obligations and visions for the time after 2030. The FCC came to this conclusion by adding a new dimension to the negative dimension of human rights, the temporal dimension. It did not change its stance with regard to the “Schutzpflichtdimension” of human rights but upheld its own jurisprudence.⁴¹ A lot of the details of this new jurisprudence and how it will be argued in future cases are still debated and seem unclear.⁴² The FCC could change its path in future cases. The following description focuses on the two main aspects of the merits of case: The positive obligations for the state to act and the temporal aspects of the negative right. Due to all the uncertainty regarding the case within German legal discourse, this section will only sum up the main line of the arguments in this case, while avoiding any judgement.

I. Duties of Protection – Schutzpflichten

In the merits of the case the FCC argues that the right to life in the first sentence of Article 2 (2) as well as the right to property in Article 14 Basic Law entail a duty to protect its citizens against the risks of climate change.⁴³ This duty of protection requires threefold: (1) International cooperation as sole national measures cannot halt climate change, (2) *national mitigation* measures, which entail all measures that reduce Germany's CO₂ emissions, in accordance with international obligations, (3) *national adaptation* measures within Germany like extensive green spaces in cities to counter the climate-induced warming there or preserving non-built areas to decrease the risk of flooding.

In the end, the FCC reaches the conclusion that the German government has not violated these obligations. It does so by first arguing that the precautionary measures within the Federal Climate Change Act are not manifestly unsuitable. The Federal Climate Change Act pursues the goal of climate neutrality and it quantifies the exact amount of emissions that are allowed in Germany until 2030. This is deemed a suitable approach by the FCC. Second, the FCC argues that the protective framework set out by the legislature is not completely inadequate for achieving the protection goal. The FCC states that a completely inadequate approach would be to allow climate

³⁹*Id.* at § 4 (1).

⁴⁰*Id.* at § 4(6).

⁴¹See Bent Stohlmann, *Keine Schutzpflicht vor zukünftigen Freiheitsbeschränkungen – warum eigentlich?*, VERFASSUNGSBLOG (2021) ä<https://verfassungsblog.de/keine-schutzpflicht-vor-zukuenftigen-freiheitsbeschränkungen-warum-eigentlich>.

⁴²Schlacke, *supra* note 12, at 912; Christian Calliess, *Das “Klimaurteil” des Bundesverfassungsgerichts: “Versubjektivierung des Art. 20 a GG?”*, 19 ZEITSCHRIFT FÜR UMWELTRECHT 355, 356 (2021).

⁴³Order of Mar. 24, 2021, at para. 144 ff.

change to simply run its course, using nothing but adaptation measures. The Federal Climate Change Act also includes mitigation measures. Third, the FCC points out that it is not ultimately apparent that the challenged provisions fall significantly short of the protection of life and health required under Article 2(2) first sentence Basic Law.⁴⁴ Here, the FCC does not follow the argument of the complainants that even the Paris Agreement's climate target is insufficient. Rather it states that the legislature has not exceeded its leeway by taking the Paris target as a basis for the Federal Climate Change Act.⁴⁵

For the duty to protect following from the right to property the FCC argues in a similar way. There is a duty but this duty has not yet been violated by the legislature. To sum up, the FCC follows its previous doctrine.⁴⁶ Human rights entail duties of protection. These duties are only violated when the state does next to nothing to protect its own citizens. As long as the state can demonstrate some effort that leads into the right direction, the duty to protect has not been violated.

II. Intertemporal Guarantee of Freedom

Instead of changing its jurisprudence with regard to the state duty to protect, the FCC “invents” a new dimension of the negative right: The intertemporal dimension. It argues that all forms of private, professional, and economic activity that directly or indirectly cause CO₂ to be released into the atmosphere are protected by the Basic Law. They are protected through the general freedom of action enshrined in Article 2(1) Basic Law as the elementary fundamental right to freedom.⁴⁷ With the Federal Climate Change Act, the legislature has violated this right. More precisely, the Federal Climate Change Act allows a specific amount of CO₂ emitted until 2030 and this allowance has an “advance interference-like effect (*eingriffsähnliche Vorwirkung*) on the freedom of the complainants” because it means that in the future there is a disproportionate risk that freedom protected by fundamental rights will be impaired. In other words, the FCC argues that, in order to stay within Germany's national CO₂ budget from 2030 onwards, the legislature would need to forbid nearly all activities which emit CO₂. This is the case because nearly nothing of the budget will be left due to the emissions allowed in the Federal Climate Change Act. People living in Germany are protected from future drastic measures of the legislature. Instead, the legislature has to act today and cannot postpone climate measures to the future. If emission reductions are delayed until 2030, the costs of climate protection will increase for future generations, as will the risk that emission reductions will only be possible at the price of serious losses of freedom. Not everyone alive in 2030 should bear a huge burden. Instead, the burden must be divided fairly between today and tomorrow. The legislature has to fairly consider the burdens of tomorrow today and make an even choice. The FCC therefore came to the conclusion that the two provisions in the Federal Climate Change Act, which deal with the amount of emissions allowed until 2030, § 3 (1) and § 4 (1) sentence 3, are unconstitutional.

