JUDICIAL RESTRAINT OR ACTIVISM? THE FEDERAL CONSTITUTIONAL COURT'S ROLE IN RECENT 'EMERGENCIES'

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This article examines the role of the German Federal Constitutional Court (Bundesverfassungsgericht) in situations commonly labelled as 'emergencies', using recent decisions on climate change and the federal pandemic emergency brake as case studies. Although the Basic Law does not provide for a general state of emergency permitting the suspension of constitutional norms, crises such as the COVID-19 pandemic and climate change nevertheless require flexibility within the ordinary constitutional framework. The article shows that the Court's jurisprudence in these contexts contains both activist and restrained elements. The climate change decision, while outwardly activist due to its creative concepts and international resonance, proves more restrained upon closer inspection, particularly in its refusal to derive new fundamental rights and its deference to legislative discretion. Conversely, the pandemic emergency brake decisions, though initially characterised by judicial restraint, include significant doctrinal developments such as the recognition of a fundamental right to school education.

1 INTRODUCTION

In the following article, I would like to offer a German perspective on the role of courts in emergencies. Specifically, I would like to highlight three recent decisions of the Federal Constitutional Court in particular and show that they contain elements of both judicial restraint[1] and judicial activism.

I will proceed in three steps: I will begin with some introductory remarks on the (constitutional) legal requirements governing 'emergencies' and what these imply for the Federal Constitutional Court's role. In a second step, I will examine the climate change order[2] and the orders on the federal pandemic emergency brake[3] with regard to their restraining and activist elements. In a third step, I will conclude with considerations on how the Federal Constitutional Court secures political leeway.

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[1] For a perspective on the Federal Constitutional Court as a conservative court, see Andreas Kulick and Johann Justus Vasel, *Das konservative Gericht. Ein Essay zum 70. Jubiläum des Bundesverfassungsgerichts* (Mohr Siebeck 2021).

[2] BVerfG, order of 24 March 2021 - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 -1 BvR 288/20 - BVerfGE 157, 30 (Klimaschutz (Climate Change)).

[3] BVerfG, order of 19 November 2021 - 1 BvR 781/21 - 1 BvR 798/21 - 1 BvR 805/21 - 1 BvR 820/21 - 1 BvR 854/21 - 1 BvR 860/21 - 1 BvR 889/21 - BVerfGE 159, 223 (Bundesnotbremse I (Federal pandemic emergency brake I)); BVerfG, order of 19 November 2021 - 1 BvR 971/21 - 1 BvR 1069/21 - BVerfGE 159, 355 (Bundesnotbremse II (Federal pandemic emergency brake II)).

2 LEGAL STANDARDS FOR JUDGING 'EMERGENCIES'

2.1 HANDLING EMERGENCIES UNDER THE NORMAL CONSTITUTIONAL SITUATION

From the perspective of German constitutional law, the term 'emergency' is somewhat misleading insofar as the German constitutional order (Basic Law – *Grundgesetz* [GG]) contains several provisions designed for special crisis situations, namely the case of defence (Art. 115a GG), the case of tension (Art. 80a GG), the internal emergency (Art. 91 GG) and the case of disaster (Art. 87a para. 4 GG). However, a general state of emergency that suspends constitutional regulations in the event of a crisis is alien to it. The normative handling of crises such as the climate crisis and the Covid-19 pandemic does not take place by declaring a state of emergency (such as Art. 15 ECHR), but within and with the means of the normative 'normal situation': the legal obligation is not suspended and restrictions are imposed on the basis of the regular laws rather than exceptional legislation.[4]

Nevertheless, the term 'emergency' also appears in Germany, particularly in the context of the Covid-19 pandemic and climate change: at the beginning of the Covid-19 pandemic, the federal legislator inserted a kind of 'emergency clause' into the Protection Against Infection Act (§ 5 *Infektionsschutzgesetz* [IfSG])[5]. This enables the German Bundestag to declare an 'epidemic situation of national significance'. The consequence of the declaration of such a situation is that the Federal Ministry of Health is granted more specific powers (§ 5 para. 2 IfSG). In particular, the Federal Ministry of Health is authorized to take measures to ensure the provision of healthcare by means of orders and ordinances. However, the constitutional requirements for dealing with such an epidemic situation of national significance remain unchanged.[6]

