https://doi.org/10.59821/18294219-2024.1-nbcp02

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ENVIRONMENTAL PROTECTION IN NATIONAL CONSTITUTIONS - ARTICLE 20A OF THE GERMAN GRUNDGESETZ (CONSTITUTION) AS AN EXAMPLE[1]

Abstract

Since the so-called environmental crisis came to the attention of the general public and politicians at the beginning of the 1970s, there have been repeated calls for the protection of the environment to be „enshrined" in national constitutions. For a long time, the demand for a special environmental constitutional right was met with unanimous rejection. But proposals for a so-called national objective of „environmental protection" were also heavily criticised. Today, however, everyone agrees that environmental protection is an extremely important task of the state. With its Article 20a, the German Grundgesetz (GG) has raised this to constitutional level. Article 20a of the Grundgesetz can serve as an example for other national constitutions.

Keywords: environmental protection; animal welfare; national objective; natural foundations of life; future generations; precautionary principle; optimisation requirement; constitutional status; sustainable development.

[1] The article was presented on 09.01.2024 and was reviewed on 18.05.2024.

1. Introduction

The introduction of[2] Art. 20a into the German constitution in 1994 is due on the one hand to increased environmental awareness in politics, and on the other hand to the impetus provided by the reunification of the two German states in 1989/1990, which made it necessary to amend the German Basic Law – the Grundgesetz (GG) - to a greater extent. To date, the GG has contained hardly any statements specific to the environment. Only the delimitation of competences between the Federal Government and the German federal states – the so called *Bundesländer* - (Art. 74 No. 20 and No. 24, Art. 75 No. 3 and No. 4 of the GG) the Federal Republic of Germany is a federal state - did the GG make environmental-specific constitutional statements.

1.1. History of origin

The deliberations in the so-called Joint Constitutional Commission – the *Gemeinsame Verfassungskommission* - of the *Bundestag* and *Bundesrat* set up on 28 November 1991 were characterised by the fact that the anchoring of environmental protection in the GG was considered desirable in terms of constitutional policy by all parties. However, there was constitutional policy dissent on the questions of whether the environment could be recognised as having an intrinsic constitutional value equal to the status of human beings (so-called protection of the environment as its own right), whether the high status of the political goal of environmental protection should be particularly emphasised in the text of the norm and whether the balancing of this goal with other state tasks should only take place through a -political -decision by the legislature and not on a case-by-case basis by the administration and courts (so-called concretisation or updating primacy of the legislature). With the necessary of two-thirds majority, the Joint Constitutional Commission finally recommended the following normative text on 28 October 1993[3]:

"The state also protects the natural foundations of life in responsibility for future generations within the framework of the constitutional order through legislation and in accordance with the law and justice through executive power and jurisdiction".

At the time,the Joint Constitutional Commission made no recommendation on the proposal to give animal welfare constitutional status and elevate it to an independent state objective[4].

With the introduction of numerous bills, including one from the German *Bundesrat*[5] and an inter-party bill from the *CDU/CSU*, *SPD* and *F.D.P.* parliamentary groups[6], and their referral to the committees during the first consultation on 4 February 1994,

[2] BGBl I, p. 3146.
[3] BTag-Drucks. 12/6000 of 5 November 1993, p. 15.
[4] See Report of the Joint Constitutional Commission, p. 68.
[5] BTag-Drucks. 12/7109 of 17 March 1994.
[6] BTag-Drucks. 12/6633 of 20 January 1994.

the reform debate entered its decisive phase. During its deliberations on 30 June 1994, the German *Bundestag*, on the recommendation of its Legal Affairs Committee, declared the *Bundesrat's* identical draft bill to be closed and decided to insert Art. 20a in a version identical in wording to the Commission's proposal. In the following round of recommended amendments to the GG pursuant to Art. 76 para. 2 of the GG, the *Bundesrat* left the *Bundestag's* resolution on Art. 20a GG unchallenged[7]. After the Mediation Committee – the *Vermittlungsausschuss* - had been called upon with regard to reform proposals for other constitutional provisions, the *Bundestag* finally decided on 6 September 1994[8] with the consent of the *Bundesrat* to insert Art. 20a in the version that is essentially still valid today and unchanged from the recommendation of the so-called Joint Constitutional Commission[9].

1.2. Parallel provisions in the constitutions of the German federal states

In the German federal states, all constitutions at the time contained provisions that gave environmental protection constitutional status (VerfBaWü: Art. 3 a and Art. 86; BayVerf: Art. 141; VerfBerl: Art. 21 a; VerfBbg: Art. 39 and Art. 40; VerfBrem: Art. 11a; VerfHmb: Preamble; VerfHess: Art. 26 a and Art. 62; VerfMecklVorp: Preamble, Art. 2 and Art. 12; VerfNds: Art. 1 II; VerfNW: Art. 29 a; VerfRhPf: Art. 69; VerfSaarl: Art. 59 a; SächsVerf: Art. 1 sentence 2 and Art. 10; VerfSachsAnh: Preamble, Art. 2 I and Art. 35; VerfSchlHolst: Art. 7; VerfThür: Preamble, Art. 31 and Art. 44 I).

Some constitutions (Hessen, Rheinland-Pfalz, Thüringen) explicitly focussed on the protection of natural resources („natural resources of man"), others (Bayern, Bremen, Saarland, Sachsen) were very programmatic and made detailed statements on the content and scope of the obligation to protect. In the state constitutions of Mecklenburg-Vorpommern (Art. 12 V), Nordrhein-Westfalen (Art. 29 a II), Saarland (Art. 59 a sentence 3) and Sachsen-Anhalt -(Art. 35 IV), the state obligation to protect the environment was subject to a legal provision („The details shall be regulated by law"). Insofar as the German federal states regulated the obligation to protect the natural foundations of life in the principles of state structure, this was even exempt from constitutional amendment (VerfMecklVorp: Art. 56 III; VerfNds: Art. 46 II; SächsVerf: Art. 74 I 2; VerfSachsAnh: Art. 78 III; VerfThür: Art. 83 III).

