ENVIRONMENTAL GOVERNANCE IN GERMANY

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Introduction

In this chapter, the author is concerned with federalism as a factor of environmental protection in Germany: is environmental protection a requirement of federal and *Land* Constitutions? How are legislatory and adjudicatory competences in environmental matters allocated between the *Bund* and the *Länder*? Have they solved conflicts between the *Bund* and the *Länder* in a reasonable way? Apart from the federal issue, the author also addresses questions of participation in environmental proceedings, as well as the issue of enforcement of environmental laws in Germany.

1. Environmental Protection as a Constitutional Requirement

1.1. *Constitution of the Bund*

The German Constitution, called *Grundgesetz* (GG) to indicate its provisional character at its time of enaction (1949), introduced environmental protection as a constitutional requirement only in 1994. Article 20a GG lays down: "Mindful also of its responsibility toward future generations, the State shall protect the natural bases of life by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order."

By pointing to the natural basis of life (in other words, the basis that sustains human life) as well as to the responsibility of future generations, the article resounds the concept of sustainability. The determination of the precise standard of protection is explicitly left to the three branches of government and, in addition, limited by other constitutional provisions

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1.3. *Primary EU Law*

Insofar as the *Bund* and the *Länder* are responsible to implement EU law they are bound to respect the environment-related provisions of the Charter of Fundamental Rights (ChFR).[6] The most important provision in this context is Article 37 which states: "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."

According to Article 51(1) ChFR Member States (MS) are bound apart from EU institutions when they are implementing Union law. Thus, for instance, if an EU directive protecting the environment leaves discretion for MS transposition measures, Articles 37 together with 51(1) can be interpreted to demand a higher level of protection than the rather modest standard of Article 20a GG. According to common interpretation, Article 37 ChFR does not, however, provide a subjective right of individuals to a high level of environmental protection.[7] This can be doubted. The fact that the article does not use the term right or freedom should not be a hindrance because other provisions of primary EU law exist that are framed in objective language but interpreted as subjective right. The prominent examples in the Treaty on the Functioning of the European Union (TFEU) are its Articles 34 and 35 TFEU (rights to free importation and exportation of products). In the ChFR, the following provisions are also formulated "objectively", but can be interpreted "subjectively": Articles 1 (human dignity), 13 (arts and sciences), 19 (extradition), 21 (discrimination), 22 (cultural diversity), 23 (equality), 34 (social security) and 38 (consumer protection). The major question to be posed as to the subjective character of a provision should be whether the relevant provision is aimed at also protecting individuals. There should be no doubt that each individual life is indeed depending on a decent state of the environment. This means that insofar as the state of natural resources is such that the living conditions of individuals are impaired, they have a right to claim that the conditions are improved. Of course, the competent authorities would be granted a discretionary margin of the measures to be taken.

[6] EU Charter of Fundamental Rights 2000. *See* Art. 51(1): "The provisions of this Charter are addressed to [...] and to the Member States only when they are implementing Union law."

[7] H. D. Jarass, "Der neue Grundsatz des Umweltschutzes im primären EU-Recht" (2011) 12 Zeitschrift für Umweltrecht 563–571.

2. Distribution of Legislatory Competences

In principle, legislatory powers rest with the *Länder*. The *Bund* has them only insofar as they are explicitly conferred to it by the *Grundgesetz* (Article 70). This division results in three categories of legislatory powers: exclusive powers of the *Bund*, concurrent powers of the *Bund* and the *Länder*, and exclusive powers of the *Länder*. Formerly, framework powers of the *Bund* for *Land* legislation existed as a fourth category, but this category was abandoned with the reform of German federalism in 2006. Instead, and as a compensation for the strengthening of *Bund* competences, the *Länder* was granted the possibility of introducing legislation deviating from *Bund* legislation in certain areas.[8]

Powers exclusive of the *Bund* mean that the *Länder* can step in "only when and to the extent that they are expressly authorised to do so by a federal law" (Article 71). Matters relating to environmental issues entail air transport, the operation of railways if owned by the *Bund*, the construction of railroad lines for the *Bund* railways, intellectual property rights, the construction and operation of nuclear power plants, disposal of radioactive substances and defence and protection of the civilian population.

Concurrent powers provide the *Bund* with priority but leave the *Länder* space to legislate "so long as and to the extent that the Federation has not exercised its legislative power by enacting a law" (Article 73). In the absence of clear determination, it is a matter of interpretation whether the *Bund* law is exhaustive or not. According to the jurisprudence of the *BVerfG* exhaustion can even be given if the *Bund* legislator intentionally abstains from regulating a question.[9]

Concerning environmental issues, concurrent powers include the following areas:[10]

- economic matters (mining, industry, energy, crafts, trades, commerce, banking)
- organisation of enterprises, occupational health
- promotion of agricultural production and forestry, importation and exportation of agricultural and forestry products, deep-sea and coastal fishing, preservation of the coasts
- land law

[8] On the history of this deal, *see* H. Meyer, *Die Föderalismusreform 2006. Konzeption, Kommentar, Kritik* (Berlin, Duncker & Humblot, 2008).

[9] BVerfG Judgment 1 BvR 2306 etc./96 of 23 June 1998, BVerfGE 98, 265 (300).

[10] Art. 74 GG.

(such as the basic rights). Therefore, a binding material content can hardly be derived from this article other than the obligation to prevent worst cases.

Concerning court practice, two kinds of contexts of invocation of Article 20a GG must be distinguished: cases of enabling and cases of mandating State action. In the first cases, State measures have already been enacted and the question is posed whether they are legitimated by the constitutional duty to protect the environment. In the second case, the State has failed to act and the question posed is whether its inaction is justifiable. Starting from a concept of judicial self-restraint courts normally accept a broad understanding of environmental protection principles if Government has decided to adopt such broad meaning but they normally prefer a more narrow understanding if Government has not yet decided itself but must be compelled to act.[2] Concerning the principle laid down in Article 20a GG there have, as yet, only been cases of the enabling kind. For instance, the Federal Constitutional Court (*Bundesverfassungsgericht – BVerfG*) recently ruled that Article 20a GG justifies encroachments on economic freedom and private property entailed in the precautionary legislation controlling the release of genetically modified seeds.[3] No case has as yet been filed asking for mandating State measures based on Article 20a GG.

