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THE CONSTITUTIONAL COURT HAS RULED

In the current heated debates on the climate question in Germany, a growing panic regarding an impending climate catastrophe clashes with major economic and social problems as a result of the corona pandemic. Now the Federal Constitutional Court has also taken a position, following constitutional complaints in 2020. This took place in a situation in which CO₂ emissions worldwide are continuing to rise – instead of falling as hoped for – and in the context of an incipient federal election campaign that is heavily dominated by climate issues. In essence, the Court is dealing with intertemporal questions of justice: To what extent can the current approach to climate protection lead to future restrictions on freedom and rights for the younger generation because the older generation is not willing to make sufficient contributions to climate protection today?

The Court takes a position that is not very convincing on logical or scientific grounds: It is based on the idea that the state's constitutionally required duty to protect can be specified in the climate field as limiting the increase in the global average temperature to well below 2°C, if possible to below 1.5°C ("Paris target") compared to the pre-industrial level. This, it argued, is the mandate for German policymakers. However, it is not in the power of German politics to ensure compliance with this target as it can only be achieved globally. Furthermore, it is highly questionable whether the German climate protection measures taken so far are making any tangible contribution to global CO₂ reductions at all. What is the CO₂ impact per euro invested? Are there not far more effective approaches with greater leverage?

All of these questions are disregarded by the Court. Instead, in its ruling it particularly focuses on the ascertainment of German CO₂ reduction paths. In doing so, it also refers to a scientifically more than questionable assertion made by the German Advisory Council on the Environment (SRU), among others, according to which Germany would only have a small, soon to be exhausted CO₂ budget available if the Paris target is to be achieved. As if the Paris target would be achieved if Germany adhered to such budget! In fact, the alleged German budget is eaten up by China alone every six months. China is also steadily increasing its emissions and will not have low per capita emissions by 2050. Other developing countries will increase their CO₂ emissions, in some cases substantially. Germany's competitiveness on the world markets will deteriorate massively if other countries apparently do not see any national budget limits for themselves, while we in Germany continue to follow the fiction that we can achieve the 1.5°C target or the 2°C target on our own. Instead

of adhering to narrow, self-imposed budget limits for our own activities, the Paris target can at best be pursued in international cooperation.

The obvious discrepancy between Germany's low CO₂ emissions and the ambitious reference to a 1.5°C or 2°C target for the world is only touched upon by the Court once: a lack of German efforts could inspire other states to refrain from the cooperation required. The subsequent examples of China and Nigeria make clear how weak this argument is. The Court also fails to explain what should be done if reality catches up and, for example, in 10 years' time it becomes apparent that other countries are not "delivering" despite considerable German efforts.

EXAMPLE: CHINA

Nowadays, China emits more CO₂ than all industrialized countries combined, with emissions still rising, while at the same time pursuing her plans toward superpower status. In developing and emerging countries, China is making a name for itself as a supplier of coal-fired power plants and other CO₂-emitting industrial facilities. China is aiming for climate neutrality by 2060. Is it plausible to assume that expensive German efforts to tighten CO₂ reduction paths would influence China to do more for climate protection? The opposite is most likely to be the case. Expensive German climate protection efforts weaken Germany's and Europe's competitiveness under the given circumstances, which can only be advantageous for China's manifold ambitions.

EXAMPLE: NIGERIA

In this poor country, with over 200 million people the most populous country in Africa, the population will double by 2050, as it already has in the last 30 years. That increase alone is three times the size of the German population. The country is characterized by massive political tensions. The government must meet the basic needs of more and more people to avoid civil war. Is it realistic to assume that climate protection efforts in Germany will have any significance for climate policy in Nigeria? Locally, there is cheap access to fossil energy sources. The more the rich world refrains from the use of these sources, the more precarious the country's financial situation becomes. If exporting fossil energy becomes more difficult, it will be used even more as a cheap solution at home. What else is the government supposed to do? Alternative ways to protect the climate while enhancing prosperity

would require a massive commitment by rich countries in Nigeria. Germany's behavior in this regard clearly shows why this is not to be expected even though much greater climate effects could be achieved per euro invested in Nigeria than in Germany.

