Chapter 4
Climate Change and Justice: Perspectives of Legal Theory

Felix Ekardt

Abstract A volume on climate law 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.

4.1 Theoretical Background: Ethical and Legal Considerations

Under what circumstances can we call social life "just", or the law "right"? This is the ultimate question of all thought about politics, morals, and the law. This question is also relevant when it comes to the question of how we deal with scarce energy

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Felix Ekardt is a lawyer, sociologist and philosopher. He is a Professor of environmental law and philosophy of law at the University of Rostock and Director of the Research Unit Sustainability and Climate Policy in Leipzig.

F. Ekardt (✉)
Forschungsstelle Nachhaltigkeit und Klimapolitik, Könneritzstrasse 41,
04229 Leipzig, Germany
e-mail: felix.ekardt@uni-rostock.de

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resources and climate change, and how we balance 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, and what shall the founding order look like? This question must be strictly distinguished from the question of how humans actually behave, and what the factual reasons for this action are (and what humans factually “deem right”) – this is a question, respectively, of the descriptive action theory or *anthropological* theory of society.[1] 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, emissions trading systems, voluntary commitments, or regulatory prescriptions.

A volume on climate law needs normative visions and principles to provide orientation and to line up normative requirements. Only thus can it enable 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; and on the other hand, rights to the elementary preconditions of freedom such as food, water, climate stability, security, energy access, a basic supply of essential resources, an absence of wars and civil wars, and so on. 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 chapter, climate change will be at the center of said balancing process. Since the political process has opted to promote an industrial society, allow industrial facilities, and approve traffic permits, to name but some examples, politics also knowingly accepts statistical projections of future deaths, i.e. an impairment of the right to the elementary conditions of freedom as a result of emissions of air pollutants and other detrimental impacts of permitted activities. This is done by balancing those interests with our present economic freedom to engage in production and consumption activities. The framework for legislative balancing is usually referred to as the proportionality test. Decisions by administrative authorities are mainly determined by legislative acts, and their discretion to apply a balancing test is initially (mostly) limited to the interpretation of the factual requirement of standards enacted by the legislature as an expression of its balancing assessment (if those standards leave room for interpretation).

[1] This distinction is not clear, e.g., in Jürgen Habermas, *The Theory of Communicative Action* (London: Beacon Press, 1985). Many readers, and probably the author himself, seem to attach a normative meaning to this book; the actual topic, however, is anthropology, that is: a descriptive theory of societies.

This chapter, while dealing with justice, gives a perspective from ethics and a (re-)interpretation of national constitutions, the European Charter of fundamental rights and the European convention on human rights in the light of sustainability.[2] Sustainability has been increasingly referred to as a key policy objective for the past 20 years, whether by the United Nations (UN), the European Union (EU), or national governments. It is, however, not always stringently applied. The intention of sustainability is to extend justice (and, respectively, law, morals and politics) across an intergenerational and global dimension.[3] By 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.[4] Elsewhere, it has been affirmed that this latter interpretation is at least misleading, that it adheres to expectations of unlimited economic growth which – in a physically finite world – cannot be met, and that this "pillar – perspective" is also incompatible with international law's fundamental tenets of sustainability.[5]

Hence, the subject of this chapter takes us to national, European, and international human rights as the basic norm of any liberal democratic constitution (on a national and transnational level). Human rights also form the typical core of any modern ethics. Environmental protection and intergenerational and global justice, however, are rarely addressed as guaranteed by fundamental rights in the existing legal and ethical discourse, but are rather assigned to the category of "national objectives," for instance in Article 20a of the German Constitution (Grundgesetz, GG) or, in the establishing rules of the EU, on Article 191 TFEU; or they are framed as abstract principles such as the precautionary principle or the principle of common but differentiated responsibility, thereby lacking concreteness and justitiability.