Article 20a GG is framed as an objective duty of the State. It does not provide subjective rights of individuals against the Government to protect the environment. In consequence, the general constitutional remedy (*Verfassungsbeschwerde*) allowing individuals to defend their basis rights by filing a complaint against State action or inaction at the constitutional court cannot be used. A breach of the constitutional duty to protect the environment could only be submitted to the *BVerfG* in a so-called objective proceeding in which the *Bund* government, a quarter of the members of the *Bundestag*, or a *Land* government may ask the *BVerfG* to declare a law or governmental inaction unconstitutional.[4]

Subjective rights asking for State environmental measures may however be based on some of the basic rights guaranteed by the *Grundgesetz*.

[2] *See* further G. Winter, "The Legal Nature of Environmental Principles" in R. Macrory (ed.), *Principles of European Environmental Law* (Groningen, Europa Law Publishing, 2004), at 11–30 (23–26).

[3] BVerfG Judgment 1 BvF 2/05 of 24 November 2010, BVerfGE 128, 1 (37).

[4] Art. 93 (1), No. 2 GG.

Most important in this respect is the right to health and life (Article 2(2) GG). This right was originally meant to protect individuals from intrusions by the State (vertical dimension) but not from intrusions by other private persons (horizontal dimension). The *BVerfG* has however given it a further meaning which is that the individual has a right against the State to be protected in the horizontal dimension. For instance, a person living in the vicinity of Düsseldorf airport, a company under civil law, asked the *Bundesverfassungsgericht* to command the *Land* Northrhine-Westfalia to take measures protecting her from the airport noise. The Court in principle acknowledged the possibility of such a right but posited that the *Land* enjoys discretion of what measures are appropriate and found that the discretionary margin was not overstepped.[5]

In addition, the right to health can serve to enable State action to prevent environmental damage caused by third parties. For instance, an industry may ask for authorisation for a polluting factory basing this request on the freedom of enterprise or private property. In this case, the economic right collides with the neighbour's right to health. Depending on the significance of the damage, the right to health can legitimate or even demand the denial of the authorisation.

1.2. *Constitutions of the Länder*

To the extent the *Länder* have competences in environmental law (see below), their Constitutions may also establish rights and duties concerning the environment. Most progressive in that respect is the Constitution of the *Land* Brandenburg which lays down in Article 38(5): "The *Land*, local authorities, associations of local authorities and other corporations of public law are obliged to prevent environmental damage and deterioration and to ensure that environmental damage is remediated or compensated."

This objective duty is, in Article 38(2), even framed as a subjective right: "Everyone has a right to protection from damage and intolerable danger that result from a change in the natural basis of life."

However, this does not mean that a person has a right to a general healthy state of the environment. Rather, as the text of the provision shows, he or she must prove that the environmental change has had negative effects on him or her as an individual.

[5] BVerfG Judgment 1 BvR 612/72 of 14 January 1981, BVerfGE 56, 54 (80).

- food products and feedstuffs, protection of plants and animals
- maritime and coastal shipping
- road traffic, construction of highways
- waste disposal, air pollution control, noise abatement
- hunting
- protection of nature and landscape
- land distribution
- regional planning
- management of water resources

The preponderance of *Bund* legislation in the realm of concurrent competences is somewhat relativized by two clauses, the necessity test and the aforementioned deviation clause. The necessity test requires that in several areas the *Bund* can only legislate if "the establishment of equivalent living conditions throughout the federal territory or the maintenance of legal or economic unity renders federal regulation necessary in the national interest" (Article 73(2)).[11] However, the necessity test is in actual practice not a serious hurdle for the *Bund*. The deviation clause, conversely, allows the *Länder* legislation in certain areas to deviate from *Bund* legislation. It can be used both in the direction of lowering or improving the level of protection. The areas falling under the clause include, inter alia, nature protection (here the *Land* must however, respect the basic principles established by the relevant *Bund* law) as well as water management (except for regulations related to materials or facilities). The reason for allowing deviation by the *Länder* is that nature and water have traditionally been considered as regional, not national assets. This was reflected in the fact that they used to be framework competences of the *Bund*, allowing the *Länder* to fill in. With the rising consciousness about the interrelated character of nature and water the *Länder* were prepared to accept the upgrading to concurrent status but some – especially Bavaria – successfully argued in favour of retaining a fallback position. In actual practice, the escape clause does make a difference: The *Bund* is motivated to accommodate all *Länder* views to avoid fragmentation,[12]

[11] The areas requiring the additional test comprise, i. a., public welfare, economic matters, highway construction, and State liability. It is hard to say what general idea lies behind this list.

[12] H. Meyer, *Die Föderalismusreform 2006. Konzeption, Kommentar, Kritik supra*, at 165; H. Schulze-Fielitz, "Umweltschutz im Föderalismus – Europa, Bund und Länder" (2007) 26 Neue Zeitschrift für Verwaltungsrecht 249–259, at 254.

but in a few cases, *Länder* have nevertheless made use of the clause, sometimes to the better and sometimes to the worse of environmental protection.

As for the exclusive powers of the *Länder*, not much is left for them of the sectoral environmental issues. *Land* legislation is responsible for such scattered areas as mountain railways, the construction of normal roads and non-long distance highways, shop closing hours, trade fairs and markets. Much more important, however, is the power of the *Länder* to legislate on administrative procedures and organisation. This is a corollary of the constitutional decision that all laws, including the *Bund* laws, are in principle enforced by *Land* administration (see section 4).

3. Distribution of Competences for Executive Rule Making

Sublegal rule making is an important instrument of policy, including environmental protection policy, because it sets the specific standards that guide the behaviour of societal actors as well as the supervisory activities of administrative bodies. German law distinguishes between *Rechtsverordnung* (regulation) and *Verwaltungsvorschrift* (administrative guideline). *Rechtsverordnungen* are sublegal rules that are addressed to civil society establishing rights and duties of individual actors, whereas *Verwaltungsvorschriften* are addressed to administrative agencies binding their activities in the internal administrative sphere. Still, such internally binding rules can have an indirect effect on citizens if they are aimed at administrative action impacting on the external sphere.

The making of *Verwaltungsvorschriften* is regarded as an implied power of any administrative body and follows the rules on the distribution of competences (see section 4). By contrast, the *Rechtsverordnungen* are regarded as legislation delegated to administrative bodies. Unlike other Constitutions,[13] the *Grundgesetz* does not conceive *Rechtsverordnungen* as a general implied power of the executive branch but requires that the power of making *Rechtsverordnungen* must be delegated to the executive branch by parliamentary law. This shall ensure a democratic basis of

[13] *See* Art. 37 French Constitution 1958. For the delegation model see Art. 290(1) and 291(2) of the Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) 2010/C 83/01.

executive rule making. The *Grundgesetz* even requires that "the content, purpose and scope of the authority conferred shall be specified in the law."[14]

The *delegatus* can be the *Bund* government, a *Bund* minister, or the *Land* government.[15] In practice, the *delegatus* will be chosen according to the importance and the regional or national nature of a given issue area.

