Prof. Dr. Christian Calliess, LL.M. EuR

The author holds the Chair of Public Law, Environmental Law and European Law at the Free University of Berlin. For 12 years he was a member of the German Advisory Council on the Environment (SRU) advising the Federal German Government. The article is partly linked to his commentary on Article 20a of the Basic Law in Dürig/Herzog/Scholz, Grundgesetz, 98th edition March 2022.

Intergenerational Justice and Climate Litigation

A Perspective from German Constitutional Law: State Objective vs. Individual Right?

Since the Climate Decision of the German Federal Constitutional Court (BVerfG) from 24.03. 2021, German environmental constitutional law has been in constant movement. With regard to fundamental rights and Article 20a GG, its new approach raises many questions that are of great relevance for academic scholars and practitioners: How does the innovation of the Court, the „Intertemporale Freiheitssicherung" ("intertemporal preservation of freedom") fit into the existing legal dogmatics based on negative and positive obligations arising from fundamental rights? How does the "eingriffsähnliche Vorwirkung" („impairment-like prior effect") influence our legal understanding of the definition of an interference of public authorities into fundamental rights? Is the new construct only applicable to climate protection or does it even have an effect beyond Article 20a GG? In my speech, these questions are discussed in the context of a presentation of environmental constitutional law, to contextualise and to reconstruct the Climate Decision.

I. Introduction

Being in this conference room reminds me on a presentation I had the opportunity to listen to in 2017 when I was on leave from university to work as the Legal Adviser to the European Political Strategy Center (EPSC), the In-House Think-Tank advising President of the Commission *Jean-Claude Juncker*. It was a presentation given by the scientist *Johannes Rockström* on new insights regarding planetary boundaries.

Planetary boundaries' core concern is to define a "*safe operating space*" for humanity in which it can exist under stable Earth system conditions with a high probability. They are reflected by the international climate protection goals agreed upon in the Paris Agreement, in concrete terms the *1.5-2 degree target*.

Science's findings on planetary boundaries strengthen the significance of Article 191 TFEU as well as Article 20a of the German Basic Law (GG). This insight is now also reflected in the BVerfG's Climate Decision of March 2021 (Climate Decision, marginal no. 33 ff. with 216 ff.), which in the

course of the so-called *climate lawsuits* awakened Article 20a of the Basic Law from its previous "slumber" and - after decades of academic debate - initiates a trend reversal in environmental constitutional law that can be described as revolutionary. For the first time there is access to justice by way of individual rights protection to review whether the legislature effectively fulfils its climate protection obligations under Article 20a of the Basic Law and efficiently steers away from exceeding the planetary boundary of the 1.5-2 degree target by 2050, which is according to the Paris Climate Agreement binding under international law. Even if the BVerfG's approach is convincing in its results, its reasoning regarding constitutional law and the role of Article 20a of the Basic Law raise many questions in terms of legal doctrine. These will impact the debate in academia as well as the comparative debate among courts regarding climate litigation. In order to answer these questions, the Climate Decision will be dealt with in the context of environmental constitutional law.

II. The State Objective to Protect the Environment in Art. 20a of the Basic Law

Article 20a Grundgesetz reads:

"The State, also in its responsibility towards future generations, protects the natural foundations of life and animals within the framework of the constitutional order, by legislation and, according to law and justice, by the executive and judiciary."

Since 1993 environmental protection as a state responsibility is not only based on state theory, but is also anchored in German constitutional law...

Due to their special importance, state objectives are constitutionally emphasised tasks of the state authorities to further a certain common good. As principles, they are optimisation imperatives;

conflicts of objectives are resolved by means of the colliding principle doctrine (in German: "Praktische Konkordanz"), whereby the instruments of weighting and balancing play as well as the principle of proportionality play a central role. State objectives have an objective-legal character and therefore **do not convey any subjective individual rights** (Climate Decision, marginal no. 112).

1. State Authorities' Duty to Protect the „Natural Foundation of Life"

Due to Article 20a of the Basic Law's character as a state objective and its indicative wording ("protects the natural foundations of life"), it establishes a constitutional obligation of state authorities to protect the environment including the climate. As a state objective it binds all three branches, not only the legislature, but also the executive and the judiciary. In concrete terms state authorities are not only obliged **to avoid any harm to the natural foundations of life themselves or to prevent their damage by private individuals**. They are also required to positively repair damage that has already occurred and to preventively preserve the natural foundations of life. Accordingly, the state must meet its duty to protect not only by averting danger (defined by the sufficiently proven **probability** of damage), but also - in light of the **precautionary principle** of environmental law - by means of **risk prevention** (defined by mere, nevertheless scientifically based **possibility** of damage). Moreover, in the interest of **resource precaution**, non-renewable resources must be used sparingly, while the principle of sustainability must be observed in the use of renewable resources.

