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GERMAN CONSTITUTIONAL LAW AND THE ENVIRONMENT

The purpose of this article is to analyse the question whether, under German constitutional law, the individual citizen has a right to a clean environment. Hopefully, this article will give the non-German reader the opportunity, which is often thwarted by language barriers, of benefiting from comparative observations of legal developments in Germany. Whether the right to a certain environmental condition or the maintenance of the status quo exists *de lega lata* or should be granted *de lege ferenda* is a question which is being asked of the legal system of every nation. This has already become a pressing question in that group of nations in which the individual is directly affected in his private domain both by pollution and by the elimination of recreational areas (by way of a decrease in natural resources and a simultaneous increase in pressures on the environment). The German Federal Republic belongs to that group which includes, apart from other Central European nations, Japan and the United States. The legal situation in Germany may, therefore, be a useful point of reference for legal decision-makers in nations such as Australia where as yet environmental problems are evident only in a few densely populated areas.

In the first part of this article the types of environmental problems found in the Federal Republic at the present time will be briefly outlined in order to expose and highlight the actual reasoning behind present regulations. An explanation of the term "German" constitutional law will then be provided in an attempt to make clear, to the foreign reader, the relationship between constitutional and statute law. The many and various contexts in which the individual's constitutional right to a clean environment could possibly play a role in the German legal system are explained in some detail in part 3. The Federal Republic's Constitution of 1949 (including the bill of rights and other provisions, especially those explaining the relationship of German law to international law) and the constitutions of several German States will be examined in part 4. The concluding part will deal with possible future legal issues.

1 An ecological survey

The Federal Republic is one of the most densely populated countries on earth. In 1979, 61,337,000 people inhabited an area of 248,630 square kilometres, representing an average of 247 inhabitants per square kilometre (as compared with 2 per square kilometre in Australia). Aside from those German states which are city states – Hamburg, Bremen, and West Berlin (and there is an average of almost 4,000 inhabitants per square kilometre in West Berlin) – the most densely populated areas are North Rhine-Westphalia (with 489 inhabitants per square kilometre) and the Saar (with 419) while Lower Saxony with 152 and Bavaria with 153 are at the bottom of the scale.

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The following few remarks fairly summarise the present ecological situation in the most environmentally significant areas in the Federal Republic. The air is being polluted by persistently increasing emissions of sulphur dioxide, nitric oxide and organic compounds. Retrograde dust particles play a further role, as does carbon monoxide (six million tons being emitted annually by automobiles alone), although a certain static level of these pollutants seems to have been reached. The most significant sources of pollution besides industry are fires, automobile traffic and energy generating plants using fossil fuels. In the metropolitan area of Cologne, for instance, the air contains more than 1,000 different substances. Smog is most hazardous in West Berlin and the Ruhr area.

The use of ground water presents a particular problem in the context of water pollution. Pollution of ground water is caused primarily by the production and storage of poisonous substances. A lowering of the ground water level has resulted from sealing the soil surface of large areas as in constructing the Munich airport, from excessive use of ground water, and from the diversion of rivers as a flood protection measure (7,000 kilometres of waterways have been canalized since 1970). The Rhine, Main, Ruhr, Neckar and Elbe Rivers and Lake Constance are heavily polluted.

The North Sea is also a cause for much concern. Although its overall ecological system has not sustained extensive damage, parts of the coastal waters and estuaries are subject to excessive stress. The quantities of poisonous substances carried by the major rivers have devastating effects on these waters. Between 10,000 and 30,000 tons of zinc reach the North Sea via the Rhine River alone every year. Added to this is the ocean dumping of refuse by the city of Hamburg and of titanium oxide by the dye industry. Maritime commerce and constant discharge by tankers play a considerable role in the pollution of ocean waters.

The most heated subject of discussion at the present time regarding the use of minerals and the soil is whether the safe and secure storage of radioactive wastes in salt rods is possible and whether the storage of such wastes is defensible from the viewpoint of national security. Geologists are not able to predict with certainty the reaction of minerals and of the geological system to radioactive wastes. Moreover, the longevity and dangerousness of radioactive nuclides call for guaranteed security for at least 100,000 years. These factors are central to this discussion.