Although the requirement of a legal empowerment is a democratic safeguard, it does not dispense from ensuring further democratic input through participation of the public in the rule-making procedure. Such procedural openness is, however, according to the ruling jurisprudence and doctrine, not a constitutional requirement of the German Constitution. It is nevertheless a democratic surplus that can be introduced by specific legislation. Indeed, many environmental laws do provide for public participation in rule making. For instance, it is provided that when *Verwaltungsvorschriften* on air polluting installations and activities are made, stakeholders must be heard.[16]

4. Distribution of Administrative Competences

Executive administration can act in different forms, such as decision making in individual cases, the setting of inner administrative guidelines, the supervision of activities, the monitoring of states of affairs, the rendering of services and the provision of subsidies.

As was stated previously (see end of section 2), the *Grundgesetz* departs from the principle that federal as well as *Land* laws are executed by *Land* administrative bodies (Article 83). This is also true for those administrative activities which do not execute laws but originate from the administrative body's own initiative.[17] If the *Bund* shall be responsible, it needs special empowerment by the *Grundgesetz* or by legislation based on the *Grundgesetz* (Article 86).

[14] Art. 80(1), second sentence GG *supra*. This provision has influenced the wording of Art. 290 (1), second sentence TFEU for the delegation of non-legislative acts to the Commission.

[15] Art. 80(1), first sentence GG *supra*.

[16] Para. 48 of the Bundesimmissionsschutzgesetz – BImSchG 1974 (Federal Emissions Protection Act), as amended.

[17] C. Degenhart, *Staatsrecht I. Staatsorganisationsrecht* (22nd ed.) (Heidelberg, C.F. Müller Verlag, 2006), at 175.

This leads to four kinds of administrative execution of laws:

- *Bund* competence to execute *Bund* laws (genuine *Bund* administration – *bundeseigene Verwaltung*)
- *Land* competence to execute *Land* laws
- *Land* competence to execute *Bund* laws. This competence is split into two subcategories:
  - Execution as a genuine right of the *Land* (genuine *Land* administration - *landeseigene Verwaltung*)
  - Execution as a mandate of the *Bund* (mandated *Land* administration – *Bundesauftragsverwaltung*)

In the environmental field, genuine *Bund* administration has become increasingly important. Originally, *Bund* administration was concentrated on the national transportation networks (waterways, navigation, railways, air transportation). This was even laid down in the *Grundgesetz*.[18] Later, based on specific legislation, the placing on the market of hazardous products as well as the generation and collection of environmentally relevant data became two more realms of *Bund* administration. Normally, the *Bund* discharges itself of these functions by setting up agencies which are organisationally separate from but supervised by the pertinent ministries. Thus, *Bund* agencies have been established that are responsible for the authorisation and supervision of the placing on the market of products such as food and feedstuff, genetically modified products, seeds, fertilizers, plant protection products and toxic chemicals. Genuine *Bund* administration has also been established for issues related to fields which, because of their local character, have traditionally been reserved for regional administration but have national dimensions justifying more centralised administration. For instance, in the realm of nature protection, the Federal Agency for Nature Protection (*Bundesamt für Naturschutz - BfN*) is responsible for the monitoring of developments of nature and landscape, the licensing of the release of alien species, the licensing of trade in endangered species under the Washington Agreement, and the planning and managing of nature protection in the German marine exclusive economic zone (EEZ).

The bulk of environmental law execution is, however, still in the competence of the *Länder*. Depending on their size and tradition, they have

[18] Art. 87, 87d, 87e, 89 GG *supra*. The administration of highways however belongs to the mandated administration, *see* Art. 90 GG.

a two or three-tiered administrative organisation. Larger *Länder* have a lower level of local authorities, an intermediate level of decentralised State administration and a high level of the ministries. Smaller *Länder* do without the intermediate level.

Concerning the level of local authorities, the *Grundgesetz* demands that local self-government must be preserved.[19] This means that neither the *Länder* nor the *Bund* are free to reduce the tasks of the local level to a minimum. Those tasks which are local in character must be left to the local level. This is true, for instance, for various public services (such as schools, theatre, water and energy supply) and – in the regulatory realm – for land-use planning. In these areas the *Land* retains the power of supervising local authorities, but this is confined to questions of law, not of policy. In addition to the self-governed tasks, the local level is also endowed with tasks that belong to the *Land*. In this area of delegated competences, the *Land* has full supervisory powers, including questions of policy. This results in a double function of the local level; one as the holder of self-government and the other as the functionary of the *Land*.[20] For instance, in the realm of land use, the master planning and the more specific building planning is a self-governed task of any Commune whereas the issuance of construction permits is a mandated task. Both tasks belong to the same Commune if the Commune is independent of a *Land* District (*Landkreis*) but they are split between the Commune and the *Land* District if the Commune belongs to a *Land* District.

Insofar as *Land* authorities execute *Bund* laws the *Bund* can issue administrative guidance. The *Bund* is also competent to supervise administrative activities of the *Land* authorities, but only in relation to possible infringements of the relevant laws. In the realm of mandated execution of *Bund* laws, however, the *Bund* supervises not only the lawfulness of the execution by *Land* authorities, but also the appropriateness within discretionary margins (Article 85(4) GG). The *Bund* can also ask the *Land* authorities to follow instructions in individual cases (Article 85(3) GG).

Should a *Land* not abide by *Bund* legislation or instructions, the *Bund* government and the *Land* can apply to the *Bundesrat* to make a decision on the issue. Against this decision, the *Bund* government and the *Land* can

[19] Art. 28 GG *supra*. Local self-government has, in itself, a double structure: the individual Communes (*Gemeinden*) and the Land District (*Landkreis*) which both have elected councils. Larger Communes are self-standing; they do not belong to a Land District.

[20] On the origin and principles of this system, *see* O. Gönnenwein, *Gemeinderecht* (Tübingen, J.C.B. Mohr, 1963), at 165 *et seq*. The system has the advantage that the *Land* does not need to set up its own agencies at the local level.

seek recourse to the *BVerfG*.[21] Both parties can also submit the case directly to the *BVerfG* without prior decision of the *Bundesrat* and can ask the Court to determine whether *Bund* law was infringed on by the *Land*.[22]

5. Conflicts between Levels of Administration

If a lower administrative agency differs in its law interpretation or discretionary policy from the views of a higher level, rules and procedures of conflict resolution are needed. Different situations must be distinguished in this respect.

