CLIMATE PROTECTION – LAW: QUO VADIS?

Univ.-Prof. retired Dr. Ferdinand Kerschner,
JKU Linz, Visiting Professor at the Charles-University Prag

We must not fall back into old patterns after the Corona crisis. We are in the middle of a climate crisis, even if some people are not so keen to hear it, but it is clearly scientifically proven. If we go back to the concept, the word of crisis, we see that crisis comes from the ancient Greek: *krísis* or *krínein* means decision or escalation, better a combination of these. In the Corona crisis, I hope and believe politics and science decided very correctly and quickly.

The quick and correct decision-krísis – should also apply to the climate crisis, and the climate crisis is clearly an interdisciplinary problem, therefore a problem for all scientists. All scientists are challenged and it would be very desirable that most or all scientists at JKU would join Scientists for Future. The right is not to be overestimated, but also not to be underestimated, which we have just seen clearly with the Corona crisis.

I. Lessons from the Corona Crisis for the Climate Crisis

Are there commonalities, differences, opportunities and threats?

To the common ground: Both crises are about human existence and the instinct for self-preservation. In the case of the Corona crisis, we have an immediate danger from the virus and this crisis is currently covering up climate change, but for me and I believe for many others, this is the far greater crisis. I always talk about the greatest challenge facing humanity in the 21st century.

Perhaps you have seen a **picture** of these crises on the internet: Homo sapiens is swimming on the sea and underneath him is a small shark that threatens homo sapiens, but a much, much bigger shark is swimming underneath this small shark and this very big shark that threatens to swallow us is the climate crisis.

Legally, there is still time, but not much longer, to transform climate protection law. It will not tolerate any delay. Even before the Corona crisis, we had very long deadlines and long-term goals in EU law: we are talking about the years 2030, 2050 and 2100. Our huge problem is that, unfortunately, no concrete measures have been adopted. Why is that actually the case? As with the Corona crisis, the scientific community is clearly of the opinion – 98% of climate researchers are of the opinion that the climate crisis is coming and that something must be done. Science provides data and facts that something must be done.

Why is it different with the climate crisis and why are we actually doing far too little? The first reason is surely that here, because the crisis does not threaten us so directly,

the economic pressure prevails. The current economy is still predominantly geared towards short-term profit. The philosopher *Martin Heidegger* speaks of the frenzy of calculating thinking. **But we need long-term thinking and decision-making**.

The second main reason is, in my opinion, a serious democratic problem: unfortunately, our politics is not, or at least not predominantly, oriented towards long-term thinking and decision-making. People think in terms of election periods, i.e. 4 or mostly 5 years. In addition, there is the short-term profit motive, so that everything is postponed, but for me, the association Scientists for Future and especially Fridays for Future are the great hope. It is foreseeable that young people will soon vote differently and politicians should actually see that.

What concrete lessons do we draw from the Corona crisis? Firstly, CO_2-emissions have fallen noticeably within a very short time during the first corona-wave, allegedly by about 4% already. For me, this is clear evidence that CO_2- emissions are of anthropogenic origin. The second point, which was and is really surprising for me, is that people are more flexible than one would like to believe. People are quite capable of doing without. Renunciation is not a popular topic in the climate crisis discussion, as it is immediately referred to the Stone Age and stagnation, but renunciation can also lead to higher welfare and a higher quality of life.

The **third point** is that not only people as consumers are flexible, in my opinion **entrepreneurs in a market economy are also extraordinarily flexible**. In a market economy, it is precisely typical that businesses are flexible. Some industries will simply go under, some will emerge.

Something surprising about abstinence: Already in 2010, one million people died of hunger, but three million people died of overeating, so in this respect, going without would sometimes make sense.

The **fourth** and, in my view, **most important point: politics and parliament can act extremely quickly and effectively if they want to**. It is surprisingly improbable how quickly new laws have been passed in the corona-crisis and also how quickly parliament has reacted.

What will remain, in any case, will be digitalisation. I believe that home office and video conferencing will remain and perhaps increase. This will have a positive effect on motorised individual transport.

There are also very **great dangers** that are now foreseeable. Many are already calling for an unconditional ramp-up the economy after the end of the Corona crisis. We will have a huge budget deficit and therefore many will say that there will be no money left for climate protection measures. Across Europe, too, there are already calls from deserving quarters for a postponement of the EU's Green Deal. These are the dangers that must be averted.

However, we also have **great opportunities**, some of which are already being seized by politicians. Now we have to set the right course for the climate crisis. **We need climate-friendly problem-solving conditions and framework conditions in the economy, massive promotion of innovative technologies, returns through green funds and the like**. The financial sector is also immensely challenged. For all of this, we need the law, because it has to set the guidelines.

