

§ 1 Introduction: The European and German perspective on globalisation and the environment

I. The commitment to an open market economy with free competition in the European internal market (art. 119 FEU Treaty)

- not a fundamental value but nevertheless a legally binding guiding principle for the entire economic policy of the European Union and its member states
 - binding all economic legislation and policies of the Union and its member states
 - a decision in favour of an open (not social) market economy with unhindered competition
- a principle requiring a strictly market-orientated economic policy, limiting state interventions to few exceptions (art. 120 FEU Treaty)
 - solutions must be found within the framework of a market-orientated policy (→ no planned-economy policies)
 - however, the market-orientated policy shall "favour an efficient allocation of resources", including natural resources
- a principle implemented and complemented by far-reaching approximation of laws, strict competition law and a prohibition of state aids that would distort competition (art. 114 et seq., 101 et seq., 107 et seq. FEU Treaty)
 - the approximation of laws must aim at a high level of environment protection (art. 114(3)) and therefore is often used to establish higher environmental standards
 - state aids (subsidies) that would distort competition and affect the trade between member states are generally prohibited (with exceptions); compliance is closely monitored by the European Commission

II. The commitment to globalisation, international trade and multilateral, rule-based international cooperation

- the European Union and its member states are *members of the World Trade Organization (WTO)* and numerous other international organisations
- they are committed to *international cooperation based on legal rules and the rule of law*,
 - not on the relative power of the "biggest bully" imposing its will on other states
 - this contrasts to the approach of the present "global bullies" USA (under DONALD TRUMP), Russia and China
- they stay committed to *multilateral cooperation in intern. organisations with strong institutions*
 - unlike the three "global bullies" who prefer bilateral cooperation because it allows to take advantage of weaker partners
- they would welcome stronger geo-regional organisations as close partners for cooperation
 - the existing ones (ASEAN, AU etc.) are in their current form too weak for an important role in intern. cooperation

III. The commitment to the protection of the environment and the climate

- not just a political but *legal commitment*

1) Policy objectives as legally binding principles of EU primary law and national constitutional law

- *state policy objectives* [Staatsziele] under the constitution are constitutional principles that substantially guide or limit all policies and activities of all public institutions in the state
- *union policy objectives* [Unionsziele] under the EU treaties (EU Treaty, FEU Treaty) are binding principles of EU primary law that substantially guide or limit all policies and activities of all EU institutions and even the member states when executing EU law

2) Environmental protection, including climate protection, as a European Union policy objective (art. 3(3) EU Treaty, 191 FEU Treaty)

- the EU shall work in all its policies for a high level of protection and improvement of the quality of the environment (art. 3(3) EU Treaty)

- its environmental policy shall pursue the objectives to
 - *preserve, protect & improve the quality of the environment,*
 - protect human health,
 - *utilise natural resources prudently & rationally* and
 - promote international measures, in particular to *combat climate change,*
- ▶ always aiming at a *high level of protection* (art. 191(1, 2) FEU Treaty)

3) The protection of the natural foundations of life as a German state policy objective (art. 20a Basic Law [= BL])

Art. 20a BL: Mindful also of its responsibility towards future generations, the state shall protect the natural foundations of life ... by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.

- a *constitutional value* (though not a *fundamental value*), but with a weak normative design
 - protection only "in accordance with..."/"within the framework of..."
- aims at *protecting the posterity*
- requires *active intervention* by the state (though with wide margin of appreciation & discretion)
- guides the interpretation and application of all German law

4) In particular: the state's duty of adequate climate protection in good time, to preserve the freedom of future generations (art. 20a BL and fundamental rights)

- The spectacular *climate protection decision of the Federal Constitutional Court* of 2021 (BVerfGE 157,30)
 - declared some provisions of the 2019 Federal Climate Action Act [Bundes-Klimaschutzgesetz] unconstitutional because they set too low targets for greenhouse gas reduction until 2030 and no targets for the following years and thus *shifted the burden* of the inevitable restrictions on freedom for climate protection *lopsidedly onto future generations*
 - state's duty to protect citizens' life & physical integrity (art. 2(2) BL) encompasses *duty to protect - even future generations - against climate change*
 - state *must* take climate action and aim to achieve climate neutrality
 - *fundamental rights* protect as *intertemporal guarantees of freedom* also against off-loading the burden to reduce greenhouse gas emissions onto the future
 - so citizens can file constit. complaints alleging that insufficient climate action violates their fund. rights; this has triggered a wave of so far unsuccessful constit. complaints
- The innovative but unorthodox approach to instrumentalise fundamental rights today to secure freedom vaguely in the future
 - is an outstanding example of judicial further development of law
 - but leaves the platform of established constitutionalist traditions, approaches and methods
 - and therefore is *controversial* among constitutionalists
 - DISCUSSION: A convincing approach?

YOUR OPINION: _____

YOUR ARGUMENTS: _____

IV. The purpose of the law to serve both, economy and environment

- big parts of the law on globalisation and environment are predominantly economic law or environmental law but serves both purposes
- this *precludes any lopsided understanding*, interpretation or application, as it has been traditionally the case for the experts in both fields of law
 - the need to develop a holistic understanding beyond the traditional ideological lines of economist or ecologist thinking

V. The law relating to economy, trade and the environment in the middle of the political struggle

- the constant profit-driven push by Big Business and their influential lobbies for low standards
 - topical: the lobbying of the European car industry against the ban on combustion engines
 - influential: climate disinformation campaigns
- the hypocritical neoliberal concept of "self-responsibility" and "voluntary self-commitment"
 - an ideological fight against binding standards that restrict business, although reality shows again and again that in face of profit interests the concept of voluntary self-restraint does not work
- the ideological fight of many environmentalists for higher standards regardless of the costs in freedom and of overbureaucratic regulation
 - a strange willingness to work with poorly designed, technocratic laws with small-scaled detailed regulations that provide little progress but cause excessive bureaucratic burden for public administration and businesses
 - the unwillingness of some environmentalists to accept that in the balancing with other public interests these may prevail
 - illegal road and airport blockades and other criminal actions by radical climate activists with a totalitarian approach
- the result: a highly dynamic but also volatile part of the law
 - a high risk that newly enacted laws may already be tightened, relaxed or replaced in the next legislative period