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The First German Climate Case

Petra Minnerop

On 29 October 2018, three German families, together with Greenpeace Germany, filed suit against the German Federal Government in the Administrative Court in Berlin. They claimed that the State's lack of climate protection constituted an infringement of their fundamental rights under Article 2 (right to life), Article 12 (right to occupation) and Article 14 (right to property) of the German Basic Law (Grundgesetz). The Berlin Administrative Court found in favour of the German Federal Government but granted leave to appeal on all grounds.¹ Since the German Parliament (Bundestag) adopted a new law, the first Climate Protection Act in 2019,² no appeal was filed and the decision of the first instance became final. This case commentary gives an overview of the main legal issues that were in dispute, and the - albeit subtle - legal developments that can be taken away from this first German climate case.

I. Background of the case

In December 2014, the German federal cabinet set a goal of reducing national greenhouse gas (GHG) emissions by 40% compared to 1990 levels by the end of 2020.³ According to the government's 2018 official climate protection report, the government will likely only achieve a reduction of around 32% from 1990 levels by the end of 2020.⁴ The claimants are families, each running organic farms, one in a region near Hamburg, the so-called 'Altes Land', a second on the island of Pellworm, and a third in Brandenburg. These families claim that they have already been affected by the impacts of climate change as their crops have been damaged by pests and extreme weather events such as droughts. They assert that climate impacts will pose a threat to their health, especially through frequent heat waves.⁵ Furthermore, the farm situated on the island of Pellworm in the North Sea lies up to one metre below sea level, like much of the island. So far, the dikes on the island have been able to protect the island.

¹ German Farmers v Germany, Berlin Administrative Court (Verwaltungsgericht Berlin) VG 10 K 412.18. The judgment was pronounced on 31 October 2019. The judgment is only available in German at the time of writing. Reference will be made to page numbers.

² Bundes Klimaschutzgesetz, Climate Protection Act 2019, BT Drucksache 19/14337, available at <https://www.bundestag.de/dokumente/textarchiv/2019/kw46-de-klimaschutzgesetz-freitag-667244> last visited 9 July 2020.

³ The German Government's Climate Action Programme, 2020 Cabinet decision of 3 December 2014, available at https://www.bmu.de/fileadmin/Daten_BMU/Pool/Broschueren/aktionsprogramm_klimaschutz_2020_brosch_uere_en_bf.pdf, last accessed 12 June 2020.

⁴ Report of the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety (BMU), Climate Action in Figures, Facts, Trends and Incentives for German Climate Policy 2018, available at <https://www.bmu.de/publikation/climate-action-in-figures-2018/> at 23; the 2019 report is also available in English, Climate Action in Figures, Facts, Trends and Incentives for German Climate Policy 2019, https://www.bmu.de/fileadmin/Daten_BMU/Pool/Broschueren/climate_action_figures_2019_brochure_en_bf.pdf.

⁵ Above n. 1 at 6.

However, if sea levels continue to rise and the frequency and intensity of storm surges increase, the dikes may no longer be sufficient.

The families claimed that by failing to meet its own national 2020 target, and that of the European Union,⁶ the Federal Government was violating their constitutional rights and their rights under European environmental law.⁷ Greenpeace Germany was asserting its rights as an environmental protection organisation in taking legal action over this violation.⁸

The claimants brought two main motions and two alternative motions against the Federal Government. They essentially sought orders compelling the Federal Government to adopt additional measures in order to achieve its own GHG emissions reduction target and to fulfil its reduction obligations under European Union (EU) Law.⁹ The Court dismissed the claim on procedural grounds. The two main motions and the first alternative motions were dismissed on lack of standing, and the second alternative motion was dismissed for being too unspecific,¹⁰ however, the Court did overcome several other hurdles under procedural law.

If the claimants' position had been fully accepted, this would have had profound consequences for the German Federal Government. It became clear during the hearing that the State was not on track to achieve its 2020 GHG emission reduction target and that indeed a postponement of the target by three years had become necessary.¹¹

II. Admissibility

The Court found that the case was justiciable (1.) and that it was a matter for the administrative courts (2.), before reasoning that the requirements of specific legal interest of the claimants were not fulfilled (3.).

⁶ The European Union's target envisages a 20% reduction of greenhouse gases by 2020 compared to 1990, https://ec.europa.eu/clima/policies/strategies/2020_en; Commission Implementing Decision (EU) 2019/2005 of 29 November 2019 on greenhouse gas emissions covered by Decision No 406/2009/EC of the European Parliament and of the Council for the year 2017 for each Member State, C/2019/8704, OJ L 310, 2.12.2019, p. 56–58, last visited 14 July 2020.

