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Human Rights and Climate Policy

Toward a New Concept of Freedom, Protection Rights, and Balancing

Neither the scope of "protection obligations" which are based on fundamental rights nor the theory of constitutional balancing nor the issue of "absolute" minimum standards (fundamental rights nuclei, "Grundrechtskerne"), which have to be preserved in the balancing of fundamental rights, can be considered satisfactorily resolved–in spite of intensive, long-standing debates. On closer analysis, the common case law definitions turn out to be not always consistent. This is generally true and with respect to environmental fundamental rights at the national, European, and international level. Regarding the theory of balancing, for the purpose of a clear balance of powers the usual principle of proportionality also proves specifiable. This allows a new analysis, whether fundamental rights have absolute cores. This question is does not only apply to human dignity and the German Aviation Security Act, but even if environmental policy accepts death, e.g. regarding climate change. Overall, it turns out that an interpretation of fundamental rights which is more multipolar and considers the conditions for freedom more heavily–as well as the freedom of future generations and of people in other parts of the world–develops a greater commitment to climate protection.

I. Misunderstandings about environmental fundamental rights, environmental national objectives, and sustainability – nationally and transnationally

Climate change is coming faster and more drastic than expected. From the current perspective of scientists the issue is to have basically minus 95% greenhouse gases in the West and minus 80% worldwide in 2050 to avoid a world suffering from huge economic damage, wars over resources, migration flows and millions of dead people.[1] As outlined in the cited reference, the existing international, European and national climate policy is far from reaching such reduction objectives and their effective enforcement, which is not frustrated by loopholes and computational tricks, even though there are (technical and legal) concepts for an appropriate response to the problem. Even an intensified unilaterally European (or in some aspects national) approach on climate protection would be possible if restrictive measures were combined with border adjustments for imports and exports and imports.[2]

But may someone demand a more effective climate policy based on German, European and international fundamental rights?[3] Not in a sense that someone could found a claim for a specific control instrument on fundamental rights, but perhaps to increase the effectiveness of climate policy as a whole–though a significant leeway for the legislator remains. In principle all this concerns three separate legal spheres–national (in this example: German), European and international laws of fundamental and human rights. However, the following will show that

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[1] These introductory questions are not discussed here in detail as they have been treated several times. Cf., e.g., Ekardt, in: Pan Jiahua (Ed.), Climate Change and Budget Approach, 2010 (forthcoming).

[2] Cf. Ekardt/ Schmeichel, Critical Issues in Environmental Taxation 2009, 737 ff.

[3] For details, cf. Ekardt, Theorie der Nachhaltigkeit: Rechtliche, ethische und politische Zugänge, 2009, § 6; Ekardt, Information, Partizipation, Rechtsschutz. Prozeduralisierung von Gerechtigkeit und Steuerung in der Europäischen Union – unter besonderer Berücksichtigung der Aarhus-Konvention, 2d Ed. 2009, §§ 1, 5.

the legal issues are the same on each level, at least with respect to substantive law. Thus, it appears justified to undertake a uniform analysis of fundamental rights. Any particularities will be indicated in every case.

In general, the conflict over the right climate policy can be regarded as a conflict of competing interests and thus as a balancing problem. Balancing in a broader sense is a core issue of the German (and European) discussion in public law and especially between economic and environmental concerns.[4] It refers to a–if not the–fundamental phenomenon of law: to find a just balance of conflicting interests, no matter whether we call it jurisdiction over discretionary decisions, proportionality test, or simply balancing. For, ultimately, any application of the law must do justice to the conflicting spheres and guarantees of freedom of the people involved. Thus, all this can therefore be traced back to the constitutional requirement that the legislature shall undertake a fair balancing of the conflicting interests. The framework for the legislative balancing is usually referred to as proportionality test. The administration is mainly determined by legislative acts and its balancing authority is initially (mostly) limited to the interpretation of the factual requirement of the standards which the legislature has enacted as an expression of its balancing (if those standards leave room for interpretation). The administration is more flexible where the legislature has not considered the respective interests so far but has left it partially for the administration to decide. In Germany, this is called discretion (Ermessen) or (planning) assessment (planerische Abwägung). This concept applies cum grano salis regardless of the respective level of law (e.g. national, European or international law). Regarding balancing in the area of environmental protection, not only economic freedom but also environmental protection itself must be considered (partly also) as an aspect of freedom and fundamental rights. This is certainly not a trivial statement but a rather controversial finding (if one pursues a challenging concept of environmental protection) which requires closer investigation when the conformity of the existing climate policy with fundamental rights is analyzed.

For some time the framework for any discussion about environmental has been the principle of sustainable development. Internationally, sustainability has ever more often been named a key objective of policy for 20 years, whether by the UN, the EU or the German Government. It is however not always taken very seriously. The intention of sustainability is to extend law/ morals/ politics in an intergenerational and global respect.[5] In contrast, a common understanding–also among lawyers–is that sustainability is simply a balanced pursuit of the three pillars of environmental, economic and social issues, if necessary even without a time- or space-spanning aspect.[6] It was the topic elsewhere that this is at least misleading, that it sticks to the demand for, in the full sense of the word, eternal (!) growth which–in a physically finite world–cannot be fulfilled, and that this "pillar-perspective" is also incompatible with international law's founding documents of sustainability.[7]

[4] Cf. pars pro toto Erbguth, Juristenzeitung 2006, 484 ff.; Erbguth, Zur Vereinbarkeit der jüngeren Deregulierungsgesetzgebung im Umweltrecht mit dem Verfassungs- und Europarecht, 1999; Erbguth, Rechtssystematische Grundfragen des Umweltrechts, 1987.

[5] Cf. for this understanding of the principle of sustainability (and with references to opposing views) Ekardt, Theorie, § 1; Ekardt, Zeitschrift für Umweltpolitik und Umweltrecht 2009, 223 ff.; with a similar result (but somewhat differing arguments) cf. Appel, Staatliche Zukunfts- und Entwicklungsvorsorge, 2005; Ott/ Döring, Theorie und Praxis starker Nachhaltigkeit, 2004; Köck, Die Verwaltung 2007, 413 ff.

[6] Cf., e.g. Steinberg, Der ökologische Verfassungsstaat, 1998, S. 114; Beaucamp, Das Konzept einer zukunftsfähigen Entwicklung im Recht, 2002, S. 18 ff.

[7] Ekardt, in: Pan Jiahua, Climate Change (forthcoming); Ekardt, Zeitschrift für Umweltpolitik und Umweltrecht

Fundamental rights issues take us to constitutional law in a functional sense, which also includes European and international "constitutional" law.[8] Environmental and climate protection, however, is rarely addressed as guaranteed by fundamental rights, but is rather assigned to the category of "national objectives," thus based on Article 20a of the German Constitution (Grundgesetz, GG) or, in European law, on Article 191 TFEU. Nevertheless, it seems constitutionally essential to consider fundamental rights. The interpretation of fundamental rights, unlike state goals, does not only generate power but also legally enforceable obligations of the government. Furthermore, fundamental rights are the strongest element of a liberal-democratic constitution. Moreover, on a constitutional level, overcoming the economically oriented understanding of freedom could also be the essential desideratum of a more future and globally oriented (thus: sustainable) legal interpretation. By the way, restrictions in favor of environmental protection "for the sake of real people's (conditions of) freedom" (as embodied in fundamental rights) might also be motivationally much more plausible than the usual, fairly misleading antagonism of "self-development versus environmental protection," as latently affirmed by national objective provisions.

Accordingly, earlier–and even today in international law–there was often, or is respectively, a discussion about environmental fundamental rights[9], as environmental fundamental rights or "climate fundamental rights" would mean a break with those traditional views diagnosed above. In the academic international law debate (unlike the practice of international law), the idea of strong or even absolute, i.e. not subject to any balancing, environmental fundamental rights seems to gain support. In national debates, however, environmental fundamental rights are considered non-specifiable and subject to balancing; therefore ultimately not helpful. Of course, the vague content of an "environmental fundamental right" would only result if one generally introduced a fundamental right "to environmental protection"–or more specific in our context: "to climate protection." This, however, is not my intention here. I am only concerned with the question, whether a correct interpretation of fundamental and human rights (nationally or transnationally) results in greater levels of environmental protection than is often assumed. Such an interpretation would build on already existing fundamental rights, with the consequence that current climate policy might be in conflict with fundamental rights. Of course, even if the issue is within the scope of a fundamental right, the problem of necessary balancing cannot be avoided. But this problem applies in precisely the same way to other fundamental rights as well (balancing is commonly called "proportionality test"). Therefore, the subject of the following analysis will not be true fundamental rights "to environmental protection." At the same time, we will not limit ourselves to accepting the common assumption that basically all aspects of fundamental rights which concern environmental issues are covered by the right to life and health, which then (a) included no provision for preventive aspects, (b) de facto prefers the defensive aspect of the fundamental right to its "protection obligation" (sup-

2009, 223 ff.; Ott/ Döring, Theorie, passim; partly also Appel, Zukunftsvorsorge, 339 ff.; Köck, Die Verwaltung 2007, 413 ff.; cf. also (implicitly) Unnerstall, Rechte zukünftiger Generationen, 1999.

[8] On the controversy about statehood and the existence of a constitution, cf. recently Möllers, Der vermisste Leviathan, 2008.

[9] For an outline of the common discussion, cf. Schmidt-Radefeldt, Ökologische Menschenrechte, 2000, 33 ff. and 40 ff.; cf. e.g. Steinberg, Verfassungsstaat, 421 ff. (explicitly criticizing „environmental fundamental rights"); Hattenberger, Der Umweltschutz als Staatsaufgabe, 1993, 77 ff.; Gibson, Saskatchewan Law Review 1990, 5 ff.; Nickel, Yale Law Journal 1993, 281 (282); cf. e.g Kiss, in: Kromarek (Ed.), Environnement et droits de l'homme, 1987, 13 ff. (showing a more positive tendency); on the notion of „third generation human rights" cf. e.g. Donnelly, in: Brölmann/ Lefeber/ Ziek (Ed.), Peoples and Minorities in International Law, 1993, 119 ff.

posedly because of further needs for balancing, separation of powers, etc.), and (c) for the rest fails to concretize environmental protection which would be required to render it practically relevant. It is precisely this approach toward "protection obligations" (including its administrative consequences) that will be subject to criticism in the course of the following analysis.

