

NATIONAL AFFAIRS

Germany

The Failure of the Environmental Code – A Retrospective –

by Sigmar Gabriel*

The beginning of February 2009 saw the failure of a particularly ambitious and long-needed project to reform and restructure environmental law in Germany – the Environmental Code (*Umweltgesetzbuch*). Environmental provisions, currently scattered over many individual acts, were to be united and consolidated into a single code. The aim was to create a modern, user-friendly and integrated environmental law involving as little bureaucracy as possible.

In their government programme of November 2005, the current coalition parties agreed to implement the reform before the next parliamentary elections in September 2009. In accordance with this mandate, in November 2007 the Federal Environment Ministry submitted a draft proposal for an Environmental Code. However, differences of opinion could not be overcome and the project failed before the parliamentary procedure had even begun. While a number of other European countries already have a consolidated environmental law, for the present Germany still has no such unified code.

The failure of the Code is particularly unfortunate for small and medium-sized enterprises, which would have benefited from this simplification of the law and the consequent streamlined bureaucracy, but it is also a missed opportunity for Germany to strengthen its environmental protection.

The History

Policy makers have pursued the goal of harmonising environmental law and consolidating it into an Environmental Code since the 1990s. Because German environmental law has developed over many years, it is fragmented and split among various specialist areas and between the different levels of government (federal and state (the *Länder*)). The various acts each have their own structures and concepts (*e.g.*, the Federal Water Act, Federal Emission Control Act, Waste Avoidance and Waste Management Act). What is especially unsatisfactory is that the authorities base their decisions on the different approaches taken in the various specialist laws, even though the environmental aims are basically the same.

As early as 1999, after extensive scientific preparatory work, the Federal Environment Ministry submitted a draft for an Environmental Code which focused on regulations for the authorisation and monitoring of industrial instal-

lations. At the time, the project could not be realised due to constitutional concerns. There were particular problems with regard to the Federal Government's limited regulatory powers in the areas of water and nature conservation.

In one of its last meetings before elections, the German Federal Parliament voted with a majority to update four laws originally intended to be part of an Environmental Code addressing:

- 1) Nature Conservation (with 38 amendments);
- 2) Water (with 37 amendments);
- 3) Consolidation of existing environmental laws;
- 4) Non-ionising radiation.

Several Parliamentarians expressed their regret that the Environmental Code had not been adopted, but felt that there were currently no other alternatives aside from separate laws. (WEB)

Constitutional reform in 2006 cleared the way for an Environmental Code. The reform redistributed legislative powers between the Federation and the *Länder*, and it was agreed that this reorganisation should lay the foundations for an Environmental Code. The Federation's regulatory powers in the area of the environment were significantly extended.

The Concept

The Environmental Code 2009 was intended as a moderate reform of environmental law, *i.e.*, it was not a question of making radical changes to German environmental law, but of incorporating existing and proven regulatory concepts into the Code. Also, maintaining existing environmental standards was an important goal. If provisions had to be revised or amended, that revision should not involve either relaxing or tightening existing environmental standards.

Originally, the regulatory package *Environmental Code 2009* consisted of six books and two legislative provisions to implement the Code, as well as an introductory act addressing adaptation of existing provisions to the new law. The six books regulated:

- General provisions and project authorisation;
- Water law;
- Nature conservation law;
- Law on non-ionising radiation;
- Emissions trading; and
- Renewable energies.

Book I contained general provisions and environmental legislation relating to projects. At the heart of this book was the introduction of an integrated project approval

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procedure. This was a new form of environmental authorisation which was to apply in future to industrial installations and other projects with environmental relevance. The subsequent books transferred existing specialist law to the Environmental Code, in some cases unaltered and in others supplemented with new provisions based on the Federation's extended regulatory powers in the field of the environment.

The Aims

The draft Environmental Code pursued various goals. Three of these are of particular note:

Standardisation and Harmonisation

One important aim of the Code was to introduce transparent, straightforward regulatory structures. The current range of national environmental provisions contains conceptual, structural and technical differences some of which can only be justified for historical reasons. This makes German environmental law increasingly difficult to navigate and is also an obstacle to enforcement. The Environmental Code aimed at revising, harmonising and simplifying environmental law, eliminating regulatory differences which no longer have any real justification, and substantially reducing the number and variety of provisions.

