Climate Justice and Climate Policy[1]

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ABSTRACT:

A research on climate change needs normative visions and principles to provide orientation and to line up normative requirements. This may enable to provide a comprehensive view on energy and climate topics. This contribution, while dealing with justice, gives a perspective from ethics respectively from a (re)interpretation of national constitutions, the EU Charter of fundamental rights and the European convention on human rights in the light of sustainability. It takes us to human rights as the basic norm of any liberal democratic constitution (on national and transnational level), but criticizes the academic international law debate (unlike the practice of international law) which seems to be focused on the idea of even absolute, i.e. not subject to any balancing, environmental fundamental rights. 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. Regarding the theory of balancing, for the purpose of a clear balance of powers the usual principle of proportionality also proves specifiable.

1. Theoretical background – ethical and legal

Under what circumstances can we call social life "just", or the law "right"? This is the ultimate question of all thinking about politics, morals, and the law. This question is also relevant when it comes to the question how we deal with scarce energy resources and climate change, how we balance the colliding interests (for instance between contemporary and future generations). Conceptually, the term justice is concerned with the normative validity of a society's basic order. Thus, a normative *theory of justice* (or ethics) answers the question: How shall humans behave or what shall the founding order look like? This must strictly be distinguished from the question of how humans factually do act and what the factual reasons for this action are (and what humans factually "deem right") – this is a question of the descriptive action theory or *anthropology* respectively theory of society[2]. A link between the theory of justice and the action theory is the equally empirical governance theory or *control theory*, i.e., the doctrine of the choice of means to effectively and factually enforce previously defined normative aims (e.g., the right to freedom from impairments to life and health), possibly after a normative balancing with other conflicting objectives (e.g., economic freedom). Such means or instruments could be for instance taxes, cap and trade systems, voluntary commitments, or regulatory law.

A volume on climate change needs normative visions and principles to provide orientation and to line up normative requirements. This may enable to provide a comprehensive view on energy and climate topics and their relevance in societies today as well as for future generations. In the perspective of both ethics and constitutions (in international, European, and national law), the resource topic is characterized by colliding human rights: On the one hand, the freedom rights of consumers and companies – on the other hand, rights to the elementary preconditions of freedom such

[1] This article is a revisited version of Ekardt F. (2012), "Climate Change and Justice: Pespectives of Legal theory", in: *Climate Change and the Law - Ius Gentium Comparative Perspectives on Law and Justice* 21, Erkki J. Hollo, Kati Kulovesi, Michael Mehling (eds.), Dordecht: Springer, pp. 63-82.

[2] This distinction is not clear, e.g., in Habermas 1985. Many readers, and probably the author himself, seem to attach a normative meaning to this book; the actual topic, however, is anthropology respectively descriptive theory of societies.

as food, water, climate stability, security, energy access, a basic supply of essential resources, an absence of wars and civil wars, etc. Generally speaking, any normative conflict can be regarded as a conflict of competing interests and thus as a balancing problem. It refers to the fundamental phenomenon of law: to find a just balance of conflicting interests. In this contribution, climate change will be the example for this. Since politics allows an industrial society, industrial facilities, approve traffic permits, etc., it knowingly accepts statistical deaths in some decades, i.e. impairment of the right to the elementary conditions of freedom as a result of emissions of air pollutants, etc., especially of young people. This is done balancing those interests with our freedom to consume and the economic freedom of the contemporary consumers. 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).

This contribution, while dealing with justice, gives a perspective from ethics respectively from a (re-)interpretation of national constitutions, the EU Charter of fundamental rights and the European convention on human rights in the light of sustainability[3]. 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 justice (respectively law/ morals/ politics) in an intergenerational and global respect[4]. In contrast, a common understanding 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[5]. 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[6].

The subject of this contribution takes us to national, European, and international human rights as the basic norm of any liberal democratic constitution (on national and transnational level). Human rights also form the typical core of any modern ethics. Environmental protection and intergenerational and global justice, however, is rarely addressed as guaranteed by fundamental rights in the existing legal and ethical discourse, 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 – or abstract principles such as the precautionary principle or the principle of common but differentiated responsibility. Nevertheless, it seems essential to consider fundamental rights. The interpretation of fundamental rights, unlike state goals or abstract principles, does not only generate competencies 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

[3] To show that the theses of this contribution are normatively right as an ethical approach would mean to demonstrate that the principles of liberal democracy are universally right. This has been demonstrated elsewhere 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. Felix Ekardt 2011, §§ 3-5; similar in his basic orientation Habermas 1985; partially differing: Rawls 1971.

