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Climate Change and Intergenerational Justice– Lessons from Germany’s Federal Constitutional Court

AIDA Climate and Catastrophic Events Working Party

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Climate Decision of the Federal Constitutional Court (BVerfG) 24 March 2021 – 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, NJW 2021, 1723

- Topic: intertemporal evaluation of fundamental rights and their restriction (new doctrinal construction in German Constitutional Law!).
- Vulgo: No limitless life at the expense of future generations.
- Attacked: Regulations of the 2019 Federal Climate Protection Act („Klimaschutzgesetz“).
- Key finding (binding German legislature as well as courts and the government):

"the legislature's duty, arising from the requirement of proportionality, to distribute the constitutionally necessary reductions in CO₂ emissions up to climate neutrality over time in a manner that protects fundamental rights" is violated.

Object of the Decision: Germany's Action against Climate Change

- **2019:** First Comprehensive Anti-Climate Change Legislation: „**Klimaschutzgesetz**“ (for comparison: UK Climate Change Act 2008)
- Previously: multitude of national laws at state and federal level, government programmes, EU regulations and international agreements.
- Purposes:
 - Guaranteeing that Germany fulfils Paris Accord climate targets
 - Enshrining Germany's national greenhouse overall reduction targets in law
(originally min. 55% reduction by 2030, compared to 1990, net greenhouse gas neutrality by 2045)
Sectoralisation of targets
Supervision and Emergency Powers given to Federal Ministries

Germany's Action against Climate Change: Sectorialisation

Permissible annual emission budgets according to Climate Action Law bill, May 2021



Annual emission budgets in millions of CO ₂ equiv.	2020	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
Energy	280		257								108
Industry	186	182	177	172	165	157	149	140	132	125	118
Buildings	118	113	108	102	97	92	87	82	77	72	67
Transport	150	145	139	134	128	123	117	112	105	96	85
Agriculture	70	68	67	66	65	63	62	61	59	57	56
Waste and others	9	9	8	8	7	7	6	6	5	5	4

Germany's Action against Climate Change: Road to Karlsruhe

- Problems (a.o.)
 - Annex 2 of the 2019 Climate Change Act sets out the annual allowable emission amounts for various sectors in line with the reduction quota for the target year 2030.
 - The provisions irreversibly offload major emission reduction burdens onto periods after 2030.
 - The reductions still necessary after 2030 will have to be achieved with ever greater speed and urgency.
 - Claim: The legislator should have mitigated these burdens in order to safeguard the freedom guaranteed by fundamental rights. The statutory provisions on adjusting the reduction pathway for greenhouse gas emissions from 2031 onwards are not sufficient to ensure that the necessary transition to climate neutrality is achieved in time.

Much ado about nothing?

- Jubilant reception in literature and practice ("epoque-defining": *Bartone*, jM 2021, 326; "sensational": Frenz, DVBI 2021, 810, "groundbreaking": BUND).
- Overlooked: Main claim against failure to take appropriate measures dismissed.
- Only occasionally taken up by courts on trifles: VGH Mannheim on the increase of parking fees in the city of Freiburg (decision of 24.6.2022 – 2 S 809/22).
- Hardly any consequences on practice of the Federal Constitutional Court: Constitutional complaints regarding the non-enactment of state climate protection laws (decision of 18.1.2022) and speed limits (decision of 15.12.2022).
- **But: June 2023:** Governmental bill for a reform of the 2019 Climate Change Act
 - 10% more total reduction till 2030
 - flexibility across the sectors (budget cross-billing)
 - yet: reduced authority of the federal ministries

Arguments of the Federal Constitutional Court

- The state objective of Article 20a of the German Constitution (Basic Law) is concretised by the Paris Agreement on Climate Protection (limiting global warming by a maximum of 1.5 - 2.0 degrees).
- Current measures are not sufficient to achieve this goal; therefore, measures in the future must be more drastic (reasonableness limit).
- Measures on both present and future ones are proportionate in themselves, but not in the intertemporal dimension: duty to share the burden between generations.
- An intertemporal dimension is inherent in Article 20a of the Basic Law (para. 183).
- Consequence: Legislator must take into account the effects on future generations (current climate legislation has an "advance effect" similar to a present intervention and requires justification, para. 187).