Simplification of Authorisation Procedures

A key aim of the draft Code was to simplify existing procedures for the authorisation and monitoring of industrial and water management projects. The traditional division of German environmental law into separate specialist areas has led to parallel procedures for project authorisation. Erecting and operating industrial installations often requires both a licence under air quality control law and a permit under water law. Different evaluation and decision-making processes apply for these specialist areas of law. The Environmental Code was to replace this dual authorisation system with an integrated project approval procedure. The requirements under air quality control and water laws were united in the overarching concept of integrated project approval, without any lowering of environmental standards. It would have applied "one licensing authority, one approval procedure, one uniform evaluation and decision-making process and one approval decision" for the approval of environmentally relevant projects.

The value added of this new form of authorisation lies firstly in its *optimised integration capacity*. The cross-media treatment of the environment which is both a practical necessity and a requirement under European law is much simpler and more effective using the approval system created by the Environmental Code than with separate and merely coordinated authorisation procedures. Secondly, this new type of authorisation gives both applicant and authority *tangible gains in efficiency and eases their administrative burden*. The applicant only has to deal with one authority, application documents only need to be drawn up and submitted once, and the procedure is subject to uniform requirements. The results of the national administrative burden assessment for

the Environmental Code showed that harmonising and streamlining authorisation provisions could save around 10% of the current administrative costs, and authorities would benefit from better access to the different technical evaluations and less duplication of work.

Structural Continuity in Environmental Legislation

The Code also aimed to create a stable and durable legislative framework. Codification was intended to give environmental provisions a logical structure to ensure that they were comprehensible in the long term. This would have noticeably improved orientation, planning and legal certainty for both individuals and industry.

The Consultation Process

The draft Code did not appear on the desks of ministerial administrators as a theoretical plan with no practical relevance. Even before the later hearing of the Länder and associations, which are a regular part of the passage of any legislation, the Federal Environment Ministry ensured that all stakeholders were broadly and intensively included at an early stage. A working group set up by the federal and state environment ministers closely followed the elaboration of the Environmental Code. At the same time, from an early stage the Federal Environment Ministry regularly involved representatives of industry and environmental associations, national associations of local authorities, the judiciary, the Bar, enforcement bodies and reputable legal scholars. Working papers and preliminary drafts were made accessible and brought into the discussions from very early on. Simulations, workshops and expert discussions with representatives of authorities and companies examined in depth the authorisation and administrative provisions, in order to assess their user-friendliness and enforceability. Many of the resulting observations, comments and suggestions were incorporated into the draft. All in all, there cannot be many laws in Germany in which all the interested parties were so intensively involved during the preparatory stages. The end result was clear: The provisions "work" in practice and present no problems for those applying them. This is why the state environment ministers, whose authorities would in future have to implement the Environmental Code, were virtually unanimous in supporting the Federal Environment Ministry draft.

At the end of November 2007, the Federal Environment Ministry initiated formal consultation within the German government. Contrary to expectations, the consultation process proved to be extremely tough. There were numerous proposals for amendments, the vast majority from the Economics and Agriculture Ministries. At their insistence, substantial changes were made to the draft even before the formal hearing of the Länder and associations. Even after this hearing, over 300 further amendment proposals were tabled by the Economics and Agriculture Ministries, thus prolonging the consultations. The timetable for the passage of legislation came under growing pressure. In a marathon consultation process lasting several months, on all levels, the Federal Environment Ministry managed to process this extensive catalogue as well. ➤

At the end of the consultations, the only remaining point of contention was how to structure the integrated project approval procedure. During this decisive phase, politicians from the various parliamentary groups increasingly voiced their opinions, making it necessary to coordinate input at a number of levels. Some politicians called for the integrated project approval procedure simply to concentrate on the process, or at least for its area of application to be considerably restricted. This would have meant largely retaining the existing law. Not much would have remained of the value added intrinsic in the proposed project approval procedure. These demands were not compatible with the reform aims of the Environmental Code as anchored in the coalition agreement, and were therefore not politically acceptable to the Federal Environment Ministry.

On 1 February 2009, the Federal Environment Ministry felt compelled to relinquish the project. Due to the entrenched differences of opinion, it was no longer possible to achieve the aimed-for implementation of the Environmental Code in the current legislative period.

Reasons for the Failure to Adopt the Code

Just as at the end of the 1990s, the Environmental Code faced massive opposition this time around. While all stakeholders insisted that of course they were in favour of an Environmental Code, in reality things looked very different. Only some of the publicly expressed support for the Code stood up to scrutiny. Once implementation became a serious prospect, a whole range of reservations suddenly appeared. In particular, trade and industry circles were sceptical or even suspicious, even though they should have been receptive to the aims of the Code, since they had been complaining for years that German environmental law was complicated, over-regulated and bureaucratic. All of a sudden companies declared they were actually quite happy with the existing provisions. They would rather not have an Environmental Code at all, but if it was necessary then they would prefer one that did not make any substantial changes to the law in force. Flawed but nevertheless familiar provisions were apparently more attractive than a new, simplified environmental law which had yet to be applied in practice.