Similarly, there has been discussion of declaring a 'state of emergency' in connection with climate change. Since 2019, many municipalities have declared a 'climate emergency'.[7] This is intended to recognize an urgent political and practical need for action and to assign the highest priority to climate protection measures that cannot be postponed. The depth and level of detail of the requirements that a local council associates with this vary. Of course,

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[4] In the context of the Covid-19 pandemic: BVerfG, order of 19 November 2021 - 1 BvR 781/21 - 1 BvR 798/21 - 1 BvR 805/21 - 1 BvR 820/21 - 1 BvR 854/21 - 1 BvR 860/21 - 1 BvR 889/21 - BVerfGE 159, 223 <principle 1>; Jens Kersten and Stephan Rixen, *Der Verfassungsstaat in der Corona-Krise* (3rd edn, C.H.Beck 2022) 65 ff.; in contrast Uwe Volkmann assumes a 'perceived state of emergency' – Uwe Volkmann, 'Der Ausnahmezustand' (*Verfassungsblog*, 20 March 2020) <https://verfassungsblog.de/der-ausnahmezustand/> accessed 27 November 2025; this leads to the problem of a possible mixture of normal situation and state of emergency, see: Tristan Barczak, *Der nervöse Staat* (2nd edn, Mohr Siebeck 2021).

[5] Gesetz zur Verhütung und Bekämpfung von Infektionskrankheiten beim Menschen of 20.07.2000 (BGBl. I p. 1045), most recently amended by the Act of 12.12.2023 (BGBl. I No. 359).

[6] A certain shift in powers in favor of the federal government and the executive has certainly taken place during the pandemic. However, it was not a state of emergency, see Jens Kersten, 'Covid-19 – Kein Ausnahmezustand!' [2020] ZRP 65, and Kersten and Rixen (n 4).

[7] See the list of German municipalities that have already declared a "climate emergency": 'Liste deutscher Orte und Gemeinden, die den Klimanotstand ausgerufen haben' (*Wikipedia*, 15 September 2025) <https://de.wikipedia.org/wiki/Liste_deutscher_Orte_und_Gemeinden,_die_den_Klimanotstand_ausgerufen_haben> accessed 27 November 2025; on the municipalities' guarantee of self-government in this context see Christiane Juny, 'Ausrufung des Klimanotstands durch Gemeinden im Kontext der verfassungsrechtlich verbürgten Selbstverwaltungsgarantie nach Art. 28 Abs. 2 Satz 1 GG' [2021] NWVBl 313.

the following also applies here: declaring such a state of emergency does not change the constitutional requirements. Therefore, the management of crises such as the Covid-19 pandemic and climate change is also subject to the regular constitutional requirements.

2.2 A NEED FOR FLEXIBILITY

From this initial finding, the question of interest here regarding the Federal Constitutional Court's role is that there is a need for flexibility. After all, it is self-evident that a raging pandemic is legally distinct from merely the regular winter cold wave, whether there are normal temperature fluctuations or extreme weather events. Because such situations, which this workshop explores under the theme of 'emergencies', place different demands on the law than the normal situation, certain flexibility of the law of the normal situation are required.

As a 'living constitution', the Basic Law can adapt to crises despite its textual rigidity and to meet changing challenges through the – sometimes dynamic – interpretation of its provisions.[8] Such a dynamic interpretation and further development of the law can come into conflict with the legislator's political leeway. At the same time, it is important not to subject the Basic Law to the constraints of the *zeitgeist*, but to understand it as a resilient constitution.

Under the Basic Law, fundamental rights also apply in times of crises such as the Covid-19 pandemic; they are neither suspended nor fundamentally subject to other provisos.[9] Therefore, certain flexibilities are required elsewhere so that the state can react appropriately. The principle of proportionality has proven to be a central instrument of flexibility during the Covid-19 pandemic. However, its breadth raises concerns about whether judicial review remains effective: The associated broad scope raises the question of the extent to which state decisions can be reviewed and whether the principle of proportionality is still able to effectively limit encroachments on fundamental rights in times of crisis.[10]

The necessary flexibility means that the Federal Constitutional Court in particular has certain leeway, which it can exercise more cautiously or more consciously when interpreting and developing the law. In the following, I would like to show that the case law of the Federal Constitutional Court can be read in both directions – cautiously and consciously – using the climate change order and the orders on the federal pandemic emergency brake.