Nevertheless, it seems essential to consider fundamental rights. Unlike general objectives or abstract principles, fundamental rights not only define legal powers, but also frame legally enforceable obligations of public authority. Moreover, fundamental rights are the strongest manifestation of a liberal-democratic constitution. On a constitutional level, overcoming the economically oriented understanding of freedom

[2] To show that the theses of this chapter 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, *Theorie der Nachhaltigkeit: Rechtliche, ethische und politische Zugänge – am Beispiel von Klimawandel, Ressourcenknappheit und Welthandel* (2nd edition, Baden-Baden: Nomos, 2011), §§ 3–5; similar in his basic orientation Habermas, supra, note 1; partially differing: John Rawls, *A Theory of Justice* (Cambridge, Mass.: Harvard University Press, 1971).

[3] For this understanding of the principle of sustainability (and with references to opposing views), see Ekardt, *Theorie der Nachhaltigkeit*, supra, note 2, § 1C; with a similar result (but somewhat differing arguments) cf. Konrad Ott and Ralf Döring, *Theorie und Praxis starker Nachhaltigkeit* (Marburg: Metropolis, 2004).

[4] See, e.g. Rudolf Steinberg, *Der ökologische Verfassungsstaat* (Frankfurt a.M.: Suhrkamp, 1998), at 114.

[5] Ekardt, *Theorie der Nachhaltigkeit*, supra, note 2, § 1C.

could also be the essential desideratum of a more future – and globally-oriented (thus: sustainable) legal interpretation. Furthermore, restrictions on behalf of environmental or (for instance) resource conservation in order to safeguard the conditions of individual freedom (as embodied in fundamental rights) might also be much more plausible motivationally than the usual, fairly misleading antagonism of individual self-realization versus environmental protection, as latently affirmed by national objective provisions. Incidentally, discussing human rights could even lead to a better normative justification of principles such as common but differentiated responsibility in climate policy – the discussion of historical emissions below will affirm that very clearly.

Accordingly, earlier – and even today in international law – there was often, or is respectively, a discussion about environmental fundamental rights[6] (not only with regard to future generations, of course), as environmental fundamental rights would mean a break with the traditional views diagnosed above. In the academic debate on international law (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 be gaining support. In national debates, however, environmental fundamental rights are considered unspecific and subject to balancing; therefore they are ultimately not very helpful. Of course, the vague content of an "environmental fundamental right" would only result if one generally introduced a fundamental right "to environmental protection"; however, this author is only concerned with the question of 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 define 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 or human rights, two largely synonymous concepts. Of course, even if this issue falls within the scope of a fundamental right, the problem of necessary balancing cannot be entirely avoided. But then, this problem also applies in precisely the same way to other fundamental rights (requiring what is commonly called the "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 (a) includes

[6] For an outline of this common discussion, see Steinberg, *Verfassungsstaat*, supra, note 4, at 421 (explicitly criticizing "environmental fundamental rights"); Norbert Gibson, "The Right to a Clean Environment", 1 *Saskatchewan Law Review* (1990), 5; James Nickel, "The Right to a Safe Environment", 3 *Yale Law Journal* (1993), 281, at 282; on the notion of "third generation human rights", see Jack Donnelly, "Third Generation Rights", in Catherine Brölmann, René Lefeber and Marjolaine Zieck (eds.), *Peoples and Minorities in International Law* (Dordrecht: Nijhoff, 1993), 119, at 119; Pascale Kromarek (ed.), *Environnement et droits de l'homme* (Paris: UNESCO, 1987).

no provision for preventive aspects, (b) de facto favors the defensive aspect of the fundamental right over the active protection right it imparts, and (c) moreover fails to concretize environmental protection, which would be required to render it practically relevant. It is precisely this approach toward "duties of protection" (including their administrative consequences) that will be subject to criticism in the course of the following analysis.