Maintaining and protecting the coastal shoals and marshes, especially those in Lower Saxony and Schleswig-Holstein, is particularly important in the context of landscape preservation. Other biosystems are threatened by highway, railroad and water transportation, by housing measures, and by water fluoridation. Each year, 100 hectares of open space in the Federal Republic are covered with cement or asphalt. Almost 15% of the nation's total area has been thus permanently withdrawn from processes of natural exchange.

Innumerable species (especially birds and fish) are either extinct or threatened with extinction. The number of extant plant varieties is also decreasing steadily.

There are two additional problem areas which cannot be classified as air, water or soil pollution. One of these is noise pollution which results

principally from vehicular traffic and also from industrial activities. The other is the most spectacular topic featuring in discussions on the environment in the Federal Republic: nuclear energy. At the beginning of 1980, there were eleven water reactors, as well as an experimental thermal reactor. Ten additional reactors were in process of construction and fourteen were at the planning stage.

The costs of environmental destruction in the Federal Republic in 1978 were estimated at between 40 and 60 billion DM, exceeding the amount spent by both private industry and the government for protective measures. Government expenditures are concentrated on clean air projects, followed, in descending order, by water purification programs, by measures against noise pollution and by waste disposal projects.

The Federal Republic has had an independent environmental policy since the end of the 1960s. The major policy principles are the "polluter pays principle" (whereby those who have caused ecological damage are financially responsible for it), and the "prevention principle" (whereby the persons interested in a particular project with a potentially adverse environmental impact are called on to work together in formulating an environmental policy in relation to the project). Legal regulations are in force in relation to nature conservation and landscape cultivation, water protection, waste disposal, radiation protection, nuclear fuels and poisonous substances.

The Act for the Protection of Nature of 20 December 1976[1] has as its aim the protection and regeneration of nature and of the landscape (both in developed areas and elsewhere) in such a way that the efficiency of natural processes, the productivity of natural resources and the plant and animal kingdom as well as the variety, special character and natural beauty of the landscape will be secured (para (1)). To this end, the Act establishes a number of general principles which are to be observed by competent authorities when they make relevant decisions. Measures to be implemented for the protection of nature and for the preservation of the landscape are to be laid down in "landscape plans", which are to be prepared in the planning of buildings. These landscape plans are to be finalised in accordance with the law of the individual state of the Federal Republic in which the development is to occur; federal law merely establishes a framework of legislative and administrative action at State level. Where private interference with nature causes significant ecological changes, the person responsible for the interference can be held liable at law to implement compensatory measures. If such measures are insufficient, the interference may be prohibited altogether. The Act also contains provisions concerning the establishment of protected areas and national parks as well as the protection and conservation of particular native plants and wild animals.

The federal Forestry Act of 2 May 1975[2] endeavours to achieve a balance between the various functions of forests, that is their economic uses, their role in the total ecology and their recreational function. The Water Resources Planning Act of 27 June 1957[3] and the practically

1 Bundesgesetzblatt 1976 I, 3574.
2 Bundesgesetzblatt 1975 I, 1037.
3 Bundesgesetzblatt 1976 I, 3017.

important Act for the Control of Detergents of 20 August 1975,[4] together with further legislation, are intended to protect water resources. The former Act subjects the use of water (for example, by means of diversion or damming or of introduction of foreign substances) to various licensing requirements; the latter Act contains provisions concerning the composition of washing and cleansing agents. In the area of rubbish removal, the Waste Removal Act of 7 June 1972[5] and the Used Oil Act of 23 December 1968[6] as well as the Dumping into the High Seas Act of 11 February 1977[7] are of particular importance.

The federal Emission Protection Act of 15 March 1974[8] is intended to prevent detrimental environmental incidents through air pollution, noise and vibrations. The Act distinguishes between installations which require licensing and those which do not and controls, inter alia, the structure and composition of installations, products, different forms of fuel, vehicles, the construction of streets and railways, as well as the supervision of air pollution in the area of the Federal Republic. Aims which are similar in part are pursued by the Lead Content of Petrol Act of 5 August 1971[9] and the Noise Emission by Aircraft Act of 30 March 1971.[10]

The Atomic Energy Act of 23 December 1959[11] seeks to protect life, health and property from the dangers of nuclear energy and similarly it contains provisions concerning supervision, licensing and liability.

