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GERMAN ENVIRONMENTAL LAW IN A NUTSHELL

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Dr. Andreas GLASER

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1. CONSTITUTIONAL LAW

1.1 Environmental protection as a constitutional principle

German environmental law is strongly influenced by constitutional law. According to art. 20a of the German Federal Constitution environmental protection is a fundamental aim of state policy. All governmental and decentralized public bodies are legally bound to this constitutional guideline. However, Parliament has many possibilities to influence environmental policy. There is also no fundamental right to environmental protection which could be claimed before the courts. Neither the fundamental rights to the integrity of the person nor to property ensure a right to a healthy natural environment. Nevertheless art. 20a of the German Federal Constitution has an impact on statutory interpretation and serves as a substantial reason to justify limitations of fundamental rights, e.g. the right to property, the right to pursue an occupation, the freedom to conduct a business, the freedom of religion and the freedom of the arts and sciences.

1.2 Legislative competences

The German Federal Constitution divides legislative competences concerning environmental protection between the federal level (the Federal Republic) and the regional level ("Länder"). Since 2006, when an important reform of German federalism was enforced, all important areas of environmental law are attributed to the legislative power of the Federal Republic: air quality management, waste management, noise abatement, spatial planning, nature conservation, water pollution prevention, soil protection, hunting and coast protection.

In respect to spatial planning, nature conservation, water pollution prevention and hunting the "Länder" may deviate from federal legislation (Abweichungsgesetzgebung). Traditionally, federal law has priority over regional law. The recently introduced "deviating

legislation" changes that customary rule. From now on the lex-posterior-rule prevails in the branches of environmental law mentioned above and legislation of the "Länder" is not bound to the federal statutes any more. Nevertheless they have to observe federal constitutional law and EU-law.

Legal transparency however is disturbed by some derogations of the lex-posterior-rule. The "Länder" have no right to alter the fundamental principles of nature conservation, protection of species law, sea protection law, parts of the water pollution prevention law related to substances and installations as well as hunting licensing law. Severe problems of definition between federal and regional competences may arise in the future. Time will show how the German Constitutional Court will deal with these problems.

2. STATUTORY LAW

2.1 Federal laws

2.1.1 Material environmental law

2.1.1.1 Basics

All important subjects of environmental law are put down in federal laws. Most of these statutes were reviewed in the past few years, notably the Federal Immission Control Act (2002), the Federal Act on Nature Conservation and Landscape Management (2010), the Water Ressources Act (2010), the Closed Substance Cycle and Waste Management Act (in revision at present, entry into force of the new Closed Substance Cycle Act in 2011), the Town and Country Planning Act (2008), the Federal Soil Conservation Act (1998), the Federal Hunting Act (1976), the Animal Protection Act (2006) and the Gene Technology Act (1993). However, the attempt to create a complete Environmental Code including all specific statutes failed once again in 2008 due to political reasons. The separation of

German environmental law into many specialized statutes will thus be maintained in near future.

There has been a fast development of Environmental energy law in the past years. The Renewable Energy Sources Act (2004/2009) and the Act on the Promotion of Renewable Energies in the Heat Sector (2008) are the main regulations. The cross-section issue of environmental energy law concerns all other parts of environmental law. Primarily environmental energy law comprises the support of renewable energy sources through financial incentives. Main goal is to combat climate change. In Germany the most important renewable energy sources are wind power stations, biogas plants, solar equipments and in some regions hydroelectric power stations. Parallel to this development nuclear energy is to be abandoned step by step until 2024. This date was delayed meanwhile until approximately 2040. But the discussion on this subject is still in progress, especially after the incidents in the nuclear power plants in Japan which were damaged by the earthquake in the month of march 2011. Emission trading and energy-saving measures as well as compulsory connection and use in local government are other relevant branches of environmental energy law.

2.1.1.2 Activities and installations subjects to approval

A characteristic of German environmental law are the various types of approvals, licences and permissions to be issued. Besides building law procedures there are different kinds of authorisations allowing either to operate an installation, to put up a waste disposal site, to use a stretch of water, to intervene in nature and landscape or to release and sell genetically modified organisms. The attempt to combine all permission types into an integrated project approval (procedure) has not succeeded up to now. Therefore permission procedures and substantial conditions result from the corresponding special statute. Neither may for instance an air polluting factory cause harmful impact on environment nor may the use of water stretches be dangerous to water quality.

2.1.1.3 Legal duties of individuals and enterprises

Both individuals and enterprises are subject to many duties concerning environmental protection. Public authorities are empowered to impose appropriate measures. Anybody running an installation has to avoid deterioration of water quality and air pollution. Waste has to be disposed according to specific rules, depending on whether a substance or object fulfils the definition of waste for recovery or waste for disposal. Consequently the respective waste has to be recycled or to be left to the waste disposal authority. Contaminated soil must be cleaned up. Particular legal regulations authorize public authorities to enforce these obligations.

In addition to this and corresponding to the polluter pays principle responsible people have to pay damages according to the Environmental Liability Act (1990) and the Environmental Damage Act (2007). The burden of proof has been reduced, liability regardless of fault has been agreed upon and damages on biodiversity have to be compensated. At last the administrative rules are completed by fiscal incentives and penalty taxes, the most famous example being the eco-tax on mineral oil and electricity.