In accordance with the tradition of the former *Weimarer Reichsverfassung* (Art. 150 Abs. 1 WRV), some state constitutions also (additionally) committed themselves to the protection of the landscape and natural monuments.

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[7] See BTag-Drucks. 12/8165 of 28 June 1994, pp.3, 55.

[8] BTag-Drucks. 12/8423 of 2 September 1994.

[9] The Constitution of Armenia recognises the state responsibility for environmental protection in Art. 12.

1.3. International and European legal regulations

At international level, there are a large number of recommendations, decisions, resolutions and declarations that do not, however, constitute binding international treaty law („soft law").

The United Nations Covenant on Economic, Social and Cultural Rights of 26 December 1966[10] sets out the obligations of states to guarantee environmental conditions that are necessary for the realization of the highest attainable standard of physical health. The Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) of 16 June 1972[11] contains principles of environmental protection and recommendations for specific measures that also apply to national environmental policy. The World Charter for Nature adopted by the United Nations General Assembly on 28 October 1982[12] regulates the state's obligations to act and the basic duties of individuals to protect and care for the natural environment. The Rio de Janeiro Declaration on Environment and Development (Rio Declaration) of 13 June 1992 and its action plan (Agenda 21)[13] also serve the goal of sustainable development. This was later developed further.

For the European area, Art. 130r of the Treaty establishing the European Communities as amended on 7 February 1992[14] originally defined the objectives of Community environmental policy. Today, these are regulated in Art. 191 to 193 of the Treaty on the Functioning of the European Union.

2. Meaning and legal character

2.1. Until 1994: Protection gaps

Until Art. 20a of the GG came into force, the natural foundations of life were only protected in accordance with partial environmental law guarantees in certain fundamental rights. Art. 2 para. 2 GG only tends to protect human health from environmental pollution[15] . The fundamental right to property under Art. 14 para. 1 GG is determined by the concept of private utility and does not protect against local immissions. The fundamental right of general freedom of action (Art. 2 para. 1 GG) and the state's obligation to respect human dignity (Art. 1 para. 1 GG) cover the area of environmental protection even less in terms of the scope of protection. Environmental goods were therefore not protected if people had no rights to them or if they had no asset value. In addition, (environmentally relevant) fundamental rights act primarily as rights of defence against the state, although they may also represent objective legal value judgements that provide

10 BGBl 1973 II, p. 1569.
11 See United Nations, General Assembly, A/Conf. 48/14, 3 July 1972.
12 United Nations, General Assembly, A/RES/37/7.
13 United Nations, Doc. A/Conf. 151/5/Rev. 1.
14 BGBl II, p. 1251.
15 For example BVerfGE 56, pp. 54 (73 ff.)- Düsseldorf-Lohausen Airport.

guidelines for legislation, administration and jurisdiction[16]. The remaining gaps in protection[17], in particular with regard to theprotection of life and health of future generations, the protection of public land and public waters, ecosystems, biodiversity, the climate and resource management, are only partially closed by Art. 20a of the GG[18].

2.2 So-called state objective provision, not a fundamental right

Art. 20a of the GG is conceived as a so-called state objective provision. In normative terms, the so-called state objective provision differs on the one hand from the (mere) legislative programme, which has no binding character, and on the other hand from the legislative mandate, which prescribes to the legislature the specific regulation of individual projects, be it at all, be it with binding force also in terms of time[19]. Other explicit state objectives of the German GG were and are the welfare state principle (Art. 20 para. 1 GG), the objective of European integration (Preamble and Art. 23 para. 1 GG), the task of safeguarding peace (Art. 24 para. 2 and Art. 26 para. 1 GG) and the objective of maintaining macroeconomic equilibrium (Art. 109 para. 2 GG). Like the aforementioned state objectives, the state objective of Art. 20a GG must also be achieved in a dynamic process. Insofar as Art. 20a GG also defines the task of protection from the perspective of future generations, it has a content aimed at shaping social living conditions in the future[20]. Furthermore, the protection of the natural foundations of life is not only about the (static) defence against impairments, but also about (dynamic) renewal in the sense of restoring nature that has already been destroyed or damaged[21].

The state objective provision of Art. 20a of the GG only has an objective legal effect. It works neither for nor against the citizen. It does not impose any legal obligations on citizens, nor does it establish any subjective public rights against the public authorities. Certain environmental policy decisions (concepts) or specific claims for benefits cannot be enforced on the basis of Art. 20a of the GG, neither by individual citizens nor by environmental organisations[22]. However, Art. 20a of the GG can (further) strengthen the partial environmental guarantees contained in the fundamental rights and thus

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16 Cf. BVerfGE 49, pp. 89 (142) – *„Schneller Brüter" Kalkar*; BVerfGE 53, pp. 30 (57) - *Atomkraftwerk Mülheim-Kärlich*.

17 Bundesminister des Innern/Bundesminister der Justiz (eds.), Staatszielbestimmungen/ Gesetzgebungsaufträge. Bericht der Sachverständigenkommission - Report of the Expert Commission, Berlin 1983(ISSN 0231-6701), p. 91.

18 See M. Kloepfer, Umweltschutz und Verfassungsrecht, DVBl 1988, pp. 305 (311).

19 For the definitions of terms, see Commission of Experts, loc. cit., p. 20.

20 Report of the Joint Constitutional Commission, loc. cit., p.67.

21 Report of the Joint Constitutional Commission, loc. cit., p.65; different opinion D. Murswiek, Staatsziel Umweltschutz (Art. 20a GG), NVwZ 1996, pp. 222 (224).