Since the two provisions [§ 3 (1) and § 4 (1) sentence 3] specify emission amounts until 2030 which—in fulfilling the obligation arising from constitutional law to take climate action—significantly narrow the emission possibilities available after 2030, the legislator must take sufficient precautionary measures to ensure that freedom is respected when making a transition to climate neutrality. Under certain conditions, the Basic Law imposes an obligation to

⁴⁴*Id.* at para. 158.

⁴⁵*Id.* at para. 163.

⁴⁶Some argue that the FCC should have solved the case by opening up its duty to protect jurisprudence. See, e.g., Callies, *supra* note 41; Kurt Faßbender, *Der Klima-Beschluss des BVerfG – Inhalte, Folgen und offene Fragen*, NEU JURISTISCHE WOCHENZEITUNG 2085, 2088 (2021); Walter Frenz, *Klimaschutzpflichten als Grundrechtsvoraussetzungsschutz nach Klimabeschluss und Jahrhunderthochwasser*, DIE ÖFFENTLICHE VERWALTUNG 715 (2021).

⁴⁷Order of Mar. 24, 2021, at para. 184.

safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations. As intertemporal guarantees of freedom, fundamental rights afford the complainants protection against the greenhouse gas reduction burdens imposed by Article 20a GG being unilaterally offloaded onto the future [...]. In this respect, there is a lack of a legal framework specifying minimum reduction requirements after 2030 that would be suitable for providing orientation and incentives in time for the necessary development of climate-neutral technologies and practices.⁴⁸

To sum up, sections 3(1) and 4(1), sentence 3, of the Federal Climate Law Act are unconstitutional because they put a disproportionate risk on the freedom to do any action that emit CO₂ after 2030. The FCC comes to this conclusion by enshrining the Paris targets into Article 20a Basic Law and transferring these targets into a remaining national CO₂ budget.⁴⁹ With the CO₂ amounts allowed to emit in sections 3(1) and 4(1), sentence 3, of the Federal Climate Law Act the national CO₂ budget might be nearly exhausted in 2030. Due to this fact, freedoms which entail actions that emit CO₂ must be heavily curtailed from 2030 onwards. The FCC adds a temporal dimension to the negative aspects of human rights. If it is foreseeable that the state will or even has to act in the future and curtail freedoms, this foreseeability created the necessity to include these actions into the legislative planning today.

From the young age of the claimants in this case one can assume that all of them will be alive in 2030. The case is therefore not about unborn future generations but about curtailing freedoms of younger people after 2030.⁵⁰ In addition, 2030 is in nine years—it is not some date in the distant future. Due to the way in which the FCC construct this impairment of the right with the remaining national CO₂ budget, it is not clear whether the argumentation could be used in other cases in which the future is more distant and less unanimous scientific evidence exist. All of this has to be kept in mind when arguing for a transfer of this line of argumentation into other areas of law for example, pension schemes.

D. The North-South-Divide in International Climate Change Law

International environmental law has been built around the North-South divide. The divide is not a geographical divide but clearly a divide between high-income economies like Germany, U.S., or Canada, and all other economies.⁵¹ This difference in income and capabilities have shaped international environmental law and international climate change law. For a thorough understanding and engagement with international climate change law this divide has to be taken into account. First, this section will briefly introduce the history and origins of the divide. One important principle to bridge this divide is the principle of common but differentiated responsibility (CBDR). Second, this principle will be described. Third, the principle of CBDR within the Paris Agreement is analyzed.

