



## Climate Protection, the German Federal Constitutional Court, and the Future of the Welfare State

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### ABSTRACT

The German Federal Constitutional Court derives from the Basic Law a right of defence against the threat of destruction of the foundations of our liberal order. This is the core point of its climate protection decision. Does this also give individuals the legal power to control the future of the welfare state?

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### I. Starting Points

1 The climate protection decision of the German Federal Constitutional Court (BVerfG)<sup>1</sup> has rightly caused a stir.<sup>2</sup> It forces the legislator to make greater efforts to save the earth. As an act of judicial power, it is politically effective, given the human responsibility for global warming that is both clearly evident and clearly reflected in the decision.<sup>3</sup> It is undoubtedly timely in terms of environmental policy. And, despite involving a balancing act in the division of powers, it has met with overwhelming approval. There are reasons for this: firstly, because the action demanded is of central importance; and secondly, because the BVerfG initially demands nothing but the further development of a legal objective, the content of which the legislature itself had previously determined.<sup>4</sup> Put simply, the BVerfG extends the time frame for climate protection without independently defining the constitutionally required conditions (at least for the time being).

2 In terms of fundamental rights doctrine, however, the decision is innovative. Ultimately, the decisive factor is neither the duty to protect, which has been developed over many years, nor equality over time. Rather, it is a threat to fundamental rights which, under certain conditions, is equated with an encroachment on fundamental rights. The BVerfG speaks of an 'advance

effect' of sovereign measures 'on future freedom',<sup>5</sup> also of the possibility of an 'unconstitutional endangerment',<sup>6</sup> then more clearly of an 'advance effect similar to an encroachment'.<sup>7</sup> In this way, one thing is made possible: the ability to ward off future adverse effects today. The innovation in the dogmatics of fundamental rights lies in bridging time: from today's entitlement to fundamental rights to tomorrow's impairment of those rights. This bridging occurs bi-functionally, through the protective duty function and the defence function.<sup>8</sup> The duties to protect become subjective legal positions<sup>9</sup> via the right to life and the right to property (article 2[2], sentence 1 and article 14[1] of the Basic Law)—nothing new in this respect. However, there is also the possibility of defending against future impairments of the 'freedoms protected by the Basic Law',<sup>10</sup> which obviously includes any number of freedoms<sup>11</sup>—and this possibility ultimately creates the stronger position that supports the result found by the BVerfG.<sup>12</sup>

3 All in all, there is now also talk of an 'intertemporal' protection of fundamental rights, but the attribute 'future-related' would be sufficient and more accurate. On this basis, further questions arise about the derivation of concrete obligations. One concerns the future of our welfare state. In order to pursue this question, there are three possible starting points. They show that the BVerfG's climate protection decision is closely related to previous decisions concerning social law: it builds on them in part and can be distinguished from them in other aspects (see II below). Against this backdrop, potential consequences for social law are examined (see III below).

## II. Connecting Factors Under Social Law

### 1. Social and Economic Minimum Subsistence Level

4 The first connecting factor between the climate protection decision and previous case law concerns the derivation and definition of legislative obligations in general. In this respect, it should be recalled that the BVerfG had already broken new ground with its 'Hartz IV decision' on the standard rates of Book II of the Social Code (February 2010)<sup>13</sup>—which deserves approval despite a clear tendency towards self-referentiality in its reasoning.<sup>14</sup> The development becomes particularly visible in comparison to a very early social law decision. At the end of 1951, a war widow had filed a constitutional complaint arguing that her inadequate provision violated article 1(1) and 2(2) of the Basic Law. In this regard, the BVerfG found that the benefits were unable to 'turn around the tragic fate of the war survivor ...'; however, this did not violate any fundamental right because their 'basic idea' was 'the protection of the individual against the state, which is conceived as omnipotent and arbitrary', 'but not the granting of claims of the individual to welfare by the state'.<sup>15</sup> From there, it is a long way to the first guiding principle of the standard rate decision, according to which 'the fundamental right to the guarantee of a minimum subsistence level worthy of human beings from article 1(1) of the Basic Law in conjunction with the welfare state principle of article 20(1) of the Basic Law ... ensures to every person in need of assistance those material conditions which are indispensable for his or her physical existence and for a minimum level of participation in social, cultural and political life'. The war widow decision

and the standard rate decision mark the starting and preliminary end point of a development in fundamental rights jurisprudence and, at the same time, the positioning of the BVerfG in the network of constitutional bodies.