3 THE FEDERAL CONSTITUTIONAL COURT'S ORDERS ON CLIMATE CHANGE AND ON THE FEDERAL PANDEMIC EMERGENCY BRAKE

The First Senate of the Federal Constitutional Court ruled that the provisions of the Climate

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[8] On judicial interpretation as a reserve of flexibility in the legal system, see: Judith Froese, 'Die Grenze des Rechts als Herausforderung der Auslegung, oder: Interpretation als Flexibilitätsreserve der Rechtsordnung' [2015] 46 Rechtstheorie 481.

[9] In the context of the Covid-19-pandemic: Stephan Rixen, 'Die epidemische Lage von nationaler Tragweite – einfachrechtliche Regelungen und verfassungsrechtliche Problematik' in Sebastian Kluckert (ed), *Das neue Infektionsschutzrecht* (2nd edn, Nomos 2021) § 4 para 4 f.

[10] See Judith Froese, 'Das Verhältnismäßigkeitsprinzip in der Krise' [2022] 10 DÖV 389.

Protection Act (*Klimaschutzgesetz*) on the national climate protection targets and the annual emission quantities permitted up to 2030 are incompatible with fundamental rights insofar as they lack sufficient requirements for further emission reductions from 2031. In all other respects, the constitutional complaints were rejected.[11]

At first glance, the climate change order appears activist: The Federal Constitutional Court ruled on several constitutional complaints that had been filed strategically, the proceedings received a lot of public attention and the court had the decision translated into English and French, thereby also contributing to the international discourse.

The First Senate used the dazzling concepts of 'intertemporal guarantee of freedom'[12] (*intertemporale Freiheitssicherung*), 'interference-like effect'[13] (*eingriffsähnliche Vorwirkung*) and 'respecting future freedom' to call for the safeguarding of fundamental over time and for a proportionate distribution of opportunities for freedom over time and across generations.

Reactions in Germany were divided. With regard to the question of interest here, it should be mentioned in particular that the Federal Constitutional Court was sometimes accused of activism and concerns were expressed about a 'jurisdictional state'.[14] In a matter in which there were many uncertainties, it was up to politicians, not the courts, to decide which path to take.[15]

In contrast, the Federal Constitutional Court's orders on the federal pandemic emergency brake[16] might appear to be (too) cautious: In the first of those orders *(Bundesnotbremse I)*, the Federal Constitutional Court rejected several constitutional complaints against the curfews and contact restrictions that had been in place in the spring of 2021.[17] Although the measures significantly interfered with various fundamental rights, they were compatible with the Basic Law given the extreme dangerous situation posed by the pandemic. The Federal Constitutional Court also rejected the constitutional complaints against the school closures during the pandemic in a second ruling on the federal pandemic emergency brake *(Bundesnotbremse II)*.[18]

Many had hoped that the Federal Constitutional Court would take a stronger stance

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[11] BVerfG, order of 24 March 2021 - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 -1 BvR 288/20 - BVerfGE 157, 30 <110 ff.>.

[12] BVerfG, order of 24 March 2021 - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 -1 BvR 288/20 - BVerfGE 157, 30 <headnote 4; 102, 131>.

[13] BVerfG, order of 24 March 2021 - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 -1 BvR 288/20 - BVerfGE 157, 30 <130 f., 133>.

[14] See Dietrich Murswiek, 'Karlsruhe als Klimaaktivist' *FAZ-Einspruch* (19.7.2021); similarly Claus Pegatzky, 'Von Richterkönigen, Volksvertretern und Generationengerechtigkeit' *FAZ-Einspruch* (15.5.2021); former President of the Bundestag, Norbert Lammert, criticized the decision in Der Spiegel as 'an inadmissible interference in the legislative branch', see Gerald Traufetter, 'Politiker in Roben' *Der Spiegel* (No. 28/2021, 10.7.2021) 30 f.; according to constitutional law expert Peter Bußjäger, the political role of the courts becomes greater the more strongly the duty to protect is enforced, which would further promote the 'judicial state', see Daniel Bischof, 'Klimaschutz durch Richters Hand' *Wiener Zeitung* (18.7.2021).

