

# Against the taming of the spinners - On the national goal of climate protection<sup>1</sup>

Lecture at the opening symposium "Clim Law Graz - Research Center for Climate Law"

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Thank you very, very much for the really very honourable invitation to speak. Let me begin with a saying by the French philosopher *Edgar Morin*: "*If you constantly sacrifice the essential to the urgent, you forget the urgency of the essential.*" This is a very clear picture of the climate crisis. With the foundation of the Climate Law Center, the Karl-Franzens-University Graz, where I was also briefly a visiting professor a long time ago, has dedicated itself to the urgency of the essential. The University of Graz and the head of the Center, Prof. Dr. *Eva Schulev-Steindl*, and her team are to be congratulated most warmly on the foundation of the Center. Good luck on the way to a sustainable climate protection law!

The corona crisis, which is still ongoing, is also essential and urgent, but the climate crisis is even more essential and has long been urgent for humanity. The climate crisis is the greatest challenge of our century.<sup>2</sup> Why is this so? Above all mine, that is, the older generation, has destroyed more of the environment and climate than all other generations before it together. Of course, the large-scale destruction of the environment and dramatically rapid climate change are offset by many positive achievements. The former, i.e. the ever-increasing climate change, is not seen by many as such, but more and more people, and especially climate scientists, who are unfortunately often and predominantly dismissed as crackpots by politics, business and industry, see it as the greatest challenge of our century.<sup>3</sup> Ninety-nine percent of climate scientists assume that climate change is anthropogenic. The designation of scientists as crackpots or the dismissal of them as crackpots also justifies the title of my lecture. We were and are enormously arrogant towards the developing and emerging countries, but also and all the more so towards all future generations together. Let me start with a frequent objection to climate protection: the EU as a whole only accounts for 10% of CO2 emissions. However, this is 10% of total CO2 emissions and it is overlooked that the EU, and the industrialised countries in general, have a significant role model effect vis-à-vis the developing and emerging countries. **If we do not change our behaviour, we cannot demand the same behaviour from the developing and emerging countries.**

In the Corona crisis, science and politics made the right decision, namely science-oriented and science-based, based on facts and data. This is now the opportunity for politicians to act immediately on the basis of knowledge in the climate crisis and to set the right course in the climate crisis. Instead of the decision-makers in Austria and the EU setting an example in the climate crisis - as previously demanded - following the polluter-pays principle, I believe that, despite all the assertions to the contrary and despite some laudable exceptions and positive approaches, the idea of growth is already quite present again. One need only look at the advertisements in the media; the idea of growth is once again pressing and a priority for many. **The danger of the frenzy of exclusively calculating thinking (Martin Heidegger) is threatening.** This must not happen again. So the crackpots must be heard here too, and lawyers must and should be crackpots too. They should also hear all other science madmen.

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1 Compare the title already by *Kerschner/Schulev-Steindl*, Editorial, RdU 2019/1,1.

2 See also *Kerschner*, Nach der Corona-Krise mitten in der Klimakrise, Unterschiede und gemeinsame Chancen und Gefahren, RdU 2020/49,93 ff.

3 Compare *Bergthaler/Kerschner/Schulev-Steindl*, Was Österreich braucht, ist Klimaschutz! Editorial, RdU 2018/1,1.

The market economy in which we live is, moreover, highly flexible, but the right legal framework is still lacking at the moment, and it still needs to be shaped and implemented.

But for this we do not have to abolish the market economy, capitalism, as some people are certainly demanding. **We must reverse the polarity of the market economy.** To do this, we need realistic and pragmatic legal bulwarks, such as the climate law centre in Graz, which will provide the government with a basis and decisive help in the climate emergency declared by Parliament. **My thesis is that climate protection in Austria, but probably also in most other EU Member States, has not yet or not sufficiently arrived in law or the legal system.** At the same time, we in Austria would actually have a very good starting position, which, as will be shown, is not shared by the courts.

What's this about? We have a **national goal of environmental protection**<sup>4</sup> and it is undisputed and undeniable that **climate protection is part of environmental protection** and part of sustainability and health protection. Climate change affects almost all environmental media. We are therefore actually in a better starting position than in Germany, where there is not yet a national goal of sustainable development. For Germany, such a national goal is urgently demanded<sup>5</sup> by the former president of the German Federal Constitutional Court, *Hans-Jürgen Papier*, in his book "*Die Warnung*" (*The Warning*). We would therefore not really need an actual national goal of climate protection, although this would of course do no harm. What would still help, however, would be a basic right to climate protection, because this would be linked to a subjective right of the individual. So we have a national climate protection target, but many people say *yes* to it, not only *yes*, but *yes, but ...!* There are also many reasons among lawyers and judges why climate change is denied. I would now like to go into this in more detail.