⁷ The German Basic Law does not provide for a right to a healthy environment. However, Article 20a Basic Law has been interpreted by the Constitutional Court so that it includes the protection of the climate, BVerfG, Judgment of 5 November 2014, 1 BvF 3/11 [47] '...a responsibility to future generations, as stated in Art. 20a GG ... This mandate may require taking measures for the protection against threats, and legitimise risk provisioning. Climate protection, ... also belongs to the environmental goods protected under Art. 20a', English version under ECLI:DE:BVerfG:2014:fs20141105.1bvf000311.

⁸ German law entitles an environmental protection organisation that was recognised in accordance with section 3 of the Act on Supplementary Provisions on Appeals in Environmental Matters (UmwRG, Umwelt-Rechtsbehelfsgesetz) to demand compliance with the law enacted to implement an EU directive in proceedings before a court. See so-called *Altrip* case, BVerwG, Judgment of 5 September 2013, BVerwG 7 C 21.12.

⁹ This action is an action for injunction (*Allgemeine Leistungsklage*), see further F. O. Kopp and W.-R. Schenke, *Verwaltungsgerichtsordnung: VwGO* (Commentary to the Code of Administrative Court Procedure, (C.H.Beck, 25th edn 2019), Vorb. s. 40 paras 4, 8a, and s. 43(2) VwGO.

¹⁰ Above n. 1 at 14, 30.

¹¹ *Ibid.* at 18.

1. Justiciability of the case

Justiciability in this case concerned the allocation of decision-making power between the political authorities and the courts in matters concerning climate policy under the separation of powers doctrine. The Federal Government had claimed that the case had to be dismissed because setting the national climate target was an act of the executive branch that fell outside the scope of judicial review.¹² The Court disagreed and found that the case was justiciable,¹³ thereby dismissing all three grounds on which the government had based its reasoning of non-justiciability. These will be explained in turn.

Firstly, according to the Federal Government, the relief sought belonged into a specific category of decisions which qualified as non-justiciable acts of state because they were of particular political importance¹⁴ and as such, entirely within the prerogative of the Federal Government.¹⁵ However, the Court found that only very few categories of such acts were accepted, where no judicial review was available, such as the decisions concerning amnesty.¹⁶ No wider rule existed to support the claim that acts such as defining the country's climate target, formed part of an exclusive power of the executive branch to the effect that judicial review was excluded.¹⁷ By contrast, the Court reasoned that judicial review was guaranteed under Article 19(4) Basic Law (Grundgesetz) despite the political significance of these acts.¹⁸ Consequently, the constitutional standard pursuant to Article 1(3) Basic Law had to be complied with when adopting these important political decisions,¹⁹ including the protection of basic rights.²⁰

¹² Ibid. at 9, 10.

¹³ Ibid. at 12.

¹⁴ These are called 'staatsleitende Hoheitsakte' in German, this can be translated as 'sovereign acts of state-leading nature'.

¹⁵ Ibid. at 9, 10.

¹⁶ Ibid. at 12, 13.

¹⁷ Ibid.

¹⁸ The provision states: Article 19 [Restriction of basic rights – Legal remedies]

(1) Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.

(2) In no case may the essence of a basic right be affected.

(3) The basic rights shall also apply to domestic legal persons to the extent that the nature of such rights permits.

(4) Should any person's rights be violated by public authority, he may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph. Available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019 last visited 9 July 2020.

¹⁹Article 1

[Human dignity – Human rights – Legally binding force of basic rights]

(1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.

(2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.

(3) The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law. Available at https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html#p0019 last visited 9 July 2020.

²⁰ Above n. 1 at 13.

Secondly, the Court rejected the Federal Government's argument that it could rely on the case law of the German Constitutional Court concerning the legal concept of 'core area of executive autonomy' (Kernbereich exekutiver Eigenverantwortung)²¹ to claim non-justiciability.²² According to the jurisprudence of the Constitutional Court, the responsibility of the Federal Government towards parliament and the people requires such a core area of executive autonomy, which includes an area of governmental initiative, consultation and action that cannot be investigated in principle.²³ However, this legal concept is designed to protect the freedom and openness of the internal opinion-building process within the government and mostly serves to protect confidentiality in ongoing inner-governmental procedures and, to that extent, excludes investigation. It entails that the access to information and documents can be restricted on a case by case basis. The so defined core area of executive autonomy does not concern or indeed restrict the ability of the judicial branch to review the government's action.²⁴

Thirdly, the Court refused to accept the argument that a regulatory gap existed in the Code of Administrative Court Procedure because this statute lacked an explicit provision dealing with the issues of non-justiciability of a claim due to a violation of the principles of democracy and the separation of powers. The government had argued that this should be resolved by legal analogy, to the effect that the court should limit its judicial review in direct application of the principles of democracy and separation of powers.²⁵ The Court was unconvinced that a gap in the statutory law existed that would allow to apply these principles by analogy.²⁶

The Court explained that the general principle of separation of powers could be adhered to by granting the executive a wide margin of appreciation, but complete exclusion of judicial review of actions of the executive would be irreconcilable with the rule of law and the guarantee of a legal remedy under Article 19(4) Basic Law.²⁷ It is interesting to note that the Court supported its findings by reference to the decision of the High Court of Ireland in *Friends of the Irish Government v Ireland*.²⁸

2. Choice of courts

The next question concerned the choice of courts. The government had claimed that the relief sought by claimants would serve to qualify the claim as constitutional in nature and could

²¹ The legal concept has been developed by the German Constitutional Court, see the so-called *Flick* case, BVerfG, Judgment of 17 July 1984, BVerfGE 67, 100.