II. Climate protection has not yet (sufficiently) arrived in law

Although we have or would have a very good starting position in law, the situation is actually quite catastrophic in Austria, to put it drastically. In Austrian law, we have a constitutional norm, a state goal of environmental law with constitutional rank, and some premises for this: This is about climate protection and it is completely undisputed or indisputable that **climate protection is part of environmental protection**[206], sustainability and health protection. Climate change affects all environmental media and health. The clear consequence of this is that the state goal of environmental protection also applies to climate protection. Therefore, contrary to the demands, we do not need a separate state goal of climate protection, as this is part of the state goal of sustainability and environmental protection. However, it would make a lot of sense to establish a fundamental right to climate protection, because this would clearly be linked to subjective rights of the individual. However, despite this state goal, what exists **not only among voters but also among decision-makers is that it is always a matter of "yes, but..."**, even with the state goal of environmental protection. In many cases, climate change and the **necessity of climate protection are still denied**, even among lawyers and judges. There are many reasons why climate change is still widely and comprehensively denied today[207].

Therefore, I would like to present to you 8 mechanisms of climate change denial :

1. People are looking at climate change. At the moment we are seeing a drought that is affecting us. There have hardly ever been forest fires here in April. But then people look away again, laugh about it and think it's another sign of the apocalypse.
2. People look at it, but console themselves with technical miracle cures, such as dimming the sun. This is also widespread among scientists.
3. One looks, but takes a rational view. Economic development is more important because wealth is still the best protection against weather extremes.
4. You look, but there are more important things. Climate protection is simply abstract. Recently, a high official of a ministry told me that climate protection is

[206] See *Kerschner*, VfGH 3. Piste und juristische Methode: Verfassungskonforme Auslegung verfassungswidrig? RdU 2017/129, 190.

[207] Largely adopted by *Naomi Klein*, Amercan writer (book: Market Capitalism vs. Climate, 2016). I do not share all views, but the book is excellent and highly recommended; see also *Naomi Klein*, Green new deal (2020).

an abstract problem and not the problem of a consumer. I have to completely disagree with that. We all have to contribute something and cannot completely shift the responsibility onto the state. Individuals also bear personal responsibility and must show individual initiative. In European primary law, in the Treaty on the Functioning of the EU (TFEU) to be precise, we have Article 191, according to which environmental policy must be based on the **polluter pays principle**[208]. Unfortunately, this is seen too little, especially in my older generation, as we have been instrumental in causing the impairments and climate change. Many do not want to recognise and hear this. Science has also achieved enormous things and produced wonderful things. Then to realise that much has been done to the detriment of the environment and the climate is psychologically difficult for many to digest.

5. You look but make no attempt to change the system and you have too much bad energy.
6. People really look, but keep forgetting about climate change. There is an ecological in and out amnesia. People are afraid that everything will change,
7. We know about climate change, climate scientists agree, and we also know that children will flee from storms and droughts, but we are unfortunately far too busy. Perhaps it is possible to think about this in times of the Corona crisis.
8. People simply deny climate change. There are still a lot of them, too.

We have a *federal constitutional law on sustainability and comprehensive climate protection*[209] with constitutional rank. If we look at these state goals, **we can deduce normative effects from them**[210]. This is not completely undisputed, but it is the prevailing view. I dealt with the normative effects in more detail a long time ago, and it is completely undisputed that these state goals are a **mandate for action for the state organs of legislation, administration and jurisdiction**. I am also of the opinion that laws that blatantly and evidently violate these state goals must also be unconstitutional. These state goals must also be weighed against other fundamental rights, which may also result in restrictions on other fundamental rights. The most important normative effect is the following: Laws are often quite doubtful and not so clear: Simple laws and ordinances must be interpreted in conformity with the constitution, namely **in dubio pro natura.** This applies to environmental protection in the narrower sense and one can also transfer the whole thing to climate protection – **in dubio pro clima**. Finally, climate protection must always be included as a public interest when it comes to weighing up interests – as is often the case.

---

[208] See *E. Wagner* in E.Wagner (Ed.), Umwelt- und Anlagenrecht, Band I: Interdisziplinäre Grundlagen und Anlagenrecht² (2021) 95f und *Stangl* in E. Wagner (Ed.), Umwelt- und Anlagenrecht 194ff.

[209] BGBl I 2013/111 as amended by BGBl I 2019/82.

[210] See already *Kerschner* in Kerschner (Ed.), Staatsziel Umweltschutz (1996) 1ff.