[15] This raises the old question of who is the 'guardian of the constitution' (*Hüter der Verfassung*); to the fundamental controversy: Carl Schmitt, *Der Hüter der Verfassung* (Duncker & Humblot 1931) and Hans Kelsen, *Wer soll der Hüter der Verfassung sein?* (Mohr Siebeck 1931).

[16] The relevant provisions were inserted into the Protection Against Infection Act (Infektionsschutzgesetz – IfSG) by the Fourth Act to Protect the Population During an Epidemic Situation of National Significance (Viertes Gesetz zum Schutz der Bevölkerung bei einer epidemischen Lage von nationaler Tragweite) (22 April 2021) BGBl I 802.

[17] BVerfG, order of 19 November 2021 - 1 BvR 781/21 - 1 BvR 798/21 - 1 BvR 805/21 - 1 BvR 820/21 - 1 BvR 854/21 - 1 BvR 860/21 - 1 BvR 889/21 - BVerfGE 159, 223.

[18] BVerfG, order of 19 November 2021 - 1 BvR 971/21 - 1 BvR 1069/21 - BVerfGE 159, 355.

here; the decision was received with corresponding criticism in the literature. The way in which the Federal Constitutional Court handled the principle of proportionality and left the legislator a wide margin of manoeuvre was criticized, as this meant that even massive encroachments on fundamental rights were no longer effectively limited.[19]

However, this black and white picture does not do justice to any of the decisions. On the contrary, a differentiated view shows that the climate change order is much more restrained than it might appear at first glance. The same is true for the way the Federal Constitutional Court exercised its supervisory function with regard to the pandemic. In particular, the second order on the federal pandemic emergency brake contains elements of further development of the law.

3.1 CLIMATE CHANGE (BVERFGE 157, 30)

3.1[a] No Derivation of a new Fundamental Right

The Court proceeds cautiously by refraining from deriving a new, autonomous ecological fundamental right. The complainants in the climate proceedings before the Federal Constitutional Court had argued that the German state had not made sufficient regulations to reduce greenhouse gases and that this violated, among other things, a fundamental right 'to a future consistent with human dignity' and a fundamental right to an 'ecological minimum standard of living'. They believed they could derive these rights from Art. 2 para. 1 in conjunction with Art. 20a GG and from Art. 2 para. 1 in conjunction with Art. 1 para. 2 sentence 1 GG. The Federal Constitutional Court, however, left open whether such rights exist. In the literature those were partly derived from Art. 1 para. 1 in conjunction with Art. 20a GG.[20] Other fundamental rights already oblige the state to uphold minimum ecological standards that are essential to fundamental rights and, in this respect, to protect against environmental damage of catastrophic or even apocalyptic proportions. In particular, the state has a duty to protect physical and mental well-being under Art. 2 para. 2 sentence 1 GG, in addition to the duty to protect under Art. 14 para. 1 GG (guarantee of property).

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[19] Oliver Lepsius, 'Einstweiliger Grundrechtsschutz nach Maßgabe des Gesetzes' [2021] 60 Der Staat 609; John Philipp Thorn, 'Grenzenlose Vorverlagerung' (*Verfassungsblog*, 3 December 2021) <https://verfassungsblog.de/grenzenlose-vorverlagerung/> accessed 27 November 2025; Klaus Ritgen, 'Die Entscheidung des BVerfG zur "Bundesnotbremse" und ihre Bedeutung für die künftige Pandemiegesetzgebung des Bundes' [2022] Zeitschrift für Gesetzgebung 102; Martin H W Möllers and Robert Chr. van Ooyen, 'Bundesnotbremse – das Bundesverfassungsgericht bleibt "etatistisch": Neue Grundrechte, weniger Freiheit und eine „Kontrollinszenierung"?' [2022] 58 Recht und Politik 68; Oliver Lepsius, 'Zerstörerisches Potential für den Verfassungsstaat' (*Legal Tribunal Online*, 3 December 2021) <https://www.lto.de/persistent/a_id/46831> accessed 27 November 2025.