If the conflict arises within an administrative hierarchy (for instance, between a *Land* ministry and the intermediate level of *Land* administration), the solution is simple: the higher level has the power of command; the lower level has not even a right of complaint at a court.

If the conflict arises between the *Bund* and a *Land* in the area of mandated administration, the *Bund* also has in principle, as was already stated, the power of instruction. However, the legal framework is somewhat more complicated because it must be taken into account that the *Land*, although standing under mandate nevertheless acts as a member of a Federation having its own rights. The doctrinal particularities of this mandatory relationship have been elaborated by the *BVerfG* in cases of nuclear energy. The leading case concerned the construction of a fast breeder installation in Kalkar, Northrhine Westfalia. The *Land* Minister of Economy, who was the mandated authority responsible for the authorisation of the installation belonged to a Social Democratic Government which politically opposed the project; he took the occasion of the Chernobyl catastrophe of 1986 to demand the developer to conduct an additional check of the safety of the planned installation on the basis of information learned from the Chernobyl disaster. Reacting to this, the *Bund* Minister for the Environment, Nature Protection and Nuclear Safety who belonged to the nuclear friendly federal Christian Democratic Government issued an instruction to the *Land* forbidding it to ask for the additional checking. The *Land* filed a complaint against this instruction at the *BVerfG* arguing that the instruction infringed the precautionary principle which – uncontroversially – was established by the German Nuclear Power Act (*Atomgesetz – AtomG*)[23] as a substantive standard for

[21] Art. 84(4), sentence 2 GG *supra*.

[22] Art. 93(1), No. 3 GG *supra*.

[23] Atomgesetz 1959, as amended.

any nuclear power plant. The *BVerfG* dismissed the complaint, introducing the distinction between two dimensions of mandated administrations: the competence of performance ("*Wahrnehmungskompetenz*") and the competence of substance ("*Sachkompetence*"). It argued that although the *Land* did have a right to execute the *AtomG* and was responsible for this in relation to third persons (*Wahrnehmungskompentenz*), it had no exclusive right to determine the content of its decision (*Sachkompetenz*) but was subjected to any instruction of the *Bund*, be it on questions of legal interpretation, policy or factual proof. Even in cases of misinterpretation of the law, it was in the power of the *Bund* to impose its opinion on the *Land*. Only in cases of bluntly irresponsible instruction or complete procedural disregard for the views of the *Land* could the *Wahrnehmungskompetenz* be touched upon and lead to a quashing of an instruction.[24]

In contrast, concerning genuine *Land* execution of *Bund* laws, the powers of the *Bund* to decide are somewhat more limited. As was already stated, if the law provides for administrative discretion, the *Bund* must leave this to be filled in by the *Länder*. It cannot impose its own policy on a *Land*. If the *Bund* does this nevertheless by fettering the discretionary margin of the *Land*, the *Land* can take recourse to the *BVerfG*. With regard to differences in legal interpretation, however, the *Bund* has the final word. It can express its views by administrative guidelines. If it finds that some administrative practice of the *Land* has infringed *Bund* law, the *Bund* has the power to declare that an infringement has been committed. It is expected that the *Land* will then change its attitude. If it refuses to do so, the *Bundesrat* can make a decision against which the *Land* can appeal at the *BVerfG*.[25]

A further kind of vertical conflict can arise between *Land* and local self-government. As was already stated, the local authority can act in a double function: as communal self-administration and, by delegation of functions, as the lowest level of *Land* administration. In the former realm, the *Land* can only check the legality of communal action; should it intrude into discretionary margins the local authority can take recourse to the administrative court. Contrastingly, in the latter realm, higher *Land* authorities can issue administrative guidelines and individual instructions both concerning the interpretation of the law and questions of policy within discretionary margins. Because the local authority is acting

[24] BVerfG Judgment 2 BvG 1/88 of 22 May 1990, BVerfGE 81, 310–347 (332 *et seq.*).
[25] *See* footnote No. 21 above.

as part of the hierarchical organisation of the *Land* in this respect, it is denied a right of appeal against supervisory orders.

Local self-government is according to German constitutional doctrine constructed as a specific mode of organising an administrative function, i.e. "bottom up" as opposed to the "top down" of *Land* administration. This has two implications which are crucial whenever the *Land* (or *Bund*) administration wants to implement projects for which it is competent to provide authorisation. For instance, the Commune of Sasbach opposed the construction of the nuclear power plant at Wyhl in the upper Rhine valley arguing (1) that the radioactive emissions would cause health risks to the local population the collective interest of which the Commune claimed to be able to represent, and (2) that the humid fumes from the cooling tower would disturb the ripening of grapes on the vineyards owned by the Commune. The *BVerfG* which was finally invoked in the case ruled that the Commune had no right of standing in the alleged two respects.[26] Concerning (1) it was not entitled to represent the collective interest of its inhabitants outside its specific administrative task. Such tasks included for instance land use planning but not health protection. Concerning (2) the Commune could not base its complaint on the constitutional protection of (land) property because basic rights are rights of citizens against the State but not of the Commune which being an administrative body is part of the State. While this is ruling interpretation there are also opposing views who construct the local self-government as a democratic bottom up organisation that is perfectly capable of forming a local political will and rely on basic rights.[27]

6. Conflicts between Sectoral Administrations

Many conflicts can arise between sectoral administrations. This is most evident with regard to bodies representing economic development and others representing environmental protection. In addition, conflicts between bodies defending different environmental concerns have recently also emerged. This is most visible in conflicts between climate policy and biodiversity protection; see for instance, the impact of biomass

[26] BVerfG Decision 2 BvR 1187/80 of 8.7.1982 (Sasbach), BVerfGE 61, 82 (101 et seq.).
[27] For a historical background of this doctrine see D. Schefold, *Bewahrung der Demokratie. Ausgewählte Aufsätze* (Berlin, BWV – Berliner Wissenschaftsverlag, 2012), at 431–456.

production on nature and landscapes, which is hardly controlled by the sustainability conditions required by EU law.[28]

