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The role of EU Primary Law in the transformation to climate neutrality

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Environmental Law in Transformation Legal Implementation and Impacts of the European Green Deal

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Introduction: Paris mirrors planetary boundaries

Paris Agreement



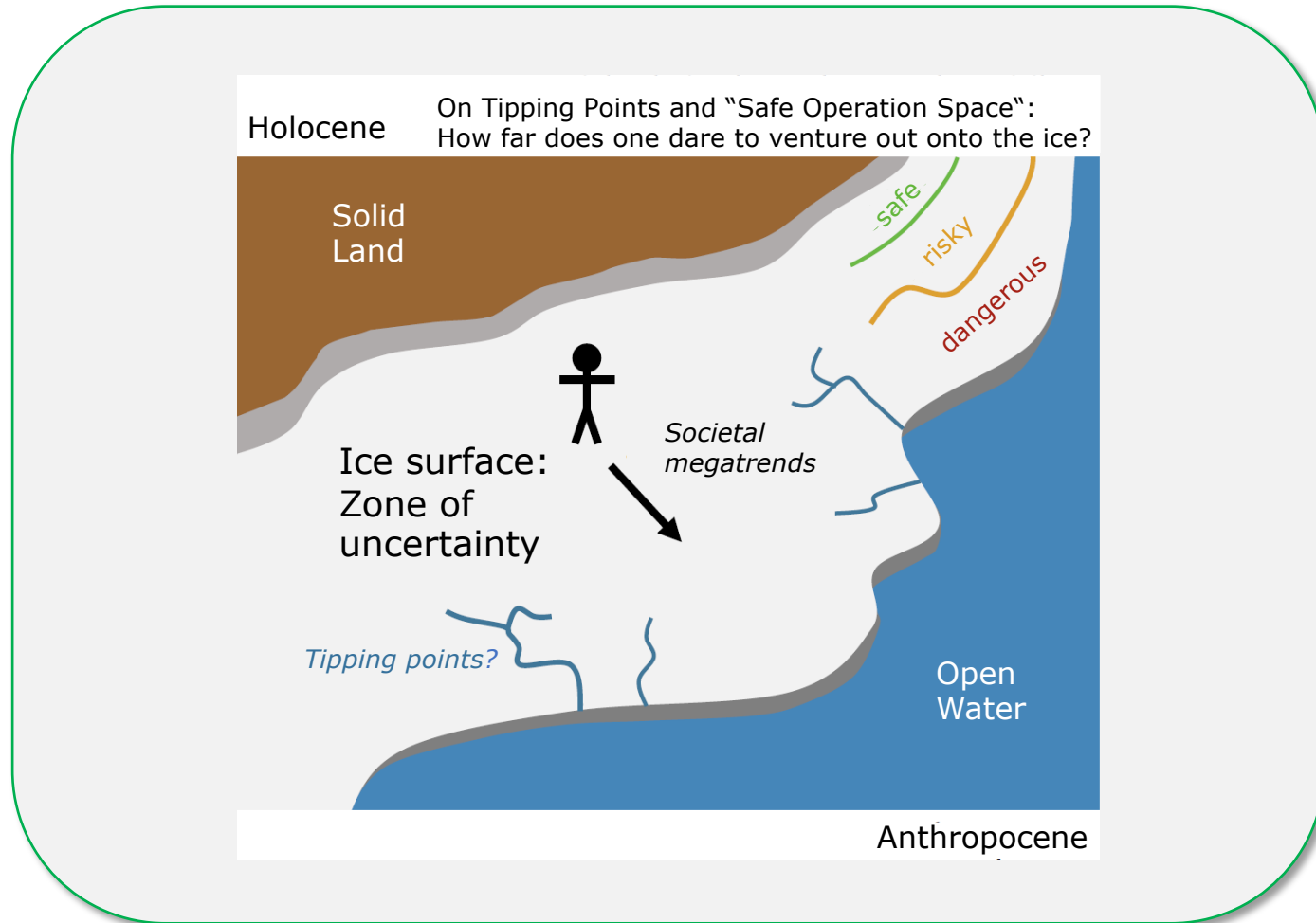
- target of keeping human-induced global warming to **well below 2°C, if possible even 1.5°C** (compared to pre-ind. levels)
- the PA objectives reflect ecological limits of the social market economy determined within the framework of the Earth system sciences