5 The climate protection decision builds on this. It also derives concrete instructions for the legislator from fundamental rights. Although it does not follow the reasoning of the Hartz IV ruling, it does implement the ruling's approaches. It mentions an obvious 'right to the ecological minimum of subsistence',<sup>16</sup> but this right is only in extreme cases given independent significance alongside obligations to protect fundamental rights.<sup>17</sup> As already explained, the BVerfG then primarily discusses a defensive dimension of the rights of freedom. Nevertheless, as far as the concrete content of claims is concerned, the parallels in both decisions cannot be overlooked. In a nutshell, the primacy of legislation remains, due to the division of powers. In the case of the social subsistence minimum, the legislature must determine the amount; any constitutional indeterminacy is reduced by a minimum limit and contained by obligations to provide justifications; within this framework, governments are free to make social policy based on their own political discretion.<sup>18</sup> In the climate protection decision, the principle of proportionality is to be observed in order to avert future adverse effects.<sup>19</sup> Substantially, however, it is about distributing burdens and limiting the legislature's scope for decision-making, and the BVerfG here focuses primarily on objective law obligations under article 20a of the Basic Law and the measures already adopted.<sup>20</sup> The yardstick is not the Constitution, but international law and national legislation.<sup>21</sup> This is doubly unsatisfactory from the point of view of fundamental rights dogmatics: on the one hand, because simple laws determine the content of constitutional guarantees, and on the other hand, because the principle of proportionality does not have a defining effect.<sup>22</sup> Countering threats, however, requires positive action. Whether the BVerfG can and will go beyond its approach in the future and independently set minimum requirements remains to be seen.<sup>23</sup>

## 2. Threats to Fundamental Rights

6 A second point is that the question of the relevance of imminent threats to fundamental rights, ie of a forward-looking protection of fundamental rights, has also arisen in social law. In 2016, the BVerfG had to decide on a constitutional complaint challenging an allegedly imminent state of emergency in nursing care. The complainants, who feared that they might need to enter a nursing home due to their health conditions, argued that the conditions in such facilities posed health risks. They claimed that despite multiple reforms, the legislature had not resolved these issues, thus violating its duty to protect.<sup>24</sup> The constitutional complaint was not accepted for decision, on the grounds that it was inadmissible as a whole.<sup>25</sup> The BVerfG pointed to the narrow conditions under which a 'violation of the Constitution by failing to rectify a law' was assumed according to previous case law. The conditions that have changed over time must meanwhile be deemed intolerable, and the legislature must have failed to make a change that had become necessary as a result.<sup>26</sup> Furthermore, the BVerfG found that the complainants lacked a direct and immediate personal concern,<sup>27</sup> since the necessity of inpatient

care had not been demonstrated 'with the requisite probability' and, moreover, there was a choice between nursing homes.<sup>28</sup>

7 Without being able to go into the complainants' arguments in more detail, the general question arises as to whether the climate protection decision will fundamentally change the corresponding judicial assessments in the future. This is not to be expected if one assumes that the requirements for a threat to fundamental rights do not differ based on the relevant dimension of fundamental rights (defence or duty to protect). On the one hand, it can certainly be argued against the non-acceptance decision that it underestimates the likelihood with which the need for care generally occurs and that it overestimates the actual choices available to the persons concerned.<sup>29</sup> On the other hand, however, it points out an essential fact: namely, that the circumstances are too uncertain to be able to speak of a present and immediate impairment of fundamental rights in cases where it is not at all precisely foreseeable in which way a person will be cared for in a case of need that may occur at some point. In this respect, the situation is different from the climate protection decision, which is based on the assumption that the passage of time alone leads to the endangerment of fundamental rights—even if it must be admitted that firstly, the categorical distinction becomes blurred at the boundaries, and secondly, the climate protection decision relies on an assumption related to the personal fate of the complainants: namely, that they will survive until a breach of fundamental rights occurs.<sup>30</sup> Whether age and average life expectancy should play a role in this respect is not addressed.<sup>31</sup>