[4] Cf. for this understanding of the principle of sustainability (and with references to opposing views) Ekardt 2011, § 1 C.; with a similar result (but somewhat differing arguments) cf. Ott/ Döring 2004.

[5] Cf., e.g. Steinberg 1998, p. 114.

[6] Cf. Ekardt 2011, § 1 C.

could also be the essential desideratum of a more future and globally oriented (thus: sustainable) legal interpretation. Furthermore, restrictions in favor of environmental or for instance resource 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. By the way, discussing human rights could even lead to a better normative justification of principles such as common but differentiated responsibility in climate policy – the discussion on historical emissions (see below) will point out that very clearly.

Accordingly, earlier – and even today in international law – there was often, or is respectively, a discussion about environmental fundamental rights[7] (not only with regard to future generations, of course), as environmental 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". 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 sustainability – and for instance resource and climate protection – than is often assumed. Such an interpretation would build fundamental rights in the way they already exist in all western countries as well as in the international declarations on human rights signed by almost every state of the world, with the consequence that current policy might be in conflict with fundamental respectively human rights (both concepts mean basically the same). 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" (supposedly 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.

2. Human rights – only subordinate and vague "protection obligations" with regard to sustainability? The traditional legal point of view in the EU and Germany

It is well known that for instance the German constitutional and administrative courts are very reluctant to recognize environmental positions based on fundamental

[7] For an outline of the common discussion, cf. Steinberg 1998, p. 421 (explicitly criticizing „environmental fundamental rights"); Gibson 1990, p. 5; Nickel 1993, p. 282; on the notion of „third generation human rights" cf. Donnelly 1993, p. 119; Kromarek 1987.

rights and previously rejected corresponding claims for violations of fundamental rights on environmental protection issues[8]. 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). Especially (but not only) in constitutional law cases there is often not clear distinction between the tests of admissibility and substantive foundation of the claim. 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, or whether the underlying action is within the scope of the respective fundamental right or it is an issue of restrictions of the respective fundamental right. 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. 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." 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 European Court of Justice of the EU (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 of the EU treaty[9]. The ECJ has not even specifically addressed fundamental protection rights against the community. Within the Member States, it recognizes the possibility of those rights. Of course, to exaggerate only slightly, the 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[10]. 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 European Court of Human Rights (ECtHR) which is responsible for the interpretation of the European Convention of Human Rights (ECHR – with is valid for all geographically European countries and is extremely similar to other international human rights treaties), the situation is basically similar. 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. Furthermore, the ECtHR has already granted information

[8] On all the jurisdiction, see in detail Ekardt 2011, § 4.

[9] On the new legislation with an explicit EU Charter of Fundamental Rights, cf. Ekardt 2011, § 4 B.

[10] 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.

rights concerning environmental damages – though confusingly not based on the right to life and health, but on the right to privacy under Article 8 ECHR. 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. 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.

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 abstract and general norm[11]. 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? 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 intergenerational context[12]. Therefore, the resulting findings can ultimately be applied to any national or transnational human rights protection – for instance with regard to climate change.

3. Intergenerational and global scope of human rights, protecting the conditions of freedom, and multipolarity of freedom[13]

The starting point for our considerations is the idea of freedom rights as classical-liberal guarantees of self-development. So far there is no need to criticize the prevailing view. In addition, freedom also has an intergenerational[14] (and global) dimension[15]. Why? In a nutshell[16]: 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

[11] Laws, regulations, constitutions, etc. remain the only abstract and general norms at least in statute law. 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 1991; on the rationality of the application of the law and the methods of legal interpretation, see also Ekardt 2011, § 1 D.; Susnjar 2010.

[12] 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 freedom and thus do not contradict the following considerations.

[13] For more details and references on this subject see Ekardt 2011, §§ 4, 5.

[14] With a partly similar reasoning, cf. also Unnerstall 1999; with more details, cf. Ekardt 2011, §§ 4, 5.

[15] 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 1999.

[16] In more details on the three main arguments, cf. Ekardt 2011, § 4; partly cf. also Unnerstall 1999.

clear that fundamental rights also apply intergenerationally and globally, i.e. in favor of the likely main victims of environmental damages.

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 for instance recently acknowledged by the German Federal Constitutional Court, but also to the existence of a relatively stable resource base and a corresponding global climate. For without such a subsistence level - including energy access and a stable global climate – and without life and health, there is no freedom[17]. 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 of the German constitution; articles 2, 3 ECFR; articles 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 of the German constitution 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 e.g. against environmental damages.