This vague fear of the unfamiliar and the legal uncertainty it allegedly entails must be seen as one of the main reasons for the failure to adopt the Code. Many of those representing the interests of industry and agriculture generally suspected that practically every regulation which deviated from the current law was a surreptitious tightening of existing environmental standards. It is not surprising that the integrated project approval procedure – entailing the most far-reaching changes to existing law – was ultimately the downfall of the Environmental Code. It generated more intense discussions on the tightening of legal provisions and on legal uncertainty than any other component of the Code. Towards the end, these disputes became more and more incomprehensible, especially given that the outcome of the many negotiation rounds with state officials, practitioners and scientists (where they had deliberated on the draft Environmental Code and examined in depth

the impacts of its enforcement) was to prove the fears of industry in this regard to be quite unfounded.

A further contributing factor was the fact that some people wanted to use it to dismantle well established and proven environmental protection standards. Such demands considerably exacerbated the arguments over the Environmental Code without actually having anything to do with the Code's concrete reform aims. The key goal of the codification of environmental law was to eliminate its fragmentation across different areas of specialist law and to build a single, systematic and comprehensive structure. In the event, however, debates on environmental standards were conducted which dragged out the consultation process and sowed the seeds for the failure of the Environmental Code.

In view of the ambitious schedule, which was due to constitutional provisions, the Environmental Code could only succeed if all the stakeholders showed the political will. This was not the case. On the contrary, it appeared from the debate that legal practice is so reconciled to the existing fragmentation of environmental law that it sees no need at all for even material simplifications. For instance, following the failure of the Environmental Code, segments of industry were heard to say that it was not the end of the world and that industry had learnt in the past to manage with the law in force. However, this is a very shortsighted view. Certainly, there would have been a transition period when the switch to the new law would have been felt. According to the national administrative burden estimate for the Environmental Code, however, in the medium and long term the Code could have significantly eased the administrative burden and provided the impetus for growth and employment. In these times of economic and financial crisis, the failure to adopt the Code is all the more regrettable.

Outlook for the Future

In March 2009 the German government adopted parts of the Environmental Code package – Books II, III and IV – as individual laws. This paved the way for these books to be adopted by Parliament before the end of this legislative period. For the Federal Environment Ministry these individual laws are the consequence of the failure of the Code. The creation of new national provisions, especially in the fields of water law and nature conservation law, is a subtask arising from the 2006 constitutional reform in Germany, and it is important that this task at least is completed in the current legislative period. Without these new regulations at the federal level, the Länder could pass further deviating regulations, thus contributing to an even greater fragmentation of the law.

Nevertheless, the Environmental Code remains on the political agenda. A modern environmental law is needed and expected: one which protects the environment effectively and functions in a simple and non-bureaucratic manner. Especially at times of a struggling economy, businesses particularly need a clear and uniform legal basis in the field of environmental law. Furthermore, developments in European law, which is becoming increasingly integrated, oblige us to continue the discussions on an Environmental Code.



Hungary

Application of International Law

by Gyula Bándi*

Not specialising in international law, but examining environmental law from a public law and European law perspective, as the host of this distinguished conference in the memory of Alexandre Kiss, my focus is also the point of view of a public lawyer. There are two questions which I would like to examine today: first, the general problem of implementing international conventions, and their impact on the development of domestic law; second, the question of the right to environment.

Before we go into detail on these two issues, let us first look at the general situation of Hungary as a member of international environmental conventions. Hungary is a party to many international environmental agreements, of which around 60 had been enacted by the end of 2008, according to the electronic register of such documents. They are mostly multilateral conventions, but there are also several bilateral ones, mostly with neighbouring countries, which are not necessarily environmental agreements, but cover environmental elements, too, and which are not counted. The latest in this list is the amendment related to the Aarhus Convention (Act XIX of 2008) and as an empowerment to adopt the full text, the Stockholm Convention on Persistent Organic Pollutants (Act V of 2008). Luckily, most of the important international environmental conventions are covered in this list, including the Cartagena Protocol, Kyoto Protocol, CITES Convention, Aarhus Convention, Biodiversity Convention, Basel Convention, Helsinki Convention, Espoo Convention and others.

In some cases, Hungary was even able to play a leading role, the best known of which is the Basel Convention, which was initiated by Switzerland and Hungary together. We also had a significant role in the preparations for the Aarhus Convention, but in most cases our intervention was less direct.