There are numerous Acts which regulate dealings with dangerous substances; only the Transportation of Dangerous Substances Act of 6 August 1975[12] and the Chemicals Act of 16 September 1980[13] need be mentioned here. The latter Act prescibes a differentiated system for the licensing, verification, certification, communication, labelling and distribution of chemicals as well as numerous restrictions and limitations.

Quite apart from these federal Acts, each of the States has enacted Acts for the protection of nature as well as other environmental legislation.

A federal environmental agency (*Umweltbundesamt*) was established in West Berlin in 1974 for advising the administration on environmental questions and for co-ordinating its programs. Its most important duties include assisting the federal Ministry of the Interior in composing legal and administrative regulations, conducting research and developing the basis for suitable measures, testing and checking processes and institutions, maintaining and publishing documentation on the environment, and informing the public.

4 Bundesgesetzblatt 1975 I, 2255.
5 Bundesgesetzblatt 1977 I, 41.
6 Bundesgesetzblatt 1979 I, 2113.
7 Bundesgesetzblatt 1977 II, 165.
8 Bundesgesetzblatt 1974 I, 721.
9 Bundesgesetzblatt 1971 I, 1234.
10 Bundesgesetzblatt 1971 I, 282.
11 Bundesgesetzblatt 1976 I, 3053.
12 Bundesgesetzblatt 1975 I, 2121.
13 Bundesgesetzblatt 1980 I, 1718.

2 German constitutional law

The phrase "German constitutional law" might lead one to think of the legal systems of both German nations. However, this article treats only the constitutional law of the Federal Republic and its states.

Regarding the federal government, the Constitution of 1949 (which codifies German constitutional law) will be discussed. There are no other constitutional laws in the Federal Republic. All other legal norms, be they laws or regulations issued by the administration, customary law norms or administrative orders are invalid if they are in conflict with the Constitution. A decision that a law passed after the Constitution came into force is invalid may be made, not by the ordinary courts, but only by the Federal Constitutional Court (*Bundesverfassungsgericht*).[14] Other courts must remove constitutional issues to the Federal Constitutional Court for its decision. According to general practice, a law will not be declared unconstitutional if it can be interpreted in any way to be in harmony with the Constitution. This so-called "constitution conforming interpretation" will be discussed later.

This article will deal only with constitutional law and not with statute law. Whether or not rights of individuals are guaranteed in non-constitutional Federal and State laws will not be discussed. In relation to a whole series of non-constitutional laws and regulations, it is still very much disputed whether they contain an individual rights component enabling individuals whose private environmental interests are impaired to institute civil legal proceedings.

This is true, for example, in the area of ocean dumping, where Art 2 para 2 no 2 of the Law on Fishing on the High Seas is accurately said to confer a right on individuals.[15] It should be expected that such individual rights will in the future become accepted to a greater degree; they are basically undisputed and have been recognised continuously in legal decisions in the areas of zoning and construction, where environmental aspects play only a secondary role.[16]

Mention should be made of user laws which may not confer a primary right to a particular environmental condition, but rather a "right to enjoy nature" out of which one may deduce the following objective: if relaxation is the thrust of such regulations, the opportunity to enjoy recreation (eg in the forest) may not lawfully be eliminated by measures which endanger the environment. The right to access is to be found at the level of federal, state and local laws, as in § 27 s 1 of the *Bundesnaturschutzgesetz,*[17] and in § 14 s 1 of the *Bundeswaldgesetz.*[18]

A right of those affected to participate in the decision making process regarding the construction of potentially dangerous plants has often been

14 Cf G Brinkmann, "The West German Federal Constitutional Court: Political Control Through Judges" (1981) 7 Public Law (London) 83; I von Munch, "El recurso de amparo constitucional como instrumento juridico y politico en la Republica Federal de Alemania" (1979) 25 Revista de Estidios Politicos 269.

15 Cf Administrative Court of Hamburg (1981) 96 Deutsches Verwaltungsblatt 269; Ph. Kunig, "Zur Rechtsstellung Dritter bei erlaubter Abfallbeseitigung auf Hoher See" (1981) 36 Juristenzeitung 295; W Peters, "Anmerkung zum Urteil des VG Hamburg vom 4 7 1980 (1981) 96 Deutsches Verwaltungsblatt 271.