Conflict resolution in these cases is based on rules of competence and participation. In most cases, one administrative body is given the final word after having heard others in the decision-making process. Hearing means that the third body has the right of comment and that the competent body must take this into account without however being bound to it. Sometimes the law only generally prescribes that the competent agency shall invite comments from all those agencies whose areas of competence are affected by the case at stake.[29] Other laws precisely identify the agencies that are to be heard. For instance, in the decision-making process regarding the release of genetically modified organisms, the primarily responsible Federal Agency for Food Safety and Consumer Protection (*Bundesamt für Lebensmittelsicherheit und Verbraucherschutz*) must hear the Federal Agency for Nature Protection (*Bundesamt für Naturschutz*) in relation to environmental effects as well as the Robert Koch Institute and the Institute for Risk Assessment in relation to health effects.[30]

If the role of the third body shall be stronger than simply to be heard, the law may provide that the decision requires its consent. In the environmental field, hardly a case exists in which such consent requirement has been introduced. Earlier examples have been abandoned in the course of the policy of removal of investment obstacles and acceleration of procedures. For instance, the nature protection laws of some of the *Länder* required the consent of the nature protection agencies in cases in which another agency was competent to decide about projects encroaching on natural sites.[31] This gave nature protection a strong stance in the daily conflicts with development-minded agencies. The most important remaining case of consent requirement is on the rights of communal

[28] *See* Art. 17 Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the promotion of the use of energy from renewable sources and amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC (2009) OJ L140/16.

[29] *See*, for industrial installations, Para. 10(5) of the BImSchG *supra*, and for infrastructure projects Para. 73(2) Verwaltungsverfahrensgesetz – VwVfG 1976 as amended (Administrative Procedure Act).

[30] Art. 16(4) Gentechnikgesetz – GenTG 1990 as amended (Act on Genetic Engineering). The right of comment of the other agencies is named "*Benehmen*" which indicates more significance than the simple hearing. In actual practice, this hardly makes a difference because, in any case, the comment is not binding for the final decision.

[31] Para. 7(1) Hessisches Ausführungsgesetz zum Bundesnaturschutzgesetz (Nature Protection Law of *Land* Hessen) of 1980, as amended; this requirement was dropped when the *Bund* promulgated its comprehensive Nature Protection Law based on its new concurrent competence in this field (*see* above).

self-administration in land-use planning. If a zoning plan was established by a Commune, the administrative agency in charge of construction authorisation – this is a body belonging to the sphere of mandated local administration – must respect any provision contained in the zoning plan. However, if the Commune did not establish a zoning plan for a given area and a project shall nevertheless be realised at this place, the administrative agency may only provide the authorisation after consent of the Commune.[32] Thereby the Commune has the opportunity to bring in any planning concerns it had lacked to express by formal planning. However, in the normal case, the Commune's primary concern will anyway be economic development, not necessarily environmental protection. Thus, in reality not many conflicts emerge between the Commune and the licensing authority.

If two administrative agencies are competent to decide on one case, a method of overcoming conflicts of decisions is the integration of procedures as, for instance, required by the IPPC Directive.[33] Article 7 of this Directive states:

> Member States shall take the measures necessary to ensure that the conditions of, and procedure for the grant of, the permit are fully coordinated where more than one competent authority is involved, in order to guarantee an effective integrated approach by all authorities competent for this procedure.

For instance, in Germany authorisations must be obtained for the construction of industrial installations both concerning possible air and water pollution. Depending on the provisions of the *Länder* on the distribution of competences, these authorisations may be issued by two different administrative agencies. Integration of procedures then means that they have to coordinate their procedures to prevent contradictory decisions.[34] The two competences may however, also reside in one overarching administrative agency. In this case, the integration is only a matter of coordinating the work of the responsible departments within the agency. It should be added that the author is sceptical about overly strong integration: the organisational separation of functions appears to better guarantee that

[32] Para. 36 *Baugesetzbuch – BauGB* (Construction Code) 1960, as amended.

[33] Directive 2008/1/EC of the European Parliament and of the Council of 15 January 2008 concerning integrated pollution prevention and control (2008) OJ L24/8.

[34] *See* for example Para. 12(3) of the niedersaechsisches Wassergesetz (Lower Saxony Water Law) which states: "The agency for water coordinates the water related authorisation procedure and authorisation with the procedure and content of [air, G.W.] emission authorisation."

the different concerns – especially the weaker ones – can, in this way, be better represented and defended.

7. Participation of the Public in Environmental Policy Formation and Law Application

Since the early 1970s public participation has gained much ground in German administrative law. Traditionally, administrative procedures were open for participation only to those individuals whose individual rights were negatively affected by the prospective outcome of the proceedings. The *citoyen*, i.e. the individual acting as a member of general public rather than the *bourgeois*, i.e. the person affected as an individual was rarely invited to participate.[35] The turn toward involving the public has had different causes, including the student's movement, the overturning of the conservative post-war coalition of the Christian and Free Democratic Parties by the social democrats in 1969,[36] and the impact of the European Communities which activated the citizens as a means of enforcement of European environmental law.[37] Over the time, the participation of the public in rule-making and authorisation procedures was introduced by an increasing number of sectoral environmental laws. A constitutional basis for this was laid by the *BVerfG*, which ruled that the fundamental rights (such as the right to health), while guaranteeing a certain substantial level of protection, additionally had a procedural dimension guaranteeing the right holder to be heard in the procedures affecting his or her right.[38]

Other than in proceedings concerning industrial processes and land use, public participation has hardly been introduced in proceedings concerning the design and marketing of products. For instance, the German regulation of procedures concerning the authorisation of placing pesticides and genetically modified organisms on the market does not involve the public.[39] According to the predominant German legal doctrine, the

[35] See for an elaboration of these two role constructs of the citizen R. Smend, "Bürger und Bourgeois im deutschen Staatsrecht" in R. Smend, *Staatsrechtliche Abhandlungen* (Berlin, Duncker & Humblot, 1955), at 309–325.

[36] The phrase proclaimed in 1968 by the SPD chancellor Willy Brandt became famous: "*Mehr Demokratie wagen*" (dare more democracy).

[37] J. Masing, *Die Mobilisierung des Bürgers für die Durchsetzung des Rechts: europäische Impulse für eine Revision der Lehre vom subjektiv-öffentlichen Recht* (Berlin, Duncker & Humblot, 1997).

[38] BVerfG Judgment 1 BvR 385/77 of 20 December 1979, BVerfGE 53, 30–99 (59 *et seq.*).