CAUTION WITH THE NATIONAL BUDGET APPROACH

In its ruling, the Court emphasizes repeatedly that violations by the government with regard to due diligences have **not** been determined. Furthermore, the Court does not criticize the existing emission targets for 2030 and 2050. However, policymakers are explicitly called upon to determine the further emission reduction path between 2030 and 2050, taking into account the interests of the younger generation. This is to ensure that the main burden for the residual reductions after 2030 is not shifted towards 2050 – something that no one in German politics has ever argued for.

Argumentative problems from the ruling would arise for policymakers if they were to take as their benchmark the "construct" of a national residual budget claimed by the plaintiffs, which has never been negotiated internationally and is not supported by any state in the world. A global residual budget, for which there are at least scientific arguments, and a national residual budget are two completely different issues.

GLOBAL VS. NATIONAL RESIDUAL CO₂ EMISSION BUDGET

The transition from a global to a national residual budget requires clarification of a difficult distributional issue on which all international climate negotiations have failed so far. As often the case, the issue is one of equity, but it is also one of money. The proposal to distribute the remaining Paris target-compatible global CO₂ emission volume equally on a per capita basis (so-called climate justice) did not meet with the agreement of countries. On the part of the industrialized countries, it was argued that for economic reasons, the CO₂ emission rights allocated would have to be based on the status quo of emissions (the so-called grandfather principle). In addition, the high population growth in many developing and emerging countries was seen as a problem since the relative share of CO₂ emission rights that would be allocated to these countries would constantly increase (at the expense of the industrialized countries). Many developing and emerging countries also rejected the principle of climate justice. Instead, they demanded even larger shares for themselves in

order to address the historical responsibility of the industrialized countries. The industrialized countries resisted this, pointing to the great technical innovations that they have produced in the process of industrialization and that the developing and emerging countries in particular want to use – and are using – to an increasing extent for their own benefit today. It is precisely because of this that the climate situation has now deteriorated so much in the short term (cf. China).

All in all, there is no consensus on this issue. In such a situation, it does not help when individual countries unilaterally act as if they had agreed on residual national budgets in accordance with climate justice. If many do not accept this allocation logic, the contribution of those who do unilaterally remains ineffective. In other words: The climate catastrophe will not be avoided because we fail to agree on burden sharing for climate protection. If, in addition, individual countries pursue "climate nationalism" to achieve their national reduction targets so that little climate finance is available to developing and emerging countries, the prospects of achieving the target are further diminished. This is exactly what characterizes the current situation. Not surprisingly, some German actors then resort to border adjustment levies for CO₂-intensive production. In doing so, they are once again imposing their own logic on the already dissatisfied developing and emerging countries, who will ultimately have to give up their previous competitive advantages in terms of CO₂ emissions without any compensation. This will further increase their anger.

Incidentally, the distribution issue would be mitigated if trading between states was agreed upon on the basis of national NDCs. Nature-based solutions for "generating" negative emissions would have to be included in such a trading framework. This would change many things for the better, as is the case with further technological progress such as in nuclear energy, carbon capture and use (CCU), or carbon capture and storage (CCS). All these options are missing from the German residual budget hypothesized by the SRU. Indeed, they are usually rejected.

To date, a national residual budget is fortunately not the German government's position and hopefully will not become so. Instead, the situation must always be re-evaluated in light of new developments, the potential of new technologies, possible international cooperation agreements (e.g. trading), and the great potential of generating negative emissions. In this way, global efforts for more climate protection can be maximized in their effect, for instance through large financial transfers to those parts of the world where the most effective climate protection is possible for the money invested.

In the Court's view, the climate issue – rightly – does not take precedence over all other issues affecting fundamental rights and freedoms. Under certain circumstances, climate risks must be weighed against security, property and prosperity risks, also in the light of international developments. For example, if humanity moves toward a 3°C warming, German policy will have to focus more on climate adaptation measures than on reducing German CO₂ emissions. To put it differently, if greenhouse gases continue to be emitted massively in many places around the world, if the world moves towards a 2.5°C warming or more, and if as a consequence the SRU residual budget for all countries of the world has long since been used up, then no one will reasonably demand national budget-compliant efforts from Germany to achieve a 1.5°C or 2°C target since the targets will have become unachievable anyway. Reality would then have caught up with fictitious postulates. Wish and reality could then no longer coincide, no matter how problematic this would be for humanity. Unfortunately, such a future is not implausible. In the worst case, we would have spent a lot of money on measures that are not particularly helpful, and this money would have been lost to the detriment of young people's prospects in education and research, amongst other things.

