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The Intergenerational Equity Dimension of the “Green Deal” Emphasised by the Order of the German Federal Constitutional Court of March 24, 2021

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Słowa kluczowe: „Zielony Ład”, sprawiedliwość międzypokoleniowa, zmiana klimatu, Raporty IPCC, prawa człowieka, bezpieczeństwo energetyczne, bezpieczeństwo ekologiczne, ochrona środowiska, porządek konstytucyjny

Abstract

On March 24, 2021, the First Senate of The German Federal Constitutional Court issued that part of the Federal Climate Change Act of December 12, 2019 (Federal Law Gazette I, p. 2513) must be deemed contrary to Basic Law. The fundamental reason underlying his conclusion was the failure of the federal legislator and the Federal Government to take suitable and prospectively sufficient measures to decrease greenhouse gases (predominantly CO₂) emissions. The Tribunal interpreted Art. 20a of the Basic Law, in conformity with the principle of intergenerational equity. By anchoring his reasoning in that concept, the Tribunal turned into an unclear and controversial path. It may serve to enhance radical political changes. However, on the other hand, it may also undermine the green change.

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Streszczenie**Wymiar sprawiedliwości międzypokoleniowej we wdrażaniu „Zielonego Ładu” ujęty w wyroku Niemieckiego Federalnego Trybunału Konstytucyjnego z 24 marca 2021 r.**

Dnia 24 marca 2021 r. I Senat Niemieckiego Federalnego Trybunału Konstytucyjnego orzekł, że część Federalnej Ustawy o zmianach klimatu z 12 grudnia 2019 r. (Federalny Dziennik Ustaw Dz.U. I, s. 2513) należy uznać za sprzeczną z ustawą zasadniczą. Podstawowym powodem jego konkluzji było niepodjęcie przez ustawodawcę federalnego i rząd federalny odpowiednich i perspektywicznie wystarczających środków w celu zmniejszenia emisji gazów cieplarnianych (głównie CO₂). Trybunał dokonał interpretacji art. 20a Ustawy Zasadniczej, zgodnie z zasadą sprawiedliwości międzypokoleniowej. Zakotwicząc swoje rozumowanie w tej koncepcji, Trybunał skierował się na niejasną i kontrowersyjną drogę. Przyjęte w jego orzeczeniu podejście może służyć wzmocnieniu radykalnych zmian politycznych, ale z drugiej strony może też osłabić dążenie do zielonej zmiany.

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In *Vanishing Face of Gaia*, James Lovelock describes the disastrous consequences of global warming and provides a pessimistic view of the European future². With some exceptions, the idea that environmental degradation, unsustainable resource use, and climate change should be the main drivers of societal collapse is widely shared³. Although public discussion on their particular impact is still pending, hardly anyone argues that all those factors put contemporary society at risk. It is also beyond doubt that humans have important detrimental implications for the natural world. For this reason, we are facing new radical ideas, which have emerged about how we should shape the regulatory environment to reduce this influence and preserve the Earth for future generations. Such circumstance brings the constitutional discussion to the challenging area of the “future humans rights”, in other words, rights

² J. Lovelock, *The Vanishing Face of Gaia: A Final Warning*, New York 2009.

³ J. Diamond, *Collapse: How Societies Choose to Fail or Succeed: Revised Edition*, Penguin Books 2005, pp. 250 -275.

of people who may or may live in the future. In this context, an Order given by the German Federal Constitutional Court on March 24, 2021⁴, should be regarded as a significant voice in the ongoing discussion and deserve detailed scrutiny.

The idea of intergenerational equity appears both in jurisprudence and the law, although it would be an overestimation to call this presence significant⁵. The basic concept is that all generations are responsible for using the Earth. Edith Brown Weiss straightforwardly describes this responsibility: “Every generation needs to pass the Earth and our natural and cultural resources on in at least as good condition as we received them. It leads to three principles of intergenerational equity: options, quality, and access. The first, comparable options, means conserving the diversity of the natural resource base so that future generations can use it to satisfy their values. The second principle, comparable quality, means ensuring the quality of the environment on balance is comparable between generations. The third one, equal access, means non – discriminatory access among generations, to Earth and its resources”⁶.