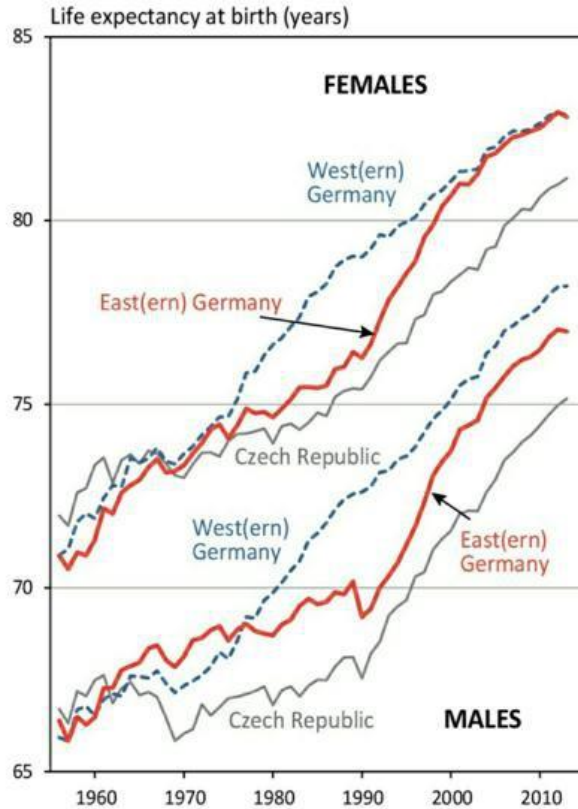
Prerequisites for the Intertemporal Effect of Fundamental Rights according to the Federal Constitutional Court

- 1) Direct and unseverable connection between the behaviour of two or more generations
- 2) Disturbance of proportionality: Toleration of the rights of the previous generation *inevitably* leads to excessive demands on the succeeding generation.
- 3) The protection of future generations is provided by a fundamental constitutional provision (not necessarily a state objective, thus also fundamental rights).

Note: Similar provisions to German Fundamental Rights in other countries (e.g. South Africa) as well as in supra-national legislation such as the ECHR.

Transferability to other Fields of Law

- Parallelism of a crisis development?
- Focus: Statutory pension insurance
- **Criterion 1 fulfilled:** pure pay-as-you-go systems (**private insurance different:** principle of individual equivalence of premium and coverage)
- **Criterion 2 problematic:**
 - "Demographic gap": Longer and longer life expectancy, low birth rate, which is only partially compensated by immigration
 - Parts of the literature: Comparability questionable. There is (only) a lack of funds, no irreversibility and no "tipping points" as with climate (*Spitzlei*, NZS 2021, 945, 947).
 - However, the BVerfG does not demand this, therefore in my opinion (+).

