How to integrate environmental law into constitutional law: The German experience

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This chapter consists of three parts. In the first part, I will give a short overview about the integration of the protection of the environment into German constitutional law. This section will start with the presentation of the relevant provision, Art. 20a BL. Then, I will elaborate on its legal character. In the second part, I will make some brief remarks on the practical implications of Art. 20a BL. Finally, I will present some preliminary conclusions.

I. The German Basic Law and the protection of the environment

A. How did the protection of the environment become a part of constitutional law?

The Basic Law for the Federal Republic of Germany (BL)[1] entered into force on 23 May 1949 and has been the Federal Republic's constitution for more than seventy years now. There have been sixty-five amendments during this time, one of them being of major interest for this conference.

In October 1994, Art. 20a was added, which incorporated the protection of the environment as a so-called policy objective of the state (*Staatszielbestimmung*). In 2002, after further discussions and decisions regarding the prohibition of ritual slaughter,[2] the protection of animals was added; Article 20a now reads as follows:

[1] Federal Law Gazette, BGBl. 1949, 1 – last amendment 29 September 2020 (BGBl. I, 2048); English version available www.gesetze-im-internet.de/englisch_gg/ [last visit: 1 December 2020]. All quotes from the BL in this chapter can be retrieved there.

[2] German Constitutional Court, 1 BvR 1783/99, judgment 15 January 2001, BVerfGE 104, 337; K. BRANDHUBER, "Die Problematik des Schächtens im Lichte der aktuellen

"*Mindful also of its responsibilities towards future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order*."

There is no further explicit mention of the environment in the German constitution. Implicitly, topics with an impact on the environment are mentioned in the articles dealing with the distribution of legislative powers between the federation and the Länder. I just mention the "*law relating to economic matters (mining, industry, energy, etc.)*" (Art. 74 I no. 11 BL), agricultural production and forestry and coastal preservation (Art. 74 I no. 17 BL), the protection of plants against diseases and pests (Art. 74 I no. 20 BL), waste disposal, air pollution control, and noise abatement (Art. 74 I no. 24 BL), protection of nature and landscape management (Art. 74 I no. 29 BL), and management of water resources (Art. 74 I no. 32 BL).

These matters are all under concurrent legislative powers which leads us to the complicated structure of German federalism. The federation has a multitude of competencies, but the Länder may enact diverging laws following from Art. 72 III,1 74 I,1 BL.[3]

Federalism is historically deeply rooted in German constitutionalism and was re-established under the Basic Law in order to safeguard a vertical balance of power and to prevent a centralized government as we experienced during national socialism. We cannot discuss today whether or not these expectations have been fulfilled, but everybody knows that federalism does not necessarily tend to be a showcase of efficiency and that some topics urgently call for a coherent regulation.[4]

The constitutions of several Länder also deal with the protection of the environment, some of them even earlier than the federal constitution.

B. What does the qualification as policy objective of the state (*Staatszielbestimmung*) imply?

The newly incorporated provision is the result of a political compromise. Since the Seventies, the Social Democrats have claimed for the introduction of a basic right to protection of the environment. The newly founded Green party

Rechtsprechung", *NVwZ* 1994, 561; K.-H. KÄSTNER, "Das tierschutzrechtliche Verbot des Schächtens aus der Sicht des Bundesverfassungsgerichts", *Juristenzeitung* 57 (2002), 491.

[3] Cf. M. KLOEPFER, "Föderalismusreform und Umweltschutzgesetzgebungskompetenzen", *ZUR* 2006, 338.

[4] S. WEICHLEIN, *Föderalismus und Demokratie in der Bundesrepublik*, 2019; J. ISENSEE / P. KIRCHHOFF (eds.), *Handbuch des Staatsrechts*, vol. VI, Bundesstaat, 3rd. ed. 2008.

continued to make this claim in the Eighties. At that time, the word "*Waldsterben*" was established, the fear that air pollution damaged and, in the long run might extinguish the forests.

Whereas the parties of the centre left were in favour of a strong protection of the environment by granting individuals an individual human right, the parties of the centre right, the liberals and the Christian democrats, strongly opposed this idea.

Under German constitutional law, a basic right is protected by the constitutional complaint every individual can bring to the Federal Constitutional Court. Thus, any individual would have been in a position to initiate judicial control of any law, administrative measure or court ruling that could have negative implications on the environment.