By expressly laying down environmental protection in constitutional law, Article 20a of the Basic Law assigns it the rank of a *constitutional principle to* be optimised in the interplay of conflicting constitutional goods, which as such are not up for disposal. Specifically, this requires the state organs (first and foremost the legislator) to integrate and take into account the concerns of environmental protection in all their decisions - i.e. not only in the area of environmental law, but in all policy areas. If equivalent alternatives are available for the realisation of an environmentally harmful project, the more environmentally compatible path must be chosen. In this context, environmental policy planning is (again) gaining importance.

Moreover, Article 20a of the Basic Law implies a **prohibition of deterioration**. This does not mean that every individual environmental impairment, i.e. every construction of a road or every erection of industrial plants, constitutes an infringement of Article 20a of the Basic Law. In this respect, it is necessary to consider improvements elsewhere, for example through adequate compensatory measures. However, environmental legislation that falls short of the applicable environmental standards and causes a deterioration of the overall environment would be considered unconstitutional. This counts especially for measures that cause irreversible damage to the environment.

In this context the BVerfG's statements in the Climate Decision regarding the **cross-border dimension of the protected goods** are groundbreaking in interpreting Article 20a of the Basic Law. They contain a commitment to the open constitutional state as which the Basic Law constitutes Germany. The protection mandate of Article 20a of the Basic Law in the words of the Court requires

> "internationally oriented action ... and in particular obliges the Federal Government to work towards climate protection within the framework of international coordination" (Climate Resolution marginal no. 201).

Therefore, a reference to the greenhouse gas emissions of other states cannot exempt Germany from its obligation under Article 20a GG to take national climate protection measures (Climate Decision, marginal no. 202 f.). This expresses a principle of mutual trust in the implementation of the Paris Agreement which roots in the international law principle of "*pacta sunt servanda*", corresponding to which Article 20a of the Basic Law obliges Germany to, within its territorially limited possibilities, unilaterally protect the global environmental good climate. These considerations can easily be transferred to the many other protected goods of Art. 20a GG that require transboundary environmental protection.

2. Intergenerational Justice in Art. 20a German Basic Law

Article 20a of the Basic Law explicitly names future generations as one of the objects of state authorities' responsibility to protect the environment. Underlying this, is the inherent tension within the principle of democracy between the short-term legitimacy of members of parliament and governments due to election cycles on the one hand and the long-term effects of their decisions on the other. Article 20a GG gives the state a special, legally binding responsibility for the long-term future. In the course of this, the respective living, acting and deciding generations may not only think of their own needs, but must also take into account the concerns of the respective future generations with regard to their living conditions. This interpretation corresponds not only with the precautionary principle (in its form of resource precaution), but also with the principle of "**sustainable development**" laid down in international law by the Rio Declaration.

Accordingly, sustainability should ensure that environmental protection is reconciled with the economic and social development interests of the present without depriving future generations of the ability to satisfy their needs, so that the long-term preservation of the foundations of human life is guaranteed. Sustainable development therefore concerns the question of preserving the scope of action of the respective living generations on the one hand, and that of the following generations on the other.

Art. 20a GG: Implementation

The reference to **future generations** in Art. 20a has proven to be a decisive point of reference for the specification of the level of protection.

It implies a duty to protect and furthermore a duty to prevent serious and irreversible environmental degradation in favour of the interests of future generations.

This coincides with the risk based approach of the **precautionary principle**:

A lack of complete scientific certainty must not be a reason for postponing cost-effective prevention measures in the event of imminent serious or irreversible damage.

The precautionary principle aims at efficient **risk management**.

Intervention of public authorities can be shifted forward into the area of risk, i.e. before a hazard - defined as a sufficient probability of damage - can be proven.

In this context, the question arises whether the standard of "**intertemporal preservation of freedom**" postulated by the BVerfG in the Climate Decision can be rooted here. It is true that the BVerfG examines Article 20a of the Basic Law at the level of justification and in this respect convincingly calls for a "proportionate distribution of freedoms across generations" (Climate Decision, marginal no. 183). However, the BVerfG does not anchor the "intertemporal preservation of freedom" in Article 20a of the Basic Law - which, as a result, is not even supposed to be violated (Climate Decision, marginal no. 183, 196 ff.). This remains surprising, since in the Basic Law only the state objective of environmental protection builds an explicit bridge to "future generations".