For many reasons, the concept understood as an unconditional obligation to cease any human activity detrimental to the Earth should be regarded as very radical and challenging to lawmakers worldwide. It would require at least two volumes to describe all of them. However, one motive seems to be the most important – a requirement of unsuitable change of contemporary way of life for the benefit of unpredicted in cultural and behavioral substance future generations, and acceptance to uncertain results of such a change. That challenge might be the fundamental reason why descriptions of present generation commitment to future ones, which could be found in official docu-

⁴ The Order of the First Senate of The German Federal Constitutional Court issued on March 24, 2021 1 BvR 2656/18, 1 BvR 78/20, 1 BvR 96/20, 1 BvR 288/20, https://www.bundesverfassungsgericht.de/EN/Homepage/home_node.html (21.09.2021).

⁵ As the most influential work in this aspect might be regarded a book by Edith Brown Weiss, *In fairness to future generations: international law, common patrimony, and intergenerational equity*, published in 1989. In legal texts it appears mostly in environmental context, i.e., in p. 24 of Council Directive 2011/70/Euratom of July 19, 2011, establishing a Community framework for the responsible and safe management of spent fuel and radioactive waste.

⁶ E. Brown Weiss, *Climate Change, Intergenerational Equity, and International Law*, “Vermont Journal of Environmental Law” 2008, vol. 9, p. 616.

ments, are usually very general. For example, in Human Rights Council Resolution dated March 2008, the Council recognizes that human beings are at the center of concerns for sustainable development. The right to development must be fulfilled to meet present equitably and future generations' development and environmental needs⁷.

There is no doubt that among European Union Member states, the constitutional regulation of the Federal Republic of Germany is one of the most detailed and clear ones regarding intergenerational equity. Article 20a of Basic Law for the Federal Republic of Germany provides that "mindful also of its responsibility toward future generations, and the state shall protect the natural foundations of life and animals by legislation and, under law and justice, by the executive and judicial action, all within the framework of the constitutional order"⁸. This constitutional regulation originates from an amendment to Federal Constitution performed in October 1994. Discussion over its implementation took almost eight years⁹, and current wording was achieved after an amendment dated July 26, 2002. Thus finding the final wording took decades of disputes among the political groups, and consensus could not be found for years. Even in Germany, where participation of ecologist groups in social life is significant, lawmakers' attitude is reluctant to implement such changes. Their conservative approach contrasts with the emotional and aggressive attitude of the youngsters street manifestation participants. An example of the 2009 Copenhagen climate change negotiations precisely showed how significant this tension might be. Outside the venue, many thousands of people gathered to call for faster and more robust action.

⁷ Human Rights Council Resolution 7/23 (March 2008), where The Council expressed among others the concern that climate change "poses an immediate and far-reaching threat to people and communities around the world".

⁸ Translation of Basic Law for the Federal Republic of Germany, made by Ch. Tomuschat, D.P. Currie, D.P.

Kommers, and R Kerr, in cooperation with the Language Service of the German Bundestag, includes amendments from vom 28.03.2019 (BGBl. I S. 404).

⁹ In 1986 the CDU/CSU parliamentary group completely rejected the anchoring of such a state goal, while the SPD supported it, https://www.bundestag.de/dokumente/textarchiv/2013/47447610_kw49_grundgesetz_20a-213840 visited on 18.09.2021 (21.09.2021).

Meanwhile, inside the conference, diplomats, negotiators, and government officials argued over costs and process design¹⁰. Arbitration in such a discussion is uneasy, and this is a second reason why the Order of March 24 should be regarded as significant. The demands of ecological activists were not only heard but also satisfied to a very far extend.

It is also quite transparent that the Tribunal based in his Order on the concept of intergenerational equity, shared by many ecological movements, has evident socialist roots. The concept of equality, implemented therein, is a socio-historical and discursive construct and a social relationship. Equality understood as such is never simply the result of removing unevenness. It is not stuck under its shell, ready to use, but requires various designs, treatments, devices, methods of supporting and transforming in constantly changing conditions¹¹. Such a dynamic concept of equity is characteristic in scientific socialism and postmodernism, where it is regarded as leverage of social engineering¹². However, even understood as such, to be implemented requires specific measures, for it refers to existing or future material needs and the distribution of tangible resources. In intergenerational equity, we need to consider the necessity of such distribution concerning time, which is of the essence since we refer to existing human beings and future ones. Although the concept used in the works of Edith Brown Weiss seems to be even more radical than the one on which the Tribunal is based, there are some certain similarities, which lead to the conclusion that both have the same ideological root¹³.

¹⁰ G Wright, *Climate Regulations as if the Planet Mattered: The Earth Jurisprudence Approach to Climate Change*, “Environmental and Earth Law Journal” 2013, vol. III, pp. 35–36.

¹¹ M. Kozłowski, *Signs of Equality. On social construction of egalitarian relations*, Warsaw 2016, pp. 18–23.