I. Background and Origins of the North-South Divide

The birth of international environmental law was the Stockholm conference in 1972. In the debate leading up to the conference, the North-South divide was very visible. For most of the southern countries, environmental issues like nature conservation and transboundary pollution were

⁴⁸*Id.* at para. 183.

⁴⁹See discussion *infra* Part E.II.

⁵⁰Neither unborn persons nor entire future generations would have standing before the FCC in this constellation. See Order of Mar. 24, 2021 at para. 109.

⁵¹For different indicators to measure this divide, see Anna Huggins & Bridget Lewis, *The Paris Agreement: Development, the North-South Divide and Human Rights*, in INTELLECTUAL PROPERTY AND CLEAN ENERGY – THE PARIS AGREEMENT AND CLIMATE JUSTICE 93, 95 (Matthew Rimmer ed., 2018).

perceived as a luxury concern of the rich North. Large parts of the southern countries have only lately gained their independence. They were keen to enhance their own national economies.⁵² They saw environmental policy and environmental concerns as a hindrance to their own economic development as well as social justice.⁵³ In her speech at the Stockholm Conference, Indira Gandhi summed up this sentiment very pointedly:

Are not poverty and need the greatest polluters? The environment cannot be improved in conditions of poverty. Nor can poverty be eradicated without the use of science and technology. For instance, unless we are in a position to provide for the daily necessities of tribal people and those who live in and around our jungles, we cannot keep them from combing the forests for their livelihood, from poaching and despoiling the vegetation. When they themselves feel deprived, how can we urge the preservation of animals?⁵⁴

In the debates surrounding the Rio conference in 1992 another aspect of the divide came to the fore: The question of culpability. For the south, the north's industrialization as well as consumption patterns were the cause of environmental degradation worldwide. The north, however, was of the perception that environmental degradation was caused by rapid population growth in the south.⁵⁵

II. The Principle of Common but Differentiated Responsibility

The first concept in international environmental law that tried to bridge the North-South divide was the concept of sustainable development.⁵⁶ The second and the one that is of utter importance for the climate regime was the concept of common but differentiated responsibility (CBDR).⁵⁷ This concept was first explicitly mentioned in Principle 7 of the Rio Declaration⁵⁸ even though it had been applied within international environmental agreements before in the Montreal Protocol of 1987 as well as the Basel Convention of 1989.⁵⁹

This differentiation between states and their responsibilities was included and further developed within the United Nations Framework Convention on Climate Change (UNFCCC).⁶⁰ As Article 3 (1) UNFCCC states:

The Parties should protect the climate system for the benefit of present and future generations of humankind, on the basis of equity and in accordance with their common but

⁵²Steffen Bauer, *Strengthening the United Nations*, in THE HANDBOOK OF GLOBAL CLIMATE AND ENVIRONMENT POLICY 320, 322 (Robert Falkner ed., 2013).

⁵³Carmen G. Gonzales, *Bridging the North-South Divide: International Environmental Law in the Anthropocene*, 32 PACE ENV'T. L. REV. 407, 408–09 (2015).

⁵⁴Mahesh Rangarajan, *Striving for a Balance: Nature, Power, Science and India's Indira Gandhi, 1917-1984*, 7 CONSERVATION & SOC'Y, 299, 300–01 (2009) (quoting INDIRA GANDHI, SAFEGUARDING ENVIRONMENT 15 (1992)).

⁵⁵Lavanya Rajamani, 88 *The Changing Fortunes of Differential Treatment in the Evolution of International Environmental Law*, INT'L AFFS. 605, 609 (2012).

⁵⁶Ulrich Beyerlin, *Bridging the North-South Divide in International Environmental Law*, 66 ZAÖRV 259, 273 (2006).

⁵⁷Rajamani, *supra* note 55; Lavanya Rajamani, *Ambition and Differentiation in the 2015 Paris Agreement: Interpretative Possibilities and Underlying Politics*, 65 INT'L & COMPAR. L. Q. 493, 500 (Apr. 2016) [hereinafter *Rajamani, Paris Agreement*].

⁵⁸U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev/1 (Vol. I), annex I, Principal 7 (Aug. 12, 1992) ("States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.").

⁵⁹Rajamani, *supra* note 55, at 608.