[20] BVerfG, order of 24 March 2021 - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 -1 BvR 288/20 - BVerfGE 157, 30 <95 ff. para 113 ff.>; Hans Heinrich Rupp, 'Die verfassungsrechtliche Seite des Umweltschutzes' [1971] 13 JZ 401, 402 derived a "fundamental right to a clean environment" ("Grundrecht auf unschädliche Umwelt") early on; for a fundamental right to an ecological subsistence minimum (Grundrecht auf ein ökologisches Existenzminimum), see only: Christian Calliess, *Rechtsstaat und Umweltstaat* (Mohr Siebeck 2001) 300; Klaus Ferdinand Gärditz in Robert von Landmann and Gustav Rohmer (eds), *Umweltrecht* (68. Supplementary delivery February 2013) Art 20a GG para 78; Wolfgang Kahl, '§ 19 Natürliche Lebensgrundlagen und Ressourcenverbrauch' in Uwe Kischel and Hanno Kube (eds), *Handbuch des Staatsrechts, Band I: Grundlagen, Wandel und Herausforderungen* (C.F. Müller 2023) para 51 ff.

3.1[b] No Violation of the Duty to Protect

The court's handling of the state's duty to protect is equally cautious: State obligations to protect arise from fundamental rights and therefore also have a subjective legal character. In terms of objective law, the state is also obliged to protect the natural foundations of life under the state objective provision of Article 20a GG. The central issue lies in the broad discretion the Court grants the state, especially the legislature, and the associated review of legislative action, which is essentially designed as a mere review of evidence.[21] As is well known, the Federal Constitutional Court only finds a breach of the duty to protect if the legislator has remained completely inactive or if the protective measures it has taken are clearly unsuitable or inadequate.[22] The Federal Constitutional Court thus rightly respects the legislator's scope for action. Because the legislator has not remained inactive and its protection concept is not completely inadequate, the very strict climate protection obligations (the Federal Constitutional Court formulates very specific requirements in the scale section) have not been violated.[23]

The Federal Constitutional Court has thereby continued its established case law with regard to the duty to protect. At the same time, however, there are further developments and significant extensions of the duty to protect: The Federal Republic of Germany should not only have a duty to protect people currently living in Germany, but also – with graduated intensity – for people living abroad and – under objective law – for future generations.[24]

3.1[c] Obligations of the Legislator

The terms the Federal Constitutional Court used ('intertemporal guarantee of freedom' etc.) indicate that the court is acting in a highly creative manner. But what is behind this? Without denying the creative approach, here, too, the court can draw on established dogma, namely the broad conception of freedom articulated in the well-known *Elfes*-decision.[25] In this decision, the Federal Constitutional Court ruled that Art. 2 para. 1 of the Basic Law is not limited to protecting a minimum level of freedom of action without which the individual

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[21] The prohibition of inferiority referred to in the second judgment on abortion (BVerfG, judgement of 27 October 1998 - 1 BvR 2306/96 - 1 BvR 2314/96 - 1 BvR 1108/97 - 1 BvR 1109/97 - 1 BvR 1110/97 - BVerfGE 88, 203 <254> is sometimes understood as a stricter standard of review, see Rudolf Steinberg, *Der ökologische Verfassungsstaat* (Suhrkamp 1998) 325 ff.; criticism of the mere evidence control in the climate change decision in Christian Calliess, 'Das "Klimaurteil" des Bundesverfassungsgerichts: "Versubjektivierung" des Art. 20a GG?' [2021] 6 ZUR 355, 357; in more detail on the potential of a further development of the duty to protect dimension: Calliess, *Rechtsstaat und Umweltstaat* (n 20) 437 ff. and 566 ff.; Gabriele Britz, 'Grundrechtliche Schutzpflichten in bald 50 Jahren Rechtsprechung des BVerfG' [2023] NVwZ 1449, 1454 interprets the recent case law of the Federal Constitutional Court as a "merging of standards"; for a further development of the doctrine of the duty to protect to meet the challenges of the climate crisis: Wolfgang Kahl, '§ 19 Natürliche Lebensgrundlagen und Ressourcenverbrauch' in Uwe Kischel and Hanno Kube (eds), *Handbuch des Staatsrechts, Band I: Grundlagen, Wandel und Herausforderungen* (C.F. Müller 2023) para 59.