22 See Kl.-G. Meyer-Teschendorf, Verfassungsmäßiger Schutz der natürlichen Lebensgrundlagen, ZRP 1994, pp. 73 (77); H.-J. Vogel, Die Reform des Grundgesetzes nach der deutschen Einheit, DVBl 1994, pp. 497 (499): The constitutional duty to protect imposed on the state cannot be misunderstood as a subjective public right to an „intact environment".

have a „subjective effect". Which interests are protected by fundamental rights must now also be determined under the influence of the value judgement of Art. 20a GG. This has significance for fundamental rights as individual rights of defence, but also for the mandate to protect the state contained in fundamental rights. However, Art. 20a of the GG cannot be given a subjective legal impact via the so-called prohibition of arbitrariness in Art. 3(1) of the GG[23].

The state objective provision is not only directed at the legislator, but also „constitutionally directly" obliges executive power and jurisdiction. Art. 20a of the GG is the standard of review for administration and jurisdiction as part of the constitutional order.

Insofar as a so-called state objective provision is addressed to the legislator, it basically leaves it up to the legislator to decide when and by what means it fulfils the state task assigned to it by law[24]. Like other state objectives, the objective of protecting the natural foundations of life cannot be precisely determined in terms of content and time. However, due to the specific nature of the object of regulation of the so-called state objective provision, the legislator is not only required to pursue the specified objective at all („whether") and to make efforts to approach the objective (at some point). The possible irreversibility of environmental damage that has already occurred, the irreversibility of ongoing damage processes and the lack of reproducibility of environmental resources mean that the legislator is not completely free to choose when to act („when"). It must fulfil the state task imposed on it at a time when it can still be fulfilled. The protection of the natural foundations of life must not come too late. However, the legislator retains a large degree of (substantial) freedom of decision in the question of which sub-goals and intermediate goals within the complex[25] overall goal of „protecting the natural foundations of life" it initially pursues and how it weights them, if and insofar as it does not completely exclude a core area of environmental protection from its area of activity and thus jeopardise the achievement of the overall goal[26]. He is also free to choose the means of realising the objective („how"). The legislator's broad scope for manoeuvre resulting from the vagueness of the state objective provision of Art. 20a GG can therefore only be reviewed by the courts within narrow limits.

When answering the constitutional question of whether the legislature has fulfilled its obligation under Art. 20a GG, the courts are limited to reviewing evident violations,

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23 Different opinion BayVerfGH BayVbl 1986, pp. 298 (300).

24 See Commission of Experts, loc. cit., p. 21.

25 Cf. N. Müller-Bromley, Staatszielbestimmung Umweltschutz im Grundgesetz? – Rechtsfragen der Staatszielbestimmung als Regelungsform der Staatsaufgabe Umweltschutz, Berlin 1990 (ISSN 0340-9716), p. 106.

26 See A. Uhle, Das Staatsziel "Umweltschutz" im System der grundgesetzlichen Ordnung - Zu dem von der Gemeinsamen Verfassungskommission empfohlenen neuen Art. 20a GG, DÖV 1993, pp. 947 (951): The legislator remains the master of environmental protection.

as is the case with the welfare state principle and the objective protection obligations derived from fundamental rights[27]. Even if the so-called state objective contained in Art. 20a GG is not easily accessible to judicial determination of its content, the legislature is not released from its normative obligation by the state objective. Even outside the legally reviewable area, the legislator remains obliged to observe the state objective.

3. Relationship to other constitutional norms

The protection of the natural foundations of life is not a primary or solely decisive concern within the German Basic Law in every case[28]. Rather, the state objective of Art. 20a GG is on an equal footing with other so-called state objectives and principles of state structure. The constitution thus requires the constant balancing of protected goods and interests as well as a solution to conflicts between environmental interests on the one hand and other interests (such as the establishment of industry, the provision of infrastructure or housing construction) on the other, in accordance with the principle of proportionality. The fact that the natural foundations of life as a prerequisite for all life and economic activity are nevertheless particularly worthy of protection is a result of the location of the state objective provision (Art. 20a GG) in the German constitution. The proximity to Art. 20 GG illustrates the relationship with the state objective provisions and state structure principles regulated there[29]. This position of the state objective provision in the GG cannot be interpreted the other way round to mean that the state objective provision of Art. 20a GG is subordinate to the other state objective and state structure principles of Art. 20 GG because, unlike those, it is not exempt from constitutional amendment (Art. 79 para. 3 GG). This does not mean that the principles of Art. 20 of the GG are overriding, even with regard to their core elements. The regulation of the protection of the natural foundations of life in a separate norm has been made for technical legal reasons. The fact that the state objective is not covered by Art. 28 para. 1 GG also does not result in its ranking with other constitutional objectives. Art. 20a GG also obliges the German federal states[30].

In the event of conflicts between the protection of the natural foundations of life and guarantees of fundamental rights (e.g. in Art. 14 para. 1 GG or in Art. 2 para. 1 GG), the guarantee of Art. 20a GG can become significant in the context of legal reservations. However, restrictions on fundamental rights and encroachments on fundamental rights that invoke Art. 20a of the GG are also permissible in exceptional cases if the fundamental right in question is not subject to a reservation (e.g. Art. 5 para. 3 GG). According to the

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27 Cf. BVerfGE 56, pp. 54 (78); BVerfG NJW 1983, pp. 2931 (2932).

28 The wording proposed by the SPD parliamentary group at the time, according to which the natural foundations of life should be „under the special protection of the state", did not prevail. It would have given environmental protection a one-sided priority protection position.