### 3. Case Law and its Containment

8 In its decision above on the significance of an imminent need for long-term care, the BVerfG did not go on to consider the implications for long-term care insurance of the notion that a system of compulsory social insurance must also be effective, at least in principle.<sup>32</sup> The BVerfG first established this principle in an equally groundbreaking decision concerning claims to benefits from statutory health insurance based on fundamental rights.<sup>33</sup> This decision was based on a different doctrinal approach than the climate protection decision, combining a right to defence and a duty to protect. In cases where persons are forced into membership with a (social) insurance, they should receive at least a minimum level of protection through this insurance. As a result, this leads to a right to treatment in life-threatening situations, namely, to treatment that is not already included in the catalogue of benefits—a point that faced criticism due to the lack of proven effectiveness.

9 There is no need to go into this point here. In one respect, however, the decision on entitlements to benefits from statutory health insurance helps us to understand the implications of the climate protection decision. Case law not only requires that the relevant leading decisions<sup>34</sup> be contextualized to systematically classify their significance. If these decisions touch upon the boundaries of the division of powers, they must also be fleshed out by subsequent judgements and contained so that these boundaries are not fundamentally shifted. Legislative transformations alone<sup>35</sup> are not sufficient for this.<sup>36</sup> This applies to the derivation of benefit claims

from the Constitution<sup>37</sup> just as much as to the obligation of the legislature to comply with a climate protection target. In this respect, the BVerfG will need to specify, on a case-by-case basis, the assumption that fundamental rights could currently be so endangered that legislative action is constitutionally required.<sup>38</sup>

### III. Prospects

#### 1. On the (Ir)Reversibility of the Development of Welfare State Institutions

10 The question of when obligations to act follow from threats to fundamental rights also relates to the overall design of social security systems. This aspect, which has been widely discussed in connection with climate protection decisions and the welfare state, essentially concerns the financial viability of social security systems, particularly pension insurance. This area of the welfare state requires continuous improvement, with the most recent significant reforms having taken place some time ago.<sup>39</sup> Nearly all reform measures have been reviewed by the constitutional courts. Protection of individual rights is provided by Article 14(1) of the Basic Law, as both the right to a future pension and already accumulated pension credits are regarded as property.<sup>40</sup> Constitutional complaints have rarely been successful, except in a few cases involving overly abrupt changes.<sup>41</sup> The BVerfG has also, after temporarily wavering, refused to consider a certain pension level as constitutionally required.<sup>42</sup> On this point, it is more restrained than the ECtHR, which has demanded a minimum level of protection in certain cases.<sup>43</sup> This shows very clearly that the constitutional protection of acquired rights in the sense of social insurance positions restrains, but does not exclude social security reforms, leaving room for future changes. However, the BVerfG has not yet dealt with another future-oriented position, namely the comparison of burdens and benefits over time.

11 This is the starting point for the arguments that seek to derive new requirements for the welfare state from the climate protection decision. According to one interpretation, the decision projects 'foreseeable encroachments on fundamental rights into the present', and it is therefore necessary to distribute 'contributions and benefits proportionately' among the present and future generations.<sup>44</sup> There is the argument that, as with so-called communicating pipes, 'benefits and contributions of future insured persons' must be 'adjusted' to current benefit cuts or benefit improvements,<sup>45</sup> or more generally, that 'intergenerational justice ... is structurally opposed to credit agreements at the expense of the future'.<sup>46</sup> The BVerfG itself does not use the term 'intergenerational justice' in the climate protection decision, but in the guiding principles alone it speaks three times of 'future generations', once of 'subsequent generations' and also of the 'proportionate distribution of opportunities for freedom across the generations'.<sup>47</sup> Nevertheless, on closer examination, the decision provides less for the future of the welfare state than claimed and does not yield substantially new insights.