[22] BVerfG, order of 27 October 1998 - 1 BvR 2306/96 - 1 BvR 2314/96 - 1 BvR 1108/97 - 1 BvR 1109/97 - 1 BvR 1110/97 - BVerfGE 88, 203 <254>.

[23] BVerfG, order of 24 March 2021 - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 -1 BvR 288/20 - BVerfGE 157, 30 <113 ff. para 151 ff.>.

[24] BVerfG, order of 24 March 2021 - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 -1 BvR 288/20 - BVerfGE 157, 30 <headnote 2 c) and para 199 ff.: international dimension; headnote 1 and para 146 ff.>.

[25] BVerfG, judgement of 16 January 1957 - 1 BvR 253/56 - BVerfGE 6, 32.

cannot develop as an intellectual-moral being. Rather, the notion of the free development of one's personality includes freedom of action in the broadest sense.[26] What the court stresses referring to the 'intertemporal guarantee of freedom' is basically the idea of freedom in the broadest sense.

It is also worth taking a look at the obligation of the legislator, which the Federal Constitutional Court has specifically stated. First of all, the legislator is only obliged to plan its climate protection targets more extensively. Karl-Heinz Ladeur spoke boldly of a 'right to freedom planning by the state' (*Recht auf staatliche Freiheitsplanung*).[27] The Federal Constitutional Court considers the protection concept of the legislature to be appropriate: The German legislator has taken precautionary measures that are not manifestly unsuitable. The legislator has made efforts towards limiting climate change, not least by introducing the provisions of the Federal Climate Change Act. The adopted provisions are not manifestly unsuitable for safeguarding the interests protected under Art. 2 para. 2 first sentence GG.[28] The Federal Constitutional Court merely requires the legislature to continue its climate protection targets for the period from 2031 onwards, but not to present a completely different or more intensive protection concept.

3.1[d] Restrictive Application of the 'Intertemporal Guarantee of Freedom'

Eventually, in two chamber decisions following the climate change order, the Federal Constitutional Court clarified that the concept of 'intertemporal guarantee of freedom' applies only when a constitutional complaint is 'directed against the entirety of the permitted emissions, because regularly only these, but not selective actions or omissions by the state, could disproportionately shift the overall reduction burden to the future'.[29] This is neither the case for the climate protection laws of the federal states, because a state-specific reduction target does not exist and the challenged regulations therefore do not have a prior effect similar to interference,[30] nor does the failure to set a speed limit for the transport sector interfere with future freedom.[31]

3.2 FEDERAL PANDEMIC EMERGENCY BRAKE I (CURFEWS AND CONTACT RESTRICTIONS, BVERFGE 159, 223) AND FEDERAL PANDEMIC EMERGENCY BRAKE II (SCHOOL CLOSURES, BVERFGE 159, 355)

In contrast, the decisions on the federal pandemic emergency brake[32] are characterized by great restraint on the part of the Federal Constitutional Court. Before I elaborate on this, I

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[26] BVerfG, judgement of 16 January 1957 - 1 BvR 253/56 - BVerfGE 6, 32 <36 ff.>.
[27] Karl-Heinz Ladeur, 'Freiheit als Anspruch auf staatliche Lenkung?' *FAZ* (6 May 2021) 7.
[28] BVerfG, order of 24 March 2021 - 1 BvR 2656/18 -1 BvR 78/20 - 1 BvR 96/20 -1 BvR 288/20 - BVerfGE 157, 30 <114 f.>.
[29] BVerfG, order of 15 December 2022 - 1 BvR 2146/22 <headnote 5>.
[30] BVerfG, order of 18 January 2022 - 1 BvR 1565/21 - 1 BvR 1566/21 - 1 BvR 1669/21 - 1 BvR 1936/21 - 1 BvR 2574/21 - 1 BvR 2575/21 - 1 BvR 2054/21 - 1 BvR 2055/21 - 1 BvR 2056/21 - 1 BvR 2057/21 - 1 BvR 2058/21 <headnote 13 ff.>.
[31] BVerfG, order of 15 December 2022 - 1 BvR 2146/22.
[32] BVerfG, order of 19 November 2021 - 1 BvR 781/21 - 1 BvR 798/21 - 1 BvR 805/21 - 1 BvR 820/21 - 1 BvR 854/21 - 1 BvR 860/21 - 1 BvR 889/21 - BVerfGE 159, 223; BVerfG, order of 19 November 2021 - 1 BvR 971/21 - 1 BvR 1069/21 - BVerfGE 159, 355.