²² Above n. 1 at 13.

²³ BVerfG, Judgment of 13 June 2017, 2BvE 1/15, BVerfGE 146, 1 ECLI:DE:BVerfG:2017:es20171107.2bve000211.

²⁴ Above n. 1 at 13.

²⁵ *Ibid.* at 10.

²⁶ *Ibid.* at 13, 14.

²⁷ As guaranteed under Article 19(4) Basic Law; *ibid.*

²⁸ The Berlin Court stated: 'On the question of justiciability of a climate protection programme, the Irish High Court came to a similar conclusion..', See further *Friends of the Irish Government v Ireland* [2017 No. 793 JR] [2019] IEHC 747.

thus not be heard by the Berlin Administrative Court. However, the Court explained that the claimants had not specified which measure the Federal Government should adopt in order to reach the climate protection target of 2020. Only if a specific claim for a formal statutory law was made, would the constitutional courts be the appropriate forum.²⁹ While one central measure to still achieve the target would be to end the use of coal-fired power plants in accordance with the report conducted by the Fraunhofer Institute, and this measure would indeed require a formal law,³⁰ claimants were not specifically seeking such an act of the legislator. Therefore, the claim was an administrative and not a constitutional matter that the Court could decide.³¹ At this point, the Court referred to the statement of the Advocate General at the Supreme Court of the Netherlands (Hoge Raad)³² who had come to the same conclusion in his opinion on the *Urgenda* case, in a country where ordinary courts cannot oblige the legislator to enact laws either.³³

3. Standing - Specific legal interest of claimants

After overcoming these hurdles to judicial review, the Court found that the claimants could not demonstrate their specific legal interest and thus, had no standing to bring the claim. In accordance with section 42(2) of the Code of Administrative Court Procedure (Verwaltungsgerichtsordnung, VwGO), the admissibility of an action seeking to have an administrative measure set aside or to have the adoption of an administrative measure ordered, presupposes that the applicant asserts that his rights have been impaired by that act or by the refusal or failure to adopt it.³⁴ As this provision aims at excluding *actio popularis* claims, claimants must argue that an interference with one of their subjective rights is *at least possible*.³⁵

To fulfil this requirement, it is necessary and sufficient that, based on the asserted facts, it appears at least possible that the action or omission of the administrative authority has interfered with a subjective right of claimants.³⁶ According to the general formula which is regularly applied by the courts, such an interference cannot occur, if the asserted legal rights

²⁹ The Court applied the theory to dual constitutional immediacy: A public law dispute is of a direct constitutional nature if parties directly involved in constitutional life are in dispute over legal relationships that belong exclusively to constitutional law, see further Kopp, above n. 10 s. 40 para. 32.

³⁰ Above n. 1 at 14.

³¹ Ibid.

³² The Berlin Court delivered its judgment before the Supreme Court of the Netherlands in *Urgenda*. See the Opinion of 13 September 2019, ECLI: NL:PHR:2019: 887; Az.: 19/00135, para. 5.43.

³³ Above n. 1 at 14.

³⁴ Section 42 para. 2 of the German Code of Administrative Court Procedure: '2. Except where otherwise provided by law, such an action is admissible only if the applicant asserts that his rights have been impaired by the administrative measure at issue or by the refusal or failure to act.' This provision directly applies to the action for annulment, similar to a quashing order (Anfechtungsklage) and the application for an order of mandamus (Verpflichtungsklage) by which an administrative action is sought, and is applied by analogy to the action for injunction (allgemeine Leistungsklage), Kopp, above n. 10 s. 42 para. 62.

³⁵ This is the so called 'Possibility Theory' (Möglichkeitstheorie), Kopp, above n. 10 at s. 42 para. 66.

³⁶ Ibid.

can obviously not exist under any consideration.³⁷ Thus, if the claimants rely upon a general public-law rule, it must be possible that this constitutes a norm which is legally binding and confers rights on them as individuals. This requires that the norm provides individualising criteria so that the claimants can be sufficiently distinguished from the general public.³⁸ By contrast, if claimants rely upon basic rights directly (e.g. the higher ranking constitutional law), they must be able to demonstrate that the State has failed to comply with its duty to protect basic rights, i.e. not applied the required minimum standard of rights protection (so-called 'Untermaßverbot').