"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) – not only for, but also for future generations. 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 intergenerational damages such as climate change since states are not the primary emitters of greenhouse gases. The problem rather lies in the fact that states tolerate or approve e.g. greenhouse gas emissions by private actors. This particular idea 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 the traditional, more objective, status of fundamental rights protection (protection obligations instead of protection rights, thus non-actionable duties!) and 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). Multipolarity would equally refute the assumption, 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.

What are the arguments for multipolarity and how can we respond to certain typical counter-arguments? In the following I will discuss whether protection rights

[17] 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 Statute of the International Court of Justice) without recourse to, e.g., the International Covenant on Economic Social and Cultural Rights; cf. Ekardt 2011, § 7.

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 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 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[18].

Second, the multipolarity of fundamental rights appears in limitation or balancing provisions such as Article 2 paragraph 1 of the German constitution or Article 52 ECFR 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[19].

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[18] 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; see also Susnjar 2010.

[19] The third argument is the wording of provisions such as Article 1 paragraph 1 sentence 2 of the German constitution 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 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 of the German constitution 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 of the German constitution and

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 that (III) defense must be on an equal footing with protection[20].

One objection against that will be: The whole re-interpretation of human rights in the light of sustainability overthrew democratic parliaments, and in "protection rights" cases there was per se larger leeway than in "defensive rights" cases. So, does my re-interpretation of human rights 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. A democracy which is based on certain principles, e.g., a separation of powers, however, promises greater freedom, rationality and impartiality than a "radical" democracy. 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, 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. 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 our context relevant, may be subjectivized, the other conditions which only support freedom (such as supporting the arts or kindergartens) is not.

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 can be 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. 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[21].

Article 51 ECFR). – For instance, Article 1 paragraph 2 of the German Constitution 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.

[20] In favor of an equal footing cf. already (but without comprehensive reasoning) Calliess 2001.

[21] 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 Constitutional Court may not demand from the Parliament: "Phase out the use of coal power within four and a half years." It may say: "The previous phasing out is too 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, a 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

4. The case of climate change[22]

Now, we can draw some conclusions with regard to climate change. By those means, it can also be pointed out how balancing rules derived from human rights can work in practice:

- As we have seen, freedom also has an intergenerational and global dimension, since 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. Fundamental rights also apply intergenerationally and globally, i.e. in favor of the likely main victims of resource overuse, climate change, etc.
- Freedom rights must be interpreted unambiguously in a way as to include the above-mentioned elementary *preconditions of freedom* – thus not only a right to social welfare in general, but also to the provision and maintenance of a relatively stable resource base, food supply, security, water supply, life-supporting functions and ecosystem services[23]. This implies with regard to climate change: a guarantee for a proper food and water supply as well as sufficient energy access on a worldwide and intergenerational scale; a life-cycle perspective of natural resources; responsibility for maintaining life-supporting functions and services of ecosystems; and a general priority in favour of resource savings.
- "Protection of freedom where it is endangered" also implies that freedom also includes a right to protection (by the public power) against fellow citizens (and not only in exceptional circumstances). This implies a protection for example against environmental or social destruction, which is threatening freedom and its conditions, such as overuse of resources, *by any public power against my fellow citizens including companies or farmers emitting GHG*.
- Protection rights in the environmental context are not excluded despite the fact that for instance many resource problems concern – for instance with regard to climate change – only *forthcoming* hazards of fundamental rights. By the same token, the scope of protection rights is indeed affected by such hazards (and not only by definite encroachments). Undoubtedly, future trends 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 with respect to fundamental rights, especially under the threat of irreversibility of the "possible" infringement. Otherwise, fundamental rights would no longer serve the very purpose of legal

out the use of nuclear energy within three days." 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.

[22] For more details and references on this subject see Ekardt 2011, § 6.

[23] In liberal democracies, there are also "further" (in contrast to "elementary") preconditions of freedom such as macroeconomic stabilization, biodiversity, etc., which are extremely helpful, but not absolutely necessary to constitute freedom. Therefore, such "further" preconditions of freedom are usually seen not as human rights but as mere obligations of the public powers (without corresponding rights of individuals). This does not mean at all that these "further" conditions are not important.

fundamental rights: to guarantee the protection of autonomy exactly where autonomy is threatened with impairment.