4.2 Human Rights: Only Subordinate and Vague "Duties of Protection" with Regard to Sustainability? The Traditional Legal Point of View in Europe 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 rights and have previously rejected corresponding claims for violations of fundamental rights on environmental protection issues.[7] 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 no clear distinction between the tests of admissibility and the substantive foundation of the claim. Camouflaging the question whether a subjective, individual right exists, it thus remains unclear what the respective issue is: whether the claimant has an individual right that allows him to bring an action, or whether the underlying action is within the scope of the respective fundamental right or is an issue of restrictions of the respective fundamental right. In spite of the different outcomes, this same situation applies to abortion cases. The basis for all this is the aforementioned idea that protection rights only describe an objective, but fail to define an exact scope of protection, requiring courts to merely examine whether the protective measures taken are manifestly inadequate. However, the latter question will always be denied, since some legislative effort can be found for every objective, virtually ruling out an assessment that state action has been "manifestly inadequate." It will be elaborated later that both this result and its reasoning might deserve criticism.

From the outset, the case law of the European Court of Justice (ECJ) is hardly devoted to the issue of protection rights as such – European fundamental rights are included in the Charter of Fundamental Rights (ECFR), which has binding force since the Lisbon Treaty, and in Article 6, paragraph 1–3 of the EU Treaty.[8] So far, the ECJ has not even specifically addressed fundamental protection rights against

[7] On all the case law, see in detail Ekardt, *Theorie der Nachhaltigkeit*, supra, note 2, § 4.

[8] On the new legislation with an explicit EU Charter of Fundamental Rights, see Ekardt, *Theorie der Nachhaltigkeit*, supra, note 2, § 4 B.

the Union. Only within the Member States has it recognized the possibility of such rights. Of course, to put it provocatively, the ECJ structurally fails to adopt almost any judgment that might bind the EU in any way. It rather seems to be driven by the unspoken intention to give the EU Commission and Council ample discretion in the determination of their policies. Thus, the existing case law lacks any real reference points for the issues discussed in this article. Although the ECJ regularly requires Member States to comply with certain environmental requirements, this has nothing to do with the recognition of protection duties. It only means that the Member States are obliged to effectively implement certain environmental protection requirements adopted by the EU Commission, the Council and the Parliament. At its core, such case law is hence no more than an issue of enforcement of simple (not constitutional) European law; and it is also completely unrelated to the precise content of that law. Protection duties, however, would oblige the EU legislative bodies to act on behalf of the environmental interests of right holders, even where such action is against the legislators' will. Currently, there is no apparent example for such a right. And because of the foregoing tendency in the case law of the ECJ, it seems likely that this will not change significantly anytime soon.[9] Although Article 37 ECFR, which formally entered into force at the end of 2009, contains a commitment to environmental protection – as did the previous EU and EC Treaties – it is not designed as a fundamental right.

A similar situation applies to the European Court of Human Rights (ECtHR), which is responsible for the interpretation of the European Convention of Human Rights (ECHR), a treaty that is applicable to all European countries and is extremely similar to other international human rights treaties. Like the German Federal Constitutional Court, the ECtHR has in fact recognized obligations of states to undertake protective action based on fundamental rights, although not often, and never in an environmental protection case. Likewise, the ECtHR has granted information rights concerning environmental damages, although counterintuitively 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 weighed appropriately. This was expressed most recently in a case on mobile telecommunication. It appears that the obligation to adopt other, more effective laws on the basis of protection duties, which would trigger a larger reorientation of the social order and not merely ensure "privacy from pollutants and noise," has not been a subject of 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 apply generally because judgments only decide a specific case,

[9] 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 its legislature's will.

but do not define an abstract and general norm.[10] Thus, in the following sections, this chapter will test and analyze a somewhat altered interpretation of existing law, based on an interpretation of existing fundamental rights rather than reliance on policy considerations or suggestions of a legislative change to the catalog of fundamental rights. But what could an extended interpretation of freedom and fundamental rights that includes an intergenerational and global dimension look like in order to be more precise than the fairly vague discussion of environmental fundamental rights? Departing from what is probably a prevailing view at the domestic level, for instance in Germany, closer examination reveals that the wording and the systematic position of the fundamental concept of freedom, which is intrinsic to fundamental rights, in the ECFR, national constitutions such as the German Basic Law as well as, ultimately, the ECHR, suggest a more complex interpretation than previously assumed, which has important implications in the intergenerational context.[11] Therefore, the resulting findings can ultimately be applied to any national or transnational human rights protection effort, for instance with regard to climate change.