II. Fundamental rights against climate change–only subordinate and vague "protection obligations"?

1. Problems of the existing case law

It is well known that in particular the German constitutional[10] and administrative[11] courts are very reluctant to recognize environmental positions based on fundamental rights and previously rejected corresponding claims for violations of fundamental rights on environmental protection issues. They already avoid the term "protection *rights*" which would clarify that subjective, individual rights are concerned (even if they are subject to balancing with conflicting legal positions).[12] Especially (but not only) in constitutional law cases there is often not clear distinction between the tests of admissibility (Zulässigkeit) and substantive foundation of the claim (Begründetheit). Thus, eventually–camouflaging the question whether a subjective, individual right exists–it remains unclear, what the respective issue is: whether the claimant has an own right that allows him to bring an action (Beschwerdebefugnis), or whether the underlying action is within the scope of the respective fundamental right (Grundrechtsschutzbereich) or it is an issue of restrictions of the respective fundamental right (Grundrechtsschranken). In spite of the different results (compared to actions in the area of environmental issues of fundamental rights) this mainly applies even to abortion decisions.[13] The basis for all this is the already mentioned idea that protection rights only describe a goal, but no exact scope of protection, and that one only has to examine whether the protective measures taken are obviously insufficient. However, the latter will always be denied, since in Germany some legislative efforts can be found for every subject, which then qualify as per se "not evidently insufficient."[14] It will be elaborated later that both this result and its reasoning (which is in fact rather proclaimed and reasoned) might deserve criticism.

From the outset, the ECJ case law is hardly devoted to the issue of protection rights as such–European fundamental rights are included in the (since the Lisbon Treaty binding) Charter of Fundamental Rights (ECFR) and in Article 6, paragraph 1-3 EU[15]. The ECJ has not even specifically addressed fundamental protection rights against the community. Within the Member States, it recognizes the possibility of those rights.[16] Of course, to exaggerate only slightly, the

[10] Cf. the basic decisions in German Federal Constitutional Court, Vol. 49 (BVerfGE 49, 89 (141)); Vol. 53, 30 (57); Vol. 56, 54 ff.; this problem is ignored in Couzinet, DVBl 2008, S. 760 ff. (citing further academic literature which does no perceive this issue); but cf. Vosgerau, Archiv des öffentlichen Rechts 2008, 346 ff.; Schwabe, Juristenzeitung 2007, 134 ff.

[11] On the example of aircraft noise, cf. German Federal Administrative Court (BVerwG), NVwZ 2006, 1055 ff.

[12] A somewhat special case is nuclear law. Cf. lately, German Federal Administrative Court (BVerwG), Neue Zeitschrift für Verwaltungsrecht 2008, 1012. On a critical position, cf. Dolde, Neue Zeitschrift für Verwaltungsrecht 2009, 679 ff. Nevertheless, the reasoning oft he following statements also applies to this area of law.

[13] Cf. German Federal Constitutional Court, Vol. 39 (BVerfGE 39, 1; 88, 203).

[14] On the example of nuclear law, cf. lately German Federal Constitutional Court (BVerfG), Beschl. v. 29.07.2009, 1 BvR 1606/08, juris n. 19.

[15] On the former derivation of unwritten EU fundamental rights, cf. EuGHE 1970, 1125, n. 4; 1974, 491, n. 13. On the new legislation with an explicit ECFR, cf. Ekardt/ Kornack, ZEuS 2010, 111.

[16] Cf. e.g. ECJ, OJ 2003, I-5659; 2004, I-9609; 1991, 4007; 1994, 955. In contrast, the ECtHR does not seem to

ECJ structurally fails to do almost anything which could bind the EU in any way. It rather seems to be driven by the unspoken intention to give the EU Commission and Council plenty of rope in the determination of their policies. Thus the existing case law lacks any real reference points for the issues discussed in this article. Though the ECJ regularly requires Member States to comply with certain environmental requirements, this has nothing to do with the recognition of protection rights. It only refers to the fact that the Member States are obliged to effectively implement certain environmental decisions of the EU Commission, the Council and the Parliament. Thus, at its core, it is just an issue of enforcement of simple (not constitutional) European law; and it also completely unrelated to the precise content of that law. Protection rights, however, would seek to oblige the EU legislative bodies against their will to something. There is, however, no example apparent for such right. And because of the indicated intentions of the ECJ, it seems likely that this is not going to change significantly.[17] Though Article 37 ECFR, which formally has entered into force at the end of 2009, does contain a commitment to environmental protection–as did the previous EU and EC Treaties–it is not designed as a fundamental right.

Regarding the ECtHR, the situation is basically similar, although somewhat differentiated in some aspects. Like the German Federal Constitutional Court, the ECtHR has in fact recognized obligations of the states to undertake protective actions in non-environmental cases based on fundamental rights, though not often.[18] Furthermore, the ECtHR has already granted information rights concerning environmental damages[19]–though confusingly not based on the right to life and health, but on the right to privacy under Article 8 ECHR[20]. However, all environmental cases of the ECHR are ultimately limited to ensuring that in the course of administrative decisions, the concerns of individuals are adequately considered and, for example, the facts are raised carefully. This was expressed most recently in a case of mobile communications.[21] It appears that the obligation to adopt other, more effective laws on the basis of protection rights, which would trigger a reorientation of the whole society and would not just keep my privacy somehow "free from pollutants and noise," has not been a subject of an affirmative ECHR judgments, so far. Nevertheless, taking into account this background, it can be stated that if any, the ECHR could be open to recognizing protection rights with respect to climate change.

In any case, the mere factual existence of case law does not per se mean that it is right. And it does not simply apply because judgments only decide a specific case, but do not determine an

pursue any theory of the functions of fundamental rights (in the sense of distinguishing between a defense and a protection function). However it apparently recognizes "protection" positions though their scope has not yet been spelled out, cf. e.g.ECtHR of 08.07.2004, 53924/ 00, n. 78 and passim; ECtHR, EuGRZ 1995, 530 (533).

[17] Of course, there are cases, though they are not numerous, in which the ECJ has declared EU legal acts void for formal reasons, e.g. due to a lack of legislative competence. But there does not appear to be any case in which the ECJ has ever required the EU to enact legal provisions against their will.

[18] For details, cf. Ekardt/ Susnjar, ZG 2007, 134 ff.

[19] Cf. e.g. EGMR, Urt. v. 21.01.2009, III. Kammer Bsw. Nr. 67.021/01.

[20] Consequently, the debate about EU environmental fundamental rights is currently focused on this provision, cf. e.g. Jarass, EU-Grundrechte, 2005, § 34 n. 1 ff.; Uerpmann-Wittzack, in: Ehlers (Ed.), Europäische Grundrechte und Grundfreiheiten, 3d Ed. 2009, § 3 n. 19.

[21] Cf. ECtHR, NVwZ 2008, 1215 ff.

abstract and general norm[22].[23] Thus, in the following we will test and analyze a somewhat altered interpretation of existing law (based on judicial interpretation, i.e. by interpreting fundamental rights, not on policy considerations à la "suggesting a legislative change of the catalog of fundamental rights"). But what could an intergenerationally and globally extended, i.e. better complying with the requirements of sustainability, interpretation of freedom and fundamental rights look like to be more precise than the rather vague discussion of an environmental fundamental right?[24] In deviation from the probably prevailing view in Germany, on closer examination we can notice that the wording and the systematic position of the fundamental concept of freedom, which is implied in the fundamental rights, in the German Basic Law and in the ECFR–as well as ultimately also in the ECHR–suggest a more complex interpretation than previously, which has important implications in the climate context.[25] Therefore, the resulting findings can ultimately be applied to any national or transnational human rights protection–also–against climate change.

2. Intergenerational and global scope of fundamental rights, protecting the conditions of freedom, and multipolarity of freedom

The starting point for our considerations is the idea of liberties as classical-liberal guarantees of self-development. So far there is no need to criticize the prevailing view. In addition, free-

[22] Even in the exceptional case where the written law rules differently–cf. Sec. 31 para. 2 German Federal Constitutional Court Act (BVerfGG) – the resulting general norm's only content is that a legislative act in its specific formulation is declared void (here based on an action for an abstract legal review (abstrakte Normenkontrolle). Thus, once again, the final judgment concerns only a specific constellation (although this can be done "wrong," too, in a liberal-democratic system, normally such a decision should nonetheless be recognized, since the alternative is even less desirable in terms of freedom: for it would ultimately be some kind of anarchy). However, it is by no means prescribed abstractly and generally, e.g. in the context of Sec. 31 para 2 BVerfGG, that there was no need in every court proceeding and in every application of the law to search again for the "right" interpretation of the law.

[23] Laws, regulations, constitutions, etc. remain the only abstract and general norms. Nevertheless it is acceptable that the practice often turns to existing judgments, because (and only) in the event that no substantial grounds be argued in favor of a change of legal opinion, the burden of argumentation bears on the party challenging the existing legal opinion from previous case law (inter alia for reasons of legal certainty), cf. Alexy, Theorie der juristischen Argumentation, 2d Ed. 1991; on the rationality of the application of the law and the methods of legal interpretation, see Ekardt/ Beckmann, Verwaltungsarchiv 2008, 241 (244 ff.).

[24] We could often extend the following arguments by previously establishing that freedom or the underlying principles of human dignity and impartiality are the universal - and sole – basis of a just basic order. For reasons of space, this is omitted here. On details, cf. Ekardt, Theorie, §§ 3-6; similar in his basic orientation Alexy, Recht, Vernunft, Diskurs, 1995, 127 ff.; partly also Habermas, Faktizität und Geltung, 1992, 109 ff.; Ekardt a.a.O. also on the differences particularly to Habermas and Rawls, A Theory of Justice, 1971. as well as on the fact that only those constitutional theories show why a constitution like the German Grundgesetz is right–and what the meaning of its fundamental concept (human dignity), from which other findings can be derived, is (of course, regarding the meaning of dignity, there is other often overlooked constitutional evidence; see below in detail).