3. Interim Conclusions

In conclusion, the protection mandate of Article 20a of the Basic Law obliges state authorities to take into account the interests of future generations when making decisions that initiate environmentally harmful or endangering developments and, in case of doubt, to choose the course of action that keeps the future as open (in the sense of moldable) as possible, in particular to avoid irreversible impairment of the environment. Therefore I like to describe the state's long-term responsibility for future generations flowing from Article 20a of the Basic Law as an "**ecological debt brake**".

In concrete terms, this results first and foremost in legislative duties to protect, which extend into the future. Pursuant to Article 20a of the Basic Law, the parliament, in exercising its comprehensive duty to protect, must develop a binding, effective, coherent and robust safety concept for the respective protected good (such as the climate), which must meet the requirements of the prohibition of inadequacy - familiar to the duties to protect fundamental rights. In the case of a complex and cross-

cutting issue of environmental policy, such as climate protection, this can be done in the form of a special kind of **guiding law**, which would specify Article 20a of the Basic Law and set its standards. The duty to protect is subject to a legislative mandate of dynamisation (Climate Decision, marginal no. 212). To ensure its effectiveness, this protection concept must be continuously examined within a political monitoring process by institutions set up specifically for this purpose and continuously improved if necessary. Accordingly, the Climate Protection Act, which implements Article 20a of the Basic Law and thus acquires quasi-constitutional status, becoming a kind of guiding law.

If, however, the interests of future generations have a comparatively weak status in the system of election cycles and party democracy and the protection of future generations (here in the sense of ecological sustainability) offered by Art. 20a GG is to be given practical significance, then the (constitution-amending) legislature is obliged to institutionalise the state's long-term responsibility through regulated procedures and forms of organisation.

Possible forms of organisation: Sustainability officers in each ministry to ensure an integrative approach of policies (see Art. 11 TFEU); a special unit based in the Chancellery with corresponding powers; a strengthened Parliamentary Advisory Council for Sustainable Development in the Bundestag; a Council of External Experts for Sustainable Development elected by Parliament. Tentative approaches in this regard can be found in the Climate Protection Act (KSG), although these are not sufficient - for example with regard to the Expert Council established in §§ 11, 12 Climate Protection Act (KSG), which remains toothless.

III. Environmental and Climate Protection through Fundamental Rights

Even though the Basic Law does not contain a fundamental right to environmental protection and the legislator amending the Constitution in the early 1990s deliberately decided to insert a state objective in the form of Article 20a of the Basic Law, fundamental rights have an important function in conjunction with Article 20a of the Basic Law. This was demonstrated not least by the BVerfG's Climate Decision.

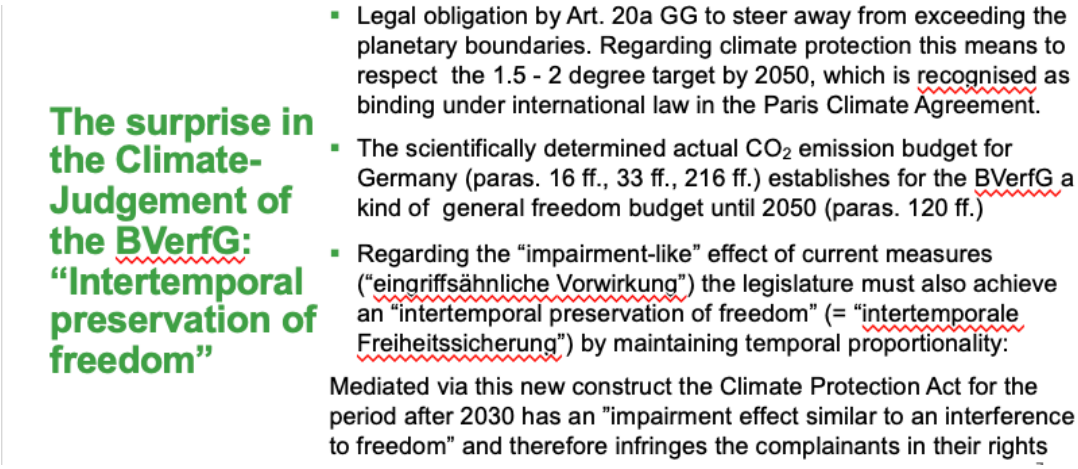
1. Right to Life, Physical Integrity and Property

The focal point of fundamental rights protection in relation to the environment is the right to life and physical integrity laid down in Article 2 (2) of the Basic Law. Its protective scope does not only apply when a health impairment is acute or imminent (*averting danger*), but also - where there is a scientifically founded suspicion - includes prior merely possible health detriments (*risk prevention*). Furthermore, privately owned environmental goods such as soils, forests, waters or agricultural land can be damaged by environmental degradation (freedom of property: Article 14 of the Basic Law)

and impaired in their usability (freedom of profession: Article 12 of the Basic Law). Therefore, climate claims are also based on fundamental economic rights.