⁶⁰United Nations Framework Convention on Climate Change (UNFCCC), (May 9, 1992), <https://unfccc.int/resource/docs/convkp/conveng.pdf>.

differentiated responsibilities and respective capabilities. Accordingly, the developed country Parties should take the lead in combating climate change and the adverse effects thereof.⁶¹

Within the UNFCCC the application of the principle led to the fact that only the Annex I countries have obligations to adopt and report on national policies and measures to mitigate climate change.⁶² The follow-up Kyoto Protocol⁶³ included legally binding obligations to reduce greenhouse gas emissions only for Annex 1 countries.⁶⁴ At that time, this differentiation was possible due to the clear recognition on both sides of the divide that the largest share of historical and current global emissions of greenhouse gases has originated in developed countries, that the per capita emissions in developing countries are still relatively low and that the share of global emissions originating in developing countries will grow to meet their social and development needs.⁶⁵ Over time this understanding has changed and with it the understanding of CBDR. The differential treatment within the climate change regime has been largely criticized by the US. Due to the high emissions of countries like China and India, both non-Annex 1 countries, the U.S. and others have argued in favor of greater parity.⁶⁶

II. CBDR in the Paris Agreement

The Paris Agreement took these different views regarding CBDR into account. The binary differentiation, as opposed mainly by the developed countries, between mitigation obligation solely for Annex I countries, like in the UNFCCC as well as in the Kyoto Protocol, was abandoned. Instead, a new version of the CBDR principle was formulated and three different possibilities for differentiation between developed and developing countries were included into the Paris Agreement. The developing countries also succeeded in their demands, and so the Paris Agreement establishes mitigation as well as adaptation as a global goal. In general, the Paris agreement has been viewed as a “major breakthrough in international climate diplomacy.”⁶⁷

The Paris Agreement formulates the CBDR principle in a different way. Article 2 (2) states: “This Agreement will be implemented to reflect equity and the principle of common but differentiated responsibilities and respective capabilities, in the light of different national circumstances.”⁶⁸ So, in the Paris Agreement the phrase “in the light of different national circumstances” was added. This should reflect the new realities with regard to emissions as well as capabilities. The agreement includes three aspects in which a differentiation between countries takes place: Differentiation in mitigation, differentiation in transparency and differentiation in finance.

The mitigation provisions in the Paris Agreement require that parties prepare, communicate, and maintain successive nationally determined contributions (NDCs) that they intend to achieve.⁶⁹ So, it is up to the parties to decide on the scope of their contributions. This has been labelled self-differentiation as it allows developing states to set lower targets than developed states.⁷⁰ Nevertheless, the Paris Agreement entails a normative expectation with regard to developed countries as Article 4 (4) states: “Developed country Parties should continue taking the lead

⁶¹*Id.* at art. 3 (1).

⁶²*Id.* at art. 4 (2a–b).

⁶³U.N. Framework Convention on Climate Change, *Kyoto Protocol*, (Dec. 11, 1997), <http://unfccc.int/resources/docs/convkp/kpeng.pdf>.

⁶⁴*Id.* at art. 3 (1).

⁶⁵U.N. Framework Convention on Climate Change, *Conference of the Parties*, FCCC/CP/1995/7/Add.1 (June 6, 1995), I.1.(d).

⁶⁶Rajamani, *Changing Fortunes*, *supra* note 55, at 615.

⁶⁷Robert Falkner, *The Paris Agreement and the new Logic of International Climate Politics*, 92 INT’L AFFS., 1107, 1116, 1124 (2016).

⁶⁸Paris Agreement, *supra* note 18, art. 2 (2).

⁶⁹*Id.* at art. 4 (2).

⁷⁰Rajamani, *Paris Agreement*, *supra* note 57, at 509.

by undertaking economy-wide absolute emission reduction targets. Developing country Parties should continue enhancing their mitigation efforts, and are encouraged to move over time towards economy-wide emission reduction or limitation targets in the light of different national circumstances.”⁷¹ Rajamani argues that this may function to discipline self-differentiation amongst developed countries.⁷²

Transparency is the currency of the Paris Agreement. It is therefore not surprising that the Paris Agreement establishes a framework on reporting requirements which applies to all countries.⁷³ This framework, however, has some “built-in flexibility” for developing countries and their capacities.⁷⁴ For example, all the information provided regarding mitigation and support is subject to a “technical expert review.” For those developing countries who need it, the review of the technical expert shall include assistance in areas in which capacity building is needed.⁷⁵ Due to the fact, that the Paris Agreement works with national pledges made by the Parties. “Transparency is a key condition for making national pledges credible and building trust between major emitters.”⁷⁶