16 Cf H-U Erichsen and W Martens, *Allgemeines Verwaltungsrecht* (4th edn 1979) 172.

17 See supra n 1.

18 See supra n 2.

provided for, eg in the government's obligation to hold a hearing before waste disposal plants (§ 22 of the *Abfallbeseitigungsgesetz*[19]) or atomic energy plants (§ 4ff of *Verordnung über das Verfahren bei der Genehmigung von Anlagen nach § 7 des Atomgesetzes vom 18 Februar 1977*[20]) are built. Consumer representatives participate in decision making on exemptions from the basic prohibition of the manufacture of indestructible substances (§ 6 of the *Bundeswaschmittelgesetz*[21]).

There are also special environmental compensation regulations for payment on account of property devaluation due to a prohibition of construction on plots neighbouring those upon which an airport has been erected (§ 8 s 1 of the *Fluglärmgesetz* of 30 March 1971[22]) and for the payment by the government of compensation for financial loss arising from the construction of facilities for the storage of radioactive wastes (§ 9 b s 4 of the *Atomgesetz*[23]).

In the German States, the same distinction exists between constitutional law and other law. A few remarks may nevertheless be made on the relationship between federal and state constitutional law. Art 31 of the Constitution whereby Federal legislation "breaks" or prevails over State laws is the point of departure for judging this relationship. This provision invalidates state constitutional laws which are inconsistent with federal constitutional laws. Its detailed interpretation has proved difficult and will not be pursued here.[24] Art 142 of the Constitution, by virtue of which amendments to the State constitution remain in force as long as they exceed the scope of the rights guaranteed in the federal Constitution, is an interesting supplement to Art 31. Should the particular State's constitutional regime confer on the individual a specific right to a clean environment not expressly conferred by federal constitutional law, then there would be no doubt as to the validity of that regime within the jurisdiction of the State concerned.

3 The consequence of the individual's constitutional right to a clean environment

Citizens who maintain that their basic rights have been violated by state action are able to lodge a complaint with the Federal Constitutional Court (Art 93 s 1 no 4a of the Basic Law; *Verfassungsbeschwerde*). Basic rights are contained principally, though not solely, in Articles 1 to 17.

As there is no explicitly formulated right to a clean environment in the first 17 articles, it is possible that it is either partially or wholly created by other articles in the Bill of Rights.

The Federal Constitutional Court Act of 12 March 1951[25] provides that the Court may deal with a complaint only after the regular legal remedies have been exhausted (§ 90 s 2). Thus the "normal" judicial

19 See supra n 5.
20 Bundesgesetzblatt 1977 I, 280.
21 See supra n 4.
22 Bundesgesetzblatt 1971 I, 282.
23 See supra n 11.
24 For details see M Gubelt, in I von Munch (ed), *Grundgesetzkommentar* vol 1 (2nd edn 1975) Art 31 n 12.
25 Bundesgesetzblatt 1971 1, 105.

channels must be gone through before complaints are directed against official acts such as administrative decisions, laws and court rulings.

A constitutional complaint is admissible whenever the complainant maintains that his rights have been violated. At this stage of the proceedings, there is therefore no need to examine requirements such as locus standi. However, a constitutional complaint is well founded only if there has in fact been a violation of rights which are vested in the complainant himself. This question can only be decided in the light of the particular basic right – see part 4 below.

The existence of a basic right to a clean environment is not only of relevance in the context of the constitutional complaint; the question can also arise in other contexts. The Constitution has significance for the interpretation of ordinary legislation. This is so when the legal circumstances allow for more than one interpretation of a law, yet only one would be compatible with constitutional law. If this is the case, government agencies and the courts are obliged to comply with the compatible interpretation.[26] For example, a construction permit for a plant which would endanger the environment might be granted according to a Federal or State law which is contrary to an individual's constitutional right to a clean environment. The permit would not be valid although the Federal or State law pursuant to which it was issued would itself not be considered unconstitutional. The provisions of the constitution thus become relevant for the interpretation of ordinary legislation.