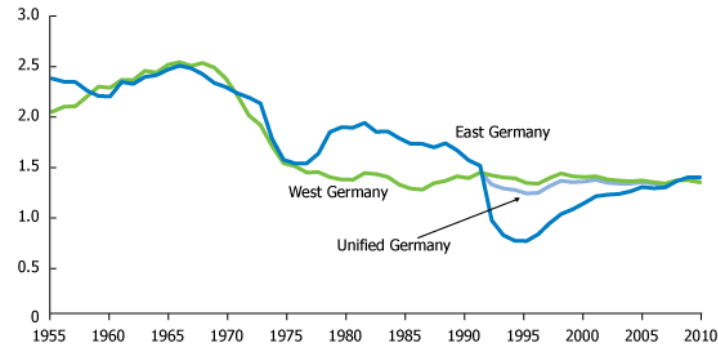


Special report | The demographic challenge

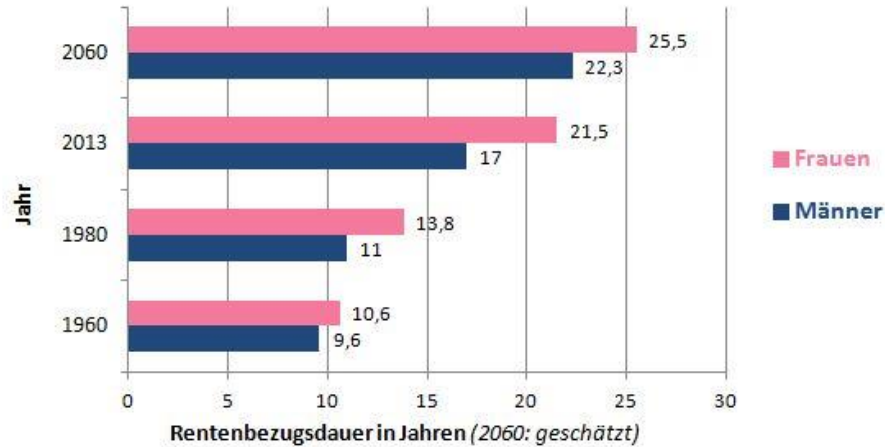
Parts of Germany are desperate for more people

Coping with ageing and shrinking populations is hardest in the east

Fertility Rate in Germany



Rentenbezugsdauer im Wandel der Zeiten.

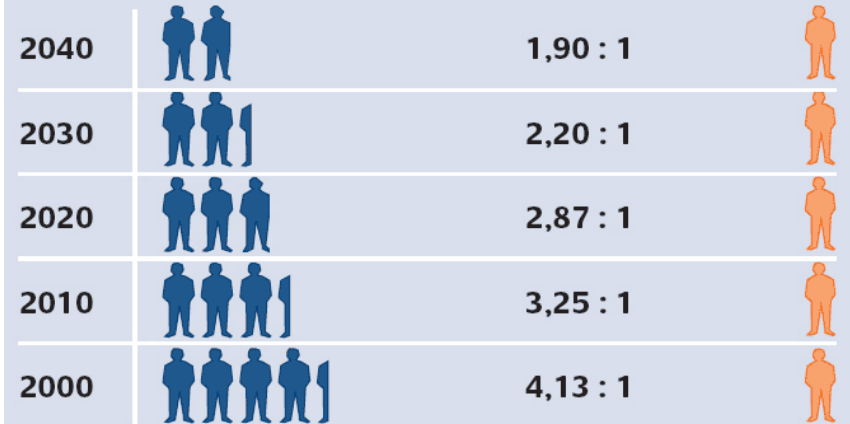


Grafik: DIA

Quelle: DRV, 07/14

Generationen im Wandel

Anzahl der Beitragszahler, die für einen Rentner aufkommen



Quelle: Bericht der Rürup-Kommission

Transferability to other Fields of Law

- **Criterion 2: Lack of comparability due to legislative discretion?**
 - Possibility of benefit reduction
 - Possibility of increased tax subsidies
 - Longer working lives (Germany: German Employers' Association 4/2023: 70 years)
 - Outsourcing to private insurance (limits of profitably investable money)
- Possibilities are mutually limiting and, incidentally, also exist for climate protection!

Transferability to other Fields of Law

- **Criterion 3: Constitutional basis for the intertemporal protection of fundamental rights?**
 - Equivalent to Art. 20a GG?
 - Approaches to an Article 20b of the Basic Law ("intergenerational justice") have not become law (cf. BT-Drucks. 16/3399, p. 1).
 - Art. 20 para. 1 GG principle of the welfare state?
 - Critics: Rather not, because with the equalisation of social inequality it is oriented towards the present: Could even work in the opposite direction.
 - Could also have been said about Article 20a GG before the BVerfG's decision.
 - Conceivable fundamental rights: Art. 3, 14 GG – pension rights

Thank You for Kindly Paying Attention!

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