At first glance, this looks quite wonderful and if all this is followed, we won't need to transform so much. In the also legal discussion surrounding the **approval of the third runway of Vienna-Schwechat Airport**, it has come to a swearing in for the first time whether one takes these state goals seriously or regards them **as lip service or alibi norm**: In February 2017, the Federal Administrative Court[211] prohibited the construction of the airport's third runway, citing the Federal Constitutional Law on Environmental Protection, Climate and Soil Protection. Argument of § 71 para 1 tit d Aviation Act is the following: Airfield runways are only to be approved if other public interests do not conflict. The judges justified this on 128 pages.

Within a very short time, the Constitutional Court[212], which was called upon in this case, then overturned the decision a few months later in June 2017 on the grounds of **arbitrariness** (!), because there had been a frequent gross misjudgement of the legal situation. That is a serious accusation. Arbitrariness is the application of the law without factual justification, and that is probably the greatest legal accusation one can make against someone. The Constitutional Court thus overturned the decision on the grounds of unconstitutionality. The main argument was that public interests are only those that are mentioned in the Aviation Act itself. In my opinion, this decision of the Constitutional Court is not covered by any method of interpretation[213]. The decision has been criticised by many legal scholars and in my opinion it was frankly a political decision. **If one follows the Constitutional Court, this has a fundamentally wrong consequence: environmental protection, climate protection and sustainability only have a meaning in the law where they are mentioned in the simple law.** This means that the state objective is no more than lip service, because where the simple law does not refer to it, it does not apply.

After this decision, the case was referred back to the **Federal Administrative Court**[214] for a new decision and this court was bound by the decision of the Federal Constitutional Court. It had to approve the third runway with further conditions. The case came back to the **Administrative Court**[215], which at least made a positive decision: The environmental impact assessment to be carried out in the approval procedure must take climate protection into account and **not only the microclimate, but also the macroclimate**. Nevertheless, the Administrative Court did not take the macroclimate into account, because the emissions are exclusively attributable to the aviation operators according to the emissions trading system. This is very problematic.

---

[211] BVwG 2.2.2017, W 109 2000 179-1.

[212] VfGH 29.6.2017, E 875/2017.

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

[214] BVwG 23.3.2018,W 109 2000 179-1.

[215] VwGH 6.3.2019, Ro 2018/03/0031.

A third runway at *London Heathrow* Airport was rejected in the second instance on climate protection grounds. The court has therefore ruled in a completely different way than in Austria.

III. Transformation of climate protection law[216]

The law of the energy transition contains 3 important points, i.e. very important challenges that we will soon have to challenge.

In my opinion, **emissions trading must be improved decisively**. In the third phase, this trade has already been improved, but we need to devalue the certificates more each year so that we also arrive at higher prices for the certificates.

Especially in the case of green energy, **it is a question of faster expansion of the transmission networks and expandable expropriation possibilities**. Here I am in favour of **faster procedures** within the framework of preferential pipeline construction.

The storage problem is an essential must of the energy transition, whereby a decision must be made **between ecology and ecology**. This conflict must be decided by politics and legislation.

IV. A fairy tale[217]

It's a winter fairytale, but also a summer fairytale – and more!

Almost all (industrial) companies, corporations, farmers, road users have realised that climate and environmental protection is also in their own interest and especially in the interest of the economy. Austrian entrepreneurs in particular are flexible and make profits through **state-of-the-art environmental technology and worldwide export**. Already 70 percent of Austrian farmers work extensively and organically – and more and more are doing so. **Gentle tourism accompanies them**, uses the strongly developed **public** transport, whose **low costs far undercut motorised individual transport driven by fossil energy**.

In general, **market-based instruments governed by the precautionary and polluter pays principles take effect**, charging the costs of environmentally harmful behaviour, avoiding significant environmental and climate hazards, and allowing environmentally and climate-friendly behaviour to "win". Environmental goods are valued by discounting future environmental costs and benefits. **Legal frameworks also enable markets to attribute externalities to the economic activities that cause them. Even WTO law has been ecologised. Economy and environment have become partners**, which also allows CO_2 taxes for fossil primary energy, but also

[216] See *Christian/Kerschner/Wagner* (Eds.), Rechtsrahmen für eine Energiewende Österreichs (REWÖ) (2016)

[217] cf.RdU 2020/1,1.

its consumption, to be controlled in a revenue-neutral way and with an eco-bonus. Renewable energies are booming and create sufficient labour.

Climate lawsuits are successful in all supreme courts. The Constitutional Court recognises the constitutional protection of the environment and the climate based on the fundamental rights of the individual: **The individual's right to freedom includes sufficient ecological living conditions**!

And all of this is already immediately obvious through **the reason of man** (§ 16 ABGB). And if the earth has not yet "burnt up" by then, **man will again be part of nature, of creation and not of its destruction**. And everyone is a winner (and not a crank)!

Therefore: Μετανοεῖτε! Think again!

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 Umweltrecht3 (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 Grundlagen2 (2021) 142, 292, 752 ff