[25] The issue here is thus an interpretation of all fundamental rights. The rights of equality which do not seem to fit are ultimately special protections of the same / equal freedom and thus do not contradict the following considerations.

dom also has an intergenerational[26] and global[27] dimension.[28] Why? In a nutshell[29]: At their point in life, young and future people are of course people and therefore are protected by human rights–today this already applies to people in other countries. And the right to equal freedom must be directed precisely in that direction where it is threatened–in a technological, globalized world freedom is increasingly threatened across generations and across national borders. Therefore it is clear that fundamental rights also apply intergenerationally and globally, i.e. in favor of the likely main victims of climate change–even though this issue has never been addressed in case law so far.

The classical-liberal understanding of freedom, which is mainly focused on the economic freedom of those living here and now, must be supplemented in other points, too. E.g. liberties must be interpreted unambiguously in a way as to include the elementary physical freedom conditions–thus not only a right to social welfare, as it was recently acknowledged by the German Federal Constitutional Court[30], but also to the existence of a relatively stable resource base and a corresponding global climate. For without such a subsistence level and without life and health, there is no freedom.[31] This fundamental right to the elementary conditions of freedom is explicitly provided to the extent life and health are concerned (see Articles 2 paragraph 2 GG; 2, 3 ECFR; 2, 8 ECHR). In all other cases it must be based on the interpretation of the general right to freedom. Contrary to the prevailing view I argue that the German Article 2 paragraph 1 GG has a counterpart in Article 6 ECFR as a general EU right to freedom (using a interpretation in accordance with its wording. The same is true for Article 5 ECHR and other similarly structured bills of rights. At least parts of a general right to freedom are also indisputably included in the right to privacy under Article 8 ECHR.–Based on what has been said so far, this right to life, health and subsistence also applies intergenerationally and globally and is the subject of human rights protection against climate change.

"Protection of freedom where it is endangered" also means that freedom also includes a right to protection (by the state) against fellow citizens (and not only in exceptional circumstances). This is a protection for example against environmental destruction which is threatening my freedom and its conditions, such as climate change, *by the state against my fellow citizens*. Without that point there would be no human rights protection against climate change since states are not the primary emitters of greenhouse gases. The problem rather lies in the fact that states tolerate or approve greenhouse gas emissions by private actors. This particular idea

[26] With a partly similar reasoning, cf. also Unnerstall, Rechte, 422 ff.; Similar in his basic tendency but without more detailed reasons, cf. e.g. Kloepfer, in: Gethmann/ Kloepfer/ Nutzinger (Ed.), Langzeitverantwortung im Umweltstaat, 1993, 22 (26 ff.); Murswiek, Die staatliche Verantwortung für die Risiken der Technik, 1985, 212; with more details, cf. Ekardt, Theorie, §§ 4, 5; the arguments are apparently ignored by Eifert, Kritische Justiz 2009, Beiheft 1, 211 (214) (thus falsely stating a weakness of reasoning.

[27] In this direction also Giegerich, EuGRZ 2004, 758 f.

[28] To be precise, fundamental rights of future people are not current rights, but their nature is that of "pre-effects" of future rights. This, however does not or not significantly alter their relevance; see in details Unnerstall, Rechte, 52 ff.; cf. also Ekardt, Das Prinzip Nachhaltigkeit, 2005, Chap. III.

[29] In more details on the three main arguments, cf. Ekardt, Theorie, § 4; partly cf. also Unnerstall, Rechte, 422 ff.

[30] Cf. BVerfG, Urt. v. 09.02.2010, http://www.bverfg.de/entscheidungen/ls20100209_1bvl000109.html?Suchbegriff=Hartz+IV

[31] The international trend toward "social" fundamental rights to the various facets of the minimum subsistence thus has a theoretical justification. Such a "constitution of international law" can be derived from the legal source of the "general principles of law" (cf. Article 38 of the ICJ-Statute) without recourse to, e.g., the International Covenant on Economic Social and Cultural Rights; cf. Ekardt/ Meyer-Mews/ Schmeichel/ Steffenhagen, Welthandelsrecht und Sozialstaatlichkeit – Globalisierung und soziale Ungleichheit, Böckler-Arbeitspapier No. 170, 2009, 42 ff.

need be explained in detail since it is not commonly articulated, as has been indicated above. But if fundamental rights *equally* included a protection of freedom against the state, but also by the state against fellow citizens and, therefore, conflicts of interest of any kind must regularly be understood as multipolar (not bipolar) conflicts of freedoms (*multipolarity*), then this would rebut

a) the traditional, more objective, status of fundamental rights protection (protection obligations instead of protection rights, thus non-actionable duties!)

b) the traditional imbalance between defensive and protective side of fundamental rights, i.e. the regular elimination of protection obligations, unless there is a case of "evident insufficiency" (understood as something which realistically never occurs, namely the complete absence of regulation in an area of law). This includes the idea that an effect on third parties might be a mere "reflex" which was not even covered by the scope of fundamental rights).

c) Multi-polarity would equally refute the assumption, which builds on the view in a) and b), that the protective side of the fundamental rights is almost entirely taken up with administrative norms, which are supposedly subject to wide legislative discretion, and is not of significant importance either with regard to standing in administrative cases nor regarding the application of substantive law ("Primacy of the (simple) law" is a rather modest description of these far-reaching conclusions[32]). This aspect refers to the fact that, so far, commonly, particularly in Germany, protection rights are not considered a yardstick for individual activity with relevance to the climate, such as the approval of a coal power plant or a lignite open-cast mine.

What are the arguments for multipolarity and how can we respond to certain well-known counter-arguments? In the following I will discuss whether protection rights exist regarding only the scope of fundamental rights (which would trigger standing in administrative and constitutional law cases). The details of necessary balancing (which will e.g. determine how much weight fundamental rights will have when interpreting substantive administrative law, e.g. discretion, in light of those rights) will be analyzed later on. This clear distinction between scope of fundamental rights and balancing differs significantly from case law which rarely clarifies whether its skepticism about protection (fundamental) rights refers to issues of standing, scope or restrictions of fundamental rights (this remains unclear even in the–ephemeral–recourse to protection (fundamental) rights in cases of administrative law).

First, the multipolarity of fundamental rights follows from the very idea of freedom, which is the center of liberal-democratic constitutions–and, as indicated in a footnote, as a philosophical necessity. Fundamental rights as elementary rights are intended to give firm protection against typical hazards for freedom. For hereby they realize the necessary *autonomy of the individual* which is embodied in the principle of dignity. This autonomy is not only threatened directly by the state, but also by private actors, whose actions are "only" approved or tolerated by the state. To dispute this statement, one would have to argue, e.g., that the construction of

[32] A pure "primacy in application" would be perfectly acceptable if the fundamental right was balanced correctly, and this balance was "codified" as a "simple law." But this assessment, whether the fundamental right was indeed correctly implemented into the law, shall not be omitted if fundamental rights do apply generally, cf. Ekardt/ Schmeichel, Zeitschrift für europarechtliche Studien 2009, 171 (176 ff.) (analyzing the issue of "final harmonization of a legal domain by EU secondary law.").

an industrial plant is relevant to the freedom of the operator but not to the residents' freedom. The classical-liberal thinking, in fact, tends to such an assumption. This view has also been adopted by the current case law. But the very purpose of a liberal state is to allow a balance of conflicts as *impartial* as possible, i.e. independent of special perspectives, and not to prefer a specific (e.g. more economically oriented) life plan. All this shows that protection rights do exist, that defense and protection are equally important–and that we should speak of protection rights, not obligations, since otherwise the equality would just not be recognized.[33]

Second, the multipolarity of fundamental rights appears in limitation or balancing provisions such as Article 2 paragraph 1 GG or Article 52 ECFR[34] which are also presumed at several instances in the ECHR: As paradigmatic defining principles of liberal-democratic bills of rights these norms also, more practically, prescribe that the freedom of action is limited by "the rights and freedoms of others." The European "constitution" (here) in the form of the ECFR and the ECHR as well as the German Basic Law thus assumes that if the state resolves specific conflicts, not only different interests but explicitly different fundamental *rights* clash.

The *third* argument is the wording of provisions such as Article 1 paragraph 1 sentence 2 GG or Article 1 ECFR which have been briefly referred to above. Public authorities shall "respect" and "protect" human dignity and also the liberties, which under Article 1 paragraph 2 GG ("therefore") exist *for dignity's sake*, and thus must be interpreted according to its structure. This relation ("therefore") can also be found in the materials of the ECFR. In addition, the double dimension ("respect / protection") of human dignity and *therefore also of the fundamental rights*–given the function of dignity as a reason for all human rights[35] which was just described–shows that freedom can be impaired by threats from various sides and that, therefore, it implies defense and protection. But most of all, the word "protect" would lose its linguistic sense if it only meant that the state shall not exercise direct coercion against the citizens (otherwise the state could simply retreat to not acting at all instead of "protecting"). Hence norms such as Article 1 paragraph 1 GG and Article 1 ECFR also imply a protection against fellow citizens. And defense and protection are linguistically on equal footing there. All this implies again that there are fundamental rights of defense and protection and that protection and defensive rights must be equally strong–and that we should speak of protection rights, not of somewhat less strong mere protection obligations. This holds true even though (in the interests of an institutional system based on democracy and a separation of powers, which is indeed the most effective protection of freedom) this "protection" cannot be understood as a direct effect of fundamental rights among citizens, but as a claim against the state for protection (see, specifically Article 1 paragraph 3 GG and Article 51 ECFR).

In Germany, many would respond that the protective function of fundamental rights could only be an objective function which cannot individually be claimed and without any real equality, since it was based on the doctrine of fundamental rights as an (also) objective order of values (Wertordnungslehre) as it was developed by the German Federal Constitutional Court. But this argument is unconvincing. First, it does not refute any of the arguments given

[33] Incidentally, "protection" as defined in this argument can also consist in granting a benefit to an individual, such as a monetary payment to secure a minimum level of subsistence.

