

Rechtsanwälte Günther

Partnership

Rechtsanwälte Günther - P.O. Box 130473 - 20104 Hamburg

Michael Gunther *
Hans-Gerd Heidel *¹ Dr.
Ulrich Wollenteit *²
Martin Hack LL.M. (Stockholm) *²
Clara Goldman LL.M. (Sydney) • Dr.
Michéle John * Dr Dirk Legler
LL.M. (Cape Town) * Dr Roda Verheyen
LL.M. (London) * Dr. Davina Bruhn *
Jenny Kortländer LL.M. (Brisbane)
Séverin Pabsch
André Horenburg

Mittelweg 150
20148 Hamburg
Phone: 040-278494-0
Fax: 040-278494-99
www.raeguenther.de

15.01.2020
00362/19 /R /R
Employee: Jule Drzewiecki
Extension: 040-278494-11
Email: drzewiecki@rae-guenther.de

Constitutional complaint *Neubauer and others*, supported by Greenpeace e.V. and Germanwatch e.V.

Summary:

Insufficient protection level of the Federal Climate Protection Act and failure to implement climate protection measures no longer constitutionally acceptable

The complainants argue that individual provisions of the Federal Climate Protection Act are incompatible with their rights guaranteed in the Basic Law and therefore unconstitutional. In particular, the complaints point to the inadequate reduction target of - 55% by 2030 (compared to 1990), which is backed up by concrete emission quantities per sector. They also contest the possibility of being able to achieve these inadequate emissions-reductions targets through emissions-trading abroad. Finally, they argue that all these provisions, as well as Germany's actual legislative omission to implement measures that achieve a sufficient level of protection, violates the fundamental right to life and physical integrity (Art. 2.2 of the Basic Law) against risks of a life-threatening nature and of a numerically incalculable extent.

The guarantee of human dignity under Article 1 of the Basic Law is also affected because the generation of the complainants is deprived of any options for action to protect itself.

The fundamental rights of the Basic Law are to be interpreted in accordance with the European Convention on Human Rights (ECHR), in particular with Art. 2 and 8, which implies a right to climate protection. This right is translated in each State's obligation to act to the extent of "its" share in preventing dangerous climate change, as the Dutch courts have already established in three instances (*Urgenda* case). On 20 December 2019, the Dutch Supreme Court finally dismissed the appeal of the Dutch government. In the short term, the Netherlands must now take significant measures to reduce Dutch greenhouse gas emissions by 25% by the end of 2020 compared to the base year 1990.

The complainants request that the Federal Constitutional Court model itself on the courts in the Netherlands when looking at the climate science and interpreting legal standards, namely human rights, and the obligation of states to act on the climate crisis. The main difference is that the subject of the complaint covers a period greater than 2020, as was requested in the Netherlands.

The Federal Climate Protection Act

With the Climate Protection Plan 2050, adopted in 2016, the German government has committed itself to achieve a greenhouse gas reduction of 55% by 2030 and then an "extensive decarbonisation" by 2050. This goal is still based on the goal backed by the Intergovernmental Panel on Climate Change report of 2014 (5th IPCC Assessment Report) that the global temperature increase will be limited to 2°C.

The German target for 2030 in the Federal Climate Protection Act (at section 3 and Annex 2) is an identical transposition of the target set at the EU-levels reduction of 40% compared to 1990 by 2030.

In addition, the law on participation in the EU trading systems allows this reduction to be achieved elsewhere, not in Germany. The law does not contain a reduction path after 2030, nor does it contain any information on the still permissible global and national greenhouse budget.

It does not take into account the most recent science or IPCC reports, nor does it take into account the binding international legal obligation of Germany and the EU under the Paris Convention to hold the increase in the global average temperature to "well below 2 °C above pre-industrial levels" and pursuing efforts to limit the temperature increase to 1.5 °C above pre-industrial levels.

Climate change: The status quo and the risk to life and limb

Humans influence and change the global climate through greenhouse gas emissions and the destruction of sinks (especially forests). Today, Germany is responsible for about 2% of global emissions and emits over 900 million (million) tonnes (t) of greenhouse gases annually. Calculated for the period since 1800, Germany is the fifth largest emitter of greenhouse gases in the world. Germany's annual per capita

CO₂ emissions of around 9.6 tonnes are still about twice as high as the international average (4.8 tonnes per capita).