29 Kl.-G. Meyer-Teschendorf, loc. cit., pp. 73, 77.

30 See Kl.-G. Meyer-Teschendorf, loc. cit., p. 77.

case law of the German Federal Constitutional Court (BVerfG)[31], even fundamental rights without an express reservation of rights are not guaranteed without any restrictions. They can be restricted by invoking conflicting constitutional law. However, this does not mean that these fundamental rights are subject to a legal reservation via the state objective provision of Art. 20a GG[32]. However, due to the vagueness of the so-called state objective provision, its precedence over the specific fundamental right to freedom can only arise as a result of a careful balancing of interests.

Insofar as certain fundamental rights to liberty also contain partial guarantees under environmental law, Art. 20a GG does not weaken their constitutional status, but rather supplements it. This does not create an overlapping problem for the state powers[33].

Protected interests of Art. 20 a GG

The object of protection of the state objective provision of Art. 20a GG are the so-called natural foundations of life. The scope of protection is largely determined by whether the state objective provision is anthropocentric and ecocentric, i.e. whether it protects the natural foundations of life (merely) „for the sake of mankind" or places them under protection in their own right and recognises them as having a constitutional status equal to that of mankind. The wording of the state objective standard does not provide any indications in this context. The fact that the so-called Joint Constitutional Commission refrained from explicitly enshrining the anthropocentric approach in Art. 20a GG („natural foundations of human life") in the interest of a compromise that could be reached by a majority[34] does not necessarily mean that the legislator amending the constitution decided in favour of the ecocentric approach. Nor does such an interpretation suggest itself in view of the word „also" included in the text of the provision[35]; this refers to the subsequent clause „in responsibility for future generations" and merely emphasises the future-oriented nature of the protection task. Conversely, the inclusion of future generations in the protection mandate does not clearly imply an exclusively anthropocentric orientation of the state objective. Future generations can also have an interest in the natural environment to the extent that it is not specifically beneficial to humans. Ultimately, however, it follows from the anthropocentric constitution of the German GG (Art. 1 para. 1 GG) that the state objective provision of Art. 20a GG as a whole is also in an anthropocentric context[36] .

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31 BVerfGE 28, pp. 243 (261); BVerfGE 30, pp. 173 (193); 57, pp. 70, (98); 84, pp.212 (228).

32 See H.H. Klein, Staatsziele im Verfassungsgesetz - Empfiehlt es sich, ein Staatsziel Umweltschutz in das Grundgesetz aufzunehmen?, DVBl 1991, pp. 729 (733): „immanent barrier to fundamental rights".

33 In this way H.-J. Peters, Art. 20a GG - Die neue Staatszielbestimmung des Grundgesetzes, NVwZ 1995, pp. 555 (556); R. Steinberg, Verfassungsrechtlicher Umweltschutz durch Grundrechte und Staatszielbestimmung, NJW 1996, pp. 1985 (1987).

34 Report of the Joint Constitutional Commission, loc. cit., p. 66.

35 See H.-J. Vogel, loc. cit., p. 500.

36 W. Brohm, loc. cit., p. 219; H.-J. Peters, loc. cit. p. 555; Kl.-G. Meyer-Teschendorf, loc. cit., p. 77.

However, the rejection of the ecocentric orientation of environmental protection does not mean „narrowly focussed" environmental protection[37]. The complexity of the overall ecological structure makes it impossible to state from the outset that certain parts of nature are irrelevant to human life. According to general opinion, the required[38] certain relationship of an environmental good to humans will regularly be given.

3.1. The natural foundations of life and the animals

The concept of the so-called natural foundations of life is synonymous with that of the environment, but is no less vague. The foundations of life are those goods without which life in its diversity could not have developed and without which it could not continue to exist over long periods of time[39]. However, it is not only those elements of nature that are protected that represent the indispensable roots of human life, i.e. not just the prerequisites for (purely) physical existence[40]. By limiting protection to the natural foundations of life, however, it is made clear that the psycho-social environment is not covered by Art. 20a GG. The fundamental rights and the welfare state principle are particularly suitable constitutional approaches for justifying the state's duty to act.

Within the framework thus described, the protection of the so-called natural foundations of life is to be interpreted broadly. It is true that no standards for the interpretation of a constitutional term can be derived from the use of similar terms by the ordinary legislator. However, ordinary law can provide guidance. For example, Section 2 (1) sentence 2 no. 1 of the German *Gesetz über die Umweltverträglichkeitsprüfung*[41] refers to the following as the environment "People, animals and plants, soil, water, air, climate and landscape, including the respective interactions".

Section 1 (1) of the German *Bundesnaturschutzgesetz*[42] recognizes the following as the basis of human life

"1. the capacity of the ecosystem,
2. the usability of natural assets,
3. the flora and fauna, and
4. the diversity, uniqueness and beauty of nature and landscape".

Until 2002, animal protection was only given partial constitutional status via Art. 20a GG[43]. Art. 20a GG only covered the preservation of species and the protection of the habitats of wild animals (not domestic-, farm-, experimental-, zoo and circus animals) from destruction. However, due to the qualitative and quantitative extent of the

[37] See M. Kloepfer, loc. cit., p. 313: The differences between an anthropocentric and an ecocentric orientation of environmental protection are rather minimal, if discernible at all.
[38] Commission of Experts, loc. cit., p. 92 et seq.
[39] Cf. N. Müller-Bromley, loc. cit., p. 104.
[40] See Commission of Experts, loc. cit., p. 98.
[41] Gesetz über die Umweltverträglichkeitsprüfung of 12 February 1990 (BGBl I, p. 205).
[42] Gesetz über Naturschutz und Landschaftspflege as amended on 12 March 1987 (BGBl I, p. 889).
[43] Report of the Joint Constitutional Commission, loc. cit., p. 68 et seq.

interference, the so-called natural foundations of human life had to be impaired at the same time. Furthermore, the protection of the animals themselves and their protection from avoidable suffering was only indirectly given, namely insofar as the suffering was caused by the destruction of their habitats. On 1 August 2002, animal protection was included in the state objective provision of Art. 20a of the GG[44].