The judges' demands on policymakers are manageable. For example, there is no call for a tightening of reduction targets by 2030. The portrayal in the media, however, is quite different. In the already heated "climate", against the backdrop of the beginning election campaign, many actors have hyped up the ruling to a drastic, epochal event and reinterpreted it for their own purposes: the government's climate policy has been severely reprimanded, it needs to be improved in the short term – although de facto that is precisely not the case. Instead, the main demand was for more precise targets from 2030 onward, and not for a tightening of the current targets.

Politicians have not reacted confidently, probably also because of the upcoming federal elections. They could have argued credibly, for example, that too little is known today about the future to define detailed reduction paths for the period 2030-2050. Most importantly, they could have immediately noted that our future actions must be shaped in the context of broader international developments. The global climate problem urgently needs to be addressed globally.

Politicians have decided otherwise: they are making massive improvements to the Climate Protection Act. With few exceptions, all political players are in favor of not only quickly fixing the details required by the Court from 2030 onward but also significantly readjusting the law even for the period before 2030. Readjustment

means significantly greater planned CO₂ reductions by 2030 so that, correspondingly, fewer additional reductions will have to be made in the period from 2030 to 2050 if the goal is, for example, climate neutrality in 2045. Fortunately, policymakers did not follow the plaintiffs' idea of setting a rigid national residual emissions budget for themselves. However, with the revised Climate Protection Act heeding the hypothetical residual budget, plaintiffs have still scored a victory. Not because of the Court's demands but because of the political response to the ruling and the "uproar" in the media and among media-effective activists.

The Court says nothing about how the targets are to be achieved. Reducing a lot more CO₂ very early on can be expensive. There is a risk of short-term decisions for unsustainable solutions which can create irreversible path dependencies, with considerable negative effects e.g. in the form of future loss of prosperity for those who are young today. Some people have already killed themselves out of fear of dying – it is better to be careful. The effects of hectic activity can in any case be counterproductive for the climate because one wants too much too soon. Such a path can burden the youth more in the future than a wise and "agile" pursuit of the options arising in the course of time. This is all more relevant because there is a lot to suggest that the approaches to climate protection being pursued in Germany today are not achieving their goals: An ever faster "more of the same" threatens to cause great damage.

CLIMATE – ONE CHALLENGE AMONG MANY

Looking into the future, a lot of unpleasant things may lie ahead for the German population – with the potential for particularly large, negative effects for young people. Climate is not the only problem area, perhaps not even the biggest. National debt has increased immensely as a result of COVID-19. Global willingness to cooperate has declined significantly in recent years. Europe is not in a pleasant position in foreign policy terms, between the major rival players, the U.S. and China, and is also not in a good state internally. The **dangers of war** are growing. War is an ultimate risk that can very quickly become a reality with cruel consequences for the entire populations. The rapidly growing world population, the foreseeable doubling of the African population by 2050, the massively growing demand for resources in the developing and emerging countries (China as a blueprint for the countries in Africa and on the Indian subcontinent) can trigger many conflicts in the future. Displacement, flight, civil war, war are not implausible futures in many parts of the world – to name but a few. The loss of biodiversity may threaten our food base, further pandemics massively restricting freedom may follow. The stability of the

monetary system is by no means assured. **Impoverishment** looms in many places as a consequence of the numerous risks mentioned.

The climate issue is closely linked to all these challenges. There are many interactions and trade-offs. Above all, it is quite possible that the climate goals, which require extensive international cooperation, will not be achieved. Similar things have happened time and again in other areas of global governance in the past. At this point, it must be acknowledged that it is neither in the power of the German government nor of the Federal Constitutional Court to rule out a future war with German participation, to prevent future pandemics or to rule out a climate catastrophe.

Climate challenges can lead to disputes between countries, for instance because some want to prohibit others from doing something or force them into a corner economically. Some are a comparatively small number of people concerned about their high standard of living, others many people in very restricted living environments. Some are already wealthy from an international perspective, others are yet to build a modest prosperity and improve their life perspective at least somewhat.

The Court is worried about the scientifically questionably construct of a residual German CO₂ budget for young people. Many others, around the globe, never had a (residual) budget and never will. The Germans do little to help these much more affected people. We are primarily concerned with ourselves, as apparently is the Constitutional Court. It seems that hardly any money of the German taxpayer is to be spent outside of Germany. In a "tunnel vision" our money is almost only used in Germany, for domestic "green projects" to force the reduction path of our CO₂ emissions. Perhaps we silently hope that the world will spare us from addressing other equity issues if we only diligently and penitently implement or further tighten our reduction path.