The necessary balancing between all the above-mentioned aspects of sustainability-oriented human rights and the classical liberal guarantees of freedom for consumers and enterprises offers some leeway. Nevertheless, especially with regard to overuse of resources, some definite conclusions can be derived:

- A very often overseen aspect of freedom 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 or social) 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. The negative consequences of an action which otherwise benefit me (for instance, of cheap free resources today) must always fall back on me, if only by way of cost recovery for the damage created by that action. This justifies limitations of fossil fuel use and instruments that try to avoid the harmful consequences of overuse.
- 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. In situations of uncertain facts such as climate change, there is also a duty to make preliminary decisions and to review them later. The current energy and climate policy already disregards the balancing rule that its decisions shall be based on a correct factual basis: In particular, existing actions are probably erroneously deemed suitable to avoid the looming drastic problems in the future.
- 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.
- The task of politics is to solve the constant conflicts between the one's and another one's freedom and, in addition, to guarantee the availability of external freedom preconditions. But generally, this does not mean that the political and democratic process has to provide an equal distribution in the sense that certain things like GHG emission rights would necessarily have to be equally distributed. Consequently, the details of social distribution are subject to political discretion. However, with respect to elementary preconditions of freedom an equal treatment, as for liberties themselves (i.e. unlike for "further" freedom-promoting conditions), is necessary to provide that everyone gets a particular absolute minimum of something. For without these basic requirements like food, water, clothing, basal energy access there can be no freedom from the outset. With regard to food, this has direct implications for the climate problem. The "equal distribution principle" in this context is supported by two arguments:

    1. Without a right to an equal absolute minimum level of elementary freedom preconditions freedom would be of no value for the poor – and liberal constitutions respectively human rights *guarantee* equal liberties. This "equal subsistence" means specifically two things: everyone must have a minimum level of resources, energy, etc. available

– however, all must be (because this is also basic) protected from disastrous encroachments such as climate change as far as possible. Resource overuse and harmful effects such as greenhouse gas emissions caused by modern lifestyle must be reduced absolutely, while every man (worldwide and also in the future) necessarily causes at least a certain minimum of GHG emissions (at least for food production and land-use) – and many people worldwide do not nearly reach their "equal" per capita share so far. This makes it rather obvious to be cautious about inequalities with regard to the subject of this contribution.

2. If a collective good such as global climate is at risk, it seems plausible to turn the usage rights or the "proceeds" of an unequal distribution (the atmosphere use) in equal parts for all persons as far as possible – for no one can claim for themselves that she had accomplished a special "performance" to produce that good. This second argument can also be seen as an argument e contrario of the polluter pays principle (which also follows from the principle of freedom). Not generally "equal wealth" (nationally or worldwide) but very probably a basic resource supply and equal greenhouse gas emission rights for all – worldwide and intergenerationally – appear reasonable. By the way, this leads to a theoretical justification of a principle of common heritage of mankind applied to geological and anthropogenic stocks.

- On a preliminary basis, a higher GHG emission rate for developing countries could be justifiable for their fight against poverty (see below)
- Another important consequence of the principles justified above is: The colliding human rights call for distinct rules of public authorities. Purely voluntary solutions will probably not be enough.
- On a procedural basis, the colliding human rights imply a broad participation of all stakeholders in all legislative and administrative decisions with relevance to climate change.

The implications of all this for today might be: absolute reduction of GHG emissions in industrialized countries; relative decoupling for developing countries including newly industrialising countries; minimising problem shifting between environmental media, types of resources, economic sectors, regions and generations; driving resource productivity at a rate higher than GDP growth.

5. The problem of historical emissions

The concept of "one human, one emission right", as justified earlier, could be amended to some degree in order to take into account historical emissions of (especially) OECD states. By these means, emission right prices could also incorporate the cost of an (inevitable) adaptation to climate change, insofar as a certain degree of climate change can no longer be prevented. "Historical emissions" consider that especially OECD Member States, in particular, have been emitting vast amounts of greenhouse gases in the past 200 years which now contribute to climate change in the atmosphere. However, it would (1) not further sustainable protection of freedom by climate protection to simply allow China, India and other emerging economies another 150 years of unlimited greenhouse gas emissions, as this would compromise the living conditions of future individuals across the entire globe. Furthermore, (2) the OECD

Member States have not necessarily acquired an "advantage" equivalent to the emitted quantity. Countries like China or India profit on their part from these "advantages", because they can comparatively rapidly reach an acceptable level of prosperity through imports of economic models and technologies that have been developed in the western world. In addition, (3) taking into account "historical emissions" leads to a complex discussion as to how the complex global history in the past centuries may have advantaged and disadvantaged different countries. It is therefore impossible to assign a more or less exact number of emission rights under the prospective "historical debt". Most importantly, (4) invoking historical emissions takes into account the advantages and disadvantages of deceased individuals, and considers nations as collective entities. Assuming that the foregoing approach – "only freedom and preconditions of freedom" – is correct, such a collectivist perspective cannot be justified. Moreover, it raises the question whether we are really responsible for the acts of our forebears. Incidentally, the experiences with national allocation plans for European emission trading have already shown that a precise calculation of historically grown emissions is problematic for individual facilities.