4 Inventory of relevant provisions

(a) *Federal law*

There is in the Basic Law no fundamental right which explicity guarantees any particular condition of the environment. In this situation there are two methodological possibilities, viz (1) One could attempt to juxtapose, in a synoptic fashion, relevant individual fundamental rights and to infer, on the strength of an analysis of fundamental notions assumed by the Basic Law about the structure and quality of the State, an unwritten basic right to a clean environment. That would involve drawing inferences concerning the intentions of the constitutional legislature by means of constitutional interpretation, starting with the hypothesis that these intentions have not always been made clear or, in other words, that it is permissible to take account of changed views about society and thereby promote consistent further development of the existing written provisions. As a matter of constitutional theory, this procedure would be legitimate; for example, the Federal Constitutional Court has proceeded in this way in connection with the principle of "the rule of law" which has only received fragmentary and rudimentary explicit attention in the Basic Law: the Court has drawn inferences from these fragmentary provisions in relation to questions which were not explicitly covered;[27] and (2) One could attempt to isolate relevant implications of individual basic rights provisions and then combine these like a mosaic so as to form the total expression of a basic right to a

26 See H Simon, "Die verfassungskonforme Gesetzesauslegung" (1974) 1 Europäische Grundrechtezeitschrift 85.

27 For details see K Stern, *Das Staatsrecht der Bundesrepublik Deutschland* vol 1 (1977) § 20 IV.

clean environment. However, it is likely that only a partial picture of such a right would emerge. Thus, this second procedure would yield a result different from that obtained by using the first.

Both courses have been taken in discussions in German legal circles. It is proposed to examine first the basic rights that come into play, as they cannot be ignored whichever approach is adopted.

(i) *Right to life and health (Recht auf Leben und Gesundheit)*

Art 2(2) of the Constitution states: "Everyone shall have the right to life and to inviolability of his person. The liberty of the individual shall be inviolable. These rights may be encroached upon only pursuant to law." This means, first of all, that the government may not choose a course of action which endangers human life.[28] It has also been recognized that Art 2 not only represents a protective measure against governmental interference, but also confers an affirmative right to assistance from the government in the form of welfare payments which ensure a minimum subsistence level or adequate medical coverage.[29] The right to life can become relevant in environmental law if the government avails itself of, permits or tolerates measures which adversely affect the environment and endanger life.

This is not to be feared in the areas of air and water pollution, illustrated in the initial pages of this article, but may play an important role in judging the legality of constructing atomic plants and atomic waste deposit facilities. Discussion is principally concentrated, however, in the scientific and technical area, as the extent and type of danger emanating from these plants is notoriously contentious. As state and federal laws already provide for suitable protection and express constitutional guarantees by barring the construction of highly dangerous installations, it is rarely necessary that an appeal based on the right to life be made in this context. The concept of physical well-being deals with a person's entire physical and mental state.[30] It therefore goes beyond mere physical health so as to include adverse psychological effects which can very well result from an impaired or badly engineered environment, as experience and psychology well illustrate.[31]

It will have been noted that the above-mentioned Art 2(2) clause 3 of the Constitution authorises derogation from the right to life and physical well-being by both Federal and State laws. This does not, however, lead to a de facto suspension of this right. It is note-worthy that administrative decrees lacking the force of law may not infringe upon a basic right. There can be no encroachment upon the essential content of the basic right in question: this is provided by Art 19 (2) of the Constitution.[32] In addition, the Constitutional Court has developed the

28 Th Maunz, G Dürig, R Herzog, R Scholz (eds), *Grundgesetzkommentar* (1970) Art 2 para 2, n 8.

29 J Schabe, "Krankenversorgung und Verfassungsrecht" (1969) 22 Neue Juristische Wochenschrift 2274.

30 H Niemohlmann, in I von Munch (ed), *Grundgesetzkommentar* vol 1 (1975) Art 2 n 48.

31 Heiss/Franke, *Der vorzeitig verbrauchte Mensch, Verhütung von Zivilisationsschäden* (1964); *Stumpf Leben und Überleben, Einführung in die Zivilisationsökologie* (1976); F Vester, *Phänomen Stress* (1976).