[39] Cf. Para.14 Pflanzenschutzgesetz – PflSchG 1986 (Plant Protection Act), as amended in 2012, and Para. 18 Genetic Engineering Act *supra*.

reason for this has always been that the placing of products on the market does not directly and individually affect individuals, because it cannot be predicted who will consume what product. Contrastingly, European Community law did provide for public participation in various product-related legal acts, including the acts on the registration of chemicals and the authorisation of pesticides, biocides and GMOs.[40]

The specific forms of participation, to the extent they are foreseen by German laws, differ in many respects. In some cases, only those persons affected by a decision are allowed to participate;[41] in other cases, it is everybody's right.[42] Some laws only invite written comments, whereas others make an oral hearing obligatory or give the responsible body discretion on whether to call a hearing.

More recently, in an overzealous attempt to remove investment obstacles, participation has been cut back in various ways. For instance, the public hearing was excluded for procedures on the release of GMOs.[43] In relation to the construction of industrial installations, a public hearing was changed from an obligation to a discretionary option of the responsible agency.[44]

8. Enforcement of Environmental Law

Enforcement of environmental law may deal with unlawful and lawful behaviour of addressees.

[40] Normally, the publication of a short version of the dossier submitted by the applicant as well as the draft risk assessment report must be published, and the public must be given a possibility to comment. For example, regarding chemicals *see* art. 64(6) and 119 Regulation (EC) No. 1907/2006 of the European Parliament and of the Council of 18 December 2006 concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (REACH) (2006) OJ L396/1; for pesticides, *see* art. 10 and 12(2) Regulation (EC) No. 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market (2009) OJ L309/1.

[41] For plan approval procedures, *see* Para. 73(4) *VwVfG supra*.

[42] For authorisation procedures for industrial installations, *see* Para. 10(3) sentence 4 *BImSchG supra*.

[43] S. 18(3), sentence 2 *GenTG supra*.

[44] S. 10(6) *BImSchG supra*. Unfortunately, the IPPC Directive (Annex V No. 5) leaves it to the discretion of the Member States whether or not to provide a public hearing. *See* Directive 2008/1/EC *supra*. The Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters of 1998 does not prescribe a public hearing either (*see* Art. 6(7)). *See* Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (Aarhus, 25 June 1998) 2161 UNTS 447.

8.1. *Unlawful Activities*

Concerning unlawful activities or omissions of private actors, three kinds of powers may be distinguished that are at the disposal of administrative authorities. First, the administrative authority may order a party to desist from an activity or to undertake an activity; such orders specify a legal obligation of the party established by law or a condition attached to an administrative act (e.g., if an operator discharges noxious substances exceeding the thresholds established by law or conditions attached to an authorisation). If there are no sectoral provisions explicitly providing these powers, they can be based on the general police power laid down in the *Land* police laws. In cases of environmental damage and absent sectoral law, the environmental damages law (*Umweltschadensgesetz*; which transposes the Environmental Liability Directive)[45] is applicable, empowering authorities to order preventive or remedial action.

Second, if the operator does not follow an order of an administrative body, the administrative agency may take measures of administrative execution (*Verwaltungsvollstreckung*). Such measures are either a so-called compulsion payment (*Zwangsgeld*), which shall induce the operator to act, or the mandating of a third person to realise the order at the cost of the operator (*Ersatzvornahme*), or the use of direct force (*unmittelbarer Zwang*). In the normal case, the application of a measure must be announced beforehand, giving the operator a last delay for compliance. In practice, administrative agencies will negotiate with the operator about remedial steps, thus, as legal sociologists term it, bargaining in the shadow of the law.

Third, the administrative body may impose a fine under the Administrative Infringement Act (*Ordnungswidrigkeitengesetz – OWiG*). The fine is conceived as a punishment for law violations. *Mens rea* is required for this. Such a fine can be imposed together with measures of administrative execution but stands as a mutually exclusive alternative with criminal prosecution. An appeal against such a fine will be decided by the criminal courts. This meets criticism because most cases involve scientific and technical questions which to decide administrative courts appear to be more experienced. Although the prosecution under the Administrative Infringement Law must identify a responsible individual, the fine may

[45] Directive 2004/35/EC of the European Parliament and of the Council of 21 April 2004 on environmental liability with regard to the prevention and remedying of environmental damage (2004) OJ L143/56.

nevertheless be addressed to the corporation if the perpetrator acted on its behalf.

Fourth, if the unlawful behaviour is a crime, the administrative agency may inform the public prosecutor who will then initiate criminal prosecution. Criminal law normally presupposes that damage was caused while administrative infringement sanctions react to the simple violation of legal duties. Until now, criminal prosecution has only been possible against natural persons so that a company as such could not be sued. Sanctions against legal persons will however, have to be established according to Directive 2008/99/EC.[46]

Finally, if the activity to be suppressed is based on an unlawful administrative authorisation, the administrative agency must first revoke the administrative act and then forbid the activity. However, in cases of legitimate trust by the operator in the lawfulness of the authorisation, the authority must provide compensation.[47]

It should be noted that all these sanctions (except criminal ones) can be imposed by the competent administrative body without going to court and asking for a judgment. This marks a fundamental difference between civil and common law systems.[48]

8.2. *Lawful Activities*

Concerning behaviour based on a lawful authorisation, this can only be suppressed if certain preconditions are met. The most important case is that new conditions (such as new knowledge about environmental risks, better available technology or a more restrictive legal policy) have emerged. In that case, the administrative body may withdraw the authorisation. In principle, compensation is due in such cases.[49] However, according to sectoral legislation, particularly dangerous activities are subject to subsequent alterations of conditions without compensation even though they have once been authorised. This is, for instance, the case with highly dangerous installations, large infrastructure projects, and installations discharging waste water into public waters. Such power of subsequent

[46] Directive 2008/99/EC of the European Parliament and of the Council of 19 November 2008 on the protection of the environment through criminal law (2008) OJ L328/28.

[47] Para. 48(3) *VwVfG supra.*

[48] *See* further R. Macrory, *Regulation, Enforcement and Governance in Environmental Law* (Oxford, Hart Publishing, 2010), at 79 *et seq.*

[49] Para. 49(2)(3)–(5) and (6) *VwVfG supra.*

imposing new requirements is an important tool to keep environmental protection up to date with technological and scientific progress.[50]

9. Evaluation

9.1. *The Federal System and the Effectiveness of Environmental Protection*

One of the questions of the present book is whether federal systems adequately respond to the needs of environmental protection. The answer is, at least for Germany, not easy to give. Overall, one can say that German federalism, although very complicated in detail, provides a rather simple solution: the essential decisions are taken at the federal level while execution is the realm of the *Länder*.