[34] On details of the latter provision, *see* Ekardt/ Kornack, ZEuS 2010, 111.

[35] Article 1 paragraph 2 GG as well as the title of this section-and also the materials on the ECFR-talk about "human rights." Thus not only "some" rights are based on dignity, as one might respond, but all of them. Therefore, the structure of human rights, i.e., "equal respect and protection" applies to all and not just some human rights.

above. Second, the Constitutional Court's doctrine of the order of values is diffuse regarding its content and ultimately untenable–thus it cannot justify a (different) understanding of protection. The order of values doctrine is not itself a justification for anything, but merely an assertion that fundamental rights are not only defensive rights, but also have other, though limited in their strength, functions. Therefore, this doctrine is a mere claim which needs to be proved first to be convincing. The Federal Constitutional Court has never given any reasons for its order of values doctrine–beyond a rather vague reference to an "overall picture" of fundamental rights and national objectives.[36] The idea of fundamental rights as a mere "objective order" also contradicts the individualistic nature of fundamental rights. How could it be justified that some fundamental rights are not of a subjective nature and thus are not enforceable–especially after considering the arguments given above?

Certainly unconvincing is the complete negation of the protective function of fundamental rights as more or less clearly insinuated by representatives of the Böckenförde school of thought[37]. That position seems to be based on the non-realizable hope of finding "certain" results through an interpretation which is limited to pure defense aspects ("less conflicts of standards = less balancing"). But there will never be such certainty. This is not only true because of the terminology of basic orders which consists of unclear terms such as freedom or dignity. Via the instrument of constitutional interpretation those terms infect the entire determination of the law. It is also true because of the general semantic frictions of interpreting norms (especially of the teleological interpretation) and because of the general normative character of legal standards, which excludes the possibility of a "fact-analog observing" of the right norms/ interpretations of norms/ judgments.[38] The decisive factor is rather the nature of the test for limitations of fundamental rights which must inevitably be undertaken in any case of an interference with fundamental rights and which leads, in one way or another, to balancing of the conflicting interests.[39] Most importantly, the sole focus on defensive rights misconceives the multipolarity of freedom and the respective arguments put forward. And it ignores that the dogmatic tradition on which it is based relies on anachronistic variations of constitutionalism and liberalism as well as, ultimately, on pre-democratic German ideas and is thus quite a dubious guide to the interpretation of modern basic orders. Furthermore, one could not argue that the recognition of protection rights prescribed the citizens a particular form of the good life (or that they were required to make use of their freedom).

The preceding tried to show (I) that, and why, there must be protection rights as aspects of fundamental rights and (II) that they are subjective, individual rights. And not only this: The arguments–especially that defense and protection are mentioned side by side – also point out

[36] Cf. German Federal Constitutional Court, Vol. 4 (BVerfGE 4, 7 ff.; 7, 198 (205)).

[37] Cf. e.g. Böckenförde, Der Staat 1990, 1 (24 f. and 29 f.); Böckenförde, Recht, Staat, Freiheit, 1991, 67 ff.; Enders, in: Friauf/ Höfling (Ed.), GG, Kommentar, leaflet, before Art. 1 n. 135 ff.; into the same direction also Schlink, Abwägung im Recht, 1981.

[38] Cf. Somek/ Forgo, Nachpositivistisches Rechtsdenken, 1996, 81 ff.; Jeand'Heur, Sprachliches Referenzverhalten bei der juristischen Entscheidungstätigkeit, 1989, 11 and passim; Alexy, Theorie, 17 ff.; Ekardt/ Beckmann, Verwaltungsarchiv 2008, 241 ff. "Normative character" does certainly not mean "subjective" as was shown by the basic philosophical argument just given in the text. – Note that the concept of objectivity / subjectivity in terms of knowledge is not linked at all to the distinction between subjective rights and objective rights (which no one individually has standing to claim).

[39] This is true even if these conflicting interests are understood as mere objective legal principles and not as subjective rights. A fortiori it would apply if the protective function of fundamental rights was covered by a wide notion of defensive rights against indirect interferences with fundamental rights.

that (III) defense must be on an equal footing with protection.[40] Another argument in favor of the second and the third aspect is the long-standing criticism of and doubt about the distinctness of the two functions of fundamental rights that the German case law generally assumes (and in this explicitness probably only German case law)[41]. Specifically the delineation between *defensive rights against indirect interferences* – which apply to someone who ultimately seeks protection by the state against other citizens, like protection rights–and protection rights does not seem to be reasonably determinable.[42] Superficially, the subject of the defensive right against indirect interventions is the exercise of influence by the public authorities on a citizen who in turn limits the rights of another citizen. Such a right is granted by the courts in slightly contoured but only sporadic cases (consequently, at least parts of the Böckenförde school of thought seem to be skeptical about this approach). In the case of protection rights, in contrast, the subject seemingly is a lack of or insufficiently effective prevention of private acts by the state. But how should one precisely be distinguished from another? For instance, instead of assuming protection rights in situations of indirect defensive rights one can always ask why permitting, not preventing, or participating in private acts which interfere with others' freedom should not trigger defensive rights against an indirect interference with fundamental rights (especially as, e.g., an environmental or building permit imposes obligations to tolerate on third parties). Even case law does not offer useful criteria for differentiation. Many might respond: Under defensive rights a citizen can only demand that the state does not undertake one clearly defined action (e.g. "not adopt a demolition order for my house"). In contrast, protection rights could only trigger a general duty to act (e.g. "more protection against sulfur dioxide from facility X"), the fulfillment of which must give leeway to the public authorities. But this is not true per se, as an example shows. Not only the addressee of a demolition order (direct interference) may say: "I want to get rid of exactly this order." Just as well a neighbor who is affected by a permit may say: "Down with the permit!" Each situations concern a particular action–in the latter case, regardless of whether you call this the defense of an indirect interference or a request for protection[43]. Defense against indirect interventions and protection are thus not reasonably distinguishable. Ultimately the case law probably only uses this distinction as a false justification, in order to allow one third party claim but disallow another. Such third party claims will primarily be allowed if there are economic concerns (as in the cases of public warnings).

This indistinguishability is a further argument in favor of our thesis that the classical-liberal economic freedom cannot precede "environmental fundamental rights" and thus cannot be argued against a human rights protection against climate change. At least the indistinguishabil-

[40] In favor of an equal footing cf. already (but without comprehensive reasoning) Schwabe, Juristenzeitung 2007, 134 ff.; Calliess, Rechtsstaat und Umweltstaat, 2001; Koch, Der Grundrechtsschutz des Drittbetroffenen, 2000, S. 503; Vosgerau, Archiv des öffentlichen Rechts 2008, 346 ff.; cf. also Murswiek, Verantwortung, 101 ff. (intending a synchronization of environmental use and environmental protection though not by expanding the protective aspect of fundamental rights but restricting their defense aspect (when determining the scope of fundamental rights).

[41] The following objections are not refuted by the attempts of clarification in Dietlein, Die Lehre von den grundrechtlichen Schutzpflichten, 1992, 87 ff.; Gellermann, Grundrechte in einfachgesetzlichem Gewande, 2000, 452 and passim; Steinberg, Verfassungsstaat, 71 ff., 307 ff.; the same holds true for Ladeur, Die öffentliche Verwaltung 2007, 1 ff.

[42] Cf. also Dietlein, Lehre, 89 f.: „Die von der Rechtsprechung entwickelten Lösungsansätze muten zufällig und ergebnisorientiert an" – (recalling e.g. BVerfG, Vol. 39 (BVerfGE 39, 1 (42)); Vol. 55, 349 (363); Vol. 56, 54 (61); German Federal Court of Justice, Vol. 64 (BGHZ 64, 220 (222))).

[43] Incidentally, the possibility of indirect horizontal effects of fundamental rights is not called into question by the foregoing and the following, but rather affirmed, cf. Ekardt, Information, § 1 C. I.

ity is an argument against the courts' camouflaging differentiation of defensive rights against indirect interference and protection obligations in order to affirm fundamental rights in one case and largely deny them in other another (while often speaking about a "mere legal reflex" which means nothing at all: Why should it not be relevant for a fundamental right, if an interference with its scope of freedom is caused by a state decision?). All this is not altered by the tendency in the practice of (especially German) courts to deny claims of (even fundamental) rights if some kind of "public" is concerned, which is necessarily the case with respect to climate change. For whether a right is impaired, does not depend on whether others are also affected.

3. Environmental fundamental rights, democracy, separation of powers–Objections against real protection rights as misunderstandings about balancing under constitutional law

Of course, a human rights protection against climate change or a multipolar conception of freedom respectively is potentially exposed to a group of other objections, which are all related and can therefore only reasonably be treated as a whole. The gist of these objections is: Protection rights overthrew democratic parliaments, and in "protection" cases there was per se larger leeway than in "defensive" cases.[44] While addressing these, I will also explain why this criticism includes several incorrect assumptions–but why are there are nonetheless margins under the doctrine of balancing between competing spheres of freedom which need be filled in a democratic procedure. At the same time, this will outline a theory of balancing of (in this case: environmental) fundamental rights, which has also an influence on the non-constitutional law of the respective jurisdiction, in a way which will be analyzed later. Only by looking at the balancing level it becomes clear what concrete obligations of the nation states and the EU arise from human rights in terms of climate policy.

There are two relevant issues. On the one hand, it will be shown that human rights protection against climate change cannot disappear in vast political latitude, as it is currently commonly accepted. On the other hand, however, human rights protection against climate change may not avoid the question of balancing and, therefore, may not give the impression that there was no balancing issue as it is sometimes the case in the transnational discussion about environment fundamental rights. For in this debate often emerges the idea that interferences with fundamental rights were generally justified even without a detailed test of balancing procedures (this can be found in many judgments of the ECJ and the ECHR[45])–or the debate is reversed as if any interference with a fundamental right were also a violation of this right, but without any reference to case law and usually without any concrete conclusions, but rather at the level of sonorous proclamations.[46]

[44] On further objections (alleged threat of "a wave of suits" and "snooping" among citizens) cf. Ekardt, Information, § 5 A.-B.

