

The German constitutional verdict is a landmark in climate litigation

Climate and freedom are interconnected in various ways. The recent German verdict on climate protection realigned the fundamental rights in liberal democratic societies and marks an important step in climate litigation around the world.

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Identifying the right climate change mitigation goals is a normative question, not an empirical question. The normative framework of climate change and climate protection is highly contentious because it requires balancing different spheres of freedom and the elementary preconditions of freedom such as life, health and subsistence, that is, the core values of liberal democratic constitutions, and because climate change mitigation goals have to be balanced against other societal goals^{1,2}. Balancing these multiple aspects provides substantial policy leeway for democratic majorities. But where does this leeway end, or put differently, which legal rules limit this policy space?

The verdict of the German Federal Constitutional Court on climate protection in spring 2021 offers answers (Box 1). It addresses some issues that have been discussed not only in scientific, legal and political literature, but also in public debates. The verdict was probably the most far-reaching judgement on climate protection ever issued by a supreme court anywhere in the world^{3–9}. For the first time, a constitutional complaint for more — rather than less — environmental protection was successful in Germany. Given the verdict's focus on major principles of liberal democratic constitutions and the central role attributed to the European Union (EU) alongside the court's global reputation, it is likely that the verdict will strongly influence the ongoing global climate debate.

In the verdict, the court mainly follows the first constitutional complaint. In doing so, the court changes its former perspectives substantially. The court recognizes that climate protection — like any policy field — requires balancing different spheres of freedom. On the one hand is economic freedom to produce and consume. On the other hand is the right to the elementary preconditions of freedom of all people. This includes future generations and people in other countries who contribute less to

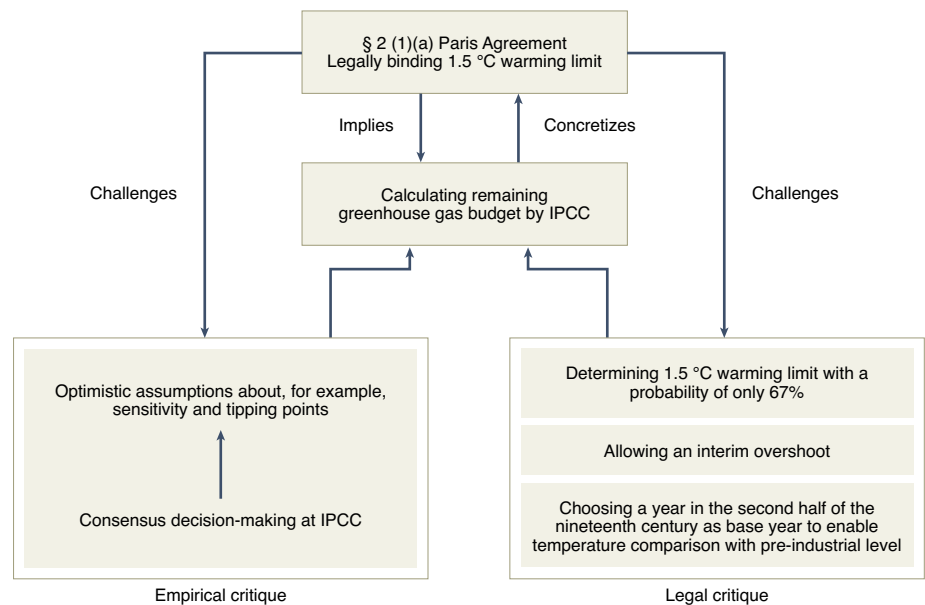


Fig. 1 | Weaknesses of the IPCC emissions budget. The verdict accepts the budget calculated by the IPCC. Simultaneously, the court acknowledges the weaknesses of this budget^{8–23}, even if they are not discussed in detail.

global warming (if at all) but will suffer from consequences more strongly^{10,11}. Balancing the different norms leads to political leeway which, in principle, is exercised by the parliaments. The role of a constitutional court is only to ensure that balancing limits are respected.

The main statements of the verdict include that policymakers must allocate the remaining greenhouse gas budget, in compliance with the 1.5 °C limit (Article 2 of the Paris Agreement) as calculated by the IPCC, so that freedom is fairly balanced intertemporally. Furthermore, the court obligates the legislature to adopt more precise climate targets by the end of 2022. Besides, key decisions on climate protection must be made by parliament (legislative power) — not by ministers (executive power). The court also discusses

some important weaknesses of the IPCC budget (Fig. 1).

As a basis for the above-mentioned findings, the verdict fundamentally repositions the normative framework of liberal democracies. Specifically, the verdict interprets core principles of liberal constitutions, such as freedom and the separation of powers, with regard to climate protection. The verdict finally recognizes that human rights also protect intertemporal and transnational freedom. This includes the elementary preconditions of freedoms exercised today, but also those that are infringed for future generations and for people living in other countries.

Importantly, the court follows the argument according to which a fundamental right is also affected if many people are impacted — as in the case of climate change.