would first like to make a few comments on the background to the decisions. The subject of the decisions were provisions of the Infection Protection Act that allowed massive infringements of fundamental rights during the COVID-19 pandemic (in the period from April to June 2021). These included, in particular, curfews and school closures. Several individuals filed constitutional complaints against the provisions of the Infection Protection Act, arguing that their fundamental rights had been violated.

The curfew and school closures served — like the other infection control measures — to protect life and health (under Art. 2 para. 2 sentence 1 GG). Under the Basic Law, life is accorded 'supreme value'.[33] However, this fundamental right, which also obliges the state to protect life, does not take precedence over other fundamental rights (such as the right to personal freedom or the right to school education). Measures to protect life must, in particular, be proportionate. However, within the proportionality framework, a structural difficulty arises: given the high value of protecting life, almost all measures appear appropriate. Therefore, doubts have been raised in the literature as to whether this limitation, which is inherent in the proportionality test in German constitutional law doctrine, is effective.[34]

In the first decision on the Federal Emergency Brake the Federal Constitutional Court limited its proportionality review to an assessment of the reasonableness of legislative evidence:

> Where scientific knowledge is tentative and the legislator's possibilities to draw sufficiently reliable conclusions are therefore limited, it is enough for the legislator to proceed on the basis of a context-appropriate and tenable assessment of the available information and evidence […]. This leeway stems from the fact that the Basic Law makes it incumbent upon the legislator, with its strong level of democratic legitimation, to resolve conflicts between high-ranking and highest-ranking interests despite uncertainties.[35]

The Federal Constitutional Court considered the measures to be proportionate when applying this standard.

In the second order on the federal pandemic emergency brake regarding school closures, however, the Federal Constitutional Court also broke new ground by deriving a new fundamental right from the Basic Law: the right to school education from Art. 2 para. 1 in conjunction with Art. 7 GG.[36] For the first time, the Federal Constitutional Court acknowledged that children and young people have a right to school education vis-à-vis the state. The school closures that have taken place in Germany since the beginning of the pandemic have interfered with this right in a serious way. As a result of the dynamic

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[33] BVerfG, judgement of 25 February 1975 - 1 BvF 1, 2, 3, 4, 5, 6/74 - BVerfGE 39, 1 <42>; BVerfG, judgement of 16 October 1977 - 1 BvQ 5/77 - BVerfGE 46, 160 <164>; BVerfG, order of 6 December 2005 - 1 BvR 347/98 – BVerfGE 115, 25 <45>; BVerfG, judgement of 26 February 2020 - 2 BvR 2347/15 - 2 BvR 651/16 - 2 BvR 1261/16 - 2 BvR 1593/16 - 2 BvR 2354/16 - 2 BvR 2527/16 - BVerfGE 153, 182 <para 232: "Höchstwert">.

[34] In detail: Froese, 'Das Verhältnismäßigkeitsprinzip in der Krise' (n 10) with further evidence.

[35] BVerfG, order of 19 November 2021 - 1 BvR 781/21 - 1 BvR 798/21 - 1 BvR 805/21 - 1 BvR 820/21 - 1 BvR 854/21 - 1 BvR 860/21 - 1 BvR 889/21 - BVerfGE 159, 223 <para 171>.