¹² M. Kozłowski, *Foucault is reading Marx. Marx is reading Foucault*, “Theoretical Practice” 2011, No. 4, pp. 177–184.

¹³ The most important difference is that Edith Brown Weiss, presents radical view, in which every generation needs to pass the Earth and our natural and cultural resources on in at least as good condition as we received them, in other words any detrimental activity should be avoided. This may lead to inequity between generations, since future ones should have far better tools to protect the environment. The Tribunal focus more on finding the balance between interest of contemporary and future generations, what might be regarded at first glance as less radical approach, although in fact doesn't differs much, because it is very unlikely, that such balance is possible to find.

It seems to be why the Tribunal in described judgment noticed that under certain conditions, the Basic Law of the Federal Republic of Germany imposes an obligation to safeguard fundamental freedom over time and to spread the opportunities associated with freedom proportionately across generations¹⁴. Furthermore pointed out that in its objective dimension, the protection mandate laid down in Art. 20a of the Basic Law encompasses the necessity to treat the natural foundations of life with such care and to leave them in such condition that future generations who wish to carry on preserving these foundations are not forced to engage in radical abstinence. In order to respect future freedom, in the view of the Tribunal, people must initiate the transition to climate neutrality in good time. In practical terms, this means that transparent specifications for the further course of greenhouse gas reduction must be formulated early, providing orientation for the required development and implementation processes and conveying a sufficient degree of developmental urgency and planning certainty.

It is beyond doubt that by pointing out the necessity of securing the natural environment for future generations with urgency and planning certainty, the Tribunal echoed calls for radical change, which could have been heard within the last decade. In 2012 UN High Level Panel on Global Sustainability summed up this need for a fundamental rethink: “We need to change dramatically, beginning with how we think about our relationship to each other, to future generations, and to the eco-systems that support us”¹⁵. However, most of such voices were merely political declarations and had limited impact on legal regulations. Changing its nature from declarations to actions, this calls, however, bring some essential questions to be asked. One of the basic ones is how radical society must be in not forcing future generations to engage in “radical abstinence”. In other words, what should the distribution of benefits and reliability for necessary burdens between generations look like?

¹⁴ It is worth to mention that art. 20a GG is located outside the fundamental rights part of the Constitution. Furthermore, Art. 20a GG is not mentioned in art. 93 (1) No. 4a GG, which lists the rights that may be asserted by way of a constitutional complaint when they are violated. Thus, the provision was consequently described as a fundamental national objective, rather than a human right.

¹⁵ The Report of the United Nations Secretary-General’s High-Level Panel on Global Sustainability, *Resilient People, Resilient Planet: A Future Worth Choosing*, New York 2012.

The factual background of the Order is anthropogenic climate change, its consequences, and the associated risks described in assessment reports and special reports published by the Intergovernmental Panel on Climate Change (IPCC)¹⁶. The Tribunal considers these reports to be reliable summaries of the current state of knowledge on climate change. The Tribunal, in his judgment, relied upon IPCC Fifth Assessment Report, according to which Atmospheric concentrations of CO₂ have increased by 40% relative to pre-industrial times due primarily to fossil fuel emissions and secondarily to deforestation and other land-use changes¹⁷. That factor cause acceleration of global warming that is currently observable due to the change in the material balance of the atmosphere caused by anthropogenic emissions. The increase in CO₂ concentrations is deemed to play a particularly significant role. According to resources quoted by Tribunal, without additional measures to combat climate change, it is now considered likely that the global temperature will increase by more than 3°C by 2100¹⁸. It is caused by a nearly linear relationship between the total amount of climate-relevant greenhouse gases emitted and the increase in mean surface temperatures¹⁹. In other words, CO₂ emissions must be limited to stop climate change and avoid increasing temperature over 2°C and preferably 1.5°C by 2100. As a result of this factual background, the Tribunal points out that the disputed Federal Climate Change Act offloaded significant portions of the greenhouse gas reduction burdens required under Art. 20a GG onto the post-2030 period. Further mitigation efforts might be necessary at concise notice, placing future generations under enormous strain and comprehensively jeopardizing their freedom protected by fundamental rights²⁰.

¹⁶ Reports are being published on <https://www.ipcc.ch/reports> (21.09.2021).

¹⁷ IPCC, Fifth Assessment Report, Climate Change 2013, The Physical Science Basis, Summary for Policymakers, 2016, p. 11.

¹⁸ Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, *Climate Action in Figures, Facts, Trends and Incentives for German Climate Policy 2019 edition*, Berlin 2019, p. 6.