32 For details see P Haberle, *Die Wesensgehaltsgarantie des Art 19 Abs 2 GG* (2nd ed 1972).

principle of "proportionality", the criteria of which are not of interest here.[33] It has been the prevailing practice of the courts to interpret, in the light of the Constitution, laws that limit basic rights to secure the integrity of a basic right by conceding to it the most efficacious operation.

(ii) *Right to choice of occupation (Berufsfreiheit)*

It is provided in Art 12(1) of the Constitution that "all Germans shall have the right to choose freely their trade, occupation or profession and their place of training". Both practising and choosing an occupation, taken together, are referred to and protected as "the freedom to choose an occupation". Every lawful activity which is intended to be permanent and is the basis of earning a living is considered an occupation.[34] This right is affected only indirectly by measures hostile to the environment, as in the case of a gardener or resort entrepreneur, both of whom would be utterly unable to work in a region with heavy pollution. Art 12(2) of the Constitution, which prohibits industrial conscription, deals, however, only with secondary regulations which clearly indicate an intention to regulate an individual's choice of occupation, as may be the case in revenue law.[35] A comparable impairment of the environment through governmental employment regulation is inconceivable, so that Art 12(2) of the Constitution can be excluded from further consideration.

(iii) *Right to property (Eigentumsrecht)*

The right conferred by Art 14 of the Constitution to own property is viewed by the majority as a corollary of the guarantee of the free expression of personality in Art 2(1); in fact, it is a necessary prerequisite.[36] Both movable and immovable property are protected, as well as the basic forms of disposition of wealth and income, these being preconditions of participation in a private enterprise economy. The property guarantee can be of importance from numerous viewpoints. One must keep in mind, however, that owning property subjects an individual to extensive social commitments. Art 14(2) declares: "Property imposes duties. Its use should also serve the public weal." This clause authorises government intervention. In addition, there is the possibility of expropriating property, which can involve financial injury inflicted by the state when it unfairly treats those adversely affected or discriminates unreasonably. An impairment of the right to enjoy property, if it has been carried out legally and for the good of the community, results in the government being obliged to pay compensation without giving the affected citizen the opportunity to demand a repeal of the measures. Of note in the context of the use of property for non-commercial reasons, especially for week-end cottages, is the fact that preventing access to light and fresh air is recognized as an actionable wrong.[37] It is also conceivable that the legal institution of the so-called "*Anliegergebrauch*",[38] the right to use the street adjacent to a neighbour's

33 See A Bleckmann, *Allgemeine Grundrechtslehren* (1979) § 12 V 3; E Grabitz, "Der Grundsatz der Verhältnissmassigkeit in der Rechtsprechung des Bundesverfassungsgerichts" (1973) 98 Archiv des öffentlichen Rechts 568.

34 BVerwGE 22, 286 (Decisions of the Federal Aministrative Court, vol 22).

35 BVerfGE 13, 181 (Decisions of the Federal Constitutional Court, vol 13).

36 D Chr Dicke, in I von Munch (ed), *Grundgesetzkommentar* Vol 1 (1975) Art 14 n 1.

37 BGHZ 30, 241 (Decisions of the Federal Court, Civil Matters, vol 30).

38 For details see H-J Papier, *Recht der öffentlichen Sachen* (1977) 93.

land, could lead to a reactivation of Art 14 against measures which endanger the environment. This legal institution means that owning a piece of property also guarantees access to a public thoroughfare, which could be threatened by construction. Temporary restriction in this area must be frequently tolerated. Businesses as a whole are also protected by Art 14, the courts having extended the concept of "property" beyond its literal meaning.[39] All factors of importance for a business are included under the protective provision in Art 14, including the state of the environment which can be of differing importance according to the type of business – one need only think of a business involved in the tourist trade. However, early legal decisions developed a formula according to which expectations of a particular financial return are not protected, so that difficulties regularly arise in setting limits.[40] The *Reichsgericht,* the predecessor of the *Bundesgerichtshof,* had decided, for instance, that the protection of property did not include regular and natural fertilization of land through flooding by the Elbe River, halted by the erection of a dam.[41]