4.3 Intergenerational and Global Scope of Human Rights, Protecting the Conditions of Freedom, and Multipolarity of Freedom[12]

The starting point for this chapter's approach is the idea of freedom rights as classical-liberal guarantees of self-fulfillment. As far as this basic understanding goes, there is no need to criticize the prevailing view. In addition, however, freedom also has an intergenerational[13] (and global) dimension.[14]

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[10] 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 falls to the party challenging the existing legal opinion from previous case law (inter alia for reasons of legal certainty), cf. Robert Alexy, *Theorie der juristischen Argumentation* (2nd edition, Frankfurt a.M.: Suhrkamp, 1991); on the rationality of the application of the law and the methods of legal interpretation, see also Ekardt, *Theorie der Nachhaltigkeit*, supra, note 2, § 1 D.; Davor Susnjar, *Proportionality, Fundamental Rights, and Balance of Powers* (Leiden: Brill, 2011).

[11] 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.

[12] For more details and references on this subject see Ekardt, *Theorie der Nachhaltigkeit*, supra, note 2, §§ 4, 5.

[13] With a partly similar reasoning, see also Herwig Unnerstall, *Rechte zukünftiger Generationen* (Würzburg: Königshausen & Neumann, 1999), at 422; with more details, cf. Ekardt, *Theorie der Nachhaltigkeit*, supra, note 2, §§ 4, 5.

[14] 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, *Rechte zukünftiger Generationen*, supra, note 13, at 52 et seq.

Why? In a nutshell[15]: for instance, young people and future generations are of course humans and hence are, or will be, protected by human rights. And this right to equal freedom must be leveraged everywhere where it is threatened – in a technological, globalized world, freedom is increasingly threatened across generations and across national borders. Therefore it is clear that fundamental rights also apply intergenerationally and globally, i.e. in favor of the likely main victims of environmental damage.

But the classical-liberal understanding of freedom, which is mainly focused on the economic freedom of those living here and now, must also be supplemented in other regards. For instance, liberties must be interpreted unambiguously in a way so as to include the elementary physical conditions of freedom – thus not only as 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 climate – and, by extension, without life and health, there is no freedom.[16] This fundamental right to the elementary conditions of freedom is explicitly provided where life and health are concerned, see, for instance, Articles 2 (2) of the German Basic Law, Articles 2 and 3 ECFR, and Articles 2 and 8 ECHR. In all other cases, it must be based on the interpretation of the general right to freedom. Contrary to the prevailing view, a literal interpretation of the ECFR reveals that Article 2 (1) of the German Basic Law has a counterpart in Article 6 ECFR in that it affords a general EU right to freedom. The same is true for Article 5 ECHR and other similarly structured bills of rights. At least elements 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 includes a right to protection (by the state) against fellow citizens (and not only in exceptional circumstances) – not only, but also for future generations. Such an understanding of the right to freedom inter alia affords protection against environmental harm which is threatening individual freedom and its conditions, for instance through climate change, *by the state and where necessary against fellow individuals*. Without that, 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

[15] In more details on the three main arguments, cf. Ekardt, *Theorie der Nachhaltigkeit*, supra, note 2, § 4; partly cf. also Unnerstall, *Rechte zukünftiger Generationen*, supra, note 13, at 422.

[16] The international trend toward "social" rights to the various facets of 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, *Theorie der Nachhaltigkeit*, supra, note 2, § 7.

emissions by private actors. This particular idea needs to be explained in detail since it is not commonly articulated, as has been indicated above. But if fundamental rights include both a protection of freedom against the state as well as a duty of the state to protect these rights against fellow citizens, conflicts of interest of any kind must regularly be understood as multipolar (not bipolar) conflicts of freedoms (*multipolarity*); and then, it follows that such an understanding would rebut the traditional, more objective, status of fundamental rights protection (protection duties instead of protection rights, thus non-actionable duties) and the traditional imbalance between the defensive and protective side of fundamental rights, i.e. the regular elimination of protection obligations, unless there is a case of "manifest inadequacy" (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 fundamental rights is almost entirely taken up with administrative norms, which are supposedly subject to wide legislative discretion, and is not of significant importance with regard to standing in administrative cases nor regarding the application of substantive law.