12 On the first point, the true innovation of the climate protection decision lies in the legal assessment of future threats to fundamental rights, which can now also be challenged individually through constitutional complaints. The bridge connecting the present to the future is built by the 'irreversibility of the events set in motion'.<sup>48</sup>

In view of this, a transfer to social benefit systems must therefore be based on the claim that their creation and maintenance will also lead to states of irreversibility. This explains why one suddenly reads about ‘tipping points’ and ‘communicating vessels’ in connection with public debt and social security. Based on the assumption that scientifically described tipping points have decisive significance for the course and irreversibility of global warming, it must be noted that social benefit systems remain man-made institutions, while the Anthropocene and the climate catastrophe produced in it are characterized precisely by the interaction between human action and nature. It is true that there are, of course, legal requirements for the welfare state as well.<sup>49</sup> And it is true that there is the inertia of institutions and the path dependency of social policy,<sup>50</sup> this makes it more difficult to reform systems than to create them. Those who have followed social policy for a longer period of time may indeed doubt (or even despair about) the capacity for reform of pension insurance. But these are problems of political processes. They are not comparable to the melting of the Greenland glaciers or the slowing of the Gulf Stream. Therefore, at least the subjective legal protection in terms of the welfare state cannot be extended by the climate protection decision. To put it more concretely: constitutional complaints against them are not admissible even if it is easy to understand that, with a capped contribution rate, a certain pension level cannot be guaranteed in an ageing population, at least not without third party means, if the retirement age remains unchanged,<sup>51</sup> ie if the so-called ‘double stop lines’ in the statutory pension insurance do not offer any financial support. At the same time, this means that drawing far-reaching consequences for social and welfare policy from an ‘intertemporal protection of fundamental rights’ does not sharpen the dogmatic outlines of such a protection, but rather clouds them and ultimately dilutes its legal content.

## 2. System-Bound Equality over Time

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However—and this leads to the second point—admittedly, the demands to constrain public debt and the welfare state through constitutional law are backed by an undeniable urgency for reforms. The demographic changes in our society establish conditions from which the welfare state cannot escape.<sup>52</sup> Apart from the fact that the difference between climate protection and the welfare state lies not only in the different degree of irrefutability of measures, but above all in the very different possibilities of selecting appropriate measures, to which we will return in a moment: the entirely justified concern regarding the demands for reforms leads to the second objection, namely that the underlying findings are not only not new, but that there is already a constitutional basis for them,<sup>53</sup> a basis that is, at least with a view to social insurance, at most strengthened but not extended by the climate protection decision. What is meant here is ‘equality over time’, which can be understood as a concrete manifestation of intergenerational justice. If social insurance systems are financed on a pay-as-you-go basis, they presuppose the participation of three generations, with the middle generation not only paying the benefits of the first through its contributions, but also taking care of future contributors.<sup>54</sup> This legally constructed connection not only establishes the possibility of comparing the situation of the generations involved,<sup>55</sup> but also obliges the legislator to do so and to ensure a balance. The duty to organize

equal distribution between the generations already exists, without anything new arising from the climate protection decision with its freedom-based approach and proportionality test.<sup>56</sup> However, this has neither been explicitly clarified by the legislator nor decided by the BVerfG, and so it may be time to recall this obligation once again.

14 However, equality between the generations in social insurance as a constitutional requirement shares a characteristic with all the constitutionally derived requirements to legislate: it remains open in terms of content. There are very different ways to reform social insurance in general, and pension insurance specifically, thereby also changing future entitlements and burdens. The small collective capital stock within the pension insurance system announced in the coalition agreement<sup>57</sup> will not be enough,<sup>58</sup> even if, in line with recent decisions,<sup>59</sup> it no longer remains completely unprotected against ad hoc political decisions. But there are enough other reform proposals, both from legal<sup>60</sup> and economic<sup>61</sup> perspectives; some of them contain quite radical ideas that would also have the advantage of taking into account a material concept of equality.<sup>62</sup> Constitutional law provides principles for all these reform proposals, but it does not contain its own roadmap. This also has procedural consequences because it would be unclear who could be entitled to complain at all if a threat of impairments of fundamental rights were to result from the failure to reform pensions.