(iv) *General freedom of action (Allgemeine Handlungsfreiheit)*

The only basic right which remains to be discussed is Art 2(1) of the Basic Law, according to which each person has the right to the free development of his personality, as long as he does not infringe the rights of others and does not violate the constitutional order or the moral code. This formulates comprehensively a protective norm intended to guarantee individual freedom, but which occasions grave problems of interpretation. It is generally recognised that this norm plays a subsidiary role in relation to more special rights of liberty in the Basic Law; however, it is also settled that its subsidiary nature must be reviewed and reassessed whenever some Act which is attacked as unconstitutional is not covered by one of these more specific rights of liberty.[42] This dragnet function opens up, in principle, the possibility of deriving from Art 2(1) some measure of protection from statutes which have a detrimental impact on the environment, provided that the more particular basic rights previously considered do not provide any such protection. There are a number of controversies concerning the interpretation of Art 2(1), but they are of no particular practical importance in the administration of the law because of the unambiguous position adopted by the Federal Constitutional Court. The controversies are relegated to the field of theory. Ever since the *Elfes* judgment of 16 January 1957,[43] the Federal Constitutional Court has interpreted Art 2(1) of the Basic Law as establishing a general comprehensive freedom which, in principle, covers all forms of activity, the real problem of interpretation being that of establishing limits to freedom, for if almost every human activity is protected by this basic right the decisive question is to determine the circumstances under which the protection does not apply. This interpretation of Art 2(1) turns the exception into the norm. It is evident that it embraces activities which are closely related to a particular

39 BGHZ 1, 223; 48, 65.
40 See Dicke, supra n 36 Art 14 n 15.
41 RGZ 161, 364 (Decisions of the *Reichsgericht,* Civil Matters, vol 161).
42 For details see R Scholz, "Das Grundrecht der freien Entfaltung der Persönlichkeit in der Rechtsprechung des Bundesverfassungsgerichts" (1975) 100 Archiv des öffentlichen Rechts 80.
43 BVerfGE 6, 32.

environmental condition in the sense that they are possible only if the environment in which they take place has a particular characteristic. Examples are activities of a recreational kind such as hiking, sailing, mountaineering, and also inactive forms of recreation in gardens or on balconies. Even the mere act of being present in buildings which may have an impaired environment due to air or noise pollution must be regarded as protected.

According to the classical understanding, basic rights partake of a defensive nature.[44] Their purpose is to fend off intrusions into existing legal positions; they do not form a basis for claims to affirmative state assistance which would create the conditions for an exercise of the basic rights. Judgments to this effect with particular reference to Art 2 (1) have been handed down repeatedly by the Federal Administrative Appeal Court and by the Federal Appeal Court in social welfare matters.[45]

These considerations notwithstanding, it is possible to argue that the basic rights can be given their full effect only if the factual conditions for their exercise are taken into account. At all events, if the State becomes responsible, either through its own actions or through actions attributable to it, for a detrimental alteration of these factual conditions to an extent which jeopardises the exercise of the basic rights — in this case, of Art 2 (1) — then the defensive function of the basic rights should come into play.[46] Included under the protective cover of basic rights should be those factual circumstances which may not directly form part of the contents of the particular basic right, but which are nevertheless a pre-condition of its enjoyment in a practical sense. It must be admitted that this opinion is not endorsed by the traditional legal dogma which surrounds the basic right. The opinion advanced above does not mean that the particular measure which causes an alteration in the environment needs to be regarded as contrary to the Constitution in every case; the measure must, however, be capable of being tested against the background of the basic right, ie the applicability of the limitations of the basic rights must be examined. As already mentioned, at this stage this view is no more than a hypothesis which has been advanced, but which has not yet been judicially endorsed. The jurisprudence of the Federal Constitutional Court has not yet extended to the protection of pre-conditions to the exercise of basic rights in order to give effect to their defensive function. Even those who follow this view will have to take into consideration the fact that in the German jurisprudential debate concerning basic rights a change of emphasis has been evident for a considerable time: apart from the defensive function of basic rights, the so-called "affirmative performance function" has been emphasised, and this has consequences for the protection of the environment. The basic rights have been combined with Art 20 (1) of the Basic Law (the principle that the Federal Republic is a social state), and the basic rights theory reacted to an extent to the mass society of the post-war period by adopting a new orientation according to which it is possible for basic rights to become the foundation for claims by the individual against the State for affirmative measures. A milestone on the