Scientific Background



- concept of ecological – especially planetary – boundaries
- Key element: visualization of the “**safe operating space**” for humanity, in which it is highly likely to maintain stable Earth system conditions
- Major challenge: to avoid “**tipping points**”, which change Earth system functions in a non-linear or even abrupt manner, whose exact location cannot be determined with certainty
- Possible consequence of transgressing tipping points: irreversible environmental damage (“**devastation scenario**”)

Illustration of planetary boundaries and tipping points



The EU's legal climate protection obligations

Article 191 TFEU reads:

*1. Union policy on the environment shall contribute to pursuit of the following **objectives**:*

- preserving, protecting and improving the quality of the environment,*
- protecting human health,*
- prudent and rational utilisation of natural resources,*

*promoting measures at international level to deal with regional or worldwide environmental problems, and **in particular** combating **climate change**.*

*2. Union policy on the environment shall aim at **a high level of protection** taking into account the diversity of situations in the various regions of the Union. It shall be based on the **precautionary principle** and on the **principles that preventive action should be taken**, that environmental damage should as a priority be **rectified at source** and that the **polluter should pay**. [...]*

The potential of Article 11 TFEU for an ecological transformation of the EU

Article 11 TFEU

*“Environmental protection requirements **must** be **integrated** into the definition and implementation of **the Union's policies and activities**, in particular with a view to promoting sustainable development.”*

- By the so-called integration clause, environmental and climate concerns are intertwined with the interests of other policies
- ✓ Substantive Dimension
- ✓ Procedural Dimension = Monitoring by institutional “watch dogs”

Substantive requirements of Article 11 TFEU

- A primary law requirement to carry out a **strategic environmental impact assessment** of individual measures, but also of policies, programmes, plans and laws
- The point of reference for a **fair balance** with external policies:
 - results from Art. 191 TFEU (in particular “precautionary principle”) and are supplemented by fundamental rights obligations that aim to keep away from the “**ecological subsistence level**” by a respecting a “safe operating space”
 - includes a **prohibition of undercutting** (*Untermaßverbot*) in the **balancing**
 - environmental concerns must be integral, visible part of the measure
 - legislator is obliged to deliver a legal binding and efficient, comprehensive as well as coherent protection concept
 - = with regard to intertemporal problems like climate protection the concept must include a “guiding law” with efficient monitoring

Art. 11 TFEU and European Green Deal

- The European Green Deal as a “***new growth strategy*** that aims to transform the EU into a fair and prosperous society, with a modern, resource-efficient and competitive economy where there are ***no net emissions*** of greenhouse gases 2050 and where economic growth is decoupled from resource use. At the same time, this transition must be just and inclusive.” (European Commission, Communication: The European Green Deal, COM(2019) 640 final, p. 2)
- Annex to the Commission’s Communication entails a detailed **roadmap** with specific measures to be taken in the next few years in order to implement the European Green Deal
- **European Climate Law** stipulating the legally binding intertemporal long-term objective of greenhouse gas neutrality by 2050; monitoring by a „toothless“ Committee of Experts
- Package of **legislative proposals**: “Fit for 55“

Article 11 TFEU and European Green Deal

- It follows from Article 11 TFEU that, in terms of the European Green Deal, its strategic key components are substantiated and made binding within the 8th EAP
- The European Climate Act establishes a binding framework for achieving the carbon neutrality goal and provides an ambitious direction by setting a path for decarbonising the EU. Following Article 11 TFEU, it can be considered as a ***guiding law***.
- On the one hand, the European Climate Law is the legally binding **concretisation** of the European Green Deal. On the other hand, it constitutes with the “Fit for 55 Package” the **implementation** of Article 11 TFEU
- But: **No efficient monitoring** ... only „toothless“ Committee of Experts

Does the European Green Deal deliver to Art. 11 TFEU? Greening the Policies ...