Essential decisions include the setting of material standards and the structuring of administrative procedures. As a matter of fact, the most important innovative steps in the post-war development of German environmental law were all taken by federal legislation. These include:

- the introduction of the precautionary principle
- the environmental impact assessment
- requirements of best available technology
- free access to environmental information
- public participation in authorisation procedures
- tools of enforcement of environmental standards
- enlarged conception of legal standing, including the association action
- economic instruments such as the waste water charge and the climate gas emissions cap and trade
- environmental liability
- new sectoral risk control such as that of genetically modified organisms, nanotechnology and nonionising radiation
- new concepts for further sectoral risk control such as the water basin approach in water law and the Natura 2000 nature protection regime
- structural changes of policies like that of redirecting energy production from fossil fuel and nuclear fission to renewables

Many of these strategic decisions were triggered by EU legislation and EU Court jurisprudence, such as the environmental impact assessment, freedom of information, a broader concept of legal standing, climate gas

[50] Para. 17 *BImSchG supra*; Para. 13(2)(1) *Wasserhaushaltsgesetz – WHG* 2009 (Water Management Act); Para. 75(2) sentence 2 *VwVfG supra*.

emissions capping and trading, environmental liability, the water basin approach, and the network Natura 2000. In some respects, Germany has also been able to feed its national concepts into EU legislation, such as the precautionary principle and the standard of best available technology. Over the years, however, Germany has given up its earlier role as an environmental pioneer and sometimes acted as a brake on EU environmental law making. For instance, it opposed the development of freedom of information legislation, the widening of *locus standi* and the introduction of the association action. It also supported the move toward deregulation, such as, for instance, when the protection standards concerning genetically modified organisms were lowered.[51]

Concerning the role of the German *Länder*, although their main function is enforcement, they also play an important role as players in federal law making. Their forum in this regard is the *Bundesrat*. However, concerning strategic environmental issues, the *Länder* are normally guided by party policies rather than by genuine *Land* interests. For instance, when the *Bund* coalition of the Social Democratic Party and the Greens introduced rules on coexistence of GMO and non-GMO farming, the draft, which in some aspects disfavoured GMO-farming, was opposed by the *Länder* ruled by the Christian Democratic Party and the Free Democratic Party. One *Land* – Sachsen-Anhalt – even went to the *BVerfG* asking for annulment of the law.[52]

This role of the *Bundesrat* sometimes leads to a standstill of *Bund* legislation when the coalition majorities in the *Bundestag* and the *Bundesrat* differ from each other. Whether this acts in favour of or against environmental protection depends on whether the envisaged *Bund* legislation shall improve or water down environmental protection:[53] improvement will not be granted because of the veto position of the anti-environment

[51] Although Art. 4 Directive 2001/18/EC establishes the precautionary principle for the release and placing on the market of all GMOs, this is lacking in Art. 4 Regulation (EC) 1829/03 for the sector of GMOs for food, feed and cultivation. Compare also Art. 23(1) Directive 2001/18/EC with Art. 34 Regulation (EC) 1829/03; the former allows safeguard measures if there is any risk to human health or the environment, the latter only allows such measures only if there is "evidence" of "serious risk". *See* Directive 2001/18/EC of the European Parliament and of the Council on the deliberate release into the environment of genetically modified organisms and repealing Council Directive 90/220/EEC (2001) OJ L106/1; Regulation (EC) No. 1829/2003 of the European Parliament and of the Council of 22 September 2003 on genetically modified food and feed (2003) OJ L268/1.

[52] *See* footnote No. 3.

[53] Political scientists tend to criticize this stalemate of what they call policy interlacing (*Politikverflechtung*); *see* F. Scharpf, *Föderalismusreform – kein Ausweg aus der*

coalition, but neither will standards worsen because the pro-environment coalition can then place its veto. A possibility at the disposal of the ruling coalition is then to draft the law in a way which dispenses with the requirement of consent of the *Bundesrat*. This is the case if a law does not involve questions of administrative procedure and organisation, that is, the realm reserved to *Bundesrat* codetermination.[54] For instance, in 2009, when the coalition of Christian and Free Democrats decided to prolong the allowable running time of nuclear power plants, it was opposed by the *Bundesrat* majority led by the Social Democrat and Green Party ruled *Länder*. The law was drafted carefully, avoiding additional administrative burdens. Although it was finally adopted by the *Bundestag* majority, some opposing *Länder* filed a complaint at the *BVerfG* arguing that the law did in fact involve procedural questions.

The fact that the space for genuine *Land* legislation is small could be critically seen because it may hinder the *Länder* in developing standards that are stricter than those of the *Bund*. This suspicion is made even worse by the fact that the category of framework competence was given up and replaced by that of concurrent competence. However, in political practice, the *Länder* have only seldomly used their discretionary margins. For instance, when nature protection was still a framework competence of the *Bund*, leaving the *Länder* space to fill in the *Land* Hessen, as noted earlier, required consent of the nature protection agency for any encroachment on natural sites. When the competence was made a concurrent one, the *Bund* did not introduce this requirement in its new nature protection law of 2009 but only required that the nature protection agency must be consulted.[55] The *Land* could have established the consent requirement by relying on its constitutional right to deviate from *Bund* standards.[56] However, the *Land* did not make use of this right. It did not reintroduce its earlier solution but adopted the *Bund* standard.[57]

Politikverflechtungsfalle (Frankfurt/M, Campus, 2009). However, the stalemate can sometimes be beneficial.

[54] Art. 84(1), sentence 5 GG.

[55] Para. 17(1) Bundesnaturschutzgesetz - BNatSchG (Federal Nature Protection Act) 2009.

[56] Art. 72(3), first sentence(2) GG. In this case, the relevant provision of the *Bund* law (Para. 17 BNatSchG) even made it explicit that the *Länder* can go further.

[57] Para. 7(4) Hessisches Asuführungsgesetz zum Bundesnaturschutzgesetz (Act of Land Hessen) of 2010 implementing the *BNatSchG supra*.

The primary responsibility of the *Länder* to enforce rather than to make environmental legislation should not be regarded as a purely technical issue. It is of utmost importance that laws are effectively enforced. Effective enforcement depends on a number of factors including the organisation of administrative bodies, the distribution of competences, the quantity and quality of personnel employed, and the technical equipment at the disposal of the supervisory authorities. In addition, the general political orientation of a given *Land* government concerning the balancing of environmental and economic interest is an important factor of environmental enforcement.