What are the arguments for multipolarity and how can these respond to certain typical counterarguments? In the following, this chapter assesses whether genuine protection rights already arise from the original scope of fundamental rights – protection rights which, in turn, would afford standing in administrative and constitutional law cases. Details regarding the subsequent balancing test (which will e.g. determine how much weight is afforded to fundamental rights when interpreting substantive administrative law, e.g. discretionary decisions, in light of those rights) will be analyzed later on. This clear distinction between the scope of fundamental rights and balancing process differs significantly from case law, which rarely clarifies whether its skepticism about (fundamental) protection 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 lies at the center of liberal-democratic constitutions – and, as indicated in a footnote, is a philosophical necessity. Fundamental rights are elementary rights that are intended to afford protection against typical threats to freedom. Thereby, 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 neighboring residents' freedom. The classical-liberal thinking, in fact, tends to favor such an assumption. This view has also been adopted by the current case law. But the very purpose of a liberal state is to secure a balance of conflicts as *impartially* as possible, i.e. independent of special perspectives, and not to give precedence to a specific set of activities and ideologies (e.g. economic and commercial enterprise). All this suggests 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 of both categories would not be recognized.[17]

Second, the multipolarity of fundamental rights appears in limitation or balancing provisions such as Article 2 (1) of the German Basic Law or Article 52 ECFR, which are also presumed on 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 manifesting itself in the form of the ECFR and the ECHR as well as national constitutions such as the German Basic Law, thus assumes that if the state resolves specific conflicts, it deals not only with clashing interests, but also explicitly with clashing fundamental *rights*.[18]

The preceding reasoning has sought to establish (I) that, and why, there must be protection rights as part of fundamental rights and (II) that these are subjective, individual rights. Beyond that, 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.[19]

One objection that might be raised is this: such a fundamental re-interpretation of human rights in the light of sustainability could result in the will of democratic parliaments being overthrown, with "protection rights" affording far greater leeway than "defensive rights". So, does this re-interpretation of human rights undermine

[17] 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, *Balance of Powers*, supra, note 10.

[18] The third argument is the wording of provisions such as Article 1 (1) (2) of the German Basic Law, 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 (2) of the German Basic Law ("therefore") exist for the sake of dignity, 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 (1) of the German Basic Law 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 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 (3) of the German Basic Law and Article 51 ECFR). For instance, Article 1 paragraph 2 of the German Basic Law 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.

[19] In favor of an equal footing see already (but without comprehensive reasoning) Christian Calliess, *Rechtsstaat und Umweltstaat* (Tübingen: Mohr Siebeck, 2001).

democracy? In essence, that question raises the old question of the relationship between freedom and democracy. Not only lawyers, but also some philosophers think (partly by implication) that democracy has latent priority over freedom. It is 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 such as the German Basic Law are based on a separation of powers and are not structured as radical democracies. In particular, justice between generations and global justice, i.e., the freedom of young people and those living after us, are arguments against radical democracy. After all, for future generations and young people as well as those living in geographically distant locations, democracy is not an act of self-determination, but one 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 conditions above that were proven relevant in the context of this chapter may be subjectivized, whereas other conditions which only support freedom (such as freedom of artistic expression) however may 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 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 administrative compliance with the legislative purpose or with rules of balancing when such balancing has been deferred to the administration. Ultimately, the objective must be a deliberative process in which multipolarity supports freedom (on the one hand preventing abuses of power, on the other hand regarding democracy as a shield for freedom) and also is adequate in terms of impartiality, engaging in a "multiple-level discourse" which in turn supports rationality since it mobilizes a maximum of good reasons among the state powers.[20]

[20] First, a constitutional court may never order a judgment against a parliament stating "the legislature is required to do precisely this." On the contrary, it must always limit its decisions to statements such as: "at a minimum, you must discontinue doing this." For instance, the German Constitutional Court may not demand from the German Bundestag: "Phase out the use of coal power within four and a half years." But it may very well say: "The previous phasing out process is too slow; take a new decision on the issue until a specified date, taking into account the following factual 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 observe certain limits which it has crossed by demanding the phase out within an unreasonably short timespan." This is all the more true as the deliberative process also includes the administration and the lower courts, as just outlined by the brief introductory note on the "deferral" of the balancing test 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.