- The **European Green Deal** foresees a realignment of the EU towards a more ecological approach
- The success of the European Green Deal will however be largely dependent on the effective **integration** of environmental concerns into the relevant sectoral policies:
 - ✓ Align the **European Semester** with the Sustainable Europe 2030 strategy
 - ✓ Make the **Common Agricultural Policy** (CAP) more environmentally sustainable
 - ✓ **Economic Tools**: Ecological realignment of taxes, duties and subsidies (“Eco-taxes and levies”)
 - ✓ **Ecology and Competition** Law, Article 107(1) and (2) TFEU
 - ✓ **Ecology and Monetary Policy**: The ECB shall consider climate-related aspects to the extent that climate change poses a threat to price stability

Greening by procedure, Art. 11 TFEU and monitoring

- Strengthening the **European Environmental Agency**
 - to enhance the enforcement of Union law: EEA inspired by US example could be equipped with control and executive powers
 - To avoid a centralistic "super regulatory authority": based on a network of independent national environmental inspectorates
- **Environmental Ombudsman based in European Parliament**
- **Sustainability Officers** in Commission's Directorates-Generals:
 - task of controlling the implementation of the European Green Deal and reviewing all legislation to ensure compliance with "guiding law"
 - suspensive veto right with a subsequent referral to the round of directors-general and heads of cabinet should make conflicts more transparent

Greening by procedure, Art. 11 TFEU and monitoring

- Transforming the European Economic and Social Committee of the EU to a **European Committee for Sustainable Development**
 - **Intertemporal ownership** in decision-making process of EU by
 - **independent monitoring institution** for the European sustainability and climate protection strategy and **watchdog for “guiding laws”** with
 - information and consultation rights, suspensive veto right
 - evaluation of the implementation of the sustainability and climate protection strategy
 - competence to review upcoming political and legislative decisions for their compliance with the “guiding laws” (= European Climate Act)
 - suspensive veto right in case of non-compliance with “guiding law”; will stop legislation for 3 month
 - time for public debate and “ecological re-reading” in EP and Council

Greening fundamental rights: A human right to a healthy environment?

Article 37 EU Charter of Fundamental Rights addresses environmental protection: The provision reads: *“A high level of environmental protection and the improvement of the quality of the environment must be integrated into the policies of the Union and ensured in accordance with the principle of sustainable development.”*

- Not an **individual** human right to a healthy environment
- Just repeating Art. 191 and 11 TFEU

Proposals for an individual right:

“Every person has the right to live in a healthy and protected environment.”

- BUT: Do we need a **new Art. 37 EU Charter?**

Greening fundamental rights: A human right to a healthy environment?

In substantive terms, no more environmental protection is provided than what is guaranteed by **the partial assurances** derived from Articles 2, 3 (1) and 17 of the EU Charter

- by **exploiting the potential of positive obligations** of state authorities deriving from these rights defining a **duty to protect**
- **Plus:** The **procedural dimension** of a human right to a healthy environment
- **Plus:** Individual Guarantee of the **Ecological Existence Minimum**