ARE THE CLIMATE PROTECTION MEASURES TAKEN SO FAR EFFECTIVE?

One central question the Court avoids remains untouched: Have our climate mitigation actions to date been on target? Do our reduction paths have any significant effect on the global climate and achieving the 2°C target? Does it help globally to get on a net zero path faster in Germany? What is the significance of the common EU climate target, which in turn is an outgrowth of the common market within the EU? How does it help to reduce our emissions and thus contribute to them increasing elsewhere? Ultimately, for German climate policy only the EU climate target is the relevant yardstick. The EU currently cannot even agree on expanding its cap-and-trade system (ETS). Electricity from nuclear power produces little CO₂, CCS

(to store CO₂ in caverns) removes CO₂ from the atmosphere. CCU, for example, to use synthetic fuels to rapidly render the world's existing passenger car fleet of about 1 billion vehicles carbon-neutral would be a boon to the climate. Many of our neighbors, such as Switzerland, have created regulations that favor such activities. The Court is not concerned with these alternative options. Many German politicians can think of nothing smarter than to dismiss the efforts of our partners instead of being happy about any contribution to reducing CO₂ emissions. Time is running out, teacher-like reproofs should be postponed until later. Yet the opposite is happening – perhaps to hedge one's own narratives in the public debate against doubts about their reasonableness.

On sober reflection, there is much to suggest that our reduction plans will have no significant impact on achieving the 2°C target, not to mention the 1.5°C target.

Under certain circumstances, tightening the reduction paths of rich countries even worsens the prospects of reaching the Paris target because far too much time, energy, money and attention are being directed to the wrong thing, namely national reduction efforts within the framework of an expensive and inefficient climate nationalism, instead of getting involved worldwide where climate problems are much more serious and where much more can be achieved for the climate with the same money spent, particularly in the developing and emerging countries with high economic dynamics and rapid economic growth. The growth of the world population by 2.5 billion people by 2050 alone makes the dimension clear. The balance sheet increase in people is equivalent to 30 times the size of the German population. None of these additional people have a CO₂ budget in the sense of the Paris Climate Agreement – not even a residual budget.

If we continue to do what does not help – and, in response to the Constitutional Court's ruling, do even more of it even faster – we are likely to promote the impending climate catastrophe, namely by failing to take more effective action against climate change at home and worldwide. Such action is both necessary and possible. Let us just mention unbureaucratic and determined funding for resolute rainforest conservation. The impending climate catastrophe will hit us brutally, especially today's younger generation. In the political arena, one can score points for a long time with engaging and catchy narratives, perhaps even in the context of constitutional court rulings. But climate is ultimately about natural laws and physics. Political narratives, constitutional court rulings, dominance in public debate are then smoke and mirrors. Nature does not care about all that. It does not act as a self-aware actor.

According to all historical experience, the decisive contributions to achieving the 2°C target will come from **new technologies**. This is the area in which Germany,

as a country rather poor in raw materials, has always made significant contributions to value creation to the benefit of many people. The current example of COVID-19 shows how important new technologies are. COVID will be overcome by new vaccines and not by government restrictions on freedom or making money available (through massive debt), as important as all of this may be in the short term. Motivating children to become global citizens and good engineers is likely to be more effective in addressing the tasks ahead than training them to live a vegan lifestyle. In this respect, other expenditures, including those in the climate sector, should not curb the funding available to education and research – quite the contrary. The crucial question is how far we commit ourselves globally and what we contribute to the development and implementation of new technologies, and not which CO₂ reduction path we pursue at home, as important as this last point seems to be in order to spare panic-driven, confused discussions and to clear our heads for what could really help.

The Court did not comment on any of these issues. That is now the task of policymakers. The Court has (only) demanded that politicians further detail the reduction path between 2030 and 2050. New laws are now being introduced but fortunately they can be changed again if necessary. **In the end, politicians could have handled the ruling more calmly.** The hectic reactions have translated into political action and steps by politicians that go beyond the ruling, driven by the election campaign, the massive media reaction to the ruling and its reinterpretation into a demand for tightening targets. This does not make our situation any easier, nor does it improve the outlook for young people.

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