The impact of international conventions on the Hungarian legal system in the past 14 years, after signing the accession agreement with the EC, can be coupled with the direct impact of Community law, due to the fact that several conventions and agreements form a part of the "*acquis communautaire*". Of course, this is not always a formal and direct impact. The Kyoto Protocol is a good example of the mixed nature of international cooperation under the EC. Hungary was a member of the whole climate change system in her own right, thus we received our country emissions allocations directly in the first round, and not through the Community system – simply because at the time of the first allocation period, we were

not EC members. However, the Community system is now the basis for the process of allocating emission rights within Hungary, and all the other procedural obligations of running the system; as a consequence of our membership, the EC obligations also became applicable in Hungary.

International Law and its Implementation from a Public Law Approach

The Hungarian system of enacting international conventions is a dualistic system, thus the specific agreements are not only ratified, but have to be enacted and adopted as part of domestic law in order to be effective and implementable. The details of the procedure for the adoption, promulgation and enactment of international conventions is regulated by Act L of 2005. Interestingly, the adoption of the above act is the direct consequence of a Constitutional Court Decision. It was the 7/2005 (III. 31) decision of the Court, which obliged the Parliament to revise thoroughly the original regulation of 1982 related to international conventions, as it was not in harmony with the Constitution and also not in harmony with the rule of state law. The deadline for changes given to the Parliament by the Court was the end of 2005.

The Court in its decision referred to Article 7 of the Constitution which stipulates how to translate international customary law and its general legal principles into the Hungarian legal system, while also providing for the harmony of international legal obligations and domestic law. It is the Constitutional Court which has the exclusive right to decide whether the transposition of international obligations has been undertaken fully in accordance with Paragraph 1 of Article 7 of the Hungarian Constitution. According to this provision the Court has the right to control both the conventions still under negotiation, and the conventions which have already been promulgated and enacted. The opinion of the Court in this respect is obligatory. Within this framework, the Court also emphasised its duty to monitor that the domestic legal regulations are in harmony with our international obligations or whether the legislator may have failed to meet the obligation to regulate something in line with the international commitments.

In addition, the Hungarian Constitutional Court dealt with other legislative issues related to international conventions several times, in connection with the procedure and duties of enactment of these documents.

The 30/2005 (VII. 14) decision found that the annexes of the 1944 Chicago Civil Aviation Convention had not been promulgated and hence were unconstitutional. The Convention itself was enacted in 1971, but without the annexes, while the texts were referred to in domestic relations. The judgment points to the fact that according to Article 7 of the Constitution, the harmonisation of

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international and domestic law may only be achieved through the promulgation of the convention. Partial proclamation and enactment does not meet this requirement. The annexes of a convention form an essential part of the document – similar to Community law or domestic law – thus the missing promulgation may also result in the same level of unconstitutional situation as if the text of the convention were missing.

Decision 8/2005 (III. 31) of the Constitutional Court emphasised that one of the major conditions of implementing international conventions is that they should not have a retrospective impact. In the given case the Parliament, while enacting in 2004 an international convention related to air cargo transport, claimed that one of the paragraphs has a retrospective effect – going back to the original time of adoption, that is 1965. The given convention is a self-executing convention, providing direct obligations and rights to private persons, and may directly be referred to in case of legal disputes. The Court underlined that even in the case of international conventions, the basic Constitutional requirements shall similarly be used, namely that the legislative actions should all be based on Article 2 of the Constitution, which contains such general requirements, as the prohibition of the retrospective effect, the need to provide enough time for implementation, and also the requirement to have clear, understandable wording of the norm. This also applies to retrospective effect, thus it is unconstitutional if the legislative regulation claims that the new requirement shall also be used within existing legal relations.

Understanding the Right-to-Environment Provisions

As a different comparative problem of international and Hungarian law, we may examine the emergence of the right to environment as a human right, on the one hand through the judgments of the European Court of Human Rights and on the other hand from the point of view of domestic law, through the provisions of the Hungarian Constitution and the judgments of the Constitutional Court. It makes the comparison even more interesting, that both Courts had their first major decision in the same year, 1994.

After some early attempts of the European Commission on Human Rights in the early 80s (see, e.g., *Arrondale v. UK* 7889/77), the European Court of Human Rights had its first landmark decision related to the indirect adoption of a right to environment approach, using Article 8 of the European Convention of Human Rights, in *Lopez Ostra v. Spain* (9 December, 1994). This case was followed by several others, such as *Fadeyeva v. Russia* (55723/00, 9 June, 2005) or *Moreno Gomez v. Spain* (4143/02, 16 February, 2005). I do not want to go into a detailed study of these decisions, as my task here

is only to refer to the connection between the European and Hungarian judgments.