Many people still deny the climate crisis and its significance. There are many mechanisms of repression. I would just like to point out a few of the most important ones. Many people deny the climate crisis as such, at least as one that was decisively caused by humans, and this despite the fact that **ninety-nine percent** of climate scientists (!) affirm and prove the anthropogenic influence. Especially in the time of the corona crisis we have noticed how quickly CO<sub>2</sub> emissions are being reduced. Although many look on, they are of the opinion that there are more important things to do and that climate protection is very abstract at all, rather than prescribing concrete courses of action. This is something we have to fight against decisively. Climate protection must be supported by everyone and must cover all human behaviour. This is also legally suggested by Article 191 TFEU. It is about the **polluter-pays principle**<sup>6</sup> and it is precisely our older generation that is the main cause of the climate crisis.

What also still prevails in many cases is that we do not want to change. We know about climate change and that our children and grandchildren will flee from storms and droughts, but we are far too busy. Hopefully, the Corona crisis has given us more food for thought in this respect too.

One last reason of denial or repression mentioned here: **Especially our generation has produced many positive technical and other positive achievements and has achieved a lot. Therefore it is psychologically explainable that we do not want to recognize that we have massively destroyed our environment and the climate has been considerably disadvantaged.** Global warming can no longer be denied. This also explains why more and more colleagues of my generation see *Greta*

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4 See *Kerschner* (Ed.), *Staatsziel Umweltschutz* (1996).

5 *The warning – How the rule of law is being undermined* (2019)<sup>3</sup> 235 ff.

6 See *E. Wagner* in *E. Wagner* (Ed.), *Umwelt- und Anlagenrecht*, Band I: Interdisziplinäre Grundlagen und Anlagenrecht<sup>2</sup> (2021) 95 f und *Stangl* in *E. Wagner* (Ed.), *Umwelt- und Anlagenrecht* 194 ff.

Thunberg as an enemy. It is so difficult to see that the achievements have also caused great, indeed the greatest, sacrifices in terms of the environment and climate.

I now come a little closer legally to the **Austrian Federal Constitutional Law Sustainability and comprehensive environmental protection**. Who of us really knows what this Federal Constitutional Law really says? I would like to quote exactly **§ 1** of this Federal Constitutional Law:

*"The Republic of Austria (federal government, provinces and municipalities) is committed to the principle of sustainability in the use of natural resources in order to ensure the best possible quality of life for future generations. "*

We have already heard that sustainability also means climate protection. Climate worth living in is a natural resource. Even clearer is **§ 3**:

*"(1) The Republic of Austria (federal government, provinces and municipalities) is committed to comprehensive environmental protection.*

*(2) Comprehensive environmental protection is the protection of the natural environment as the basis of human life against harmful effects. Comprehensive environmental protection consists in particular of measures to keep the air, water and soil clean and to avoid disturbances caused by noise. "*

**Comprehensive environmental protection also includes climate protection.**<sup>7</sup> Climate protection damage is also included in § 3 (2) and it does not include an exhaustive list of measures, but it might be useful to expressly include climate protection here. Given this starting point, we could actually be very satisfied if this were to be a real legal implementation. We will see that, unfortunately, these consequences have not yet been implemented by the Constitutional Court.

What are these **normative consequences**? I have once<sup>8</sup> tried to analyse the decisive normative consequences in more detail: The most important aspect of the state's goal of environmental protection (= also climate protection) is that it is a **mandate for action for all state organs**, i.e. not only for the administration, but also for (simple) legislation and also for the courts, including the Constitutional Court! Let us record that here. If you take the trouble to examine the judicates of all the supreme courts to see how far climate protection is present there, and the Supreme Court in civil and criminal matters (OGH) has no entry on climate protection at all, then the Administrative Court and in some cases the Constitutional Court as well.

The next normative effect, which would be very important: **In the case of blatant violation of simple laws against this state objective, these laws would have to be unconstitutional**. Furthermore, the state goal of environmental protection would always have to be weighed against other fundamental rights. What I consider to be decisive in practice, but unfortunately has not been seen as such so far, **the state goal of climate protection must be taken into account in the interpretation, even in the case of dubious interpretation, in accordance with the constitution**. In environmental protection, one could, transferred from criminal law, speak of *"in dubio pro natura"* and in climate protection of *"in dubio pro clima"*.

The last important normative consequence would be that climate protection is **also seen as a public interest in the** interpretation of simple laws. After all, in simple laws it is often seen - and we will see this right away with the Aviation Act - that climate protection is not yet explicitly mentioned.