Box 1 | Overview of the verdict

The verdict is based on four constitutional complaints. The first complaint was filed in 2018 by individual plaintiffs, including Hannes Jaenicke (actor), Volker Quaschnig (energy researcher) and Josef Göppel (former Member of Parliament), alongside the Solar Energy Support Association Germany (SFV) and Friends of the Earth Germany. They were legally represented by Felix Ekardt and attorney Franziska Heß. The SFV had prepared the lawsuit by commissioning legal opinions from Felix Ekardt from 2010 onwards,

which largely built on his postdoctoral thesis²⁴ and some recent contributions^{18,19}. In 2018, the constitutional complaint faced almost unanimous scepticism in politics, jurisprudence and the media. When accepted for decision in August 2019 — surprisingly for many — the picture changed. Further constitutional complaints followed in January 2020, including those by activists from Fridays for Future. All complaints ask for a statement of the court that there is a constitutional obligation in favour of a more ambitious climate policy.

This too is a break with previous rulings, especially in German jurisprudence. Besides, in line with the complaint, the precautionary principle is finally applied to fundamental rights. The precautionary principle means that it is not solely a matter of whether the plaintiff has already been harmed. Now, cumulative, uncertain and long-term impairments of fundamental rights also have to be considered. This is compelling because, in the case of imminent irreversible damage, fundamental rights cease to exist. This is precisely what the court recognizes. Applying the precautionary principle in this way renders the international debate on causality in climate claims partially moot¹².

The court furthermore draws the right conclusions from the above-mentioned insight that liberal democracies centre on balancing different spheres of freedom. Balancing the economic freedom rights of producers and consumers, and the rights to the fundamental preconditions of freedom of all humans, imposes a double threat to freedom: freedom can be constrained not only by measures to protect the climate but by climate change itself. Both have to be averted. The so-called balancing limits that result from the guarantees of freedom (and from the constitutionally enshrined principle of environmental protection, which guarantees additional safeguarding of the preconditions of freedom) must not be violated. In the specific case of the verdict, German (and EU) climate law violated the requirement to balance freedom fairly across time.

Furthermore, according to the court, public policies have to be based on the latest and best available scientific insights. Facts must be carefully investigated, and potential gaps or uncertainties must not be used to justify inaction. In the past, the court applied such fact-finding principles rather vaguely and only occasionally with some specificity.

Another important element of the verdict is that the German government cannot use the inaction of other states to justify its own slow progress. The court recognizes that national measures may negatively affect economic competitiveness and do not necessarily motivate other countries to follow suit. Instead, emissions may be shifted to other countries^{13,14}. Consequently, the verdict requires Germany to work towards effective international climate protection.

The court furthermore recognizes the binding nature of the 1.5 °C warming limit in international law. The court correctly finds (unlike parts of the international legal and scientific literature) that Article 2 of the Paris Agreement no longer speaks of “two degrees”, but that states must pursue efforts to limit the temperature increase to 1.5 °C. Likewise, the court notes that the Paris Agreement refers in various provisions precisely to Article 2 as the binding objective lodestar for all detailed requirements of the Agreement. Following the fundamental rights’ requirement of net zero emissions to balance spheres of freedom, the court ultimately also recognizes that Article 2 of the Paris Agreement is on its way to becoming a constitutional minimum standard.

By that means, the verdict makes it clear that IPCC reports contain a substantial gap by neglecting law, instead focussing on economic cost–benefit analyses and some vague ethical statements¹⁵. This also applies to the Paris Agreement: the IPCC does not deal with the Agreement in detail in legal terms — despite establishing the 1.5 °C limit as a legally binding yardstick for the emissions budget. Moreover, the verdict supports recent developments in EU (and international) climate policies to raise targets and to implement more ambitious — and transnational — policy instruments, such as more effective emissions trading schemes. According to the verdict, the goal must be

zero fossil fuels in literally all sectors as soon as possible. While this statement is encouraging, both the EU and Germany — contrary to common perceptions — still have to go quite fast and far to become true climate leaders¹⁶.

As regards Germany, the court requires that the remaining climate budget has to be distributed more equitably between generations. However, even the revised German Climate Protection Act of June 2021 does not comply with this. The largest part of the remaining climate budget will be used up by 2030 — even according to the optimistic IPCC budget. In any case, amending the Climate Protection Act, which contains only targets, is insufficient because, without policy instruments, targets are meaningless.

Unfortunately, the court fails to recognize that the majority of German emissions are not regulated by German legislation alone but by EU legislation. With the EU Commission’s proposals for more ambitious EU climate policy in July 2021¹⁷, the EU will increase the scope of emissions regulated at the EU level. Against this background, the first complaint had requested a statement by the court that Germany had not taken sufficient action for climate protection at the EU level. The court did not address this issue directly. Indirectly, the issue has been taken up by the aforementioned international climate protection commitment, which aims to prevent emission shifting to other countries.

Rather than amending national legislation, German governments can achieve greater effects in EU legislation through the EU Council of Ministers. This is because of the size of the EU and because an increasing number of emissions can no longer be controlled by national legislature at all. In July 2021, the EU Commission proposed a more sophisticated EU emissions trading scheme: the trading scheme should finally act as a quantity control system for all fossil fuels. The proposal also includes a stricter zero emissions target. However, measured against the 1.5 °C limit, important upgrades of the proposals are essential. First, the targets have to be even stricter. Second, all surplus legacy allowances in emissions trading that states gave away to companies and that still substantially dilute the price of emissions certificates today have to be removed. Third, all loopholes, including the option to take credit for pseudo climate protection measures abroad, have been closed. Fourth, a second emissions trading scheme for animal products is required to substantially reduce livestock farming. The verdict implies that Germany should take a leading role and demand such upgrades. □

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Competing interests

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