2.1.1.4 Planning instruments

Apart from compulsory means German environmental law also contains several planning instruments to conceive regional development planning, national parks, nature reserves, water protection areas and waste management plans. As an important element of town and country planning development plans for local real estate take place on a local level. They have to incorporate all environmental and ecological concerns.

The creation of nature reserves is of utmost importance for the implementation of European environmental law. This especially applies to the Directive on the conservation of natural habitats and of wild fauna and flora as well as to the Directive on the conservation of wild birds. After the composition of the coherent European ecological network (natura 2000) by the European Commission and the member states, German authorities implement a system of nature reserves. Due to this many legal conflicts may arise in the future because of land-owners fearing severe restrictions.

2.1.2 Procedural environmental law

The idea of procedural justice gained much terrain in German administrative law over the last years. The evolving procedural approach can be recognized first of all in environmental law. The most important step in this context was the promulgation of the Environmental Impact Assessment Act (1990). According to this act an environmental impact assessment must take place before projects evoking major effects on environment can be authorized. Public authorities dealing with an application for a corresponding project have to consider the results of the assessment as soon as possible. The Strategic Environmental Assessment is also to be mentioned regarding specific planning decisions. Other procedural regulations are the Environmental Audit Act (2002), the Environmental Information Act (2004) and the Environment Legal Remedies Act (2006).

The Environmental Information Act guarantees a right of free access to information concerning environment which is held by or for public authorities. Anybody may exercise this right without further authorisation. Limited exceptions are provided by law regarding public or private interests.

The Environment Legal Remedies Act authorizes environmental associations to appeal against certain administrative decisions regarding projects with presumed harmful impact on environment. This is a privileging exception to Section 42 § 2 of the Code of Administrative Court Procedure which states that an action is only appealable if the plaintiff claims a violation of his own rights. However the action can only be successful if the administrative decision is also an infringement of a regulation conferring rights to individuals. This conception is the item of a preliminary ruling procedure before the Court of Justice of the European Union (case C-115/09) at present. Advocate General Sharpston´s opinion is unequivocal: the German regulation violates the Public Participation Directive (2003/35/EC).

2.2 Law of the "Länder"

The significance of the environmental law of the "Länder" has perceptibly increased since the federalism reform has taken effect in 2006. This is for two reasons: The "Länder" have a substantial deviating legislative competence for environmental law at first. Secondly Federal legislation often uses opening clauses in favour of the "Länder" even though the Federal Republic has exclusive competences in some spheres. Several "Länder" already enacted specific provisions on nature conservation, water pollution prevention and hunting deviating from the federal model. It is therefore necessary to examine case by case whether the federal or the regional statute is applicable.

2.3 Administrative competences

Although environmental legislation mainly occurs on the federal level the "Länder" have the competence of the administration according to the Federal Constitution. They determine the responsible authority and the details of administrative procedure autonomously. Regional authorities are subject to little legal supervision by the Federal Republic while exercising environmental law. Control is consequently limited to questions

of lawfulness, not covering discretionary decisions. Nuclear Energy Law is an exception. Federal authorities have a discretionary power including the power to intervene.

3. EUROPEANISATION OF GERMAN ENVIRONMENTAL LAW

German environmental law is strongly influenced by European environmental law, e.g. implementation of Air Quality Maintenance Plans, creation of nature reserves in order to complete the natura 2000 network, definitions of waste, waste for disposal and waste for recovery, conditions for releasing into environment and placing on the market genetically modified organisms as well as requirements concerning protection of species trace back to European Directives or Regulations. Moreover, the entire environmental procedure law originates from EU-directives. The same applies to environmental liability. The Europeanisation of German environmental law therefore stands symbolically for the Europeanisation of German administrative law as a whole.

4. CONCLUSIONS

German environmental law is in a process of consolidation after the important federalism reform in 2006, as seen from internal perspective. The federal statutes are in good shape altogether. Concerning environmental law the federalism reform was successful. The failure of the Environmental Code as a prestige project of legal science does not affect the practicability of environmental law in Germany. It remains interesting to observe whether and to what extent the trend of re-federalisation will continue in the future. In any case, the first experiences with greater freedom for the "Länder" can be said to be positive ones. The formerly expressed concerns in this respect, such as a pretended depreciation of environmental protection did not come true. There is no race to the bottom, but soft competition between the "Länder". They are able to take into account the geographical and biological peculiarities of the single regions, even better than the federal legislator.

5. FORECAST

Transposition of European law remains the essential problem of German environmental law. Various directives authorize both individuals and associations to exercise procedural rights. The enforcement of those rights causes additional difficulties. The narrow interpretation of regulations about Air Quality Maintenance Plans by German jurisdiction, which had to be rectified by the Court of Justice in case C-237/07 is a recent example. The above mentioned Environmental Legal Remedies Act is another conflict between German environmental law and EU law. Problems in both cases arise from the conception of subjective rights in German administrative law, which has to be extended according to EU-directives. Some provisions of German procedural law about healing and irrelevance of formal irregularities in the administrative procedure are able to compromise effectiveness of EU-law at last. Therefore, application has to be suspended in the realm of implementing EU-law.

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