On the whole, it seems fair to say that the enforcement responsibility of the *Länder* has proven to be effective. The situation would hardly be better if this responsibility was shifted to *Bund* agencies. To the extent administrative activities have consequences for the entire State – such as in relation to placing products on the market and concerning the collection of comprehensive environmental data – competences have understandably been entrusted to the *Bund* level.

In conclusion, therefore, applying a standard of bounded rationality, the German federal system of environmental protection has proven to be a viable concept. Many things could of course be improved, but they are hardly related to the question of federalism.

9.2. *EU Legal Acts and German Federalism*

According to established EU practice and ECJ jurisprudence, EU law is uncommitted regarding the internal organisational structures of the MS. If legal acts are required to be transposed into law (such as directives, regulations leaving space open for MS legislation, and certain decisions), they are addressed to the entire State. The responsibility for the ensuing legislation is a matter of competence distribution under domestic law. The same is true in relation to the many obligations the EU legal acts lay upon administrative bodies. Their addressee is once more the entire State, while the final responsibility results from internal law. In the same line, if a *Land* is responsible to legislate or enforce a law and does not abide by EU legal acts, EU sanctions will be aimed at the *Bund*.

The internal organisational structure must, however, ensure that EU law is effectively transposed and administered. One would expect that the *Bund* is given powers to assume this task. However, the *Grundgesetz* is tacit in that regard. Although the EU Commission is mandated and entitled to supervise the transposition of EU law into national legislation and

administrative practice,[58] no such task and powers have explicitly been entrusted to the *Bund* in relation to the implementation of EU law by the *Länder*. However, the general supervisory powers the *Bund* possesses when a *Land* breaches the Constitution or *Bund* laws are commonly interpreted to also cover the implementation of EU law. If a *Land* does not transpose an EU directive or fails to apply EU law in administrative practice this is regarded as a violation of the constitutional principle of faithful respect of the *Land* for the *Bund* (*Bundestreue*) thus empowering the *Bund* government to take "the necessary steps to compel the *Land* to comply with its duties", including also "the right to issue instructions to all *Länder* and their authorities."[59] The *Land* may appeal against such measures at the *BVerfG*.[60]

In actual fact, however, these oversight powers of the *Bund* have never been used in relation to the non-implementation of EU law. The *Bund* rather prefers informal means to make the *Länder* comply with EU law, and if it does not succeed, it usually waits for the EU Commission initiating a treaty infringement procedure. If, in such case, the treaty infringement procedure leads to a fine, the offending *Land* must pay.[61] Of course, the threat of such sanctions will motivate the *Länder* to abide by their obligations.[62]

Thus, in overall effect, EU supervisory instruments lead to a cooperation among national actors rather than increasing conflicts between them.

9.3. *EU Good Governance Principles and German Environmental Law*

9.3.1. *Participation*

As was previously outlined (section 7), EU law has had a decisive impact on German administrative procedures. The tradition of confining participation in proceedings to those persons whose individual rights are affected by the outcome has been converted into a broader concept involving the public at large or, in more restricted cases, stakeholders who are *de facto*,

[58] Art. 17(1), first and second sentence TEU; Art. 258 TFEU *supra*.

[59] Art. 37 GG. *See* C. Baier, *Bundesstaat und Europäische Integration. Die „Europatauglichkeit" des deutschen Föderalismus* (Berlin, Duncker & Humblot, 2006), at 214 *et seq*.

[60] Art. 90, No. 3 GG.

[61] Art. 104a(6), first sentence GG.

[62] K. Gerstenberg, *Zu den Gesetzgebungs- und Verwaltungskompetenzen nach der Föderalismusreform* (Berlin, Duncker & Humblot, 2009), at 307.

but not necessarily also *de iure* affected. More recently, however, there has been a trend toward reducing participation because it is regarded as an obstacle to investment and economic growth.

9.3.2. *Accountability*

German law is rather precise in identifying that institution which is accountable for a decision. Legislatory competences are clearly distributed between *Bund* and *Länder*. The level which is competent is also accountable for any legislatory failure. For instance, if an EU directive was not transposed and this causes damage to a beneficiary of the directive, the *Bund* or *Land* is liable to pay compensation depending on which is competent to transpose the directive. The same is true for failure in the administrative realm. That level is accountable which is competent to make a decision or other action. Which level that is depends on whether the task belongs to the genuine *Bund* administration, mandated *Land* administration or genuine *Land* administration.

9.3.3. *Effectiveness*

As was shown previously (section 8), German law has developed a rather differentiated system of enforcement tools. In practice, however, the command and control approach which is reflected in these tools is seldomly being applied if business can be induced to respect its obligations under environmental law. In cases of infringement, administrative agencies rather tend to use ways of persuasion and education. However, this does not make the farer reaching powers superfluous. They serve as a fallback position which allows administrative agencies to negotiate in what legal sociologists call the "shadow of the law".

9.4. *Centralisation or Decentralisation?*

A general trend of centralising both legislatory and administrative competences certainly exists in the environmental field. One major element in this regard was the replacement of the category of a framework competence by the category of concurrent competence which reduced the legislatory space of the *Länder* in relation to nature protection and water management. It is true that this loss was somewhat compensated by the right of the *Länder* to initiate deviating legislation but in actual practice, they do not often make use of this right.

A trend toward centralisation is also noticeable concerning administrative competences. As was outlined previously (section 4), within the category of mandated *Land* administration, the *BVerfG* almost completely emptied the rights of the *Land* to determine the content of a decision. In controversial cases, the *Länder* were degraded to mere receivers of *Bund* instructions. Concerning genuine *Land* enforcement of *Bund* laws, the *Bund* has attracted increasingly more administrative functions by establishing semi-independent *Bund* agencies, especially concerning the collection of environmental data as well as concerning the placing of products on the market.

Whether this centralisation is to the better or worse of environmental protection, however, is not easy to determine. Reasonable ground certainly exists for centralising legislation and administration on the placing of products on the market. The same is true for the collection of environmentally relevant data. In contrast, doubt surrounds whether the construction of large transportation networks should be decided by national authorities. Of course, the trans-regional economic importance of such projects speaks in favour of centralisation. However, the environmental effects – air pollution, noise, damage to nature – are primarily local and regional. This should at least lead to a requirement of local or *Land* authorities to consent to a project; however, this is not foreseen.[63]

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[63] *See* Para. 38 Construction Code *supra*; the requirement that construction projects must be consented with local authorities is removed for projects subject to plan approval procedures (*Planfeststellungsverfahren*). These are mainly infrastructure projects such as transportation networks.

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