The state objective provision of Article 20a of the Basic Law can also include the protection of human health if this is jeopardised because so-called natural resources are damaged or destroyed. This protection then comes alongside the protection against health hazards under Art. 2 para. 2 GG. In a similar way, environmental protection measures can benefit the material or artificial environment created by humans[45].

3.2. „Also in responsibility for future generations"

The special emphasis on the protection of the so-called natural foundations of life with regard to future generations („also") gives Art. 20a GG a content aimed at shaping social living conditions in the future[46]. It follows from this future-orientation of the state objective that the state must take precautionary measures far in advance of the immediate threat. Regardless of their current condition, finite raw materials and primary energies must be saved, renewable raw materials and energies must be conserved, etc. In addition, the protection mandate obliges the state to make extensive and long-term cause and effect forecasts. The German GG is thus expressly committed to the guiding principle of „sustainable development", which was laid down in the Rio Declaration for the area of international environmental policy.

4. Protection mandate of Art. 20a GG

Art. 20a GG places the task of protecting the environment and animals primarily in the hands of the legislator, but also explicitly mentions the executive power and the judiciary. It follows that the second and third powers must also play a part in protecting the natural foundations of life. By describing the principle of the separation of powers and the differentiated legal obligation of the three powers, the state objective standard is linked to Art. 20 para. 3 GG. This repetition of an already applicable constitutional principle is merely declaratory. At the same time, however, it sends a constitutional policy signal that the provision on state objectives must be integrated into the existing basic structures of the GG[47], and contains a rejection of a one-sided prioritised protective position of environmental protection[48].

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44 Gesetz zur Änderung des Grundgesetzes (Staatsziel Tierschutz) of 26 July 2002 (BGBl I, p. 2862).
45 Report of the Joint Constitutional Commission, loc. cit., p. 68.
46 See Kl.-G. Meyer-Teschendorf, loc. cit., p. 79: Rejection of an ecological fundamentalism.
47 Report of the Joint Constitutional Commission, loc. cit., p. 67.
48 Only optimisation requirement.

4.1. Protection through legislation

In relation to executive power and case law, the legislator has priority in terms of legal status and legal logic due to its power to legislate.

4.1.1. „Within the framework of the constitutional order"

The term „constitutional order" has the same meaning as the term contained in Art. 20 para. 3 GG. It is therefore not to be understood comprehensively as in Art. 2 para. 1 GG (totality of legal norms that are formally and substantively in accordance with the constitution). However, it also does not have the narrow meaning expressed in Art. 9 para. 2 GG (elementary principles of the constitution). The term „constitutional order" in Art. 20a GG refers to the entire body of norms of the constitution.

4.1.2. Content and scope of the protection obligation

The legislature is obliged to create a legal system that realizes the protection of the so-called natural foundations of life and animals in the best possible way, taking into account the protective direction of Art. 20a GG and the principle of equal status of the state objective with other constitutional principles and constitutional legal interests. Art. 20a GG therefore requires the legislature to seriously weigh up environmental protection against other public and private interests. This duty to act gives rise to duties of protection on the part of the legislature in the sense of hazard defence on the one hand and precaution on the other. They also exist with regard to future human generations. The starting point and basis for comparison is the state of the natural foundations of life at the time the norm was created, as the inclusion of the state objective provision of Art. 20a GG in the Basic Law is intended to help improve the environmental situation according to the will of the legislator amending the constitution[49]. Environmental legislation that falls short of current environmental standards or even causes the situation to deteriorate is unconstitutional. Beyond these requirements, the legislator has a prerogative of judgement, the scope of which is greater or lesser depending on the nature of the regulated area in accordance with the importance of the legal interests affected, the urgency of protective measures, etc.

In the area of hazard prevention, the legislator must prevent imminent damage by third parties, eliminate damage that has already occurred and refrain from causing damage through government action[50]. Hazards must also be countered if they arise without human intervention or are caused by nature itself.

The duty to protect „precaution" means both risk prevention in the sense of intervening below the danger threshold, i.e. when damage is only theoretically possible, and

[49] Unanimous view: D. Murswiek, loc. cit., p. 226; F. Klein, loc. cit., p. 730.

[50] See M. Schröder, Verfassungsrechtliche Möglichkeiten und Grenzen umweltpolitischer Steuerung in einem deregulierten Strommarkt, DVBl 1994, pp. 835 (837), for the area of energy supply.

precaution for future generations in the sense of measures to save (finite) or conserve (renewable) resources. In this respect, the legislator must create a so-called precautionary law. The precautionary principle is therefore no longer just a political programme principle.

However, Art. 20a GG does not contain any statements on the intensity of protection afforded by precautionary decisions made by the legislator[51]. However, the German Federal Constitutional Court has not extended the objective legal duties to protect derived from fundamental rights very far in the area of risk prevention. According to this, a risk-specific graduated precaution based on the standard of „practical reasonableness" is sufficient. Even a socially adequate residual risk may be acceptable for reasons of proportionality, because the demand for absolute safety would misjudge the limits of human cognition and absolute technical safety cannot be realized (BVerfGE 49, pp. 89 (143)). The same must apply to the legislator's duty to take precautionary (risk) measures under Art. 20a GG. Due to the complex cause-effect relationships, there is often no reliable knowledge about the effectiveness of environmental protection measures. The extent of the legislator's room for manoeuvre depends, on the one hand, on the importance of the basis of life and the legislator's ability to form a sufficiently reliable judgement on the effects of its environmental protection measures and, on the other hand, on the weight of the conflicting constitutional rights[52].