In the *Fadeyeva* case, one may read a kind of summary of the previous judgments:

“70. Thus, in order to fall under Article 8, complaints relating to environmental nuisances have to show, first, that there was an actual interference with the applicant’s private sphere, and, second, that a level of severity was attained.

...

134. The Court concludes that, despite the wide margin of appreciation left to the respondent State, it has failed to strike a fair balance between the interests of the community and the applicant’s effective



The temple in the puszta near Somogyvámos, Hungary

Courtesy: Wikipedia

enjoyment of her right to respect for her home and her private life. There has accordingly been a violation of Article 8.”

In the *Moreno Gómez v. Spain* case, the margin of analogy is even greater:

“53. Article 8 of the Convention protects the individual’s right to respect for his private and family life, his home and his correspondence. A home will usually be the place, the physically defined area, where private and family life develops. The individual has a right to respect for his home, meaning not just the right to the actual physical area, but also to the quiet enjoyment of that area. Breaches of the right to respect of the home are not confined to concrete or physical breaches, such as unauthorised entry into a person’s home, but also include those that are not concrete or physical, such as noise, emissions, smells or other forms of interference. A serious breach may result in the breach of a person’s right to respect for his home if it prevents him from enjoying the amenities of his home (see *Hatton and Others v. the United Kingdom* cited above, § 96).

...

57. The present case does not concern interference by

public authorities with the right to respect for the home, but their failure to take action to put a stop to third-party breaches of the right relied on by the applicant.

...

62. In these circumstances, the Court finds that the respondent State has failed to discharge its positive obligation to guarantee the applicant's right to respect for her home and her private life, in breach of Article 8 of the Convention."

The greatest difference between the case law of the European Court of Human Rights and that of the Hungarian Constitutional Court is that while there is no explicit right to environment in the European Convention, there is such a right in the Hungarian Constitution.

Even the first environmental act – Act II of 1976 – contained a right to environment provision, referring to the right of citizens to live in an environment, "worthy of human beings". Article 18 of the 1989 amendment of the Constitution, among the general provisions, gives a broad definition of such a right: "The Hungarian Republic recognises and implements the right of everyone to a healthy environment". Beside this broad and modern understanding of the right to environment, there is also a narrower concept within the human rights chapter of the Constitution. This is Article 70/D §, which refers to the need to protect the environment, meaning here an instrument to achieve the physical and spiritual human health in Hungary. These two types of provisions are usually examined together.

Thus the starting point in Europe at large and in Hungary is different, but as we may clearly understand from the judgments of the Constitutional Court, the conclusions are mostly similar.

The cornerstone judgment in this field is the 28/1994 (V. 20) decision of the Constitutional Court, the essence of which has been repeated many times, while there have not been many substantial additions to other decisions during the past 14 years. Thus while the European Court moved forward to cover nuisances and amenities, without having a direct legal basis, the Hungarian Court did not move ahead that much. On the other hand, the Hungarian Court could create a much wider approach, but it is due to the wording of the Constitution, directly covering the right to environment.

Some of the major elements of the Hungarian system are:

- the right to environment is a fundamental right, but not a subjective, personal right;
- this right refers to the duty of the state to protect the environment, but the level of protection may only be determined in a negative way – the state may not go below the originally guaranteed level;
- thus the right means the need to develop the legal and institutional system, requiring the state to develop the guarantees of such a right;
- subjective and procedural rights may be used to support the implementation of the right to environment;
- the protected subject is not the individual person, but "mankind" or "nature";
- prevention has priority over other measures, such as liability;
- the right may only be limited in a proportionate way, and only based on the need to be compared with the protection of other fundamental rights.

The following table compares the major elements of interpretation of the two courts:

ECHR	HCC
There is no direct legal basis	There is a legal basis in the Constitution
The duty of the state is the major point of reference in both cases	The duty of the state is the major point of reference in both cases
This duty covers the failure to take action	The content of the duty is not defined, but among others may also cover the failure
The subject is the individual human being or family	The direct subject is the individual, but in the background may also be mankind or nature
The content of the protection is broad – nuisances, amenities	The content is not really defined, but it may be relatively broad as prevention is mentioned as a first priority
Actual interference to the private sphere is needed	Based on general, broad legality, constitutional issues; actual interference is not a requirement
The practice of the state may also be the legal basis	Mostly legislative issues are taken into consideration, there has not been a reference to the practice of the state