### 3. Freedom and Social Rights

15 If one leaves aside the distributional issues within individual social benefit systems, liberty rights in general, as they were used by the BVerfG in the climate protection decision, cannot have a significant steering effect. The welfare state must remain capable of acting to be able to fulfil its tasks in the future. In this sense, the debt brake<sup>63</sup> also serves to protect future generations<sup>64</sup> and contains requirements that are part of a broader political process.<sup>65</sup> However, the brake cannot be triggered by fundamental rights. Even if, following the climate protection decision and contrary to the systematics of the Basic Law, no specific protection-related connection to certain preliminary effects or preconditions of fundamental rights<sup>66</sup> were required (l. above), the legislature has too many legally permissible and factually open options for action.<sup>67</sup>

16 From the opposite, positive perspective, consequences for the welfare state based on fundamental rights could arise from a 'participatory dimension' of the rights to freedom—in the sense that these rights may not only guarantee protection against restrictions but also a form of participation. This approach was briefly brought into focus by considerations of the legal dimensions of benefits<sup>68</sup> and the *numerus clausus* decision of the BVerfG,<sup>69</sup> which at the time, when the welfare state was expanding, appeared to be as groundbreaking<sup>70</sup> as the climate protection decision does today. However, the participatory dimension did not achieve a role of its own, but remains a rule for the distribution of existing capacities.<sup>71</sup> That could change. For in its *Bundesnotbremse* (Federal Emergency Brake) II decision, the BVerfG added a right to school education<sup>72</sup> to the above-mentioned right to a minimum subsistence level (above, II.1.). This further closes the legal gap—to be

understood from the historical development of social law—that had arisen through the deliberate omission of social rights in the Basic Law.<sup>73</sup> This right also requires concretization and containment (above, II.3.). Although social rights concretize the programming of the welfare state, their basic problem is that they create subjective positions for the protection of collectively established institutions. If these institutions fail, case-by-case repairs risk causing further dysfunctions due to uncoordinated subjective rights. An illustrative example is the jurisprudence on the right to health in some Latin American countries, which not only overburdens courts<sup>74</sup> but also creates unbalanced priorities<sup>75</sup> and new inequalities. In this context, too, everything speaks in favour of a restrained jurisprudence that updates state obligations without excessively restricting the legislator's social policy discretion, including its powers to enact new conditions for social benefits. The same restrained jurisprudence will be necessary for future climate protection policy.<sup>76</sup>

#### IV. Conclusion

- 17 That is the bad news and the good news. States have to protect the environment, and they must reduce emissions that are harmful to the climate. There is no way around this. The welfare state also has to reform itself and, in addition to adapting to demographic, social, and technological changes, must take on an additional task: the transformation of the welfare state is required for the ecological transformation to succeed in a socially acceptable way.<sup>77</sup>
- 18 The good news is that the future is still in our hands. Both factually and legally, various options for reforming the welfare state are still available. The best solution must be fought for politically. Making this choice is a matter for parliamentary discussion, not pretorian decision.

#### Notes

- 1 BVerfG of 24.3.2021, 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20 and 1 BvR 288/20.
- 2 To describe them as 'invigorating in any case', according to Bartone JM 8/9/2021, 326, might be quite an understatement in this respect.
- 3 BVerfG of 24.3.2021, 1 BvR 2656/18 et al, cit 16 ff.
- 4 Cf BVerfG of 24.3.2021, 1 BvR 2656/18 et al, cit 252 f, 263, whereby the update must be carried out by the legislator himself.
- 5 BVerfG of 24.3.2021, 1 BvR 2656/18 et al, cit 116.
- 6 BVerfG of 24.3.2021, 1 BvR 2656/18 et al, cit 117.
- 7 BVerfG of 24.3.2021, 1 BvR 2656/18 et al, cit 183 and 184. For a critical review see *Kloepfer/Wiedmann DVBl.* 2021, 1333 (1339).
- 8 In procedural terms (§ 90.1 sentence 1 BVerfGG), both legal positions are opened by the assumption of a present, own and direct concern. The former is supposed to follow with regard to the duties to protect from the irreversibility of the development and the possibility that 'climate change will progress during the lifetime of the complainants in such a way that their rights protected by Article 2.2 sentence 1 and Article 14.1 of the Basic Law will be impaired'; the individual concern is from the fact that the possible impairment of rights might still be experienced by the complainants