Here, claimants firstly relied on the norm-character of the GHG emission reduction target and thus, they had to demonstrate that this target had binding norm-character and conferred individual rights on them (a). They also tried to argue that a factual, indirect interference with their basic right under Article 2(1) Basic Law (b) existed. Lastly, they invoked the doctrine of the 'duty to protect' under the German Basic Law (c) where a duty arises directly from the basic right under the state's obligation to take protective action. None of these arguments was successful to demonstrate that a rights violation was at least possible.

a) Does a binding norm exist that creates a duty to act for the Federal Government?

This question concerned the public-law norm character of the 2020 climate target, from which a corresponding duty of the Federal Government to adopt additional climate protection measures could arise. The Court found that no provision with norm-character existed and for that reason, no corresponding legal obligation to adopt further measures could be established.³⁹ The Court explained that the cabinet decision to achieve a 40% reduction by 2020 could not qualify as a binding norm and thus, could not oblige the government.⁴⁰ In other words, the omission to adopt additional measures could not amount to a violation of a norm because the cabinet decision, which adopted the Action Programme Climate Protection 2020, did not qualify as a legally binding provision in the first place.

A cabinet decision is adopted by a majority of votes and this decision is binding on ministers. As such, it constitutes internal law.⁴¹ The fact that the climate protection programme envisaged several actions of the Federal Government did not mean that a legal effect materialized in the form of a binding external effect in relation to individuals before further concrete administrative actions were taken. While some plans and programmes in the area of environmental protection have law-quality, because they rest upon a legal norm and are

³⁷ BVerwG, Judgment of 19 November 2015, 2A 6/12; BVerwGE 153, 246, Kopp, *ibid*.

³⁸ Above n. 1 at 15; BVerwG, Judgment of 28 November 2007 – 6 C 42/06; BVerwGE 130, 39. By contrast, if claimants rely upon a basic right directly, they can argue that either the State's action or inaction interferes with their protected right. Such interference can be direct, e.g. through a targeted measure, or it can occur indirectly, as a factual consequence of a measure or legal act.

³⁹ Above n. 1 at 15.

⁴⁰ *Ibid*.

⁴¹ *Ibid*. at 16.

subject to environmental assessment, these are different from the climate action programme which represents a political statement concerning the intention to adopt certain measures without external effects.⁴² The subsequent decision of the Federal Government to postpone the 2020 target to the year 2023 in the draft Federal Climate Protection Act was thus also lawful.⁴³ Three further legal concepts were introduced by the claimants to argue that the cabinet decision had acquired norm-character.

Firstly, the claimants made the argument that the administration was under a legal obligation to achieve the action programme's original target as a result of the legal concept of 'self-commitment of the administration' (Selbstbindung der Verwaltung). This concept entails that if the administration follows a certain administrative practice in relation to individuals, other individuals must be in a position to claim equal treatment in accordance with Article 3(1) Basic Law.⁴⁴ While the Court found that the programme formed the basis of a number of measures of the Federal Government, this did not constitute a practice that could create the necessary binding effects of the administration in relation to individuals.⁴⁵

Secondly, the Court refused to accept that an external effect arose on the basis of the protection of legitimate expectations (Vertrauensschutz).⁴⁶ This concept is crucial in cases primarily involving the protection of property rights, where new laws unfold a retroactive effect.⁴⁷ Under German law, it requires to demonstrate that property dispositions have been made with the legitimate expectation that the current legal situation remains valid.⁴⁸ However, the claimants had not made such investments in reliance on the 2020 climate target.⁴⁹

⁴² Ibid.

⁴³ Ibid. This concerned the adoption of the draft Act through the cabinet in October 2019, the Act was adopted by Parliament in November 2019.

⁴⁴ Article 3

(1) Insofar as, under this Basic Law, a basic right may be restricted by or pursuant to a law, such law must apply generally and not merely to a single case. In addition, the law must specify the basic right affected and the Article in which it appears.

(2) In no case may the essence of a basic right be affected.

(3) The basic rights shall also apply to domestic legal persons to the extent that the nature of such rights permits.

(4) Should any person's rights be violated by public authority, he/she may have recourse to the courts. If no other jurisdiction has been established, recourse shall be to the ordinary courts. The second sentence of paragraph (2) of Article 10 shall not be affected by this paragraph; see also Judgment of 6 December 2016 - 1 BvR 2821/11 BVerfGE 143, 246-396 ECLI:DE:BVerfG:2016:rs20161206.1bvr282111., BVerfG, Judgment of 15 November 2011, 1 C 21/10, BVerwGE 141, 151.

⁴⁵ Above n. 1 at 17.

⁴⁶ Ibid.