[45] On the necessary further development of a European legal test for a violation of fundamental rights and fundamental freedoms see in more detail Ekardt/ Schmeichel, Zeitschrift für europarechtliche Studien 2009, 171 (197 ff.). On the relation of the "three constitutional courts" from a new perspective, cf. Ekardt/ Lessmann, Kritische Justiz 2006, 381 ff.

[46] These two extreme variations also dominate in the context of the debate on "WTO and Human Rights." On that debate (with an own approach) see Ekardt/ Meyer-Mews/ Schmeichel/ Steffenhagen, Welthandelsrecht, 42 ff.

So, do protection rights–and accordingly human rights against climate change–damage democracy? This raises the old question of the relationship between freedom and democracy. Not only some lawyers, but also some philosophers think (partly implicitly) that democracy even has latent priority over freedom. It is initially correct that freedom and democracy contribute to each other–as is argued for example by Jürgen Habermas.[47] A democracy which is based on certain principles, e.g., a separation of powers, however, promises greater freedom, rationality and impartiality than a "radical" Habermasian democracy, which reduces the constitutional jurisdiction to a mere control of procedures. That is precisely why constitutions just like the German Base Law are based on a separation of powers and are not structured as radical democracies. Particularly justice between generations and global justice (and thus sustainability), i.e., the freedom of young people and those living after us, are arguments against radical democracy. Since for future and young people and those living geographically far away democracy is not an act of self-determination but of heteronomy. For today they are not participants in this democracy. Against this background, first the criticism on multipolarity is incorrect which assumes that a liberal-democratic constitution implied a kind of omnipotent parliament (which would exclude multipolar rights since they impose additional limitations on legislation and administration). This is not demanded, but rather a system of balance of powers in the interests of the best possible protection of freedom and of a maximum of rationality and impartiality.[48] The public authorities' task is to protect these very principles. A separation of powers at the national and at the European level as well as the existence of strong constitutional courts underline that the respective parliament is in fact not supposed to be omnipotent. This then leads to a democracy which is not a principle opposing freedom, but a principle resolving conflict *between* freedoms. This function makes it reasonable to have further conflict resolving institutions, e.g., courts. All this is particularly true if it can be shown that freedom may only be restricted to enhance freedom or freedom conditions–of which the elementary above that were proven just as in the climate context relevant, may be subjectivized, the other conditions which only support freedom (such as supporting the arts or kindergartens) is not.[49]

Up to this point we have seen several things, sometimes even before explicitly discussing the concept of democracy: *Even without multipolarity democracy has its boundaries anyway. It is always necessary to balance conflicting interests anyway. And the analysis of the functions of fundamental rights has also shown that necessary defensive and protection constellations do not differ per se.* Now, we have to make further considerations. In balancing conflicting posi-

[47] In the Kantian respectively liberal democratic theory of justice, freedom and democracy both follow from the principles of human dignity and impartiality (the latter principle is also sometimes called principle of universalizability or categorical imperative, with a slightly different meaning). These principles are in turn understood as required by rationality or reason respectively. Die Überhöhung des Demokratieprinzips bei Habermas, Faktizität, S. 109 ff. und 537 ergibt sich teilweise daraus, dass er anders als Kant oder Rawls das Menschenwürde- bzw. Autonomieprinzip nicht aus der Rationalität folgen lässt, sondern als dogmatisch gesetzt sieht.

[48] See the remark and the reference in footnote ... on the validity of the Kantian thesis: that universal rationality demands freedom (and a democracy with separated powers) on the basis of human dignity and impartiality. This thesis (including all that can possibly be derived from it, such as protection of freedom conditions and balancing rules) withstands any, particularly post-modern constructivist, criticism. This is the only thing that rationality demands in the fields of morals and law.

[49] Cf. in details the references in footnote ... In contrast, e.g., Alexy, Recht, 127 ff.–and certainly Habermas, Faktizität, 109 ff.–apparently do not limit the number of possible concerns which democratic politics can consider as relevant interests. My approach, on the other hand, excludes a protection of a person against herself or an invention of public authorities into areas of the good life–which should be in line with liberal democracies (a fact that is rarely stated or even justified clearly).

tions, a parliament has, in fact, a certain prerogative to the judiciary, albeit not an absolute one. Because whenever balancing of conflicting interests may lead to a number of different results–and this is the norm–a decision maker which is elected and can be deselected is the most rational and freedom supporting alternative: thus a parliament and not a court. The parliament, however, must remain within the limits set by the rules of balancing which can be deducted from the very fundamental rights (you can also call it a multipolar test of proportionality substantiated with further rules[50]). We will get back to some of these rules in more detail. The problem with the existing German debate is that many people erroneously conclude that since there is usually not "precisely one" result of balancing (optimally even identified by quantification and calculation in economic terms) there were no multi-polarity (i.e., not equality of defensive and protection rights) and no further rules of balancing beyond appropriateness/ necessity.[51] We shall see that this is not true. In any way, what has been said above holds true equally for and independently of the political or legal area one is considering. The decision on the right laws in regarding security and anti-terror policy (which unquestionably commonly has been held a question of fundamental rights) just does not follow different rules than climate change policy which is the subject of our analysis. The legislature may make different choices, and the task of constitutional courts is (only) to control the framework of those decisions based on a set of balancing rules which are derived from the very liberties. The issue is always that some institution of control such as a constitutional court reviews the adherence to rules of balancing. Afterwards, the legislature may react by (partly) altering the constitution. Or the issue is that another institution of control such as a non-constitutional court assesses compliance with the legislative will by the administration or compliance with rules of balancing when such balancing has been passed on to the administration, etc.

Working out the details of the rules of balancing, the balance of powers becomes even less focused on jurisdictions and judicial decisions than previously (where the German Federal Constitutional Court or the European Court of Justice may ultimately decide ad libitum, whether parliaments shall have wide, limited or–as in the abortion decisions–"no" discretion). The aim must be a ping pong, which multipolarily supports freedom (one the one hand preventing abuses of power, on the other hand regarding democracy as a shield for freedom) and is also adequate in terms of impartiality, with a "multiple-level discourse," which in turn supports rationality since it mobilizes a maximum of good reasons, among the state powers. First, a constitutional court may never order a judgment against a parliament stating "You have to do precisely this." Contrary, it must always limit its decisions to saying "At least you must not continue doing this." For instance, the German Federal Constitutional Court may not demand from the German Bundestag–to use a key example of climate protection: "Phase out the use of coal power within four and a half years." It may say: "The previous phasing out is too

[50] Similar, see Calliess, Rechtsstaat, 373 ff.; Susnjar, Proportionality, Fundamental Rights, and Balance of Powers, 2010.

[51] Prominently, cf. Böckenförde, Staat, Verfassung, Demokratie, 1991, 188 ff. and passim. The position of the German Federal Constitutional Court is unclear. Sometimes it proceeds like the ECJ with respect to balancing (basically just testing for a legitimate purpose–very generously–, appropriateness, and necessity). But sometimes it operates on a (larger) volume of balancing rules as it was proposed in this essay. Finally, sometimes the BVerfG seems to dictate "precisely one" balancing results to the legislature (e.g., with respect to the protection of embryos). This is another consequence of the unclear protection theory of protection obligations; critical Steinberg, Neue juristische Wochenschrift 1996, 1995 ff.; Susnjar, Proportionality, passim. See specifically on the issue how in a few cases (though not from the principle of human dignity) total prohibitions of balancing may be inferred, e.g. Ekardt/ Kornack, Kritische Vierteljahreszeitschrift für Gesetzgebung und Rechtswissenschaft 2006, 349 ff.

slow; take a new decision on the issue until XX.YY.2010, taking into account the following fact situations, normative concerns, as well as procedural and balancing rules." Conversely, the constitutional court could rule on an action brought by an energy company: "Of course, the legislature may phase out nuclear power generation–but it must remain within a certain limit which it has crossed unfortunately, as it has demanded phasing out the use of nuclear energy within three days." Such a line that neither takes away the prerogative from the parliament nor gives the constitutional court excessive, unclear power allows all state powers to function as good as possible regarding their respective tasks defined by freedom, democracy, impartiality, and rationality. This is all the more true as the ping pong also includes the administration and the lower courts, as just outlined by the brief introductory note on the "passing on" of balancing by the legislature. It allows authorities to respond to a court decision with new decisions, which then in turn are subject to judicial control. The same is true with respect to the legislator and the constitutional jurisdiction. And the legislature may also react on decisions of lower courts with legislative changes, etc. This creates a complex web of competences for concretization and control.[52] It follows from the stated principles that courts are limited in their review of issues of normative balancing, difficult interpretations of the factual requirements of norms, and uncertain questions of fact–in contrast, their review is not restricted with respect to simple interpretations of the factual requirements of norms, issues of procedure, and certain facts.[53]

The coal example shows that in complex situations such as climate change the defensive aspect of fundamental rights is by no means "clearer" than the supposedly more sophisticated protection aspect. For example, the legislature may allow for the "defensive" rights of utility companies in very different ways if it wants to phase out the use of coal (or nuclear energy). It may determine equitable compensation, grant transition periods, etc. And the same holds true for possible claims for protection–it can deactivate all nuclear power plants, otherwise build them safer, take stronger protection against terrorist attacks, etc. This complexity, however, is independent of the respective function of fundamental rights. And regarding both "defense" as well as "protection," if these functions exist at all, it is clear: In a democracy based on the separation of powers, laws for more climate protection and sustainability need be made by parliament, not a court.[54] Nevertheless, considering the foregoing we can state that a human rights protection against climate change does exist in principle–and that it does make sense to imagine such judgments of constitutional courts.