The provisions regarding finance and funds stick to the old understanding of CBDR and entail a real differentiation between developed and developing countries. Article 9 (1) Paris Agreement states: “Developed country Parties shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation in continuation of their existing obligations under the Convention.”⁷⁷ A concrete content to this obligation was given through later decisions of the parties.⁷⁸ In 2018 it was decided to set a new collective quantified goal from a floor of 100 billion USD per year and taking into account the needs and priorities of developing countries.⁷⁹ This goal has not been reached so far and is a reason for constant conflict within the climate negotiations.⁸⁰

E. The FCC Climate Protection Order and the North-South Divide

Political as well as legal answers to climate change are needed to address the North-South divide. The FCC seems to be aware of this. When stating the relevant legal obligations for the case, it cites Article 2 (2) of the Paris Agreement.⁸¹ Unfortunately, it does not seriously engage with the principle of CBDR in its decision. The judgement is open for international legal obligations only to some extent. Therefore, the judgement should not be labelled “postcolonial”⁸² or “international”⁸³ without a disclaimer.

Two aspects of the judgement have a special relevance for the North-South divide: First, the duties of protection *vis-à-vis* complainants living in Bangladesh and in Nepal and second, the threshold of Article 20a Basic Law with its calculation of the remaining C02 budget for Germany.

⁷¹Paris Agreement, *supra* note 18, at art. 4 (4).

⁷²*Id.* at 510.

⁷³Rajamani, *Paris Agreement*, *supra* note 57, at 511.

⁷⁴Paris Agreement, *supra* note 18, at art. 13(1), (2).

⁷⁵*Id.* at 13(11).

⁷⁶Falkner, *supra* note 67, at 1121.

⁷⁷*Id.* at art. 9(1).

⁷⁸For an overview of the finance mechanism, see Hao Zhang, *Implementing Provisions on Climate Finance Under the Paris Agreement*, 9 CLIMATE L. 21 (2019).

⁷⁹U.N. Framework Convention on Climate Change, *Conference of the Parties Serving as the Meeting to the Parties of the Paris Agreement*, Decision -/CMA.1 (Mar. 19, 2019).

⁸⁰Kate Abnett, *EU Pledges 4 billion Euros More in Climate Funds for Poorer Countries*, REUTERS (Sept. 15, 2021), <https://www.reuters.com/business/finance/eu-pledges-extra-4-billion-euros-international-climate-finance-2021-09-15/>.

⁸¹Order of Mar. 24, 2021, at para. 8.

⁸²Goldmann, *supra* note 11.

⁸³For another approach to the international character of this judgement, see Katja Gelinsky & Marie-Christine, *Fuchsm Bitte noch mehr: Rechtsprechungsdialog im Karlsruher Klimabeschluss*, VERFASSUNGSBLOG, May 26, 2021, <https://verfassungsblog.de/bitte-noch-mehr/>.

1. Duty to Protect for Complainants Living in Bangladesh and Nepal

Standing for a constitutional complain in Germany requires the possibility of the violation of a fundamental right. Further, the complainants need to be presently, individually, and directly affected by the measure. For the non-German citizens living in Bangladesh and Nepal, the FCC in a single paragraph states that their duty to protect might be violated from the German government.⁸⁴ For the question of whether these claimants are presently, individually, and directly affected, the FCC does not even differentiate between the claimants living in Germany and non-Germans living abroad. Here the FCC states:

The complainants are presently affected in their own fundamental rights As things currently stand, global warming caused by anthropogenic greenhouse gas emissions is largely irreversible. . . . 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 and Art. 14(1) 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 (cf. BVerfGE 49, 89 <141>). This is certainly the case where a course of events, once embarked upon, can no longer be corrected.⁸⁵

To sum up, regarding the question of standing, the FCC generously grants standing also for the non-German complainants living in Bangladesh and Nepal. On the merits it denies a human rights violation of the duty to protect. Right at the beginning of its argumentation, the FCC states:

Although it does appear conceivable in principle, there is no need to decide at this point whether duties of protection arising from fundamental rights also place the German state under an obligation vis-à-vis the complainants living in Bangladesh and in Nepal to take action against impairments caused by global climate change.⁸⁶

Due to the statement that there is no need to decide on this, all comments that follow have no legal weight as they are not relevant to the decision itself. They are only *obiter dicta*. Nevertheless, the FCC engages with this question and the arguments in almost four pages.