⁴⁷ Especially in situations of apparent retroactivity where a person has planned actions and the legal framework alters for the future, thereby still unfolding an impact for decisions made in the past. This is sometimes called secondary retroactivity or, by direct translation from German, 'false' retroactivity, as opposed to actual or primary retroactive effects where a rule is introduced and applied to events that have already concluded. See further P. Craig, *Administrative Law* (8th ed. 2016) 22-002 (page 670).

⁴⁸ BVerfG, Judgment of 6 December 2016, 1 BvR 2821/11 ECLI:DE:BVerfG:2016:rs20161206.1bvr282111.

⁴⁹ Above n. 1 at 17.

Thirdly, there was no external effect of the cabinet decision under the theory of statutory reservation (*Wesentlichkeitstheorie*).⁵⁰ The theory entails that essential questions concerning the exercise of an intervention in basic rights must be regulated through a legal statute.⁵¹ However, the Court held that a sub-statutory rule as replacement for a law enacted by parliament could not be elevated to norm level, by contrast, it would be unlawful as a violation of the constitution.⁵²

b) A factual interference with Basic Rights

Basic rights can also be affected by indirect and factual interferences if the objectives and effects of these measures are comparable with imperative interventions.⁵³ However, the Court found that GHG emissions are not attributable to the State, even though they originate from German territory. In this context, the Court relied on the jurisdiction of the Constitutional Court in the so-called forest damage cases.⁵⁴ There, the Constitutional Court had found that the state's preventive control measures in the context of the use of technological means associated with emission of air pollutants could not be used as a link for the argument that the state was also jointly responsible for the consequences of general air pollution that resulted from the use of technic.⁵⁵ The Berlin Court transferred the rationale of this reasoning and held that GHG emissions could not be attributed to the state either.

c) The doctrine of the duty to protect fundamental rights and the constitutionally demanded minimum standard

Finally, the Court addressed the possibility of a rights-violation under the protective dimension of basic rights. According to the settled case law of the Constitutional Court, basic rights in their objective content create state duties towards the individual.⁵⁶ The claimants had invoked the right to physical integrity in Article 2(1) Basic law. The Court noted that they did not assert that they already had acute health concerns, but that they were afraid that serious health implications could result especially from frequent heat waves. It was acknowledged that these prospective implications can, under certain conditions, amount to a violation of fundamental rights. The state has a corresponding duty to protect the right to life based on an existing risk.⁵⁷

⁵⁰ BVerfGE, Order of 8 August 1978, 2BvL 8/77, BVerfGE 49, 89.

⁵¹ Kopp, above n. 10 s. 42 para. 125.

⁵² Above n. 1 at 18.

⁵³ BVerfGE 105, 279, 299, Order of 26 June 2002, 1 BvR 670/91, ECLI:DE:BVerfG:2002:rs20020626.1bvr067091

⁵⁴ Above n. 1 at 19, for the forest damage decision see BVerfG, Order of 26 May 1998, 1 BvR 180/88, ECLI:DE:BVerfG:1998:rk19980526.1bvr018088.

⁵⁵ BVerfG, Order of 26 May 1998, 1 BvR 180/88, [17], only in German, ECLI:DE:BVerfG:1998:rk19980526.1bvr018088.

⁵⁶ Above n. 1 at 20; for a recent decision in the context of COVID-19 see BVerfG, Order of 12 May 2020, 1 BvR 1027/20.

⁵⁷ Above n. 1 at 20; BVerfG, Order of 14 January 1981, 1 BvR 612/72, BVerfGE 56, 54-87.

The Court clarified that the owners of the three businesses practicing organic farming were particularly affected by climate change.⁵⁸ However, the Court explained that in fulfilling the duty to protect basic rights, the legislature and the executive both have a wide margin of appreciation, which leaves room to consider competing public and private interests.⁵⁹ Accordingly, this discretion in policy-making can only be subjected to judicial review to a limited extent, depending on the specific nature of the subject matter in question, the possibilities of forming a sufficiently secure judgment and the significance of the legal interests at stake.⁶⁰ Nevertheless, to fulfil its duty to protect basic rights, the state must take sufficient measures that lead to adequate and effective rights protection, based on careful fact-finding and reasonable assessments.⁶¹ This concept of the protection of the minimum standard (the so-called ‘Untermaßverbot’) within the margin of appreciation is also derived from the jurisprudence of the Constitutional Court. Both standards, the wide margin of appreciation and the ‘Untermaßverbot’, are applied alongside each other.⁶²

In relation to the standard set by the wide margin of appreciation, the Court scrutinized whether the measures are entirely unsuitable or completely inadequate. The minimum standard would be violated if it was evident that the state was not achieving the constitutionally required minimum standard of protection.⁶³ The Court posited that the 2020 climate protection target did not represent the constitutionally required minimum standard.⁶⁴ In the context of defining this minimum threshold, the Court engaged with international law,⁶⁵ considering Article 3(1) UNFCCC, Article 10(10) Kyoto Protocol and Article 2(2) Paris Agreement as well as the commitment to protect the climate for the present and for future generations in accordance with the principle of common but differentiated responsibilities. Developed countries should take the lead in combating climate change and its adverse effects.⁶⁶ The Court acknowledged that Article 4(3) Paris Agreement demanded

⁵⁸ Ibid. at 21.