To date, this has led to an increase in average global temperatures of around 1°C and in Germany of as much as 1.4°C, a considerable part of which is due to emissions from Germany since the beginning of industrialisation. The temperature increase would have been even more noticeable if the oceans had not absorbed considerable amounts of CO₂ and the temperature rise. Indeed, oceans have warmed steadily since 1970 and have absorbed more than 90% of the excess heat in the climate system - they are now at their physical and ecological limits. Past and present generations have used up this "sink" and it is no longer available for the present and future generations.

Even if humanity immediately stopped greenhouse gas emissions, temperatures would continue to rise. The warming caused by emissions since pre-industrial times until today will continue for centuries and cause longterm changes in the climate system. According to the IPCC, it is even possible that the greenhouse gases already released into the atmosphere will cause global warming of 1.5 °C. Even today and it cannot be ruled out that abrupt, unstoppable and uncontrollable effects may be triggered by past emissions alone (so-called *tipping points*). Every further emission of CO₂ or other greenhouse gases increases this risk.

These phenomena are already having an impact locally and thus also on the legal positions of the complainants. The extreme summer in Germany in 2018 and weather extremes in 2019 are partly attributed to human-caused (anthropogenic) climate change, since such events (will) occur significantly more frequently than they would have without anthropogenic climate change. The number of extreme weather events in Germany has more than doubled in the last 50 years. The bushes and forest fires currently raging in Australia in the winter of 2019/2020 are exactly what climate scientists predicted in 2007 with regard to the effects of climate change for the year 2020 with global warming of about 1°C. The same applies to the extreme affliction of the German forest, especially through the continuing drought today.

Climate change creates uncertain life prospects for the complainants, threatens the lives, health and safety of their entire generation, and, for complainants living on islands, their homes. It is also likely that the complainants' farms will not survive solely because of climate change, notably due to an increase in heat and drought, water shortages, land rendered unusable due to extreme rainfall, forest fires, etc.

Climate change is an existential physical phenomenon for which we have been responsible, and which has been foreseeable for at least 40 years. On the basis of the IPCC findings and also on the basis of the Dutch judgements in the *Urgenda* case, it is clear that at least a limit of 1.5° of global warming compared to preindustrial values must be resolutely pursued. If this level of protection is

abandoned, according to the findings of the IPCC, millions more people will be acutely endangered by the consequences of climate change than is already the case, or will be killed by rising sea levels coupled with extreme weather events.

The Federal Climate Protection Act does not pursue this level of protection, nor does it provide a reduction path to greenhouse neutrality that would be globally compatible with this level of protection.

Despite continuous climate diplomacy and political declarations of intent, there has been practically no significant reduction in greenhouse gas emissions in Germany over the last 20 years, let alone a targeted transformation of the economic and social order towards greenhouse gas neutrality. Despite clear scientific statements, the resonance of the political decision-making process appears to have been paralysed for decades. The already existing damage caused by climate change and the now undisputed existential threat, taking into account the jurisprudence of the Federal Constitutional Court, result in the obligation to stop releasing greenhouse gases as far as possible and proportionately.

It is a scientific consensus that there is a final global greenhouse gas budget available to humankind if global climate goals are to be achieved. This budget can be calculated on the basis of a maximum global temperature target - in this case defined solely on the basis of the protection of human life and the considerable risks of the occurrence of so-called *tipping points* at 1.5° C - the probability of occurrence and a global distribution key for the few remaining tonnes of greenhouse gases.