The FCC affirms that there could possibly be a duty to protect persons living in Bangladesh and Nepal. One factor that could establish such a constitutional duty could be the fact that “the severe impairments already or potentially faced by the complainants due to climate change are caused to some—albeit small—extent by greenhouse gas emissions emanating from Germany.”⁸⁷ The FCC differentiates between the duty of protection *vis-à-vis* the complainants living in Bangladesh and in Nepal and people living in Germany.⁸⁸ To recollect, for people living in Germany the duty to protect consist of mitigation as well as adaptation measures. For people living in Bangladesh the FCC reduces this obligation to mitigation measures only. It argues:

However, with regard to people living abroad, the German state would not have the same options at its disposal for taking any additional protective action. Given the limits of German sovereignty under international law, it is practically impossible for the German state to afford

⁸⁴Order of Mar. 24, 2021, at para. 101 ff.

⁸⁵*Id.* at para. 108.

⁸⁶*Id.* at para. 174.

⁸⁷*Id.* at para. 175.

⁸⁸*Id.* at para. 176.

protection to people living abroad by implementing adaptation measures there Rather, it is the task of the states concerned to select and implement the necessary measures. Whereas steps such as minimising the further development of open spaces, restoring, unsealing, re-naturing and reforesting suitable areas, and introducing resilient plant varieties are generally feasible at the domestic level, the German state clearly cannot implement such measures abroad.⁸⁹

Clearly, Germany cannot build dykes in Bangladesh. However, it could assist, particularly monetarily, building these dykes. These obligations to assist with funds, so the FCC, are only political or international law obligations but don't derive from the Basic Law. The FCC states: "This does not exclude Germany from assuming responsibility, either politically or under international law, for ensuring that positive steps are taken to protect people in poorer and harder-hit countries."⁹⁰ The FCC itself even cites Article 9 (1) of the Paris Agreement, which is an outcome of the CBDR and requires that developed countries, such as Germany, explicitly provide financial resources to support developing countries in mitigation but also in adaptation. The FCC does not assume an obligation for such financial support, which could arise from the duty to protect in Article 2 (2) Basic Law. Rather, the FCC considers it sufficient that Germany has acceded to the Paris Agreement. It is not clear from the outset why the duty to protect life and health enshrined in Article 2 (2) Basic could not extend to financial assistance of people living outside of Germany. In addition, with pushing the CBDR principle into the sphere of only political as well as international legal responsibility the FCC weakened the support commitments included into the Paris Agreement.⁹¹

II. Article 20: A Basic Law and Germany's remaining CO2 Budget

For the argumentation of the FCC, the remaining CO2 budget plays an important role. The budget is used to argue that the Federal Climate Change Act is disproportionate. The argument goes along these lines. In 2030 the rest of the budget will be nearly exceeded, and it might be necessary to curtail all activities which emit CO2. These activities which emit CO2 fall within the general freedom enshrined in Article 2 (1) Basic Law. So, in 2030 the legislature will curtail this general freedom of Article 2 (1) drastically. How does the FCC incorporate the CO2 budget into the Basic Law? Here, Article 20a Basic Law is used as a basis. Initially, the jurisprudence of the FCC has not given Article 20a Basic Law, introduced into the Basic Law in 1994, any meaningful content.⁹² In its climate protection order the FCC gives substantive meaning to Article 20a Basic Law.

The FCC argues that Article 20a of the Basic Law obliges the state to protect the climate. Climate change is an international problem which requires international solutions. The FCC recognizes this and states that the climate protection requirement thus also has an "international dimension"⁹³ from the outset. It further states:

[This] international dimension of the obligation to take climate action arising from Article 20a GG is not confined to the task of seeking to resolve the climate problem at the international level and ideally reaching some agreement to that effect. Rather, the constitutional obligation to take climate action also extends to the implementation of agreed solutions.⁹⁴

⁸⁹*Id.* at para. 178.

⁹⁰*Id.* at para. 179.

⁹¹See also Anna Huggins and Md Saiful Karum, *Shifting Traction: Differential Treatment and Substantive and Procedural Regard in the International Climate Change Regime*, 5 *TRANAT'L ENV'T L.* 427, 431 (2016) (arguing that accountability mechanism for the mitigation as well as the support commitments are vital for the success of the Paris Agreement).