⁵⁹ The standard formula applied by the Constitutional Court is as follows: ‘However, the legislator has a wide scope of assessment, evaluation and policy-framing. The Constitutional Court can only establish a violation of a duty to protect if no measures are taken, or if the measures are evidently unsuitable or wholly inadequate, or if they significantly fall short of the objective of the protective duty.’ Translated by the author, in German: ‚Doch kommt dem Gesetzgeber dabei ein weiter Einschätzungs-, Wertungs- und Gestaltungsspielraum zu. Daher kann das Bundesverfassungsgericht die Verletzung einer Schutzpflicht nur feststellen, wenn überhaupt nichts getan wird, wenn Maßnahmen offensichtlich ungeeignet oder völlig unzulänglich sind oder wenn sie erheblich hinter dem Schutzziel zurückbleiben‘, see for instance very recently, BVerfG, Order of 12 May 2020, [1 BvR 1027/20](#).

⁶⁰ Above n. 1 at 22, 23.

⁶¹ Ibid. at 23, 24.

⁶² BVerfG, Judgment of 28 May 1993, BvF 2/90, 2 BvF 4/92, 2 BvF 5/92, BVerfGE 88, 203.

⁶³ Above n. 1 at 23.

⁶⁴ Ibid.

⁶⁵ Ibid. at 24; Federal Ministry for the Environment, Nature Conservation, Building and Nuclear Safety stated in its Climate Action Plan 2015 that it views the temperature target of the Paris Agreement as a binding commitment of the Paris Agreement, https://www.bmu.de/fileadmin/Daten_BMU/Pool/Broschueren/klimaschutzplan_2050_en_bf.pdf, 6.

⁶⁶ Above n. 1 at 24; This is also reflected in the report of the German Ministry, above n. 4 at 14 (2019 edition), it states: ‘Industrialised countries bear special responsibility for climate change. Since the start of industrialisation,

greatest possible ambition to be demonstrated by parties through their reduction commitments.⁶⁷ However, the Court then stated that the international community had not come far with the operability of this responsibility and its assignment to individual states over the last three decades.⁶⁸ Compared with the IPCC recommendation of reductions for developed countries between 10% and 40% in 2007,⁶⁹ when Germany adopted its 2020 target, and in the light of the EU's 20% target, the German target of 40% was considered to be an already ambitious objective at the upper limit by the Berlin Court. Against that background, it found it difficult to understand how this could be the constitutionally demanded minimum. Even if Germany only achieved a reduction of 32% and the reduction of 40% was delayed by three or five years, the constitutionally guaranteed minimum standard would not be violated.⁷⁰

Nevertheless, the Court addressed the argument that new scientific evidence would require application of the so-called carbon budget approach.⁷¹ Here, the Court explained that the remaining carbon budget would allow Germany to emit a further 6.600 million tons of CO₂ after 2020.⁷² If emissions continued at the height of present levels, then this budget would be used up within less than 9 years. However, if a linear reduction rate was implemented, the budget would last until 2037.⁷³ It is noteworthy that the Court supported the view that in the context of ethical and normative discussions around the distribution of the remaining carbon budget, 'much could be said for an at least equal distribution of the remaining carbon budget per capita of the world population'.⁷⁴ However, the Court then observed that 'as far as can be seen, there is arguably not a single industrialised state that would adhere to this.'⁷⁵

On that basis, the Court found that it would not be for the judge to prescribe an imperative and mandatory minimum standard of climate protection for the state.⁷⁶ A different result would not be dictated by the case law of the European Court of Human Rights (ECtHR).⁷⁷ The Court acknowledged that the European Convention on Human Rights (ECHR) and the

Germany has emitted almost five per cent of global greenhouse emissions. Given the threatening impacts on people and the environment, Germany therefore has a special responsibility to combat climate change.'

⁶⁷ Above n. 1 at 24.

⁶⁸ Ibid.

⁶⁹ B. Metz, O.R. Davidson, P.R. Bosch, R. Dave, L.A. Meyer, Contribution of Working Group III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change, 2007, at 90, https://www.ipcc.ch/site/assets/uploads/2018/03/ar4_wg3_full_report-1.pdf, last visited 14 July 2020.

⁷⁰ Above n. 1 at 25.

⁷¹ Ibid., for the carbon budget approach see the J. Rogelj, , D. Shindell, K. Jiang, S. Fifita, P. Forster, V. Ginzburg, C. Handa, H. Khesghi, S. Kobayashi, E. Kriegler, L. Mundaca, R. Séférian, and M.V.Vilariño, 2018: Mitigation Pathways Compatible with 1.5°C in the Context of Sustainable Development. In: Global Warming of 1.5°C. An IPCC Special Report, at 104. Report available at <https://www.ipcc.ch/sr15/>, last visited 15 July 2020.