2. Climate Protection as an "Intertemporal Preservation of Freedom"

Climate protection, as a „natural foundation of life“, is one of the protected public goods included in of Article 20a of the Basic Law. Nevertheless, Art. 20a GG was a "sleeping beauty" for a long time. This changed with the so-called *climate lawsuits* and the BVerfG's Climate Decision.



Mediated via the new construct of an "intertemporal preservation of freedom", according to the Court the parliaments Climate Protection Act **after 2030** has an "eingriffsähnliche Vorwirkung". This can be described as an advanced or prior effect similar to an interference into future freedom and leads to an impairment-like effect on the freedoms of the complainants protected by the Basic Law, because minimum regulations on CO_2 reduction requirements for the time after 2030 are not explicitly made (Climate Decision, marginal no. 120 ff., 18). On this basis, the BVerfG arrives at a new and astonishingly broad interpretation of "injury in fact" (marginal no. 108 and 129 ff.) and affirmed standing to the complainants (marginal no.116).

In its reasoning, the BVerfG then becomes more specific and makes additional reference to "the general freedom of action guaranteed in Article 2 (1) of the Basic Law" (marginal no. 184). Upon closer examination, however, Article 2 (1) of the Basic Law is only mentioned by way of example to invoke fundamental rights in a defensive dimension that is interfered with by an "impairment-like effect". By this new construct the Court avoided (at this stage) to scrutinize the Climate Protection Act under the "duty to protect" arising from fundamental rights. Consequently, the Court could check the Climate Protection Act by way of a classic interference of state authorities into fundamental rights,

including the "freedom distribution principle" under the rule of law and the balancing of the proportionality test (marginal no. 188 ff).

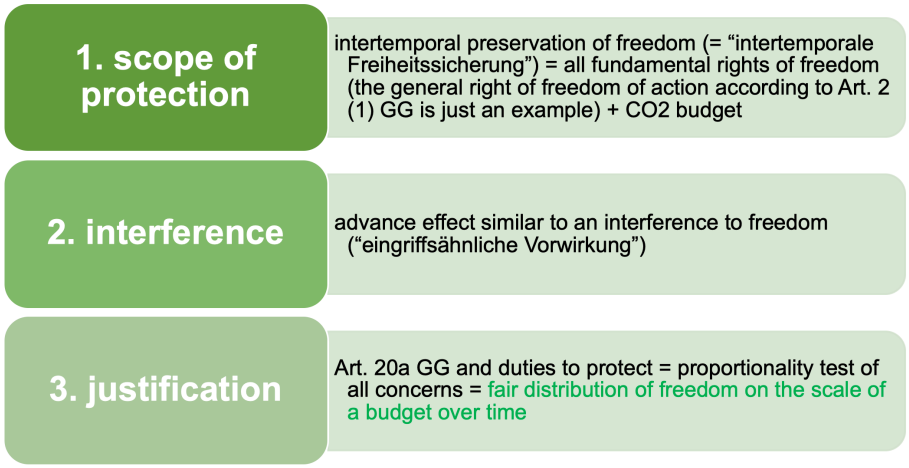
Accordingly, within the justification test, it identified Article 20a of the Basic Law as well as the state authorities duties to protect fundamental rights as legitimate interests that can limit to exercising constitutional freedoms (marginal no. 185, 190 ff.) and subsequently balances them against the endangerment of future freedoms (marginal no. 186 ff.) by means of a proportionality test (192 ff.). **Surprisingly, according to the BVerfG, from this follows for the legislator not a duty to respect and to refrain from interferences into freedom, but a duty to act in a certain manner, which is close to a duty to protect**:

> "Necessary reductions of CO_2 emissions up to climate neutrality should be distributed in a progressive manner throughout the future in a way that does not violate fundamental rights" (Climate Decision, marginal no. 19-21, 120 with marginal no. 158 ff., 216 ff., 256 ff.).

On the basis of this new construct that is **mixing the state authorities duty to respect and to protect** fundamental rights, it will henceforth be possible to review, by way of a constitutional complaint, the extent to which the legislature and the executive effectively fulfil their respective duty to protect the climate and effectively steer away from exceeding the planetary boundary of the 1.5-2 degree target by 2050, which is binding international law under the Paris Climate Agreement.