In order to realize the protection of the natural foundations of life in the best possible way, also in the precautionary area, the legislator must above all make environmental protection law efficient.

The area of environmental law has different (special) functional and structural characteristics than other law areas. There is rarely a simple causality of cause and effect. Rather, there is a multi-causality of causes with many overlapping cumulative and synergistic effects. In some cases, there are long latency periods between the establishment of causes and recognisable consequences of damage. Small causes can often have large effects. Negative trends can continue even after the primary causes have ceased to exist. Humans can only grasp these natural processes to a limited extent, but are constantly influencing them with ever more effective means. The legislator of environmental law must take these characteristics of the subject matter of regulation into account.

Due to the long-term effects and the lack of information, so-called precautionary law must allow for the possibility of follow-up monitoring of decisions and the possibility of rectification. This is the only way to fulfil the requirements of the German Federal Constitutional Court, which has stated the conditions under which environmental

[51] M. Schröder, loc. cit., 836: „Bloßes Blankett".

[52] On the constitutional limits of preventive state activity in general, see D. Grimm, Verfassungsrechtliche Anmerkungen zum Thema Prävention, Kritische Vierteljahresschrift für Gesetzgebung und Rechtswissenschaft, Berlin 1986 (ISNN 2193-7869), pp. 38 (46 et seq.).

interventions may have to be reassessed in accordance with the constitution (BVerfGE 49, pp. 89 (130)):

"If the legislature has made a decision whose basis is decisively called into question by new developments that were not yet foreseeable at the time the law was enacted, it may be required by the Constitution to review whether the original decision can still be upheld under the changed circumstances."

Upon this background, the creation of a system of temporary and provisional partial decisions is obvious and recommendable, which would provide scope for a later improvement of the information basis for subsequent decisions (e.g. through greater use of validity periods, granting of trial authorisations, extension of the possibility of subsequent orders, etc.).

The appropriate consideration of the precautionary principle in the design of the laws also requires an extensive instrumentalisation of the precautionary objectives. Including the objectives as (merely) general purpose provisions without further provisions on how they are to be realized would not have a sufficient protective effect within the meaning of Art. 20a GG. Such environmental legislation could not fulfil the task of helping to resolve conflicts between environmental and other concerns.

Precautionary environmental legislation must differentiate in the area of legal consideration according to the extent to which decisions are reversible. As a rule, solutions that are differentiated in terms of subject matter, space and time should be favoured. It should be possible to reverse and correct decisions without causing irreversible damage[53].

If several equivalent alternative courses of action are available to realize a public or private goal, the alternative with the least impact on the so-called natural foundations of life should be chosen[54] . Decision-making under conditions of uncertainty requires a wealth of alternatives. The consideration of alternatives must therefore be systematically reflected in the legislative process. Scientific expertise must be incorporated and a system of participation rights created.

Above all, precautionary law must be appropriate to the subject matter of technology and sufficiently recognize the complexity and dynamics of technology. The legislator must develop criteria, procedures and institutions to enable a choice between technical alternatives and the design of technical systems. In particular, legal instruments must not be alien to the subject of technology. They can only be effective if they recognize the inherent laws of the subject matter to be regulated and adapt to specific structures and functional conditions.

In this context, it should be mentioned that the so-called state objective provision of Art. 20a GG also influences the design of procedural law by reinforcing the partial

[53] Cf. BVerfGE 53, pp. 30 (65).

[54] See M. Kloepfer, loc. cit., p. 310 et seq.

guarantees of environmental law contained in the fundamental rights of freedom (e.g. in Art. 2(2) GG). The German Federal Constitutional Court has ruled[55] that the state's duty to protect high-risk projects is reflected not only in strict substantive authorisation requirements, but also in procedural safeguards, insofar as this is important for the effective protection of fundamental rights. These procedural safeguards are all the more important the less it is possible to predict the long-term consequences of environmental decisions (and non-decisions) in a situation of uncertainty and ignorance and the faster the initial conditions change[56].

Insofar as a legal matter is regulated simultaneously in environmental laws and in transport-, energy or commercial laws, there must be no contradictions in interpretation between the normative (behavioural) requirements for the application of the law[57]. Contradictions in values would lead to legal uncertainty and jeopardise the effectiveness of environmental protection law. The legislator must keep the standardisations free of contradictions and in line with the system, i.e. coordinate them with each other.

However, which control instruments the legislator uses to realize its duty of protection under Art. 20a GG is entirely at its political discretion. The constitutional protection mandate is not violated from the outset if the legislator also relies on the self-regulation of the market and utilises performance incentives and performance controls associated with competition. However, the legislator must not relinquish control and steering completely. It must constantly review the effectiveness and efficiency of market-based instruments and methods.

Art. 20a GG therefore does not contain a compelling rationale in favour of the polluter-pays principle, with the consequence that the principle of sharing the burden as a cost allocation principle would be unconstitutional[58]. It is true that the polluter-pays principle and the precautionary principle complement each other in many cases, because the polluter-pays principle allows the burden of bearing the damage to flow into the polluters' calculations in an anticipatory manner, so to speak, and thus leads to a market-compliant channelling of capital into less environmentally harmful economic sectors. However, the polluter-pays principle can be unsuitable as a control instrument if the allocation of financial burdens does not provide a remedy or only provides a delayed remedy (e.g. for the removal of contaminated sites, acute emergencies; to overcome conflicts of objectives and interests).

As statutory control must be flexible and situation-specific in order to realize the best possible environmental protection, Art. 20a GG does not guarantee the existence of environmental laws already in force[59]. On the other hand, it cannot be inferred from

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55 Cf. BVerfGE 53, pp. 30 (65).