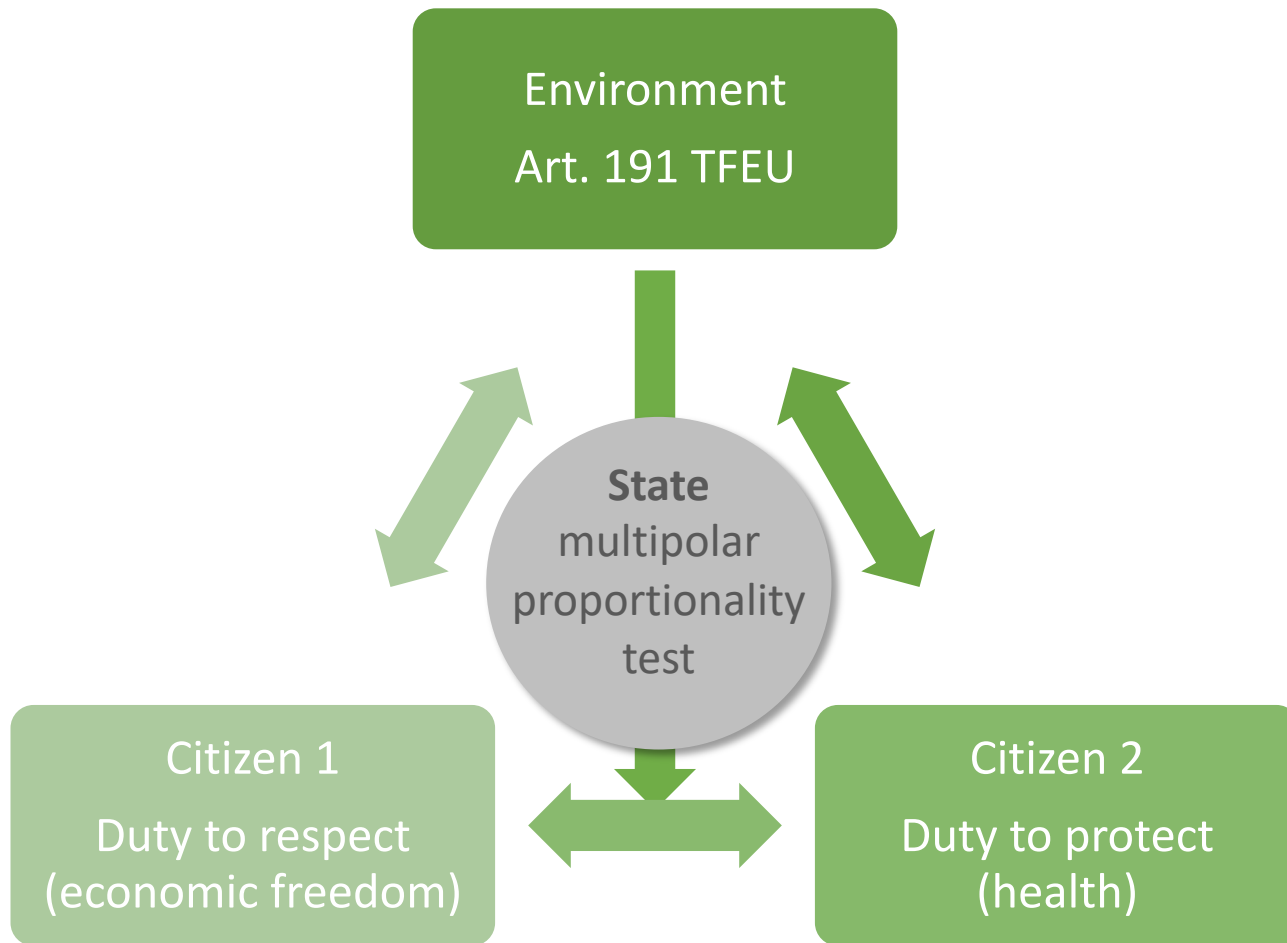
Duty to respect and duty to protect

State authorities according to human dignity (Art. 1 EU Charta) have a **duty to respect** (dimension of defence) as well as a **duty to protect** (positive obligation) **fundamental rights**

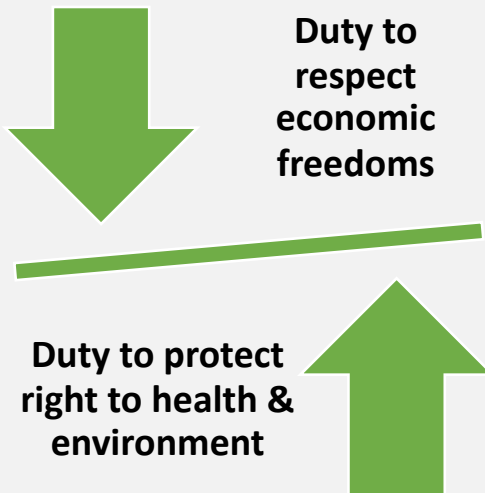
Basic rights involved in environmental protection: right to **life and health**), right to **property** and freedom of **profession**

Human dignity in conjunction with Art. 191 TFEU guarantees an **ecological minimum standard of living**: If there is a threat of irreversible environmental damage (if tipping points are exceeded), which could result in a kind of "devastation scenario", then from a legal perspective the right of every citizen to the **"ecological subsistence level"** is infringed.