⁷² Above n. 1 at 26.

⁷³ Ibid.

⁷⁴ Ibid.

⁷⁵ Ibid.; translation by the author, the German version reads: 'Soweit ersichtlich, gibt es aber bislang weltweit wohl keinen einzigen Industriestaat, der sich daran hält.'

⁷⁶ Ibid.

⁷⁷ Ibid.

pertinent case law would serve as interpretative tools for the content and scope of basic rights and principles of the rule of law at the level of the constitution.⁷⁸ However, according to the ECtHR's settled case law, the ECtHR also afforded member states a wide margin of appreciation.⁷⁹ In contrast to the view of the claimants, the Court held that the judgment of the Court of Appeal in *Urgenda* could not be used to clarify the content of the margin of appreciation more precisely.⁸⁰

III. Standing of Greenpeace Germany as environmental organisation

The Court held that Greenpeace Germany did not have standing to bring the claim on behalf of the three families. Firstly, Greenpeace Germany was not an organisation that would fall into any of the categories of section 3 UmwRG.⁸¹ Secondly, the legal concept of procuratorial right to bring legal action was not applicable.⁸² This legal concept had been developed by the German Federal Administrative Court at a time when the requirements of Article 9(3) of the Aarhus Convention regarding access of environmental organisations to administrative and judicial proceedings had not yet been implemented by the national legislature.⁸³ It would presuppose that a natural person has standing, this was not the case as explained above.

The Court found that Greenpeace did not have standing to enforce compliance with European environmental law under EU law in accordance with the criteria developed by the Court of Justice of the European Union.⁸⁴ The Court stated that even if it were assumed that an environmental organization can demand objective legal review of national law with European Environmental Law, the 2020 target was not based on EU law.⁸⁵

⁷⁸ Above n. 1 at 26.

⁷⁹ See for example Case of *Hatton and Others v. the United Kingdom*, Application no. 36022/97) 8 July 2003 [GC], paras 97, 98 and 100, see further the Manual on Human Rights and the Environment, Council of Europe (2nd ed, 2012) https://www.echr.coe.int/LibraryDocs/DH_DEV_Manual_Environment_Eng.pdf, last visited 15 July 2020.

⁸⁰ *Ibid.* at 27.

⁸¹ Law on supplementary provisions governing actions in environmental matters under Directive 2003/35/EC (Umwelt-Rechtsbehelfsgesetz) of 7 December 2006 (BGBl. 2006 I, p. 2816), as amended by the Law of 21 January 2013 ('the UmwRG').

⁸² Above n. 1 at 27.

⁸³ *Altrip* case above n. 8; s. 42(2)(2) of the Code of Administrative Court Procedure is to be applied in conformity with EU law, see the preliminary ruling in Case C-72/12 *Gemeinde Altrip and Others v Land Rheinland-Pfalz*.

⁸⁴ Above n. 1 at 28; Case C-664/15 *Protect Natur-, Arten- und Landschaftsschutz Umweltorganisation v Bezirkshauptmannschaft Gmünd*, concerned the application of the Water Framework Directive, at [58]: 'Having regard to the foregoing, the answer to the first question is that Article 9(3) of the Aarhus Convention, read in conjunction with Article 47 of the Charter, must be interpreted as meaning that a duly constituted environmental organisation operating in accordance with the requirements of national law must be able to contest before a court a decision granting a permit for a project that may be contrary to the obligation to prevent the deterioration of the status of bodies of water as set out in Article 4 of Directive 2000/60.'

⁸⁵ Above n. 1 at 28.

Finally, the argument that the so-called Effort Sharing Decision resulted in a duty of the Federal Government to take additional measures for climate protection did not succeed.⁸⁶ The Court agreed that under certain conditions it was conceivable that environmental organisations or individual citizens may bring an action for compliance with an objective norm of EU environmental law, as the case law on the direct effect of EU-directives shows.⁸⁷ However, this requires that an unconditional obligation of the Member State arises from the provision. Given that the government may comply with its obligation under the Effort Sharing Decision by offsetting surplus GHG emissions against previous years or by purchasing additional emission allowances from other EU member states, the Court did not find that the element of unconditionality was satisfied in this instance.⁸⁸

IV. Final remarks on legal developments

Several legal points can be taken away from this judgment. Firstly, the Court found that setting a quantified GHG emission reduction target does not belong to an act of the executive branch which is outside of the scope of judicial review, but instead, the executive and the legislature are bound by the constitutional guarantee of Article 19(4) Basic Law and all basic rights in their climate policy and law-making. It is interesting to note here that for the first two aspects of admissibility of the claim where the Court found in favour of the claimants (justiciability of the claim and choice of courts, above II. 1. and II. 2. respectively) and thereby opposed the view of the Federal Government, reference to foreign judgments was made in support of its own findings.