56 See M. Kloepfer, loc. cit., p. 310 et seq.

57 M. Schröder, loc. cit., p. 836, for legal matters that are regulated in environmental and commercial laws.

58 Thus, however, expressly D. Murswiek, loc. cit., p. 225 et seq.

59 See H.-J. Peters, loc. cit., p. 556.

the state objective standard that the protection mandate must be taken into account by drafting an independent environmental code[60]. Nor does Art. 20a GG lead to a prohibition of binding authorisations in the area of environmental law[61] , because consideration of the environmental concerns concerned in a manner that satisfies Art. 20a GG can also take place on the factual side. However, regulations that completely neglect the obligation to comprehensively identify and assess environmental impacts arising from Art. 20a GG are constitutionally questionable[62] . Strengthening self-regulation and self-regulation in environmental law, for example by delegating legislative powers to private individuals, extending voluntary commitments in the form of standardising agreements or concluding standard-substituting public law contracts, is desirable in the interests of effective environmental protection[63], but is not constitutionally required.

4.2. Protection by law enforcement and jurisdiction

The explicit inclusion of the executive power and case law in the protection mandate of Art. 20a GG gains significance for those areas of environmental law in which the control possibilities of statutory law diminish and the „fine control" is the responsibility of the administration by setting limit values, issuing administrative regulations specifying standards and applying other regulatory mechanisms representing statutory law, by interpreting undefined legal terms and by weighing up interests in the context of discretionary actions and case law[64].

4.2.1. „In accordance with the law and justice"

The emphasis on the binding nature of „law and justice" is of a clarifying nature. In this respect, Art. 20a GG merely repeats the wording contained in Art. 20 para. 3 GG and once again emphasises the primacy and the reservation of the law and implicitly the legislator's freedom of design[65]. The wording does not have any further dogmatic significance. In particular, the conclusion is not justified that, without this reservation, the administration and jurisdiction would be exempt from the legal obligation of Art. 20 para. 3 GG.

By subordinating decisions of the executive power and jurisdiction to formal laws and other legal norms, Art. 20a GG thus regulates a legislative reservation[66]. However,

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60 See R. Steinberg, loc. cit., p. 1993.

61 Thus - for the new regulation of planning approval by the German Gesetz zur Vereinfachung der Planungsverfahren für Verkehrswege of 17 December 1993 (BGBl I, p. 2123) - R. Steinberg, loc. cit., p. 1994.

62 See M. Kloepfer/Th. Elsner, Selbstregulierung im Umwelt- und Technikrecht, DVBl 1996, pp. 964 (970 et seq.).

63 H.-J. Vogel, loc. cit., p. 499.

64 The inclusion of the wording in the normative text of Art. 20a GG arose from the fear of the Joint Constitutional Commission that the administration and jurisdiction could „overplay" those of the legislature with their environmental policy ideas.

65 See Kl.-G. Meyer-Teschendorf, loc. cit., p. 77.

66 H.-J. Peters, loc. cit., p. 557.

it does not conversely turn the state objective into a „state objective subject to legislative reservation"[67].

4.2.2. Content and scope of the protection obligation

For the administration and the courts, the state objective standard is primarily a standard for interpretation and consideration. In this respect, Art. 20a GG has a so-called weight-providing function[68]. Insofar as there are loopholes in the law, Art. 20a GG can also be a benchmark for the courts in the (judicial) development of the law.

The significance of the protection of the natural foundations of life is now reinforced by Art. 20a GG in the case of standards that contain the public interest or public interests as an undefined legal concept on the factual side (e.g. Sections 11, 12 (1) of the German *Bundesberggesetz*) or otherwise relate to a common good (e.g. Section 6 of the German *Wasserhaushaltsgesetz*; Section 9 (1) of the German *Bundeswaldgesetz*). When interpreting and applying undefined legal terms, the future-orientated nature of the protection task must also be taken into account. Insofar as ordinary law already standardises the precautionary principle, which is currently only the case in immission control law (Section 5 (1) No. 2 of the German *Bundesimmissionsschutzgesetz*), nuclear law (Section 7 (2) No. 3 of the German *Atomgesetz*), water resources law (Section 1a of the *Wasserhaushaltsgesetz*) and waste law (Section 1a of the German *Abfallgesetz*), it must also be taken into account that the natural foundations of life are also necessary for the existence of future generations.

Particular weight is given to the so-called state objective as a standard for consideration in planning and (police and) regulatory law.

When weighing up the planning objectives against the interests affected by the planning in overall and sectoral planning law, the protection of so-called natural resources and animals must be taken into account more sustainably than before. If the planning authority does not give environmental protection the constitutional status to which it is (now) entitled in the balancing process, this constitutes what is known as a misjudgement in the balancing process and therefore a misuse of discretion. It does not matter whether environmental protection is enshrined in specialist legislation as an internal optimisation requirement, such as in construction planning law (Section 1 (5) No. 7 of the German *Baugesetzbuch*), or as an external optimisation requirement, such as in road law (Section 8 (4) of the *Bundesnaturschutzgesetz;* Sections 41 (1), 50 of the *Bundesimmissionsschutzgesetz*).

In future, environmental protection will also have to be taken more seriously in the area of (police and) regulatory law. Its constitutional status will make it a stronger component of so-called public safety and order than before. An inferior consideration of environmental protection and an overriding consideration of economic, housing or

[67] Cf. H.-J. Peters, loc. cit., p. 557.
[68] See Commission of Experts, loc. cit., p. 102

transport policy interests may violate the principle of proportionality and constitute an overstepping of regulatory discretion.

The state objective provision of Art. 20a GG is also important for the judicial application of the law insofar as it provides a guideline for the constitutional interpretation of laws and leads to the consideration of hazard prevention and precaution in environ mental protection in the (judicial) development of the law[69].