Balancing the different interests



Balancing the state authorities duties to respect (economic freedoms) and to protect (health, environment)



- Balancing in the triangle of duty to respect (economic freedoms) and the duty to protect (right to health as well as the environment) = **fair distribution of freedom on the scale of a budget over time by multipolar proportionality test**
- As a result, the constitutionally required minimum standard (“Untermaßverbot”) thus requires that the safe operating space defined by planetary boundaries is prevented from being exceeded by a **suitable and effective, i.e. long-term, coherent and legally binding environmental protection concept**.
- In view of the weak enforcement of environmental and climate protection issues in everyday political life to date, even in the case of adopted government strategies, additional consideration must be given to "climate protection through procedures". In concrete terms, this means effective **monitoring** of the adopted protection concept in the political process = Art. 191 with 11 TFEU

A procedural fundamental right to a clean environment

In view of the limits to determine the substantive content of a fundamental right to a clean environment conceived in terms of a “duty to **respect**”, it seems feasible to implement a fundamental right to a clean environment by a **procedural** concept **together with** a “duty to **protect**” with its positive obligations of public authorities.

In the course of a national and international discussion, **three building blocks of a procedural** fundamental right to clean environment have emerged:

▪ a right to **participation** of the citizen in environmentally relevant decisions of the administration

A



▪ a right to adequate **access to justice**

B



▪ and - as a necessary precondition for the exercise of the other two rights - a right to environment-related **information**.

C



A procedural fundamental right to a clean environment

A **judicially enforceable** procedural fundamental right to environmental and climate protection in Article 37 of the Charter of Fundamental Rights could therefore be formulated as follows:

"Every person has the right to a clean and healthy environment, as well as its preservation and protection. This right is guaranteed through rights to information, participation in administrative proceedings, and effective access to justice".

A fundamental right to the ecological existence minimum

- Legal basis of the **Ecological Existence Minimum = Art 1 EU Charter**
- Its coupling with **planetary boundaries** and Art. 191 TFEU including the **precautionary principle** implies among others a **shift of burden of proof**:
Tipping points (in the field of climate protection, for example, the 1.5-2 degree target) define a **rebuttable presumption**.
- State authorities as addressees of the fundamental right must demonstrate and **prove** that they have taken **all necessary measures** in their concept of protection laid down in the “guiding law”
- = **steering away** from the planetary boundaries ('keeping a safe operating safe') and thus effectively guarantee the minimum ecological existence.

Moreover: Greening fundamental rights

- Greening existing **fundamental rights**
 - By a principle of “ecological responsibility”
 - Article 2 (1) EU Charter = life and health: Could be supplemented by the “right to ecological integrity”.
 - Article 17 (1) EU Charter = property: introduce a special “**ecological limitation**” (“*ökologische Grundrechtsschranken*”), in order to push for an “ecologically responsible concept of property”.

Greening by “European Rights of Nature”?

- ✓ This discussion centrally revolves around the rationale of environmental protection, namely the question of whether the environment should be protected based on human purposes, as in the **anthropocentric** approach, or for its intrinsic value and sake, as in the **ecocentric** approach.
- ✓ Construction of inherent rights combined with representative actions by trustee environmental organizations (“stewardship”)
 - The **legal (not the ethical)** controversy rather appears to be of a **theoretical** nature:
 - This is particularly true when considering the possibility of introducing **class actions**.
 - In practical legal terms, the primary function of rights of nature was to give nature legal standing to ensure **access to the courts**, where there is a lack of individuals whose subjective rights have been affected.
 - Requires effective **access to justice** at Member States level as well as EU level
 - Art. 263 (4) TFEU must be adapted either by interpretation (= good by to ”Plaumann-Formula” in case there ist no efficient access to justice at national level) or Treaty change

Thank you for your attention!

For a deeper dive:

1. Fundamental Rights Protection in Germany: The Multifaceted Dimensions of Freedom Defined by the Duty to Respect and the Duty to Protect by Christian Calliess: SSRN

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3847822

2. Christian Calliess, [Rechtsstaat und Umweltstaat – Zugleich ein Beitrag zur Grundrechtsdogmatik im Rahmen mehrpoliger Verfassungsrechtsverhältnisse](#), Mohr Siebeck, Tübingen 2001.

3. Generationengerechtigkeit im Grundgesetz: Brauchen wir einen Artikel 20b GG? (Intergenerational Justice in the German Basic Law: Do we need an Article 20b GG?) by Christian Calliess: SSRN

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3752266

4. Möglichkeiten und Grenzen eines „Klimaschutz durch Grundrechte“ (Possibilities and Limits of a 'Climate Protection Through Fundamental Rights' by Christian Calliess :: SSRN

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3827384