In this regard it is important to notice that it is the on a scientifically basis calculated **overall CO_2 budget for Germany until 2050** (Climate Decision, marginal no. 16 ff., 33 ff., 216 ff.) establishes for the BVerfG a kind of **general freedom budget of all people living in Germany until 2050** (Climate Decision, marginal no. 120 ff.). By way of referring to this general freedom budget, the Court examines Article 20a of the Basic Law as a justification to limit the exercise of constitutional freedoms. Later, in its second Climate Decision on climate protection in the constitutions of the German Länder from 18.01.2022, the BVerfG confirmed and specified its approach: It emphasised as a prerequisite to the "intertemporal preservation of freedom" that the respective legislator must be always subject to an at least roughly recognisable budget of still permissible CO2 emissions (marginal no. 10). Accordingly, the intertemporal preservation of freedom is not linked to a concrete fundamental right, as is usually the case, but is tested in the form of a general freedom budget over time against the yardstick of a scientifically determined actual CO2 emission budget.

The following testing structure thus results from the Climate Decision:



The budget approach as an essential component of the intertemporal preservation of freedom clarifies that this new construct cannot be transferred without further ado to other issues of intergenerational justice, such as social security or public debt.

Though, if Article 20a of the Basic Law is not the starting point and Article 2 (1) of the Basic Law is only mentioned as an example, then the question arises where the new intertemporal preservation of freedom, together with the impairment-like effect, is derived from. Therefore, with regard to doctrine the BVerfG left many essential questions unanswered.

IV. Reconstruction of the Climate Decision for the European level

Therefore, and because the new tool of the BVerfG is very special in its approach it cannot be easily transferred to the European level. Against this backdrop it makes sense to **reconstruct the Climate Decision based on the well-established German doctrine of fundamental rights** that is - taking into account in particular the case law of the European Court of Human Rights in Strasburg - to some extent mirrored in European fundamental rights protection.

1. Defensive Dimension (Duty to Respect) and Protective Dimension (Duty to Protect) of Fundamental Rights in Environmental Protection

Fundamental rights are traditionally defensive rights against sovereign restrictions on freedom, they imply a duty of state authorities to respect individual freedom. They establish a presumption of freedom against state intervention, so that the democratically elected legislator must prove "their better right" when restricting freedoms. However, environmental damage is usually not caused by the state, but by private polluters, such as companies or private individuals.

Against this background, a very extensive interpretation in literature has emerged, which wants to bring about protection against private interventions through a massive expansion of the concept of interference (as a result, it is even an abandonment of the concept).

Background: The Mülheim-Kärlich decision of the Federal Constitutional Court, which is at least misleading in this respect, is likely to have been a decisive trigger, as it speaks of a state "co-responsibility" for threats to the physical integrity of third parties as a result of the state-approved construction of a nuclear facility. This leads to the conclusion that the consequences of the state's behaviour, up to and including the mere non-prohibition (i.e. failure to act) of these impairments, are to be attributed to the state as an encroachment on the fundamental rights of third parties. The associated obligation to tolerate must be attributed to the state as if it were its own action - and thus as an encroachment on the relevant fundamental rights of the person affected.

Especially where pollution is merely permitted by a licence of state authorities , this interpretation leads to an over-expansion of the concept of interference. The consequences of this become particularly clear in the example of Article 2 (1) of the Basic Law, which is interpreted in the sense of a general freedom of action: its barely delimitable scope of protection, in conjunction with a broad concept of interference, would expand the sphere of fundamental rights holders in such a way that the Article 19 (4) of the Basic Law's limit to popular standing would be violated and a barely contoured, general claim for enforcement of the law would be established.

The debate on the concept of interference is made much more complex and even confusing by the BVerfG's Climate Decision. As previously mentioned, an " impairment-like effect on the freedom protected by the Basic Law" is assumed (Climate Decision, marginal no. 182 ff.). This novel extension of the concept of encroachment, which is neither dogmatically derived nor explained by references to the BVerfG's case law, raises a variety of questions that have led to an unusual explanation of the decision by one of the court's judges.

In this context, the linking to "the general freedom of action guaranteed in Article 2 (1) GG ..." also raises questions (Klimabeschluss marginal no. 182 ff.); for this suggests a reference to the Elfes case law of the BVerfG, in the course of which a "fundamental right of the citizen to be burdened with a disadvantage only on the basis of regulations which are procedurally and dogmatically in accordance with the constitution" has been created. This way, the state objective of Article 20a GG would then be "subjectivised" via Article 2 para 1 GG. This in turn would mean that the BVerfG, bypassing the constitution-amending legislature, would de facto have created a fundamental environmental right , which not only enables a complaint-like access to the courts by the general public, but also an individual claim to environmentally compatible action by all state organs.