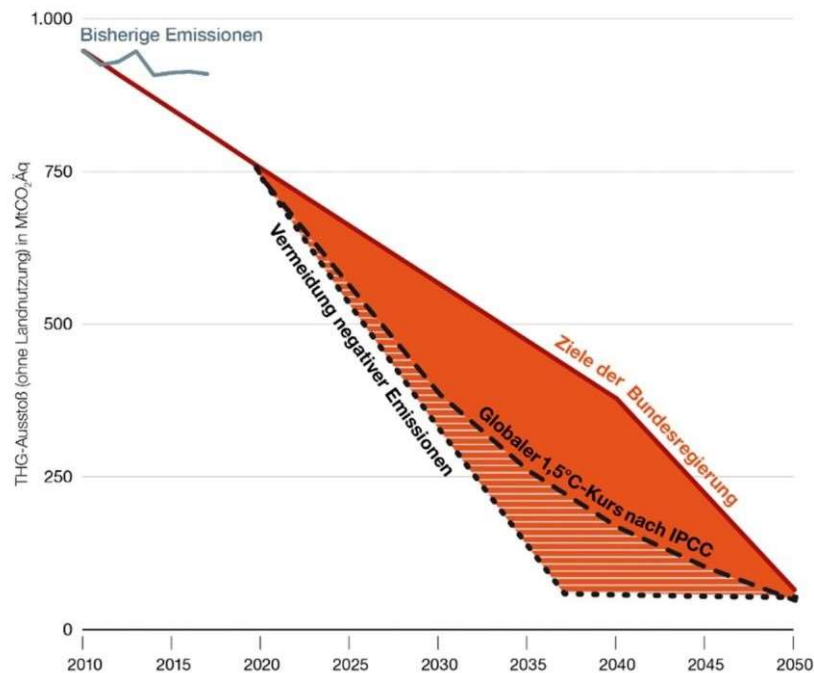
It is not evident that this consideration underlies the Federal Climate Protection Act, but - in any case, due to the explicit emission quantities in the annex to the Act, the available budget will be completely exhausted in a few years, if one assumes - like the German Council of Environmental Experts and the Berlin Administrative Court in the *Greenpeace* climate case (Ref. 10 K 412.18) - an equal per capita approach for emission allowances worldwide.

The complainants argue that - while maintaining proportionality with regard to other fundamental rights - all legal provisions that are objectively possible and necessary to protect the climate system and future generations as well as the fundamental rights of the complainants must be implemented and the necessary measures must be taken to this end. Contrary to this obligation to act or protect, which has also been defined by the Dutch courts, Germany is not on the way to making its share of the necessary global reductions on the way to greenhouse gas neutrality.

The concrete obligation to act

If one considers the scientific findings examined by the IPCC on the feasibility and necessity of reductions to greenhouse gas neutrality around the 1.5° target,

Germany would have to reduce significantly more by 2030, about 70% compared with 1990, in order to do "its part", at least the minimum of what is globally necessary. Germany will, as stipulated by the Federal Climate Protection Act, reduce its emissions far less than the global average of what is necessary. This is illustrated in the following graph.



Source: adapted from New Climate Institute, 1.5°C: What Germany must do, 2019, with permission (<https://newclimate.org/2019/03/14/15c-was-deutschland-tun-muss/>)

If one aggregates the many emission paths that the IPCC assessed in its special report of 2018 on 1.5° C warming, one obtains an average reduction line as an emission path that would be *globally* suitable to at least approximately maintain the 1.5° target. The dotted line in the graph (global 1.5° course according to the IPCC) shows the course of German emissions if they were to roughly follow this global path from 2020.

However, if one considers the actual emissions in Germany up to 2019 (based on data from the Federal Environment Agency), as well as Germany's annual emissions planned under Annex 2 of the Federal Climate Protection Act up to 2030, and then a linear path towards greenhouse gas neutrality up to 2050, as envisaged in Section 1 of the Act, the red line emerges (targets of the Federal Government).

The IPCC emission paths also include negative emissions (i.e. removal of CO₂ from the atmosphere) to varying degrees. If these were to be omitted completely, the dotted emission path would result (avoidance of negative emissions).

In the view of the complainants, the global average of a course that is compatible with 1.5° C global warming also represents the absolute underestimate of a

requirement for action on the part of the legislature (as assumed as a yardstick in the *Urgenda* Decision), and not, for example, an extremely precautionary or best possible reduction performance. This is due to the fact that the emission scenarios considered by the IPCC reflect only a low probability that this target can actually be met, and because this approach leads to very rapid reductions, particularly in developing countries, and not in those countries that have historically borne the greatest responsibility.

All in all, therefore, the German legislature has enacted an indecisive, inappropriate law that is incompatible with obligations to act and protect, which allows far too many greenhouse gas to be emitted on German territory up to 2030, thus depriving the generation of complainants of the opportunity to decide on their own future. Germany is not doing "its part".

Such reductions are actually feasible, as official studies (e.g. by the Federal Environment Agency) show.

The law thus violates the fundamental rights under Article 1 (human dignity) in conjunction with the state's objective under Article 20a of the Basic Law, according to which the natural foundations of life are to be protected in responsibility for future generations (right to the future), Article 2.2 (right to life and physical integrity) and - with regard to the complainants' specific farms - Articles 12 and 14 (right to freedom of occupation and property), taking into account Articles 2 and 8 of the European Convention on Human Rights.