All this obviously does not rule out moderate consideration of factors such as "historical emissions" and "adaptation costs" (which are, to date, only taken into account via global financial funds) when calculating the details for an international emission trade. Insofar as the freedom principle leads to the justification of certain equality standards and provision of certain basic needs (= fundamental preconditions of freedom) and also to implementation of the polluter pays principle, these aspects can be considered e.g. when calculating the price range, and that with a minimal administrative effort.

6. On the road to a justice-based global climate governance

As we see, "one human – one emission right" is not solely meant to be a European project, but also a further development of the currently not very ambitious or enforceable Kyoto Protocol on a global scale after 2012. Based on the general justification that we provide above, the main elements of a global approach could be:

1. In order to prevent disastrous climate changes, the global per capita emissions allowance would have to be fixed and limited – and then would have to be distributed on an equally per capita basis.
2. The per capita amount could be (according to IPCC) around 1 t CO_2 per person annually. This would be above current emission levels in most developing countries, but far below the OECD countries' emissions.
3. If OECD countries wanted to emit more greenhouse gases, western states would have to buy emission rights from southern countries. In contrast to Kyoto, this would lead to an emission trading scheme between all states across the globe.
4. By these means, a reduction of greenhouse gas emissions would get started *and* funds would be mobilised for the reduction of poverty reduction in the southern hemisphere.
5. The scheme would not have to impose the 1 t per capita from the outset, but could reach this goal in several stages beginning at 5 t per capita (which is the global emission average by now); in line with the projections of the IPCC, however, one should achieve the 1 t level by 2050.
6. Full integration of developing countries into the overall reduction obligation system should potentially be delayed by some years. Prior to that point in time, such countries could obtain extra additional emission rights or some kind of additional payment in order to manage their reductions and adaptation.
7. Also the sectors aviation, shipping, land use, agriculture, and deforestation would have to be fully integrated in the global cap-and-trade scheme.

8. A global institution should have the right to control emission reductions and enforce them with severe sanctions.
9. The annually decreasing aggregate number of emission certificates held by each state or group of states after international emission trading could than form the basis for a national or continental emission trading scheme among primary energy users (as described earlier), including an annually degressive number of certificates, annually auctioning, etc. The basic principles of such national (or continental) distribution systems might have to be prescribed on a global level to ensure the funds really reach the socially disadvantaged (after all, many states worldwide are not democracies). By the way, the differences of such systems compared to existing EU ETS would be the broader basis (primary energy), the stricter goals, the lack of loopholes such as CDM and the strictly global focus.
10. Primary energy producers or importers would have to auction certificates and pass the costs on through products, electricity and heating prices etc. to consumers. States or regional integration organizations (such as the EU) would then distribute the auctioning revenues to all citizens on a per capita basis.

By these means, energy efficiency, renewable energy, and longterm energy security would be forced (without a very complex „instrument mix" ordinary citizens are unable to really understand). Western countries would partly buy certificates, but partly rely on more energy efficiency, sufficiency, and renewable energy sources and therefore reduce their overall greenhouse emissions. Step by step, the developing countries would do the same. This would stop the global "race to the bottom" with regard to climate policy. Even from a broader economic point of view, the entire concept would lead to very important advantages: One would avoid the disastrous costs of climate change; new technologies would be forced; and independence from energy imports (and rising fossil fuel prices) would increase. Emission trading would help identify the cheapest available climate protection measures, and a broad range of greenhouse gas emissions could be covered and integrated (including, for instance, emission from meat consumption or bioenergy[24]).

In developing countries, eco bonus would be high initially and emission trading costs low; the opposite would apply in OECD countries (because emission trading costs between states would be added to "southern" eco bonus and would be substracted from eco bonus in the OECD countries). This would only be fair, as the higher per capita contribution to climate change originating from the OECD countries would be compensated, while at the same time the social justice of climate policy could be largely sustained in the same countries. Moreover, even the socially underprivileged in western countries would benefit from the financial transfers to the south, as these would stimulate the development of welfare states in the south, thereby reducing social dumping and stabilizing the western welfare state in the medium term. Furthermore, a determined attempt to combat climate change along these lines might avert the social consequences of global warming impacts in both North and South, whose severest manifestations are already emerging: migration and war for resources, such as food and water.

[24] And integration e.g. of bioenergy-caused rainforest degradation would work much more precise than by vague and incomplete "bioenergy sustainability criteria". European and national bioenergy policy is criticised in more detail by Ekardt/ von Bredow 2011.

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