¹⁹ Geschäftsstelle des Sachverständigenrates für Umweltfragen, *Demokratisch regieren in ökologischen Grenzen – Zur Legitimation von Umweltpolitik, Special report*, Berlin 2019, p. 36.

²⁰ According to p. 121 of the Order: If a society that is geared toward a CO₂-intensive lifestyle is forced to switch to climate-neutral behaviour within an extremely short period of time, the restrictions on freedom are likely to be enormous.

However, shortly after issuing the Tribunals Order, its factual background was challenged by IPCC's 6th report²¹, which provided a far more pessimistic view than the 5th one. According to scenarios provided therein, compared to 1850–1900, the global surface temperature averaged over 2081–2100 is likely to be higher by 1.0°C to 1.8°C. It may happen even under the very low GHG emissions scenario considered as the one that started in 2015 and has very low and low GHG²² emissions and CO₂ emissions declining to net-zero around or after 2050, followed by varying levels of net negative CO₂ emissions. In other words, using the way of thinking implied by the Tribunal to secure the right of future generations to avoid “radical abstinence”, the changes must be immediate and radical. The shift from a carbon-based economy to a zero-emissions economy must happen not within the perspective of thirty years but far more sooner. Considering IPCC's 6th report, it seems that arguments used by Tribunal to protect future generations serve more the idea to protect the current generation. From that point of view, the Tribunal failed to find the balance between current and future society's interests and failed to imply the rule of intergenerational equity.

The provided argumentation undermines the whole concept of intergenerational equity. It is hard to believe in the idea of equity spread in the time since the famous phrase of Socrates, “I neither know nor think that I know”, never became successfully denied regarding future predictions. Its uncertain essence and, opposite to that necessity to find defined measures to provide equity are fundamental reasons why the whole idea of intergenerational equity contains a severe internal contradiction, which causes its profound weakness. It is interesting that Tribunal also elaborated arguments against the fundamental concept on which relied issuing the Order. In p. 121 of its motive, it is pointed out that “If alternative CO₂-free and climate-neutral forms of behavior were available and sufficiently established in society so that any CO₂-producing exercise of freedom could at least be partially replaced, the prohibition of climate-harming behavior would entail less intrusive restrictions on freedom than if such alternatives did not exist. For example, if a fully

²¹ IPCC, *Summary for Policymakers*, [in:] *Climate Change 2021: The Physical Science Basis. Contribution of Working Group I to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change*, eds. V. Masson-Delmotte et al., Cambridge 2021, pp. 18–19.

²² Green House Gases.

developed CO₂-neutral transport system were in place and the necessary vehicles and other transportation equipment were manufactured in a CO₂-neutral manner, the loss of freedom associated with banning all CO₂-producing transport and manufacturing activities would be much less extensive than if such alternatives were not available”. By formulating such a remark, the Tribunal confirms that the distribution of wealth, which is the foundation of intergenerational equity, relies upon future technological progress and scientific development that is unpredictable from a historical point of view. If it is so, spreading the opportunities associated with freedom proportionately across generations is simply impossible.

Since we realize it, the Tribunal’s approach to intergenerational equity resembles the Marxist idea of equity used as political leverage, which aims to give this thought a form of universality, to present it as only reasonable and generally applicable²³. Karlsruhe Tribunal instrumentally uses this profoundly dialectical and ideological concept to increase political pressure on policymakers to find proper solutions. However, considering the text of the judgment, it is implausible to judge what kind of solutions it should be. It may cause certain doubts related to the described Order, even if someone unconditionally supports the idea of climate protection. Why is it necessary to base on artificial and ideological grounds since some reasonably justified goals must be achieved?. The Tribunal used some controversial ideas and tried to construct “future human rights” since there is no sense and no need of it when we must protect climate here and now. The answer to these questions might be only speculations, however burring in mind Copenhagen protests, paraphrasing famous saying of Benjamin Disareli: If you wish to win a peoples’ heart, allow them to confute you²⁴. The view described in the judgment may be regarded as severe political leverage of green change. However, it may also seriously undermine it by the use of inconsistent and controversial ideas. It is worth burry in mind that one of the significant negative results of the green and Marxist alliance in Western Europe was the antinuclear movement, which caused almost complete resign from atomic zero-emission energy source development²⁵.

²³ K. Marks, *German Ideology*, [in:] *Works*, vol. III, eds. K. Marks, F. Engels, Warsaw 1961, pp. 52–53.

²⁴ R. Green, *The Laws of Human Nature*, Profile Books 2018.

²⁵ J. Lovelock, *op.cit.*

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