Finally, the BVerfG states that the legislature has a duty to set reduction targets for the period after 2030 (Climate Decision, marginal no. 251 ff.). However, such a mandate to act would have to anchor in the fundamental rights protective dimension. At the same time, the construct of an impairment-like prior effect is based on the defensive dimension of fundamental rights, thus mixing the protective and defensive dimension. Against this background, the obvious solution would have been to strengthen the dogmatically robust duties to protect from fundamental rights in connection with Article 20a GG. What such a path might look like is outlined below.

2. The Continuous Need to Boost the Protective Dimension of Fundamental Rights (Duty to Protect)

a) Basics

The fundamental rights to life, health and property, in conjunction with the protective dimension of fundamental rights ("duty to respect") recognised in Germany's constitutional law (Climate Decision, marginal no. 151 ff.), create a substantively effective fundamental right to environmental protection. This showcases the potential environmental protection has in protecting freedoms in parallel to Article 20a of the Basic Law. The duty to protect fundamental rights demands not an omission of state authorities, as is the case when dealing with the duty to respect, but action by the legislature (and the other branches) that offers "too little" protection from polluters.

State authorities according to human dignity (Art. 1 GG = Art. 1 EU Charta) have a duty to respect (dimension of defence) as well as a duty to protect (dimension of protection) fundamental rights

Basic rights involved in environmental protection: right to life and health), right to property and freedom of profession

The two fundamental rights dimensions can be distinguished by the concept and definition of interference ("Eingriffsbegriff"). The efforts to expand the concept of interference as outlined above result first and foremost from the awareness that the duty to protect fundamental rights must become more efficient and be strengthened compared to the effectiveness of the defensive dimension of fundamental rights, the duty to respect. In this respect, there is a problematic asymmetry, which has its origins in the traditional definition of interference, according to which fundamental rights are exclusively rights of defense against sovereign encroachment. The lack of balance in this doctrine is

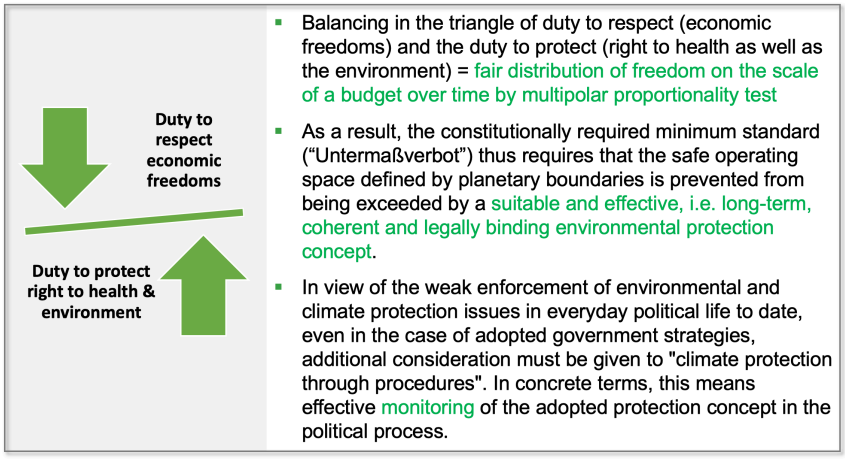
particularly severe in cases, where the state protects a legal interest of the common good and/or individuals, such as the environment, by intervening in the fundamental rights of third parties. In these multidimensional or multipolar constellations it is accepted that the state authorities duty to respect is scrutinized in a much more detailed and intense proportionality test ("Übermaßverbot") then the duty to protect (https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3847822).

To give you an example:

At this point, the multidimensionality of freedom becomes clear: As a car driver, A pollutes the air and climate; at the same time, B wants state authorities to protect him from the summation of these burdens and their consequences. A can effectively take legal action against strict emission limits and driving bans on the basis of his fundamental rights of defence (possibly Art. 14, 12, 2 (1) GG), whereby the rights of B (Art. 2 (2) GG) then become an abstract issue to be weighed in the proportionality test. At the same time, B's protective fundamental rights cannot be enforced with equal effectiveness under constitutional law.

In a democratic constitutional state, it is the parliament that is called upon to distribute multi-dimensional freedom between defensive rights and duties to protect in a proportionate manner by "proper balancing".