⁹²Berkemann, *supra* note 26, at 701, 704.

⁹³Order of Mar. 24, 2021, at para. 201.

⁹⁴*Id.*

The German state must therefore seek international solutions and also implement these agreements. The FCC further stresses the point of responsibility and trust. So, it states that national

activities should serve to strengthen international confidence in the fact that climate action – particularly the pursuit of treaty-based climate targets – can be successful while safeguarding decent living conditions, including in terms of fundamental freedoms. In practice, resolving the global climate problem is thus largely dependent on the existence of mutual trust that others will also strive to achieve the targets. The Paris Agreement very much relies on mutual trust as a precondition for effectiveness.⁹⁵

The FCC shows a real commitment to international law and highlights the importance of trust. This trust should not only include national mitigation measures but also the other obligations within the Paris Agreement like the financial obligations laid down in Article 9 (1) of the Paris Agreement and the CBDR more generally.

One welcomed aspect of the judgement with regard to the CBDR principle is the fact that finger pointing towards other countries is off the table. The FCC states:

Either way, the obligation to take national climate action cannot be invalidated by arguing that such action would be incapable of stopping climate change. It is true that Germany would not be capable of preventing climate change on its own. Its isolated activity is clearly not the only causal factor determining the progression of climate change and the effectiveness of climate action . . . but if Germany's climate action measures are embedded within global efforts, they are capable of playing a part in the overall drive to bring climate change to a halt.⁹⁶

Taking one's own share seriously and showing one's own ambition is one step in the direction of implementing the CBDR principle.⁹⁷

In a further step, the FCC turns towards the content of Article 20a Basic law. It points out that Article 20 a Basic law has a binding effect on the legislature and it is not up to the legislature alone to specify the protection mandate arising from Article 20a. In the Federal Climate Change Act, the legislature has made Article 20a concrete. It formulated the climate goal that the increase in the global average temperature must be limited to well below two degrees Celsius and preferably to 1.5 degrees Celsius above pre-industrial levels. "By adopting the temperature limit of Article 2(1)(a) PA, the legislature has set the fundamental course of national climate change law in a direction that gives the German state an opportunity to effectively fulfil its constitutional mandate to take climate action through its own efforts embedded within an international framework."⁹⁸ With this interpretation of Article 20a Basic Law, the FCC incorporates the Paris target into the Basic Law.

In order to determine whether the legislature could achieve this goal with the Federal Climate Change Act, the FCC argues that the temperature target must be translated into a national CO₂ budget. With this move towards a certain measuring method, the FCC deviates from the Paris Agreement. It leaves the path of self-differentiation of the NDCs. It turns the procedural obligations to establish an NDC into a duty to succeed. With this move, it gives "teeth" to the goals in the Paris Agreement,⁹⁹ without arguing in depth, as will be seen, which "teeth" should be used.

⁹⁵*Id.* at para. 203.

⁹⁶*Id.* at para. 202.

⁹⁷For additional information on the *Urgenda* judgement, see Patrícia Galvão Ferreira, 'Common But Differentiated Responsibilities' in the National Courts: Lessons from *Urgenda v. The Netherlands*, 5 *TRANSNAT'L ENV'T L.* 329 (2016).

⁹⁸Order of Mar. 24, 2021, at para. 210.

⁹⁹WAGNER, *supra* note 2, at 2258.

For the global budget the FCC refers to the calculations of the IPCC. Setting a national remaining CO₂ budget is not only a mathematical endeavor. It entails questions about climate justice, fairness, and equity. For the national budget the FCC uses the calculations of the German Advisory Council on the Environment (SRU)¹⁰⁰, which chose the approach of a per-capita emission right, for example, respectively, according to the distribution of the current population figures, and does not include historical pollution of industrialized countries such as Germany. The FCC still states that other distribution methods are conceivable.