III. Climate protection as an issue of balancing conflicting fundamental rights

[52] A basic, but frequently encountered misconception is, after all, to express that courts themselves had to undertake balancing (although the legislature only sporadically "passed on" such balancing to the courts, e.g., to the civil courts for the concretization of civil general clauses in light of conflicting rights–a constitutional court may then only review whether the civil court complied with the rules of balancing in its decision). This is not sufficiently clear, e.g., in Hofmann, Zeitschrift für Umweltrecht 2007, 470 (471 f.).

[53] Cf. in more detail, Ekardt, Information, § 5; Ekardt/ Schenderlein, Neue Zeitschrift für Verwaltungsrecht 2008, 1059 ff. (focusing on aspects of European law).

[54] Therefore, judgments like those of the German Federal Constitutional Court regarding protection of embryos or family taxation are problematic; cf. in particular BVerfG, Vol. 39 (BVerfGE 39, 1 ff.; 88, 203 ff.) Thus, perhaps a constitutional court should never repeal laws, as the House of Lords in Britain does (including the use of demand for reconsideration instead of cassations in so-called defense cases). At least it should be true to regard the repeal of a law as an exceptional case which requires further reasons–and otherwise order the parliament to alter a law instead of repealing it or dictating the wording of the alteration.

1. Rules of balancing, precaution, and the problem of "absolute" minimum standards

On this basis and in consideration of possible political balancing we can further develop the specific obligations that eventually bear on politics regarding climate change. Only after determining what remains of the commitment to climate protection that was derived before, it becomes clear what judicially enforceable obligations politics has in terms of climate change.[55]

As already mentioned, with respect (also) to (environmental) fundamental rights balancing is inevitable, and in general it is nothing sensational. To put it somewhat more plastic: Since politics allows an industrial society, industrial facilities, approve traffic permits, etc., it knowingly accepts statistical deaths, i.e. impairment of the right to the elementary conditions of freedom as a result of emissions of air pollutants, etc. This is done balancing those interests with our freedom to consume and the economic freedom of the consumers. Usually the camouflaging term stochastic damage is used in this context. It means statistical cases of illnesses and deaths that occur at least long term and in combination with other causes of damage in the wake of the way of life in the industrial society. Since there is indeed no general formula "harm no one" (neminem laedere[56]) (because otherwise almost everything else would be prohibited, for numerous human actions are in some way unfortunate for anyone) this in itself is just not scandalous. The very absurdity rather lies in schizophrenia such as "we want more climate protection and yet continuous economic growth," i.e. it lies in political compromise formula, which in fact deny the necessity of painful balancing.[57]

What rules of balancing have to be applied in particular situations may be derived from the core of liberty rights. This is shown first for the basic rule of balancing, which under the usual terminology of balancing as a proportionality test is often referred to as "legitimate purpose": that, on the one hand, the material for balancing must be complete and, on the other hand, must not contain impermissible concerns. Further reasons have been given elsewhere for the assumption that self-determination or the new interpretation of freedom, respectively–and everything that follows from it–is the only justifiable criterion of justice and the only possible subject matter of state action. If this is true, then it is also relatively easy to specify as a balancing rule, what the (only) permissible material of just balancing is: the very freedom of all people concerned which, as shown, includes the essential freedom conditions. In addition to these human rights such other concerns are permissible subject matters of balancing that support freedom but are no absolutely necessary requirements and, since they are not logically included in the concept of freedom, are no human rights (e.g. supporting the arts or creating spots at kindergartens).[58] In addition to the sole justifiability of the principle of freedom the

[55] The fact that theories of economic efficiency are no good alternatives to the following theory of balancing is outlined in Ekardt, in: Pan Jiahua, Climate Change (forthcoming). However, this does not rule out the quantification of facts by the legislature within (!) the rules of balancing. Within those rules(!) the legislature may also use its discretion to weigh interests subjectively within the objective limit by demonstrating that it has assigned a numerical value to normative concerns. This, in turn, is a subjective decision which is not objective at all.

[56] This is ignored in, e.g., Hochhuth, Relativitätstheorie des öffentlichen Rechts, 2000.

[57] Overall, the literature rarely developed balancing rules involving protection rights. But *see* Calliess, Rechtsstaat, 373 ff. and Cremer, Die öffentliche Verwaltung 2008, 102 ff.–On the fact that sustainability in a physically finite world (despite the potential of, e.g., solar energy) is incompatible with continuous economic growth, cf. Daly, Growth, passim; Ekardt, Cool Down, Chap. 1; Wuppertal-Institut, Deutschland, passim.

[58] Even if the reference to freedom is seldom made in this context, yet it may be common ground that those conditions that "merely support freedom" are at least no human rights–there is a fundamental right to subsistence, but no fundamental right to a spot at a kindergarten. Despite its new grounds and new terminology this statement is in line with the common German debate on the welfare principle (Article 20 paragraph 1 GG): The idea of

foregoing is confirmed by another consideration: it is also the only way to clarify that both authoritarian restrictions of freedom as well as an economically liberal-postmodern ignorance of freedom conditions are inadmissible. Thus, interventions on issues which do not affect the freedom of several people–i.e. regarding the good life instead–are excluded.[59] Likewise not consistent is today's practice, generally to declare "the common good" (or a "public interest") a permissible concern for balancing. For the term common good is meaningless and thus ultimately arbitrary. From the point of view of legal theory it is consequently unnecessary and potentially authoritarian.[60] Moreover, "the common good" does not reveal the main issue: everyone's self-determination. Against this background the notion of "the common good" should be removed from legal arguments and, as far as it explicitly appears in laws, be interpreted as *the protection of freedom and freedom conditions*. The most part of what conventionally is called "common good," can be called freedom condition, anyway (such as support of the arts, the non-essential part of social justice, protection of biodiversity, etc.)–the only difference is that the new concept offers clearer contours and a real justification of those concerns. This is how the notion of "the common good" could possibly be attributed in part to its original meaning: interests that deserve consideration in a just state. But that would need more accurate reconsideration and assessment–not a mere proclamation of the formula of the common good–which may also disguise the lack of real reasons (and is thus detrimental to the rationality and impartiality of public decisions). European and German law still lacks such a clear definition, of course without any justification.[61] In essence, human rights protection against climate change deals with a collision of the fundamental rights to the elementary conditions of freedom with economic liberties, as for example governed by Article 2, paragraph 1, Article 12, paragraph 1, and Article 14, paragraph 1 GG. Of course, economic freedom is a recognized concern of national, European, and international fundamental rights.

Protection rights in the environmental context are not excluded from the permissible material for balancing despite the fact that climate change and (most) other environmental cases concern only hazards of fundamental rights. By the same token, the scope of protection rights is indeed affected by such hazards. Undoubtedly, future trends of climate change are not per se exactly predictable and therefore "uncertain." However, such an objection would fail, because impairments of fundamental rights which are "only possible" are *not* irrelevant at least with respect to particularly important fundamental rights and under the threat of irreversibility of the "possible" infringement. This is true even though German case law seems to implicitly presuppose such irrelevance by considering precaution (i.e., "risks" or "uncertain impairments") mostly non-actionable–in contrast to European case law.[62] Otherwise, fundamental

"subsistence" is necessarily limited, be it in social or environmental terms. However, (in Germany and the EU) the freedom conditions of living and health are already explicitly labeled as fundamental rights. The discussion whether a marginal area of health "is essential and therefore covered by the scope of fundamental rights" would thus be of little practical relevance.

[59] In more detail on a partially similar theory of balancing rules (but with different standards and a justification of those standards which is rather based on the rule of law than liberties, which makes their derivation more difficult and consequently decreases the gain in clarity of balancing rules), *cf.* Susnjar, Proportionality, Chap. 5.

[60] On this issue and the following, see with further references Ekardt, Information, § 1 E. (also on the authoritarian or even totalitarian legal history oft he term); on the other hand, for attempts to keep the notion as a (non substantive) formula for necessary balancing and procedure, *cf.* Häberle, Öffentliches Interesse als juristisches Problem, 1970; Uerpmann, Das öffentliche Interesse, 1999.

[61] *Cf.* Grabenwarter, EMRK, 4th ed. 2009, § 18 n. 12 f.

[62] Instead of many, cf. BVerwG, Neue Zeitschrift für Verwaltungsrecht 1995, 995 ff.; overlooked in Couzinet, DVBl 2008, 760 ff.; differentiating Calliess, Rechtsstaat, 244; on particularities of the discourse about hazard control and precaution, *cf.* Ekardt/ Schmidtke, Die öffentliche Verwaltung 2009, 187 ff.

rights would no longer serve the very purpose of legal fundamental rights: to guarantee the protection of autonomy exactly where autonomy is threatened with impairment. And such impairment does not primarily come from public authorities. Furthermore, risk and precaution are not reasonably distinguishable, as is proved elsewhere.[63] It should also be recalled that the recent climate change projections could not only be "too pessimistic," but rather, as elsewhere stated, that there are indications that the climate change predictions so far have even been too optimistic–and that therefore looming human rights impairments caused by climate change might be more dramatic than previously thought.[64] Likewise, it should be noted that because of the extinguishing fossil fuel resources regardless of climate change many climate measures (such as the expansion of renewable energies) are and remain reasonable. Thus we have to agree to some rulings by the German Federal Constitutional Court holding that there is also a fundamental rights protection against "only possible" impairments of fundamental rights.[65] However, it need by critically emphasized that the German Federal Constitutional Court has so far only abstractly recognized this idea but in all concrete cases decides actions de facto as if "uncertain predictions" per se led to a loss of fundamental rights protection. For it regularly grants the legislature an almost arbitrary decision-making power as to whether and to what extent an action is required in cases of uncertain impairments of fundamental rights. However, in light of the above mentioned arguments in favor of precaution this is not convincing. Rather, precaution is generally required and can only be omitted as far as the rules of balancing, which have to be discussed in more detail, allow. The following paragraphs will briefly introduce some of these balancing rules. Later on, we will determine to what extent they give rise to the obligation of a more demanding national and transnational climate policy.