Balancing the state authorities duties to respect (economic freedoms) and to protect (health, environment)



b) Judicial Control

Strengthening the duties to protect under fundamental rights is therefore primarily a question of the density of judicial review. In principle, the BVerfG distinguishes between a review of evidence, justifiability and content. In this regard it is problematic that the standard of review applied in the context of fundamental right's duties to protect in its jurisdiction is not applied in a uniform manner. In environmental protection, the BVerfG only conducts an *evidentiary review* limited to evident,

obvious violations of fundamental rights, in the framework of which it examines whether the state organs (as a rule, the legislature is addressed here) have remained completely inactive or whether the protective measures taken are obviously unsuitable (Climate Decision, marginal no. 151 ff.). In other cases (not related to environmental protection), however, it uses the doctrine of justifiability in the sense of the prohibition of inadequate measures: Accordingly, what is necessary is then an

"adequate protection - considering conflicting legal interests; the decisive factor is that protection is effective as such. The precautions taken by the legislature must be sufficient for adequate and effective protection and must also be based on careful fact-finding and reasonable assessments".

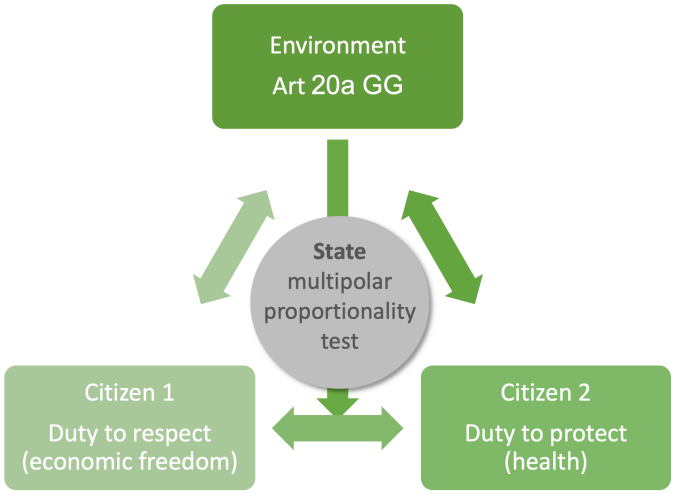
In contrast to the evidence review, a review of justifiability on the basis of the prohibition of inadequate measures generally enables a higher level of scrutiny, because the BVerfG reviews whether the constitutionally required minimum protective standard of fundamental rights is guaranteed, based on a careful investigation of the facts.

If the BVerfG would consistently apply its doctrine on the prohibition of inadequate measures to the area of environmental protection, this could have been an alternative approach to the "intertemporal preservation of freedom" that, based on the duty to protect, would have delivered after all the same results in the Climate Decision

c) Distribution of Freedom within the Framework of a Multipolar Proportionality Test

If this approach is taken, Article 2 (2) and Article 14 (1) of the Basic Law's duties to protect parallel to the intertemporal requirements of Article 20a of the Basic Law and opposite to the defensive fundamental rights can be specified within the multipolar constitutional law framework including a proportionality test. The BVerfG assessment of the "proportionate distribution of opportunities for freedom across generations" (Climate Decision, marginal no. 183) therefore can be mirrored perfectly well and would become, integrated into this structure, more transparent.

Balancing by a multipoloar proportionality test



If a multipolar proportionality test is carried out, the state authorities measure (e.g. the climate protection law) is to be scrutinized in a first step by considering the polluters environmental burden according to the standard of the duty to respect rights including the 3 step test (suitability, necessity, appropriateness) of the established proportionality test ("Übermaßverbot").

In a second step, the state authorities' duties to protect vis-à-vis affected persons (e.g. Art. 2 (2) GG) and the environment (Art. 20a GG) are to be examined by the standard of the prohibition of inadequate measures ("Untermaßverbot"). The latter is similar in structure to the classical proportionality principle. Here, a three-stage examination can also be carried out, in which the protection concept of the legislator is to be examined regarding 1. its suitability, 2. its necessity and 3. its appropriateness. Within the framework of the latter, it must be examined whether accepting remaining dangers and risks according to the state authorities duty to respect is appropriate with regard to the state authorities duty to protect, considering conflicting private and public interests.