In particular, Article 20a GG does not specify what share of the overall burden would be appropriate for Germany in light of fairness considerations. However, this does not make it permissible under constitutional law for Germany's required contribution to be chosen arbitrarily. Nor can a specific constitutional obligation to reduce CO₂ emissions be invalidated by simply arguing that Germany's share of the reduction burden and of the global CO₂ budget are impossible to determine. Since Article 20a GG also includes an obligation to reach the climate goal through international cooperation, Germany's contribution in this regard must be determined in a way that promotes mutual trust in the willingness of the Parties to take action, and does not create incentives to undermine it [...] Certain indications regarding the distribution method can be derived from international law, such as from Article 2(2) and Article 4(4) PA (on the principle of common but differentiated responsibilities).¹⁰¹

The FCC does not engage any further with its own statement. The order lacks arguments about the requirements, which might derive from the CBDR enshrined in the Paris Agreement. Do they require to take historical emissions into account? What are the right "teeth" to enforce the Paris Agreement? They don't even reiterate the arguments of the SRU laid down in their report¹⁰² for choosing a certain calculation method.¹⁰³ If the North-South divide had been taken seriously, it would have been necessary at this point to justify, why the per capita approach was chosen as the decisive one. Instead, the problem is recognized and described, but no discussion takes place. Even so it can be agreed that Article 20a Basic Law might not entail the solutions for a very long and very difficult international debate about equity, justice, and fairness. It might not include answers to the question who should bear the burden of climate change in which way. By using a certain remaining national budget, the FCC itself picks one "right" answer. A few more arguments for this choice would have been deemed necessary.

F. Conclusion

The climate protection order of the FCC is a landmark ruling. The FCC maintained its restrictive jurisprudence with regard to the duty to protect but added a new dimension to the negative freedoms: a temporal dimension. If it is foreseeable that the state will or even has to act in the future and curtail freedoms, this foreseeability creates a constitutional obligation for the legislature today. Under this condition the legislature is obligated to safeguard fundamental freedoms over time and to spread the opportunities associated with these freedoms proportionately across generations. Whether this temporal dimension can be applied in other areas, besides climate change, remains to be seen. For climate change there seems to be more unanimity in science about the developments in the future. The science in other areas like pensions or austerity might be less

¹⁰⁰Sachverständigenrat für Umweltfragen (SRU) is the German Advisory Council on the Environment.

¹⁰¹Order of Mar. 24, 2021, at para 225.

¹⁰²Sachverständigenrat für Umweltfragen, *Für eine entschlossene Umweltpolitik in Deutschland und Europa*, *Umweltgutachten* 48 (2020).

¹⁰³See SCHLACKE, *supra* note 12, at 915 (criticizing the SRU take of the remaining budget).

straightforward. Preparation for future pandemics might be another case for this new dimension of human rights.

The North-South divide, the rich countries versus the poor countries, has shaped, and is shaping, international environmental law. One of the principles that addresses this divide is the principle of common but differentiated responsibility. This principle is also one of the cornerstones of the Paris Agreement. For setting up nationally determined contributions, as required by the Paris Agreement, the parties are enabled to self-differentiate. For the financial resources, the agreement requires that developing countries shall take the lead to assist developing countries with respect to both mitigation and adaptation. The FCC turns this obligation around. With including the temperature limit of Article 2(1)(a) Paris Agreement in Article 20 a Basic Law and calculating a national remaining target, the FCC turns a self-differentiation requirement into a success requirement. It gives teeth to the Paris target and pushes for its enforcement. This is one important step towards the implementation of the Paris Agreement and this part of the decision can be labelled “international.” Unfortunately, the FCC only follows these lines with regard to national mitigation efforts. International agreed solutions to help the poorer parts of the world to mitigate as well as adapt to climate change are not included into the Basic Law. In particular, the FCC gives no teeth to the financial aid provisions laid down in Article 9 (1) of the Paris Agreement. Therefore, the statement that the order now allows for foreigners to “compel Germany to live up to its duties as a good global citizen”¹⁰⁴ can only refer to national mitigation efforts.

Combating climate change is not only a technical matter which can be solved by technical innovation within states but also an ethical question,¹⁰⁵ a question of justice and burden sharing between rich and poor states. With the principle of CBDR the Paris Agreement tries to address these tough issues. With calculating a remaining national CO₂ budget, the FCC had the opportunity to engage in this question, to argue for a certain understanding of climate justice. The court has left this opportunity unused and instead choose one possible outcome without engaging with the arguments behind it. These difficult questions of justice, fairness, and equity should not be kept out of national legal discourse. They should be addressed and argued. Climate change litigation should take these issues on board.

¹⁰⁴Goldmann, *supra* note 11.

¹⁰⁵STEFAN RAHMSTORF & HANS-JOACHIM SCHELLNHUBER, DER KLIMAWANDEL: DIAGNOSE, PROGNOSE, THERAPIE 81 (8th ed. 2018).