5. Conclusion

Art. 20a of the German GG contains a so-called state objective provision. In contrast to mere political programme statements, this represents directly applicable law. The legal content of Art. 20a GG consists above all in making the obligation to legislate to protect the environment, which until 1994 was primarily the result of political pressure, independent by giving it constitutional status. The so-called state objective provision of Art. 20a GG restricts the legislator's room for manoeuvre in many areas. The legislator must create a so-called precautionary law and, in doing so, take into account the special functional and structural characteristics of environmental law, i.e. the specific nature of the subject matter of the „environment". Due to the long-term effects of measures in the environmental sector and the lack of information, precautionary law must provide the possibility of so-called follow-up observation and improvement. Precautionary environmental legislation must also differentiate according to whether and to what extent decisions in environmental policy are reversible. Finally, it must take into account that decisions in the environmental field require a wealth of alternatives and that contradictory values must be avoided. Even if it is not easy to understand dogmatically, the construction of environmental protection in the German constitution is a viable approach.

[69] See Kl.-G. Meyer-Teschendorf, loc. cit., p. 78. However, it is questionable whether rules on the burden of proof or so-called presumptions of judgement can be developed from Art. 20a of the Basic Law, which - in a broader sense - follow the motto „in dubio pro natura".

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Նորբերթ Բերնսդորֆ

Իրավաբանական գիտությունների դոկտոր,
Մարբուրգի Ֆիլիպսի անվան համալսարանի պատվավոր պրոֆեսոր,
Հիմնարար իրավունքների Եվրոպական միության իշխանության ազգային փորձագետ (Վիեննայում), Գերմանիայի դաշնային սոցիալական դատարանի նախկին դատավոր, ՀՀ դատախազության «Օրինականություն» գիտագործնական պարբերականի խմբագրական խորհրդի անդամ

Կարլա Պիլար Արզաբե

Իրավաբանական գիտությունների դոկտոր, «People for the Ethical Treatment of Animals (PETA)», «Albert Schweitzer Foundation», «Sea Sheperd e. V.» և այլ միջազգային կազմակերպությունների անդամ և գործընկեր, որոնք զբաղվում են շրջակա միջավայրի և կենդանական աշխարհի պաշտպանությամբ

ՇՐՋԱԿԱ ՄԻՋԱՎԱՅՐԻ ՊԱՇՏՊԱՆՈՒԹՅՈՒՆԸ ՆԵՐՊԵՏԱԿԱՆ ՍԱՀՄԱՆԱԴՐՈՒԹՅՈՒՆՆԵՐՈՒՄ. ԳԵՐՄԱՆԻԱՅԻ ՍԱՀՄԱՆԱԴՐՈՒԹՅԱՆ (GRUNDGESETZ) 20Ա ՀՈԴՎԱԾԸ ՈՐՊԵՍ ՕՐԻՆԱԿ[1]

Համառոտագիր

Հաշվի առնելով, որ 1970-ականների սկզբին, այսպես կոչված, բնապահպանական ճգնաժամը հայտնվեց լայն հանրության և քաղաքական գործիչների ուշադրության կենտրոնում՝ բազմիցս հնչում էին շրջակա միջավայրի պաշտպանությունն ազգային (ներպետական) սահմանադրություններում «ամրագրելու» կոչեր: Բնապահպանական իրավունքի նորմեր պարունակող առանձին սահմանադրություն ընդունելու պահանջը միաձայն մերժվեց, իսկ «շրջակա միջավայրի պահպանության», այսպես կոչված, ազգային նպատակի վերաբերյալ առաջարկներն արժանացան խիստ քննադատության:

Այսօր, սակայն, բոլորը համակարծիք են, որ շրջակա միջավայրի պահպանությունը պետության կարևորագույն խնդիրներից է:

Գերմանիայի Սահմանադրության (Grundgesetz) 20Ա հոդվածը շրջակա միջավայրի պաշտպանությունը բարձրացրել է սահմանադրական պաշտպանության մակարդակի և կարող է օրինակ ծառայել ազգային (ներպետական) այլ սահմանադրությունների համար:

Հիմնաբառեր - շրջակա միջավայրի պաշտպանություն, կենդանիների բարեկեցություն, ազգային նպատակ, ապագա սերունդներ, կանխարգելման սկզբունք, օպտիմալացման պահանջ, սահմանադրական կարգավիճակ, կայուն զարգացում::

[1] Հոդվածը ներկայացվել է 09.01.2024 թ., գրախոսվել է 18.05.2024 թ.:

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ЗАЩИТА ОКРУЖАЮЩЕЙ СРЕДЫ В НАЦИОНАЛЬНЫХ КОНСТИТУЦИЯХ – СТАТЬЯ 20A КОСТИТУЦИИ (GRUNDGESETZ) ГЕРМАНИИ КАК ПРИМЕР[1]

Абстракт

С тех пор как, так называемый, экологический кризис привлек внимание широкой общественности и политиков в начале 1970-х годов, неоднократно звучали призывы к «закреплению» защиты окружающей среды в национальных конституциях. Требование об особой конституции на окружающую среду было встречено единогласным отказом. Предложения о, так называемой, национальной цели «защиты окружающей среды» также подверглись резкой критике.

Однако сегодня все согласны с тем, что охрана окружающей среды является чрезвычайно важной задачей государства.

Статья 20A Конституции (Grundgesetz) Германии навела на вопрос о защите окружающей среды до конституционного уровня, что может послужить примером для других национальных конституций.

Ключевые слова: охрана окружающей среды; забота о животных; национальная цель; естественные основы жизни; будущие поколения; принцип предосторожности; требование оптимизации; конституционный статус; устойчивое развитие.

[1] Статья была представлена 09.01.2024 и прошла рецензирование 18.05.2024.