- 9 themselves, according to BVerfG of 24.3.2021, 1 BvR 2656/18 et al, cit 108 and 109 f.  
BVerfG of 24.3.2021, 1 BvR 2656/18 et al, cit 97 ff; on the rejection of a duty to  
protect under Article 12 (1) GG very briefly cit 100.
- 10 Formulation in BVerfG of 24.3.2021, 1 BvR 2656/18 et al, cit 184; the 'freedoms  
comprehensively protected by the Basic Law' were mentioned above in cit 183.
- 11 For a critical review see *Bartone* JM 8/9/2021, 326 (331); *Möllers/Weinberg* JZ 2021,  
1069 (1073 f).
- 12 Legal protection is also provided by the duty to protect. For both approaches (duty to  
protect and right of defence) it is decisive that it is not about the protection of future  
persons, but against future dangers; cf on the questions of a legal entity of future  
persons *Kleiber* Der grundrechtliche Schutz künftiger Generationen, 2014, 145 ff.
- 13 BVerfGE 125, 175.
- 14 Cf *Möllers* in: *Das entgrenzte Gericht*, 2011, 281 (384 f).
- 15 BVerfG of 19.12.1951, 1 BvR 220/51 (E 1, 97), cit 31.
- 16 On this *Buser* DVBl. 2020, 1389 (1391 f); *Calliess* ZUR 2021, 323 (328 ff), with further  
references also to the opposing view.
- 17 BVerfG of 24.3.2021, 1 BvR 2656/18 et al, cit 114: 'In addition to the duties to protect  
... an ecological safeguarding of existence could, however, have an independent effect  
if, in an environment changed to the point of hostility to life, adaptation measures (cit  
34 above) could still safeguard life, physical integrity and property, but not the other  
prerequisites of social, cultural and political life. It is also conceivable that adaptation  
measures would have to be so extreme that they would no longer allow for social,  
cultural and political integration and participation.'
- 18 Cf on this BVerfGE 137, 34, 89 f.
- 19 BVerfG of 24.3.2021, 1 BvR 2656/18 et al, cit 188, 192 ff.
- 20 Critically on the 'reinterpretation of a duty to protect into a right of defence' *Calliess*  
ZUR 2021, 355 (356 f).
- 21 BVerfG of 24.3.2021, 1 BvR 2656/18 et al, cit 195 ff.
- 22 On the criticism of the substantive orientation towards duties to protect *Ekardt/Heß*  
NVwZ 2021, 1421 (1423 f); on the attempt of a reconstruction under defence law  
*Hofmann*, NVwZ 2021, 1587 (1588 ff); on the criticism of the 'filling up' of Article 20a  
GG under simple law *Polzin* DÖV 2021, 1089 (1095 f), but cf also on the possibilities  
of justifying self-binding measures *Möllers/Weinberg* JZ 2021, 1069 (1075).
- 23 In this respect, the interpretation as a new 'anthropocene constitutional dogmatics',  
according to *Sinder* JZ 2021, 1078 (1082 ff), is (still) questionable.
- 24 On this *Moritz* Staatliche Schutzpflichten gegenüber pflegebedürftigen Menschen,  
2013, 123 ff.
- 25 BVerfG [Kammer] of 11.1.2016, 1 BvR 2980/14, cit 17.
- 26 BVerfG of 11.1.2016, 1 BvR 2980/14, cit 19.
- 27 The BVerfG also explicitly pointed out that a constitutional complaint was not an  
*actio popularis*, BVerfG of 11.1.2016, 1 BvR 2980/14, cit 22. Completely different  
constitutional questions, namely those of the federal distribution of competences,  
were raised by the attempts to take action against a nursing emergency in hospitals  
by means of referendums in the *Länder*; according to the Bavarian Constitutional  
Court (BayVerfGH, of 16.7.2019, Vf 41-IX-19), the Hamburg Constitutional Court (of  
7.5.2019 - 4/18), the Bremen Constitutional Court (of 20.2.2020, St 1/19) and the  
Berlin Constitutional Court (of 20.1.2021, 105/19), federal law contains conclusive  
regulations and leaves no room for state law provisions on the minimum staffing of  
hospitals.
- 28 BVerfG of 11.1.2016, 1 BvR 2980/14, cit 25; the standard of probability itself,  
however, is not very high in the abstract; the BVerfG requires 'that [a complainant's]  
fundamental rights are affected with some probability by the measures based on the  
challenged legal norms', cit 23.
- 29 In addition to objections aimed at concretizing the duties to protect, on this