The well-known balancing rules of the proportionality test, appropriateness and necessity of a limitation of freedom in favor of the interests of other stakeholders, directly follow from the multipolar principle of freedom: Indeed someone's freedom may not be limited, if it is not for the benefit of someone else's freedom. Adequacy as the last step in the conventional proportionality test may also be understood as an umbrella over a number of other balancing rules, which also follow from the principle of freedom. One of those rules is that a concern may not evidently be set aside too unilaterally in favor of other interests. This again follows from the idea that freedom should be maximized in total, even though it does not rule out "deadly" balancing in a specific case if a conflict cannot be resolved differently.

Another balancing rule, which can also be applied under the heading of adequacy is the polluter pays principle, which in turn follows from the principle of freedom itself. For freedom must include responsibility for the foreseeable (including environmental) consequences of one's own actions–even in other countries and in the future, and also for the unpleasant consequences of one's own life plan.[66] The negative consequences of an action which otherwise benefit me (e.g., of cheap free movement today) must always fall back on me, if only by way of cost recovery for the damage created by that action.

[63] *Cf.* Ekardt/ Schmidtke, Die öffentliche Verwaltung 2009, 187 ff. (also on the further issue that the majority view in Germany incorrectly measures fundamental rights according to the average man, e.g., when gathering the facts about the risk of a pollutant it considers a 40-year average male (and thus ignores weaker people, such as pregnant women, elderly, or children); cf. also Böhm, Der Normmensch, 1996.

[64] *Cf.* with further references Ekardt, in: Pan Jiahua, Climate Change (forthcoming).

[65] *Cf.* German Federal Constitutional Court, Vol. (BVerfGE) 49, 89 (140 ff.); 53, 30 (57); 56, 54 (78).

[66] The polluter pays principle is indeed mentioned in, e.g., BVerfG, Vol. 115 (BVerfGE 115, 118 ff.). However, the recourse to this topos always appears somewhat arbitrary and not systematically derived.

Yet another balancing rule is that the assumptions of underlying facts must be correct. Every decision must, for instance, be based on the latest climate research in order to understand what dangers threaten the freedom of future generations. It is essential that facts are relevant material for applying a norm and determining the degree of impairment of a concern, but that those statements of fact as such (!) do not have a normative meaning: the actual danger posed by aircraft noise to the health of local residents, for example–on which scientific discourse and surveys can be undertaken–does not logically automatically imply whether and to what extent this noise must be prevented. The decision under the rules of balancing is thus always a political-democratic and not a scientific one.[67] In situations of uncertain facts such as climate change, there is also a duty to make preliminary decisions and to review them later. This latter rule also appears in previous case law, but again not as a claim of protection of fundamental rights but only as objective obligation. And in environmental cases it is always only proclaimed in the abstract, but never specifically demanded.[68] This, too, deserves criticism.

After all, the decision for or against a reasonably effective climate policy is not left to the discretion of majorities or sovereign states, even though this may be a widespread view. The common political idea that, e.g., security policy is a human rights issue but climate change is not, is inaccurate. However, if balancing is allowed, even necessary, and regarding environmental law potentially fatal (e.g., even a "weaker" form of climate change will result in fatalities), this raises the question whether (here: environmental) fundamental rights yet do have an "absolute" core which is safe from any balancing[69]. Article 19 paragraph 2 GG does not shed any light on this issue. Although this provision guarantees the substance of fundamental rights, this does not necessarily mean that in every situation an absolute core of every fundamental right must remain for everyone.[70] German case law in turn disposes of the problem simply by factually inaccurately insinuating that the described problem of stochastic damage, which will be characteristic especially for climate change, does not exist. In any case it assumes that no threats could be diagnosed in "short term" (which is usually true but just passes on the problem).[71] In the area of security law, on the other hand, the judiciary sometimes attests absolute, substantial minimum standards which are not subject to balancing, as recently illustrated in the Aviation Security Act case (the case in which the German Federal Constitutional Court rejected the authorization in Section 14 paragraph 3 Aviation Security Act to bring down planes with "innocent" passengers which are converted by terrorists into attack

[67] From a climate-is never follows an ought. It does not follow from facts what should be done in life. On the distinction of is and ought and the specific relevance of facts and factual uncertainty in balancing (and generally in legal and moral decisions) see also Ekardt/ Susnjar, Jahrbuch des Umwelt- und Technikrechts 2007, 277 ff.

[68] BVerfGE 24, 119 ff.; 3, 303 ff.; 39, 1 ff.; 39, 160 ff.; 53, 30; 77, 170 ff.; BVerfG, NJW 1996, 651; cf. also Meßerschmidt, Gesetzgebungsermessen, 2000.

[69] Unfortunately the term "absolute" instead of "not subject to balancing" is often linguistically wrong used as a synonym for "universal." As indicated in footnote ... the idea of freedom is indeed universally valid. But since all men have their own freedom, it does not mean that this universal freedom is an "absolute" freedom which is not subject to any balancing. Curiously enough, the debate on torture and absoluteness of human dignity started precisely on this confusion: during one of his lectures no lesser than Niklas Luhmann presented the example of the caught terrorist who has hidden a ticking nuclear bomb in a city to refute the universality of human rights. The question in this example is whether one should torture the terrorist to get the required information. Unfortunately, Luhmann has at best refuted the absoluteness of human rights–but has also unintentionally documented that the Grand Master of sociological systems theory (who liked to highlight his jurisprudential "background knowledge" based on his studies) is not able to keep apart basic categories of legal theory.

[70] On the controversy about Article 19 paragraph 2 GG with further references, see also Hochhuth, Relativitätstheorie, 150 ff.

[71] *Cf. e.g.* German Federal Administrative Court (BVerwG), NVwZ 2006, 1055 ff.; Vol. 87 (BVerwGE 87), 332 (375) (regarding aircraft noise).

weapons, e.g., against nuclear power plants).[72] At closer inspection, however, the normative theory of the Aviation Security Act case seems hardly justifiable and therefore not transferable to the law of climate protection:

First, a striking inconsistency catches the eye: There is no way to justify that shooting down an aircraft with passengers who are doomed anyway should be prohibited in all (!) circumstances (even if doing so could avoid an–uncertain, but possible[73]–worst-case scenario) and the sacrifice at worst of hundreds of thousands of people on the ground should be required– and conversely that the legislature should have complete discretion, although (according to the European Commission) each year 310,000 deaths from particulate matter are accepted, just because fellow citizens do not want to purchase somewhat more expensive cars, heaters, etc. with appropriate filtering techniques (also there are no serious uncertainty of environmental health knowledge regarding the carcinogenicity of particulates).[74] As shown above, the distinction of defensive and protective rights can justify these differences. The same holds true for the mere allegation that there was no fundamental rights protection against uncertain impairments. Also it does not help to point to the support of "a broad parliamentary majority" (wherever such a statement would fit in the fundamental rights dogmatic), since there is (or at least was) a broad parliamentary majority support in Germany and Europe for both policies, on particulate matter and on aviation security. Even the principle of human dignity–despite widespread claims to that effect–does not imply a contrary view, as the principle of dignity on its own is neither an applicable legal norm nor could it grammatically contain the statement "absolute prohibition to treat someone as a mere means."[75] Even the somewhat helpless-looking general appeal that a society which does not strictly forbid certain things ignores the autonomy does not give very valuable insight. Do I become an autonomous individual by having a most sacred right not to be shut down in an airplane and instead dying 30 seconds later in the crash? There may indeed be absolute prohibitions of balancing. But they must be justified differently than usual. For example the absolute ban on torture can probably be suffi-

[72] *Cf.* BVerfGE 115, 118 ff.; critically, cf. Vosgerau, Archiv des öffentlichen Rechts 2008, 346 ff.; Isensee, FAZ v. 21.01.2008, 9; Ekardt/ Kornack, Kritische Vierteljahreszeitschrift für Gesetzgebung und Rechtswissenschaft 2006, 349 ff.; Depenheuer, in: Depenheuer (Ed.), FS Josef Isensee, 2007, 43 ff.

[73] The fact that a possible and not only a certain impairment of fundamental rights is relevant was explicitly the subject of the foregoing considerations.

[74] This represents 65,000 deaths in Germany alone, cf. EU-Commission, here quoted from http://www.bundestag.de/aktuell/hib/2005/2005_104/01.html.

[75] The principle of human dignity itself is not a liberty/ fundamental right/ human right. Even more, this principle is not at all created as a norm which would apply to individual cases; not even as objective law. Human dignity is rather the reason–the justification–of liberties and human rights, rather than a right itself. Therefore, it directs the application of other norms, in this case the different spheres of freedom of those citizens concerned and prescribes autonomy as a guiding principle of a legal system. The "inviolability" of dignity and its nature as "reason" for rights which can be seen in provisions like Article 1, paragraph 2-3 GG ("therefore," i.e. for dignity's sake, there are human rights) show that this is not only philosophically reasonable, but also evident from the point of view of legal interpretation. Furthermore, this finding is supported by the formulation in the materials on the ECFR which characterizes dignity as a "basis." That the ECFR materials also refer to human dignity as a "right" has to be understood against this background that human dignity is a kind of "right to rights" (Enders). On the state of this discussion, see Ekardt/ Kornack, Kritische Vierteljahreszeitschrift für Gesetzgebung und Rechtswissenschaft 2006, 349 ff. wäre hier nicht Ekardt/ Kornack, ZEuS 2010, 111 (142 ff.) interessanter?; similarly Enders, Die Menschenwürde in der Verfassungsordnung, 1997; see also Vosgerau, Archiv des öffentlichen Rechts 2008, 346 ff.; fort he opposing view, see instead of many Böckenförde, Juristenzeitung 2003, 809 ff.– The BVerfG, too, does not claim that dignity is a subjective, individual right. However, the Court seems to understand dignity as an applicable legal standard containing a ban of treating another human being as a mere means.

ciently justifiable considering results on freedom.[76] The recent decision of the German Federal Constitutional Court of early 2010 on Hartz IV is caught in the trap of seemingly "absolute" statements which yet are incorrectly reasoned from the point of view of fundamental rights theory and also very vague, largely superable by balancing, and thus practically not helpful.[77]

Another balancing rule, which is essential for a human rights protection against climate change may be called the rule of "exceptional equality." This balancing rule can be derived from our prior findings, too. It leads to the necessity of equal treatment towards future generations and people in developing countries. Substantive equality, unlike legal equality, is normally not a liberal-democratic basic requirement. In my opinion, in the case of climate change, however, the consequent application of the foregoing results in an obligation to globally distribute per capita emission rights equally. This "equal subsistence" specifically means two things: Everyone must have a minimum of energy available or must be able to make use of land, respectively (and the latter can be expected never to be completely free of GHG-emissions)–and everyone must be protected as good as possible from disastrous climate change, since this is essential, too. This also requires restrictions on the wealthy to raise the minimum for all. All this is supported by two arguments:

- Greenhouse gas emissions must be drastically reduced, while everyone needs to release at least a certain quantity of greenhouse gases–and this makes it obvious to be careful with inequalities in the distribution.
- Even more important is this: If a public good such as the climate is monetized, it seems plausible to distribute the "proceeds" to all as equally as possible–because here no one can claim for himself that he has accomplished a special "performance" in the exercise of his freedom to produce that good.