Secondly, the Court examined whether the government had fulfilled the minimum standard as required by the Basic Law to protect the rights of the claimants from adverse effect of climate change under the doctrine of the state's duty to protect. That confirms that basic rights are under threat through adverse effects of climate change. In addition, the legal nature of the reduction target is not relevant from that perspective (i.e. the norm-quality), because under the doctrine of the duty to protect basic rights, the basic right itself forms the legal basis of the claim. What matters in that context is only the definition of the minimum standard

⁸⁶ Decision No 406/2009/EC of the European Parliament and of the Council of 23 April 2009 on the effort of Member States to reduce their greenhouse gas emissions to meet the Community's greenhouse gas emission reduction commitments up to 2020, OJ L 140, 5.6.2009, p. 136–148. The so-called 'Effort Sharing Decision' of the EU Parliament and Council of 23 April 2009 (406/2009/EU) is a decision that obliges the Member States to reduce their greenhouse gas emissions in economic sectors not subject to EU emissions trading in the European Union by a total of 10% by 2020 compared to 2005, OJ L 140, 5.6.2009, p. 136–148. According to Art. 3 (1) in conjunction with Annex II of the Decision, Germany must reduce its emissions in the non-EU ETS sectors by 14% between 2005 and 2020. Certain 'flexibilities' allow States to carry over surplus emissions to later years and to make use of quantities from the following year amounting to 5 % of their annual emission allocation in advance (Article 3 (3)), States can also transfer up to 5 % of their emission allocations to other States.

⁸⁷ Case C-41/74 Yvonne van Duyn v Home Office, [1974] ECR 1299; Case C-152/84 Marshall v Southampton and South West Area Health Authority (No 1) [1986] ECR 723.

⁸⁸ Above n. 1 at 29.

of rights protection which cannot be undercut even though a wide margin of appreciation does exist. The Court was convinced that the measure of the government did not fall below the minimum standard in the light of the fact that the 2020 reduction target was qualified as internationally ambitious. Consequently, duties to protect basic rights from interference caused by climate change exist and the scope of judicial review includes the scrutiny of GHG emissions reduction targets. This is an important step and it may have consequences for the first Climate Change Act adopted by the German Bundestag in November 2019.⁸⁹ The new law specifically states that no new subjective rights are created through the Act.⁹⁰ While it is an entirely different question if this can be fully defined by the Act itself, the route to judicial review⁹¹ will remain open under the doctrine of the duty to protect basic rights regardless. It is also interesting that the legal argument at this point comes very close to the reasoning of the Supreme Court in *Urgenda*, where the duty to protect fundamental rights was aligned with the positive action doctrine developed in the case law of the ECtHR.⁹² Both courts found that a standard in climate protection arises from the state's duty to protect fundamental rights and that it is generally plausible to state that increasing GHG emissions reduction efforts will improve rights protection.

Thirdly, the Berlin Administrative Court confirmed that Greenpeace Germany as an environmental NGO, while traditionally lacking standing under German law, can sue if an infringement of EU Environmental law is argued.

Lastly, the Court voiced the opinion that there the argument for an at least equal distribution of the remaining global carbon budget across the world's population could be made.⁹³ It is unfortunate that this promising approach was immediately restrained when the Court pointed out that no other industrialised country seemed to comply with this demand.⁹⁴ This statement reveals a general risk of ambitious climate protection measures but it does not carry any legal value. Moreover, it emphasises that there is a persistent danger of qualifying climate policy as an inherently foreign policy or international law domain, thereby assigning the responsibility for insufficient climate protection to the international community, when instead highest possible ambition must be defined in accordance with national circumstances and responsibilities, and enshrined in domestic law.

⁸⁹ Climate Protection Act 2019, above n. 2. It sets a quantified reduction rate of at least 55% compared to 1990 for 2030, s. 3(1). Section 3(3) states that if international or European law should demand higher reduction targets, the necessary measures will be adopted by the Government. Furthermore, reduction targets can only be increased, but not decreased. Targets from 2031 onwards for all sectors will be laid down in sub-statutory administrative rules (Rechtsverordnung), s. 4(1),(6).

⁹⁰ Ibid. s. 4 (1).

⁹¹ A constitutional complaint against the German Climate Protection Act was filed in February, see further <https://peoplesclimatecase.caneurope.org/2020/02/youth-is-taking-the-german-climate-law-to-the-court/> last visited 15 July 2020.

⁹² The State of the Netherlands v Urgenda, Hoge Raad (Supreme Court of the Netherlands), Judgment of 20 December 2019, paras 5.8; 6.1-6.6; ECLI:NL:HR:2019:2007.

⁹³ Above n. 1 at 26.

⁹⁴ Ibid.