- see *Graser* in: *Spiecker gen. Döhm/Wallrabenstein (eds), Pflegequalität im Institutionenmix*, 2017, 11 (36 ff, 41 ff).
- 30 Cf BVerfG of 24.3.2021, 1 BvR 2656/18 et al, cit 108 f.
- 31 How the specific situation of the complainants did not play a role, cf *Polzin DÖV* 201, 1089 (1091 f).
- 32 So BVerfGE 115, 25, 49 (on SHI); BVerfG [Chamber] of 20.4.2016, 1 BvR 122/13, cit 12 (on pension insurance). Cf on this *Becker ZVersWiss.* vol 99 (2010), 585 (592 ff).
- 33 BVerfGE 115, 25, known as the 'Nikolausbeschluss' ('St. Nicholas Decision'), dating back to *Kingreen NJW* 2006, 877 (880).
- 34 Cf *Lepsius JZ* 2019, 793 ff.
- 35 Cf on SHI § 2 para 1a Social Code Book (SGB) V, inserted by art 1 of the SHI Care Structure Act of 22.12.2011 (BGBl. I 2983).
- 36 On the subsequent development of case law in SHI benefits law see *Becker*, in: *FS für Steiner*, 51 (69 ff); in greater detail also: <https://www.nikolaus-beschluss.de/>.
- 37 Insightful in this respect also BVerfGE 137, 34, above II.1.
- 38 This process has already begun, cf BVerfG [Chamber] of 18.1.2022, 1 BvR 1565/21 et al.
- 39 Cf only *Becker* in: *Ehlers/Fehling/Pünder (eds), Besonderes Verwaltungsrecht*, 4th edn 2021, § 79 cit 20 ff with further references.
- 40 Fundamentally BVerfGE 53, 257; cf *Becker LVA Mitt.* 2005, 228 ff; *Papier/Shirvani* in: *SRH*, 6th edn 2018, § 3 cit 42 ff, each with further references.
- 41 With regard to the separately examined protection of legitimate expectations, cf review by *Butzer*, in: *Grundlagen und Herausforderungen des Sozialstaats*, vol 2, 3, 14 ff.
- 42 Cf BVerfG [Chamber] of 20.4.2016, 1 BvR 122/13, cit 12 (on required rates of return).
- 43 Although based on proportionality tests, cf on this and opposing views Decision of 13.12.2016, No. 53080/13, *Bélané Nagy/Hungary*.
- 44 *Schlegel NJW* 2021, 2782 (2788).
- 45 *G. Kirchhof* *Intertemporale Freiheitssicherung—Zu den Folgen der Klimaschutzentscheidung des Bundesverfassungsgerichts für die Sozialversicherungen und die Staatsverschuldung* 2021, These 9.
- 46 *Ibid.*, These 15.
- 47 BVerfG of 24.3.2021, 1 BvR 2656/18 et al, LS 1, 2b, 2e and 4.
- 48 BVerfG of 24.3.2021, 1 BvR 2656/18 et al, cit 108, 118, 119, 130, 133, 146, 185, 186, 187, 198, 262; on the requirements to be met by it *Wahnschaffe/Lücke DÖV* 2021, 1099 (1103 f) and *Möllers/Weinberg JZ* 2021, 1069 (1077).
- 49 On this generally see only *Zacher* in: *HStR* III, 3rd edn 2004, § 28 cit 95 ff; *Becker*, in: *SRH*, 6th edn 2018, § 1 cit 23 ff See also *Janda ZRP* 2021, 149 (151 f); *Spizlei NZS* 2021, 945 (947 f). Very generally *Ekarde* *Theorie der Nachhaltigkeit*, 3rd edn 2021, 349 ff.
- 50 Cf *F. X. Kaufmann* *Varianten des Wohlfahrtsstaats*, 2003, 27 ff.
- 51 Cf Coalition agreement between SPD, Bündnis 90/Die Grünen and FDP, 73.
- 52 Cf only *Becker JZ* 2004, 929 ff.
- 53 Fundamentally *Heberlein* *Generationengerechtigkeit als verfassungsrechtliches Gebot in der sozialen Rentenversicherung*, 2001; on this see also *Becker DRV-Schriften* vol 51 (2004), 56 ff.; *Steiner NZS* 2004, 505 ff.
- 54 Fundamentally *Schreiber* *Sozialpolitische Perspektiven*, 1972, 44 ff.
- 55 While the legislator can in principle also set the reference points of comparability through laws via their period of validity, cf generally *P. Kirchhof* *HStR* VIII, 3rd edn 2010, § 181 cit 157 ff.
- 56 On the theoretical background see also *Kleiber* *Schutz künftiger Generationen*, 218 ff.
- 57 Of EUR 10 billion, coalition agreement between SPD, Bündnis 90/Die Grünen and FDP, 73.
- 58 In view of annual pension expenditures of more than EUR 30 billion, see *DRV*,