2. Subsumption of the balancing test

On this basis it follows that a constitutional court needed to make a fundamental rights ruling confirming an obligation to a more intensive climate policy. The German Federal Constitutional Court as a national constitutional court, the ECtHR as European international law (quasi-)constitutional court, and the ECJ as EU law (quasi-)constitutional court would have to determine, if concerned with the effectiveness of climate policy, that the legislature has not complied with its obligations–which can be demonstrated in the form of balancing rules–and that it has to remedy this within a given period of time. The remedy would be to bring about an effective global climate policy or, in the alternative, to press ahead on climate policy significantly more massively as EU than previously. Merging what was previously worked out, the principal human rights violations of existing climate change policy are as follows:

a) The current climate policy already disregards the balancing rule that its decisions shall be based on a correct factual basis: In particular, existing actions are probably erro-

[76] Incidentally, the Aviation Security Act case in BVerfG, Vol. 115, 118 ff. could perhaps still be considered a (barely) convincing decision, though not because of its reasoning about human dignity: Rather one could reach the same result in the Aviation Security Act case by arguing that a situation in which a terroristic act is (1.) actually detected (2.) in time is simply too unlikely to create such a law.–On the absolute ban on torture, cf. Ekardt, Wird die Demokratie ungerecht?, 2007, Chap. III D.

[77] Cf. BVerfG, judgment of 02/09/2010, available at http://www.bverfg.de/entscheidungen/ls20100209_1bvl000109.html?Suchbegriff=Hartz+IV.

neously deemed suitable to avoid the looming drastic damages from climate change.

b) Furthermore, politics has not yet taken into account in its decision making that the fundamental right of freedom has also an intergenerational and global cross-border dimension and that, therefore, legal positions of future generations and the proverbial Bangladeshis need be considered in parliamentary / legal decisions.[78]

c) Furthermore, politics must embrace the polluter pays principle. This is evidently not yet done regarding climate protection, in particular, globally and intergenerationally.

d) The essential right to the conditions of freedom, i.e. to subsistence (of those living here and now, but also intergenerationally and globally) can at most be overcome by balancing in marginal areas because freedom is pointless without this physical basis. That right also includes a basal energy access and an at least somewhat protected stability of the global climate. This in turn requires drastic climate policy measures which have not been implemented by climate policy decisions in the past. In particular it was also not taken into account that the scarce remaining emissions budget would have to be distributed equally in the face of (aa) its scarcity and (bb) the imperative nature of at least low emissions for human survival.

Against this background, we can agree to the conventional formulations of the German Federal Constitutional Court regarding environmental policy–and here more specifically climate policy. Indeed, in situations uncertain facts politics has some discretion with respect to estimations and balancing the various interests. Only in cases of "evident" excess should those democratic decisions, e.g., in Germany or the EU annulled.[79] But this can reasonably only mean that in cases of violations of balancing rules constitutional courts must remand the issue to politics for a new (climate) policy decision within the limits of their discretion and under compliance with the rules of balancing. In our context, the latter require a much more intensive climate policy oriented at an equal distribution per capita. As outlined in Section B., such a policy, however, implies greenhouse gas reduction targets of about 95% in Europe and about 80% worldwide until 2050. It may be left open whether the statement in d) should be understood to mean that climate policy must achieve exactly those targets or slightly lowered targets (or, in the light of later scientific findings, perhaps even higher targets). Similarly, in terms of the statements under c) it may be left open, whether within narrow limits there should (presumably) be exceptions to the polluter pays principle, as this principle has not at all been complied with in climate policy so far. In any case, when faced with such actions, constitutional courts must require parliaments to create new climate policies to prevent the highlighted violations of balancing rules in the future.

In any case, the allegation that the current national and transnational climate policies were quite comprehensive does not refute the fundamental rights violation by existing climate policy diagnosed above. For existing climate policy is not sufficiently adequate to the magnitude of climate problems as was documented in the statements at the beginning of the study. Moreover, those protected by human rights cannot be referred to (a) the possibility of more ambitious climate protection treaties in the future which supposedly rendered constitutional court rulings on climate policy unnecessary today. Their claims also cannot be objected by

[78] With an (in my opinion suboptimal) ex post view at liability rather than an ex ante perspective at prevention, *cf.* Verheyen, Climate Change Damage and International Law: Prevention Duties and State Responsibility, 2006.
[79] Instead of many, *cf.* BVerfG, Judgment of 07/29/2009 - 1 BvR 1606/08 -, juris n. 19.

stating that (b) a purely national or European approach could not solve the global climate problem. For (a) does not appear sufficiently probable to justify a further delay. And (b) is simply wrong, as the potential is ignored, to gradually spread an ambitious European climate policy globally by combining it with border adjustments, as was outlined elsewhere.

Similarly, the insights gained are also arguments against the assumption that measures which perpetuate the existing energy system conform to fundamental rights. This applies, e.g., to the continuation of lignite use by the approval of new opencast mines, the continuation of coal subsidies and the construction of new coal power plants. It must be considered, however, that an effective climate policy ultimately deals not so much with the prevention of individual plants but rather with a whole different approach. In principle, it is in fact up to the legislature to decide how to achieve those climate objectives which are derived from the rules of balancing.

The preceding arguments indicated that a duty to stronger climate change policies can be derived at a national, European and international level. One could consider, however, that a violation of the constitution could be prevented by an interpretation of the applicable climate protection laws in conformity with fundamental rights, i.e., by a stricter interpretation of existing law rather than a creation of new law. However, obviously this does not solve the problem. For a constitutional interpretation of laws may not go beyond their clear terms. For instance, it is not possible to derive stricter targets from the current EU-ETS or the Kyoto Protocol. Instead, as long as the legislature does not act or is not obliged to act by a constitutional court's decision, only in marginal areas where the formulations of the laws are broad one can use a constitutional requirement to apply the most "climate friendly" interpretation in order to bring fundamental rights to bear as good as possible.[80]

A final point shall be noted: The issue of the existence and scope of fundamental protection rights is neglected in the environmental discussion in favor of a total of a permanent debate on environmental class actions.[81] Even beyond provisions which allow the curing of violations or make them irrelevant and thereby often prevent a real substantive success of such actions, environmental class actions *and* individual rights to sue are only as strong as the underlying substantive law. However, below the constitution, the latter is often neither sufficiently strong, as can be seen from the still dubious environmental and particularly climate policy related overall balance of Western societies. Nor can administrative court actions for compliance with simple laws–no matter whether they are brought by environmental groups or individuals–solve another basic problem of environment protection: the creeping disappearance of environmental concerns through balancing in seemingly "unimportant individual cases," where in their entirety they add up to a use of resources and climate in Europe which is indeed not permanently and globally viable and ergo is not sustainable. This is where a revised interpretation of fundamental rights, as developed above, strengthens substantive law in a way that class actions alone can not provide (in addition, the financial and human capacity of associations, to actually bring class actions, is notoriously overestimated by friend and foe). For fundamental rights can demand stricter substantive law or bring about such law through ap-

[80] Some further effects of this new approach on administrative law are discussed in Ekardt, Die Verwaltung 2010, Beiheft 11 (forthcoming) (introducing, e.g., enhanced standing in administrative court actions and the possibility of enforcing precautionary limits).

[81] On the following in more detail, cf. Ekardt/ Schenderlein, Neue Zeitschrift für Verwaltungsrecht 2008, 1059 ff.

propriate interpretation.

IV. Judicial Review

Up to this point it has been shown that there are constitutionally compelling arguments for stronger national and transnational climate protection. At its core this is true regardless of whether we apply national fundamental rights (which would have to be claimed before the national constitutional court), EU fundamental rights (which belong under the jurisdiction of the ECJ[82]), or fundamental rights under international law (for the geographical area of Europe the ECtHR would have jurisdiction). For the basic international structures parallel those national structures. Because of the human rights basis of the argument in this essay it is ultimately not limited to Europe but applies worldwide. However, due to the absence of an international human rights court there is no instance where a specific action could be brought. However, the statements in this study are indirectly relevant to other international jurisdictions, such as the WTO courts.

Following the position developed above, every individual, perhaps correctly even those outside Germany, would be a potential claimant. For the future climate change addressed in the opening chapter will hit humanity as a whole, and not just individuals. Therefore, at least every younger citizen (although an exact age limit cannot easily be specified) can plausibly claim that his human rights will be affected in the future by an insufficient climate policy. In any case, the reasoning of this study should have explained that there is no rule providing that human rights can only be claimed if only individuals and not many or even all humans are affected. Since climate change will probably affect future generations and people in many developing countries considerably more drastic, these groups, too, are in principle potential claimants. Of course, German and European law still lacks a provision on third part standing that would allow representatives to bring actions to preserve those rights today–when they can still have real effects– even though future generations (naturally) do not have the ability to be present themselves.[83]

[82] This is possible only through the detour of Treaty infringement proceedings or proceedings for a preliminary ruling.

[83] In my opinion it is quite obvious as an alternative in this context to recognize case law third party standing so that those living today could turn to the courts at least with the request that the legislature should be obliged to create appropriate third party standing.