As the Eighties were also a time of economic problems and high unemployment rates, the parties of the centre right feared that the country's economic recovery would be hindered by overstretched protection of the environment.

The debate did not show any progress for some years and it was only after reunification in 1990, that a compromise could be reached.[5]

There was a general idea of constitutional reform at that time, and Art. 20a was understood as a visible, but not too far-reaching amendment.

So, time was ripe to introduce the protection of the environment into the constitution. But yet, no majority was in sight for a new basic right. In the end, the newly created article came close to them (Art. 1-19) to underline its relevance.[6]

But the introduction as policy objective of the state (*Staatszielbestimmung*) clearly implies a different quality.[7] One can say that is a legally binding constitutional norm for all branches of government; it has a higher impact than an objective that is only laid down in a parliamentary law. The protection of the environment was thus constitutionally consecrated.

What does this mean? The state has a duty to care for the environment, but there is a wide range of discretion for the laws to enact and the measures to take and the constitution does not provide a concrete standard for reviewing these acts and measures.

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[5] N. MÜLLER-BROMLEY, *Staatszielbestimmung Umweltschutz im Grundgesetz?*, 1990.

[6] R. STEINBERG, "Verfassungsrechtlicher Umweltschutz durch Grundrechte und Staatszielbestimmung", *NJW* 1996, 1985.

[7] K.-P. SOMMERMANN, *Staatsziele und Staatszielbestimmungen*, 1997.

Being not in form of a basic right, but only a policy objective of the state, it cannot be invoked by an individual constitutional complaint. But individual constitutional complaints against measures of protection that restrict individuals' rights might review whether Art. 20a BL was rightfully invoked as a basis for the restriction[8].

II. What have been the effects of the introduction of Art. 20a into our constitution?

First of all, there already existed laws dealing with pollution, with the protection of nature as such, with the preservation of species, etc. in Germany before the amendment that brought us Art. 20a. Even more laws have been enacted thereafter.

As in many fields of law and policy, the European Union has been the thriving force in enacting new law. With a set of about 200 acts of EU legislation, mostly all of our national law on the environment is determined today by EU legislation.

Second: The words "*natural foundations of life*" are open to interpretation as no binding definition does exist. One might include plants, earth, water, air, landscape and climate.

At least, law-making and law enforcement should take these issues into account and give them the weight they deserve. In this regard, awareness has been raised over the last decades.

Third: The Federal Constitutional Court used Art. 20a as an additional argument in several cases, but not as the decisive argument. In individual constitutional complaints, the relevant basic right of the individual is always Art. 2 and the right to life and physical integrity.

Art. 20a nevertheless could be invoked before the Federal Constitutional Court in a norm control procedure provided for in Art. 93 I no. 2 BL:

> "*in the event of disagreements or doubts concerning the formal or substantive compatibility of federal law or Land law with this Basic Law or the compatibility of Land law with other federal law on application of the Federal Government, of a Land government or of one fourth of the Members of the Bundestag*"

[8] Federal Constitutional Court (Chamber), 1 BvR 1031/07, decision 27 July 2007, DVBl. 2007, 1097.

Fourth: The content of the provision, the protection of the natural foundations of life, reflects mostly the debate of the 1980ies. It is focused inwards and does not take into account the global implications, it does not yet reflect the component of global justice. An updated interpretation will have to add these topics.

III. Preliminary conclusions

Man-made law in a democracy is the outcome of debates and does show the necessary elements of compromise.

While this is true in general, core human rights such as human dignity, the right to life or the prohibition of torture should not be at the disposal of political majorities.

Today, in face of the threats of climate change, we may ask ourselves and our governments, whether there is still room and time for compromise. Recommendations have been existing for long as well as merely enforceable international law. A strong legal basis in constitutional law might be our last resort in order to get things done.

An extraordinary situation as this one we currently face calls for strong action. A powerful constitutional norm might be necessary, but it is not an end in itself. What counts are the concrete implementations, the working solutions, the minds ready for meeting the challenges.

Coming from a country in the global north, I have to admit that our society as a whole is still struggling with the global dimension of climate change and climate justice as well as our responsibility towards the global south. The colonial history of Germany is not at the focus of public debate and, compared to some of our European neighbours, it seems to be neglectable. But of course, the German economy has profited throughout the last 200 years from a globalized economy based on structures laid out during colonialism. So, for my understanding, our national debate can and should be more influenced by international law and by international goals such as the SDGs to raise awareness and to call our politicians to act.