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<sup>7</sup> See Kerschner, VfGH 3. Piste und juristische Methode: Verfassungskonforme Auslegung verfassungswidrig? RdU 2017/129,190.

<sup>8</sup> See Kerschner in Kerschner (Hrsg), Staatsziel Umweltschutz (1996) 1 ff.

The **normative effects of the government's climate protection goal** have been demonstrated and the planned third runway at Vienna's Schwechat Airport in **2017 has**, so to speak, taken an **oath**. The Federal Administrative Court<sup>9</sup> rejected the construction of the third runway based on a weighing of interests. The court based its decision primarily on the national goal of climate, environmental and soil protection. This concerns a passage in § 71 of the German Aviation Act, which states that *"the permit shall only be granted if there are no other public interests that stand in the way"*. The main question was whether climate protection interests are also such other public interests. The Federal Administrative Court has affirmed this.

The Austrian Constitutional Court<sup>10</sup> denied this within a very short period of time - namely only half a year later - on the grounds that this 128-page decision was **arbitrary (!)** with the argument that climate protection was not explicitly mentioned as a public interest in the Aviation Act. In my opinion, **this decision** of the Constitutional Court was and is clearly **politically oriented**. The political pressure to build this third runway was simply too great. Not a single methodological argumentation spoke in favour of this result, and the accusation of arbitrariness by the Constitutional Court was almost arbitrary for me.<sup>11</sup>

The Federal Administrative Court (BVwG 23.3.2018, W 109 2000 179-1) was then itself bound by the decision of the Constitutional Court and had to authorise the third runway, albeit under many conditions.

The Administrative Court (VwGH 6.3.2019, Ro 2018/03/0031) was also forced to comment on this again, focusing on the environmental impact assessment procedure, which was also necessary here, and - very pleasingly - at least in principle affirmed that climate protection must also be taken into account in environmental impact assessment procedures, namely not only the **microclimate but also the macroclimate (!)**. He has made a restriction especially for flight operations, because in the opinion of the Administrative Court the emission certificate system is exclusive and therefore climate protection is not to be taken into account beyond that. **But this argument of exclusivity is also nowhere in the law<sup>12</sup>**. The fatal consequence of the Constitutional Court's ruling is, however, that this Federal Constitutional Law on Climate Protection has become an alibi norm, because according to it climate protection is only relevant there, even if the simple legislator refers back to it. Thus, according to this situation, the simple legislator decides whether the constitutional state goal of climate protection is valid or not. That is incomprehensible!

It is to be hoped that the Constitutional Court will abandon this view, but it will not be easy to resolve or get out of the dilemma. There are also new appointments to the Constitutional Court and it is to be hoped that this will also lead to a different, more lawful view of the Constitutional Court.

We come back to the **connection with the current Corona crisis**, which has resulted in a very poor economic and budgetary situation. My fear is - and I really do see dark clouds gathering here - that the idea of the previous government's idea of a renaissance of the idea of a **new state goal** will arise. This plan was about a **national goal of international competitiveness**. In my view, at the time it was almost a declaration of war on climate and environmental protection. What was it about?

A *"Federal Constitutional Law on State Goals"* was planned, i.e. no longer just comprehensive environmental protection and sustainability. A new § 3a was to be introduced and it said: *"The*

9 BVwG 2.2.2017, W 109 2000 179-1.

10 VfGH 29.6.2017, E 875/2017.

11 *Kerschner*, VfGH 3.Piste und juristische Methode: Verfassungskonforme Auslegung verfassungswidrig? RdU 2017/129,190ff; *Kerschner*, Klimaschutz aus umweltrechtlicher, insbesondere auch aus völkerrechtskonformer Sicht, RdU 2019/35,49ff.

12 For more details see *Kirchengast/Madner/Schulev-Steindl/Steininger/Hofer/Hollaus*, RdU 2020, 76 ff.

*Republic of Austria is committed to a competitive business location as a prerequisite for growth and employment".* This discussion about such a state target can - as I said - now come up again, even boil up. There were also explanatory comments on this proposal at the time, and it was even said that the state has a **duty to guarantee the ability to work and run a business (!)**. I do not know whether people were aware of what such a guarantee obligation means, namely that the state should really be obliged to achieve sufficient earning capacity and business capability. Such goals are enormously difficult to achieve and if the state does not achieve these goals, official liability may well be the consequence. At the time, I, along with others, massively opposed such a state target and thought that the ecological lamb Hainburg should be sacrificed and slaughtered on the altar of the third runway so that industry and the economy would once again have a completely free rein. The aim of this new state goal was clearly to prevent a decision such as that of the Federal Administrative Court on the third runway. The argument of the proponents of such a state goal was that a weighing of interests must always be carried out anyway, and such a weighing of interests is also provided for in the TFEU. In my opinion, this should be viewed quite critically and naturally also applies to the renaissance of this idea.