Connection with the EU budget

In view of this, the Federal Climate Protection Act cannot be sustained if it contains regulations according to which reduction services may be provided abroad. Only if *at least* all reduction services under the Act are provided domestically there will be a chance that a sufficiently rapid reduction path, including in the EU, will be initiated. This is because the German law only implements the EU target for 2030, namely a 40% reduction in greenhouse gas emissions relative to 1990. This target is objectively unsuitable and illegal from an EU and human rights perspective. This is the subject of the lawsuit brought before the European courts by the complainant from Langeoog, among others (People's Climate Case, C-565/19 P).

In addition, the court must stipulate that further reductions in Germany are not passed on to other EU countries - because then these would be absorbed into the overall EU budget and would be unsuitable for the protection of the complainant's fundamental rights.

Implementation measures

Irrespective of the level of protection provided by the law itself, the implementation of sufficient reduction measures is also not apparent. The legislator itself has not made any forecasts as to how and to what extent the 55 % target provided for by

the Climate Protection Act itself can be achieved by the measures adopted to date. Studies estimate that even this target will be missed by a considerable margin with the laws submitted so far. However, as experience with the failure to achieve the climate protection target for 2020 shows, targets must be backed up by measures which also lead to the achievement of the target with sufficient certainty in terms of forecasts. A significantly faster implementation of reductions, also to achieve an appropriate interim target of about -70% compared to 1990, is possible and proportionate in all sectors.

The complainants

The complainants are teenagers and young adults who partly run ecological agriculture and sustainable tourism themselves or their families in Germany, namely on the North Sea island Pellworm, in the Alte Land on the Elbe near Stade and in Brandenburg, as well as on the island Langeoog. One complainant lives and studies in Göttingen.

The complainants are between 15 and 32 years old and are thus all likely to experience the predicted effects of climate change by the turn of the millennium. They are already affected by the noticeable effects of climate change in Germany (e.g. extreme weather conditions, heat waves), but cannot protect themselves through their democratic rights, especially through the electoral process only. They feel helplessly exposed to the economic and political "business as usual" and are under considerable stress with regard to their own future.

Most of the complainants were co-plaintiffs in the *Greenpeace* lawsuit against the Federal Government for the enforcement of the 2020 climate protection target (40% reduction compared to 1990), which resulted in the negative ruling of the Berlin Administrative Court (VG Berlin) of 31.10.2019, Ref. VG 10 K 412.18.

One complainant is a co-plaintiff in a European climate case with regard to the insufficient climate targets of the EU, which is currently pending before the European Court of Justice on appeal under case number C-565/19 P. This is supported in Germany by Germanwatch e.V. and shows that the EU's broad target of a 40% reduction in greenhouse gas emissions by 2030 compared to 1990 is incompatible with EU fundamental rights and EU primary law - for reasons similar to those presented in this complaint.

One complainant, *Neubauer*, has effectively "suspended" her education and life in order to work together with hundreds of thousands of her generation for more climate protection, both politically and in the media. She co-founded *Fridays for Future* in Germany. In her book *Vom Ende der Klimakrise - Eine Geschichte unserer Zukunft* (2018) she calls for effective protection for her and future generations.

Moreover, the (parental) farms of the complainants are already physically affected by climate change. So far, this has mainly manifested itself through more frequent and stronger extreme weather events with flooding of agricultural land, hail, spread of previously unknown pests, heat stress of dairy cattle and general drought in spring and summer with the corresponding harvest losses. In the future, the complainants' farms will also be partially affected by the sea level rise and by a lack of water supply.

Most of the complainants have their home on North Sea islands – which will simply no longer exist without rapidly effective climate protection.

One complainant is already a farmer himself and is already suffering from considerable crop losses attributable to climate change in 2018 and 2019 (approx. 50% losses) and must fear that the consequences of ineffective climate protection will damage the dairy cattle and make their own land useless due to lack of irrigation. Already today, heat stress occurs in the animals due to the temperature increases. In addition, the forest belonging to the farm has been damaged to a considerable extent and is further endangered. The complainant therefore also asserts present and future interventions in Article 14.2 of the Basic Law (ownership).

Attorney
Dr. Roda Verheyen

Attorney
Dr. Ulrich Wollenteit