- Kennzahlen der Finanzentwicklung (available at: [www.deutsche-rentenversicherung.de](http://www.deutsche-rentenversicherung.de)).
- 59 BVerfG 22.5.2018, 1 BvR 1728/12, cit 70, 73 ff (fiscalization amount); BSG 18.05.2021, B 1 A 2/20 R, cit 49 ff (commissioning of the BZgA). On the background of the dogmatics of fundamental rights see *Becker* JURA 2019, 496 (506 ff).
- 60 Cf only within the context of the DJT *Steinmeyer* Gutachten B zum 73. DJT, 2020 with further references.
- 61 Proposals for a Reform of the Statutory Pension Insurance Scheme, Expert Opinion of the Scientific Advisory Council to the Federal Ministry for Economic Affairs and Energy (Vorschläge für eine Reform der gesetzlichen Rentenversicherung, Gutachten des Wissenschaftlichen Beirats beim Bundesministerium für Wirtschaft und Energie) (BMWi), 2021 (available at: <https://www.bmwi.de/>).
- 62 *Becker* FAZ of 20.3.2020, 16.
- 63 Art 109 para 3 and 115 para 2 GG in the version of Föderalismusreform II, G of 29.7.2009 (BGBl. I 2248).
- 64 Cf *Mangoldt/Klein/Starck/Huber/Voßkuhle/Wendt* GG, 7th edn 2018, art 115 cit 9, 11 ff with further references.
- 65 According to *Dürig/Herzog/Scholz/Kube* GG, art 115 (as of: July 2021) cit 246 ff.
- 66 On this see *Kleiber* Schutz künftiger Generationen, 19 ff, 296 ff and 309 ff.
- 67 Similarly, *Faßbender* NJW 2021, 2085 (2089); likely also *Ekardt* Theorie der Nachhaltigkeit, 279 ff; for a different view and for the ‘recognizability’ of a ‘tipping point’ also in this respect *G. Kirchhof*, Intertemporale Freiheitssicherung, 27 ff, 30.
- 68 Particularly *Häberle* VVDStRL 30 (1972), 43 (97 f, 112 ff); cf also *Müller* Soziale Grundrechte in der Verfassung? 1973 (2nd edn 1981).
- 69 BVerfGE 33, 303, 331.
- 70 Cf *Zacher* Sozialpolitik und Verfassung im ersten Jahrzehnt der Bundesrepublik Deutschland, 1980, LXXXV f; on the ‘fashionable suspicion’ of participation at the time *Friesenhahn* DJT 1974, G 33 f.
- 71 On this see BVerfGE 147, 253 (allocation of places in medical studies); cf for derivation also *Kingreen* in: *Bonner Kommentar*, art 3 GG (Stand 2020), cit 303.
- 72 Derived from art 2 para 1 in connection with 7 para 1 GG, BVerfG of 19.11.2021, 1 BvR 971/21, LS 1.
- 73 On this see only *Badura* Der Staat 14 (1975), 17 (22 ff); on the state of European legal development and the topicality of social rights see only *Becker* in: *Iliopououlos-Strangas* (ed), *Die Zukunft des Sozialen Rechtsstaates in Europa*, 2015, S. 101 ff.
- 74 On the situation in Brazil see only *Machado* ZIAS 2017, 1 ff.
- 75 Cf *Yamin/Norheim* Human Rights Quarterly 36 (2014) 196 ff.
- 76 Cf *Wagner* NJW 2021, 2256 (2257 ff).
- 77 Cf *He* ZIAS 2020, 72 ff.

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