[36] BVerfG, order of 19 November 2021 - 1 BvR 971/21 - 1 BvR 1069/21 - BVerfGE 159, 355 <headnote 1; para 44 ff.>.

infection rate at the time of the adoption of the 'federal pandemic emergency brake' at the end of April 2021, when the vaccination campaign had only just begun, this intervention was countered by overriding public welfare interests in the form of averting dangers to life and health and to the functioning of the healthcare system, which, according to the legislator's reasonable assessment at the time, could also be countered by school closures.

Finally, it should be emphasized that the court stresses here that interventions in fundamental rights to combat a pandemic must satisfy the general constitutional standards applicable to restrictions of fundamental rights in every respect.[37]

It should also be mentioned that the Federal Constitutional Court applies strict standards for the existence of emergency situations in a different context, namely public debt. In its landmark ruling pronounced in November 2023, the Federal Constitutional Court set strict standards to exceeding of credit limits. The legislator argued that there was a new emergency situation and transferred the € 60 billion credit authorization earmarked for the coronavirus pandemic, which no longer was not needed, to the Climate and Transformation Fund. The Federal Government's argument that there was an extraordinary emergency situation was rejected by the Court. The Second Senate declared the Second Supplementary Budget Act 2021 null and void and set strict standards: there must be an objective causal link between the natural disaster or the extraordinary emergency situation and the exceeding of the credit ceilings. The Second Senate did not agree with the Federal Government's argument[38] that the loan-financed measures contribute to reducing the financial burden on future generations and that the requirements for the causal link should therefore be lowered. Rather, with the standards it has established, it expresses the fact that the challenges of the time are fundamentally to be financed in the present.[39] Future generations, who are not in a position to decide on current borrowing, should not be financially burdened with the expenditure of the present. Politicians can continue to make the necessary expenditures with regard to climate change, but they must either change their priorities or relax the constitutional requirements of the so-called debt brake.

4 CONCLUSION: SAFEGUARDING FUTURE POLITICAL OPTIONS FOR THE LEGISLATURE THROUGH THE JUDICIARY

Ultimately, the Federal Constitutional Court interprets the Basic Law dynamically in crisis situations or 'emergencies', as it does elsewhere.[40] This is not unproblematic in view of the counter-majoritarian difficulty,[41] but the conflict cannot be completely resolved either. Finally, I would like to take a look at a central justification that the Federal Constitutional

[37] BVerfG, order of 19 November 2021 - 1 BvR 781/21 - 1 BvR 798/21 - 1 BvR 805/21 - 1 BvR 820/21 - 1 BvR 854/21 - 1 BvR 860/21 - 1 BvR 889/21 - BVerfGE 159, 223 <headnote 1>.
[38] BVerfG, judgement of 15 November 2023 - 2 BvF 1/22 - BVerfGE 167, 86 <para 66>.
[39] See Gregor Kirchhof, 'Die Schuldenbremse – eine Haushaltskrise als Chance in der Zeitenwende' [2023] NJW 3757, 3761.
[40] Cf. Daniel Wolff, 'Strategische Verfassungsprozessführung, das Bundesverfassungsgericht und der Klimaschutz' [2024] DVBl 1402, 1406.
[41] Alexander M Bickel, *The Least Dangerous Branch* (Bobbs-Merrill 1962).

Court uses in its climate decision, but also in its case law on European integration:[42] the court does not refer to a state of emergency, which – as we have seen – is fundamentally alien to the Basic Law. Rather, it argues that political scope for decision-making must be secured for the future. In this respect, the judiciary positions itself as both a counterweight to the present legislature and an ally of the legislature of the future.

[42] The Federal Constitutional Court derives a 'right to democracy' from Art. 38 para. 1 in conjunction with Art. 20 para. 1, para. 2 and Art. 79 para. 3 GG. According to case law, this requires the preservation of democratic scope for shaping and decision-making, also for the future. This could result in limitations for the current legislator, but these could be legitimate with a view to keeping the future open, cf. BVerfG, judgement 12 September 2012 - 2 BvR 1390/12 - 2 BvR 1421/12 - 2 BvR 1438/12 - 2 BvR 1439/12 - 2 BvR 1440/12 - 2 BvE 6/12 - BVerfGE 132, 195 <para 120 ff.>.

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