4.4 The Case of Climate Change[21]

Now, it is possible to draw some conclusions with regard to climate change. Based on the foregoing arguments, 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, given that young people and future generations are humans and therefore are protected by human rights. Fundamental rights also apply intergenerationally and globally, i.e. in favor of the likely main victims of resource overuse, climate change, and so forth.
- Freedom rights must be interpreted unambiguously so as to include the foregoing elementary *preconditions of freedom* – and 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.[22] With regard to climate change, this implies: a guaranteed proper supply of food and water as well as sufficient energy access on a worldwide and intergenerational scale; a life-cycle perspective on natural resources; responsibility for maintaining life-supporting functions and services of ecosystems; and a general priority in favour of resource efficiency.
- "Protection of freedom where it is endangered" also implies that freedom includes a right to protection (by public authority) against fellow citizens (and not only in exceptional circumstances). This implies protection provided by the authorities, for example, against environmentally or socially harmful behavior that threatens freedom and its conditions, such as overuse of resources, *against fellow citizens, be these natural or legal persons*.
- In the environmental context, protection rights apply in spite of the fact that e.g. many resource problems – for instance with regard to climate change – only represent *future threats* to fundamental rights. For the scope of protection rights is already affected by such threats, not only by concrete and present encroachments. Undoubtedly, future trends are not always predictable and therefore "uncertain". However, an objection based on uncertainty 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 such potential infringement. Otherwise, fundamental rights would no longer serve the very purpose of legal fundamental rights: to guarantee the protection of autonomy exactly where autonomy is threatened with impairment.

[21] For more details and references on this subject see Ekardt, *Theorie der Nachhaltigkeit*, supra, note 2, § 6.

[22] 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, however – merely that individuals do not have the same degree of legal standing to require their enforcement.

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 overlooked aspect of freedom is the polluter pays principle, which in turn follows from the principle of freedom itself. Freedom must include responsibility for the foreseeable (including environmental or social) consequences of individual behavior – even across political and temporal boundaries, and also for potentially undesirable consequences such responsibility may incur on the acting individual's life plan. The negative consequences of actions which otherwise benefit an individual (for instance, use of inexpensive resources today) must always fall back on that individual, if only by way of cost recovery for the damage created by such 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 factual uncertainty such as climate change, there is also a duty to make preliminary decisions and to review them over time. 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 also has an intergenerational and global cross-border dimension and that, therefore, legal positions of future generations and right-holders in other regions (the "proverbial Bangladeshi") need to be considered in parliamentary and legal decisions.
- The task of politics is to solve the continuous conflicts between different freedoms and, in addition, to guarantee the availability of external conditions of freedom. But generally, this does not mean that the political and democratic process has to provide an equal distribution in the sense that certain privileges – such as greenhouse gas emission rights – necessarily have to be equally distributed. Instead, the details of social distribution are subject to political discretion. However, with respect to elementary conditions of freedom, equal treatment is necessary to ensure that everyone obtains the absolute minimum required to enjoy their freedoms. For without these basic requirements such as food, water, clothing, and basic energy access, there can be no freedom to begin with. As regards food, this has direct implications for the climate problem. The "equal distribution principle" in this context is supported by two arguments:

    1. Without an equal right to the absolute minimum conditions of freedom, the latter would be of no value for the poor – and liberal constitutions as well as human rights *guarantee* equal liberties. In particular, this "equal subsistence" means two things: everyone must have a minimum level of access to resources, energy, and so on, and all must be protected from disastrous threats such as

climate change to the extent possible. Resource overuse and harmful effects such as greenhouse gas emissions caused by modern lifestyles must be reduced in absolute terms, while everyone (worldwide and also in the future) necessarily will cause at least a certain minimum level of greenhouse gas emissions (at least for food production through land use), and many around the world have not yet reached their "equal" per capita share. 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 the global climate is at risk, it seems plausible to afford usage rights or the "proceeds" of an unequal distribution (such as atmospheric use) in equal parts to all persons as far as possible – for no individual can claim particular responsibility in producing that good. This second argument can also be seen as an argument *e contrario* to the polluter pays principle (which also follows from the principle of freedom). Hence, "equal wealth" (nationally or worldwide) may not be a reasonable expectation, but very probably a basic resource supply and equal greenhouse gas emission rights for all – worldwide and across generations. Incidentally, this leads to a theoretical justification of the 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 with a view to their fight against poverty (see below).
- Another important consequence of the foregoing principles is: colliding human rights call for distinct rules imposed by 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 greenhouse gas 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; and driving resource productivity at a rate higher than Gross Domestic Product (GDP) growth.

4.5 The Problem of Historical Emissions

The concept of "one human, one emission right", as argued earlier on a general basis, could be amended to some degree in order to take into account historical emissions of (especially) states that form part of the Organisation of Economic Co-operation and Development (OECD). By these means, the price for emission rights 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. As a concept,

"historical emissions" take into account that 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 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 reach an acceptable level of prosperity comparatively rapidly through imports of economic models and technologies that have been developed in the industrialized world. In addition, (3) taking into account "historical emissions" leads to a complex discussion as to how global historical developments in 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 conditions 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 emissions trading in the EU 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 emissions trading system. Insofar as the freedom principle leads to the justification of certain equality standards and provision of certain basic needs (= fundamental conditions of freedom) and also to implementation of the polluter pays principle, for instance, these aspects can be considered e.g. when calculating the price range, and that with a minimal administrative effort.

4.6 On the Path to a Justice-Based Framework for Global Climate Governance

As shown above, the notion of "one human – one emission right" is not solely meant to be a project at the domestic level, but also an extension of the current and not very ambitious (let alone enforceable) Kyoto Protocol on a global scale after 2012. Based on the general justification provided above, the main elements of a global approach could be summarized in the following ten points:

1. In order to prevent disastrous climate change, the global per capita emissions allowance would have to be fixed and limited – and then would have to be distributed on an equal per capita basis.

2. According to the Intergovernmental Panel on Climate Change (IPCC), the per capita amount would need to be around 1 tonne of 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 system between all states across the globe.
4. By these means, a reduction of greenhouse gas emissions would get started *and* funds would be mobilized for the reduction of poverty in the southern hemisphere.
5. The scheme would not have to impose the 1 tonne per capita from the outset, but could reach this goal in several stages beginning at 5 tonne per capita (which is the global emission average by now); in line with the projections of the IPCC, however, the 1 tonne level would have to be achieved 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 additional emission rights or some form 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 into the global emissions trading system.
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 then form the basis for a national or continental emission trading system among primary energy users (as described earlier), including an annually degressive number of certificates, annually auctioned. The basic principles of such national (or continental) distribution systems might have to be prescribed on a global level to ensure that funds really reach the socially disadvantaged (after all, many states worldwide are not democracies). Compared to existing trading systems such as the EU ETS, such a framework would possess a broader basis (primary energy), stricter goals, a lack of loopholes such as offsets, and a 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, and so on 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 long-term energy security would be forced (without a highly complex "instrument mix" ordinary citizens are unable to fully 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, 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: it 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 meet consumption or bioenergy).[23]

In developing countries, the number of transferable rights would be high initially and emission trading costs low; the opposite would apply in 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.

[23] 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 Felix Ekardt and Hartwig von Bredow, *Managing the Ecological and Social Ambivalences of Bioenergy – Sustainability Criteria Versus Extended Carbon Markets*, in: Walter Leal (ed.), *The Economic, Social, and Political Aspects of Climate Change* (Berlin: Springer, 2011), 455.