Why? **We have the basic rights of property and freedom of employment as the foundation of a free market economy anyway**, and so far this basic right has been limited by the state's goals of environmental protection, climate protection and sustainability, at least if these state goals are interpreted correctly. I believe that the planned new state objective is intended quite deliberately to break down the restrictions on these two fundamental rights of property and freedom of employment, to **paralyse** them, as it were. If we perhaps want to express this here metaphorically in a formula: if the national objective of protecting the climate and the environment is rated 1 and the new planned national objective is also rated 1, then all we need to do is subtract:  $1-1=0!$  And then the paralyzed state goals no longer have the effect that the basic rights to property and freedom of employment are in this respect unlimited, i.e. no longer have any limitation as they do now. At that time I have also explained again and again and have also now connected with an **appeal to the youth: Do not put up with this, it is about your future!**

The demonstrations of the "*Fridays for Future*" movement are - I believe - on the right track anyway. In my opinion, one must, of course, always fight against such tendencies **by democratic means** in a democratic constitutional state.

I will now come to the conclusion, namely the future scope of the Climate Law Center. It is about the meaningful **transformation of the current climate protection law**.<sup>13</sup> I would like to point out that, of course, regulatory law is necessary, but I believe that **market-based instruments of climate protection will also be very useful and necessary**. The idea behind them: **In a market economy, market-based instruments are most effective, and there is a simple principle at stake here: the burden on the climate must bring material disadvantages and must be expensive. Climate-friendly behaviour must bring material advantages, profits.** In my view, there is no need for anything more than this principle, and I have already mentioned that the economy is flexible enough to implement it. Admittedly, some businesses and some industries will go under, but new, completely different ones will emerge. I would like to give just one example of the **charging of climate costs**, which is of great concern to us Austrians, namely the regulation of **motorised private transport**. As our earlier studies have already shown, it is necessary here - which has not yet been successful because transport is Austria's holiest cow - **to charge costs to motorised private transport depending on the number of kilometres and emissions**. Those who drive more and produce more emissions must also pay more. The issue at stake is therefore tolls on motorised private transport.

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<sup>13</sup> See *Bergthaler/Kerschner/Schulev-Steindl*, Editorial: Ein Winter- (aber auch Sommer-) Märchen oder auch mehr?, RdU 2020/1,1.

An objection that was raised immediately. It would make transport more expensive, so that products would become more expensive and that this would be at the expense of consumers. I am firmly convinced that this is precisely the aim, that regional organic products will become cheaper and will therefore be more likely to be bought than products from faraway countries. I would of course mention the **CO2 tax**, which I regard as the most important instrument for charging costs, but this is a separate chapter that must be linked to an eco-bonus. But I do not want to go into that in more detail here.

Lastly, the view: Let me quote *Pope Francis* from the *Encyclical laudato si*: "*The alliance of economy and technology ultimately clings to everything that is not its immediate interest.*" **It is now up to science to change the immediate interests of business and technology accordingly.** Business and technology are flexible enough. Ultimately, what is at stake is an eco-social market economy and environmentally and climate-friendly technologies. One last sentence to conclude: climate protection also and especially needs a strong legal voice. The Climate Law Center in Graz will be such a strong voice, I am sure of it, and I wish it every success.

#### **Selected literature related to Climate-protection-law:**

- *Damohorsky/Proelss/Stejskal* (Eds.), *Adaption to climate changes from the perspective of law* (2019)
- *Ennöckl*, *Wie kann das Recht das Klima schützen?* ÖJZ 2020, 41 ff
- *Fitz/Ennöckl*, *Klimaschutzrecht*, in *Ennöckl/Raschauer/Wessely* (Eds.), *Handbuch Umweltrecht*<sup>3</sup> (2019) 757 ff
- *Frenz*, *Grundzüge des Klimaschutzrechts* (2020)
- *Kirchengast/Schulev-Steindl/Schnedl* (Eds.), *Klimaschutzrecht zwischen Wunsch und Wirklichkeit* (2018)
- *Schulev-Steindl*, *Klimaklagen: Ein Trend erreicht Österreich*, *ecolex* 2021/7, 17 ff
- *E.Wagner*(Ed.), *Umwelt- und Anlagenrecht, Band I: Interdisziplinäre Grundlagen*<sup>2</sup>(2021) 142, 292, 752 ff