Figuratively speaking, the multidimensional or multipolar proportionality test does form a kind of corridor, within which the legislature has the margin of appreciation required by the separation of powers to weigh and balance conflicting interests: First, regarding the polluters of an environmental impact the first and second step of the proportionality test under the duty to respect (appropriateness, necessity) must be examined. With regard to those affected, the first and second steps of the test of prohibition of inadequate measures under the duty to protect (appropriateness, effectiveness) must be examined. The same must be done for the protection mandate of Article 20a of the Basic Law. The third stage of the multipolar proportionality test, appropriateness, is where the three test strands of the relevant defensive right, the opposing duty to protect and the public interest of environmental protection pursuant to Article 20a of the Basic Law converge.

Proper balance is then achieved within the framework of a multipolar weighing of interests, which considers and balances the interrelationships between the legal positions of the multipolar constitutional law system. Concurrent interests shift the weighting within the balancing framework. Accordingly, the concerns of the duties to protect of fundamental rights (e.g. Art. 2 (2) GG) and the common good (e.g. Art. 20a GG) can - provided they have the same content- be summarized and thus strengthen a certain goal pursued by the state measure (e.g. air pollution control) and the protected interests behind it in the balancing process. In this context, an alternatives test must be carried out. This is the case, because it aims precisely at the outlined corridor between the prohibition of excessive and inadequate measures and helps to find the "right balance" between favoring and burdening the respective fundamental rights holders and thus to establish the balance of the distribution of freedom in the multipolar constitutional law system. The multipolar proportionality test outlined in this way is not only a framework-like specification for the legislative development of a specific protection concept, but also a yardstick for its judicial review and (possible) further development or redesign.

The necessary legislative margin of appreciation is preserved through the density of judicial review. This is to be designed congruently in the multipolar constitutional law system: If, within the framework of the duties to protect, only an evidentiary review is possible, then, with regard to the conflicting duty to respect, a justifiability review or even an intensified content review may not be carried out. Rather, only an evidentiary review may be used with regard to the duty to respect, in order to keep the equilibrium in judicial control between the state authorities duties to respect and protect.

3. Art. 20aGG and the Basic Right to an Ecological Subsistence Level

In special (extreme) circumstances, a fundamental right to an ecological subsistence minimum can be successfully raised in addition to the duties to protect.

> **Human dignity in conjunction with Art. 20a GG guarantees an ecological minimum standard of living: If there is a threat of irreversible environmental damage (if tipping points are exceeded), which could result in a kind of "devastation scenario", then from a legal perspective the right of every citizen to the "ecological subsistence level" is infringed.**

This can be derived from Article 20a in conjunction with Article 1 (1) and 2 (2) of the Basic Law by way of interpretation - analogous to the fundamental right to a social subsistence minimum developed by the BVerfG. Although the BVerfG Climate Decision embraced the considerations of the literature on an ecological subsistence minimum in its Climate Decision, it proceeded far more restrictively than with the social subsistence minimum (Climate Decision, marginal no. 113-115). Especially when

the fundamental right is anchored in Article 1 (1) of the Basic Law, its content is not only directed at the preservation of a viable environment, but also an environment worth living in. Measured against these normative requirements, there is an absolute minimum standard of protection that can be controlled by the courts, within the framework of which the legislature has no room for manoeuvre.

Examples of the ecological subsistence minimum: breathable air, drinkable water and edible food. Thus, the state must ensure that all necessary natural environmental elements (such as air, soil, water, fauna, flora, landscape) are available in sufficient quantity and condition for human existence.

4. A Fundamental Right to a Clean Environment?

In view of the limits to determining the substantive content of a fundamental right to a clean environment conceived in terms of a "duty to respect", it seems feasible to implement a fundamental right to a clean environment by a procedural concept on the one hand and at "duty to protect" (instead of a "duty to respect") by public authorities.

In the course of a national and international discussion, three building blocks of a procedural fundamental right to a clean environment have emerged:

For a deeper dive:

1. Fundamental Rights Protection in Germany: The Multifaceted Dimensions of Freedom Defined by the Duty to Respect and the Duty to Protect by Christian Calliess: SSRN https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3847822

2. Christian Calliess, Rechtsstaat und Umweltstaat – Zugleich ein Beitrag zur Grundrechtsdogmatik im Rahmen mehrpoliger Verfassungsrechtsverhältnisse,Mohr Siebeck, Tübingen 2001.

3. Generationengerechtigkeit im Grundgesetz: Brauchen wir einen Artikel 20b GG? (Intergenerational Justice in the German Basic Law: Do we need an Article 20b GG?) by Christian Calliess: SSRN

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3752266

4. Möglichkeiten und Grenzen eines „Klimaschutz durch Grundrechte“ (Possibilities and Limits of a 'Climate Protection Through Fundamental Rights' by Christian Calliess: SSRN

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3827384