44 See A Bleckmann, Allgemeine Grundrechtslehren (1979), 156.
45 BVerfGE 5, 85; 7, 183, BSGE 9, 206 (Decisions of the Federal Social Court, vol 9).
46 Cf Chr Sailer, "Subjektives Recht und Umweltschutz" (1976) 91 Deutches Verwaltungsblatt 521.

road to this new understanding was the Conference of the Association of German Teachers of Constitutional Law in 1972 with papers by Peter Haberle and Wolfgang Martens.[47]

These efforts have had some impact upon the Court, particularly in the area of equal treatment (Art 3 (1) of the Basic Law), for example, in the law relating to State subventions,[48] in relation to claims for social welfare and for inoculation (which opinion derived from Art 1 (1) and Art 2 (1)),[49] and in relation to State aid to private schools (Art 7 (4)).[50] Rights to work, to education and to housing have not been recognised. It is conceivable that a process has started which will eventually engulf Art 2 (1) with the result which has been specified above. It must be admitted that the courts have so far voiced their opposition to this kind of development. In the absence of a relevant decision of the Federal Constitutional Court, a decision of particular importance is the judgment of the Federal Administrative Court of 29 July 1977.[51] A number of citizens, as plaintiffs, attempted to invoke the existence of an environmental right for the purpose of preventing building in a particular area. The court denied the existence of such a basic right without advancing any reasons of substance. Sening, admittedly an outsider in the jurisprudential discussion of the matter, has expressed the opinion that this judgment is based on a misunderstanding of elementary factual developments of the last decade. He considers that future generations will be able to understand the environmental reasons for the end of the present civilization if they read this judgment.[52]

A somewhat different picture emerges when one considers that the Federal Constitutional Court has inferred from Art 2(2) clause 1 of the Basic Law, in connection with the principle of the dignity of man (Art 1(1) clause 2), that all the organs of the State are under a duty to promote and protect—that is, by engaging in affirmative action—the legal values of life and of physical integrity. This is particularly clearly expressed in the decision concerning the constitutional validity of the decriminalisation of abortion,[53] and it has been reiterated on later occasions.[54] In a similar spirit, the Superior Appeal Court for the State of North Rhine-Westphalia recently decided that a road traffic authority was under similar positive duties in relation to the registration of motor lorries in built-up areas. A form of reasoning is evident in these decisions which, if applied to Art 2(1), could equally lead to the protection of the pre-conditions of an exercise of the basic rights conferred by it.[55]

(e) *Is there a basic environmental right?*

As explained earlier, there are two different ways in which, within the framework of existing constitutional law, individual legal entitlements can

47 (1972) 30 Veröffentlichungen der Vereinigung der Deutschen Staatsrechstlehrer.
48 Cf BVerfGE 30, 191.
49 Cf BVerwGE 1, 159; 9, 78-81.
50 Cf BVerwGE 27, 360.
51 BVerwGE 54, 211.
52 "In 2000 years, when the remains of our civilization are dug up, the reasons for its fall will not be understood unless, by accident, the judgment of the Federal Administrative Court of 29.7.1977 is dug up as well." (tr) (1979) 25 Bayerische Verwaltungsblätter 492.
53 BVerfGE 39, 1.
54 BVerfGE 46, 160.
55 Judgment of 21 August 1980, 12 A 1859/78 (not yet published).

be affirmed. We have shown that the basic rights to life and physical integrity and to property are capable of supporting, in individual cases, claims by the individual to the preservation of particular environmental situations, but that this is only a very rudimentary form of protection. There may be the seeds, in Art 2(1), of the development of a defensive right in relation to adverse environmental impacts which impede the free development of the personality. However, it must be remembered that Art 2(1) is capable of being limited in particular circumstances. Such a broad interpretation of the defensive function of Art 2(1) has not as yet attained recognition in the literature or in the decisions of the courts.

The final theme which needs to be explored is the possibility of an environmental basic right being derived from the interpretation of the Basic Law as a whole. The argument has been put forward that the individual positive guarantees in the Basic Law are merely particular manifestations of a comprehensive environmental basic right which stands behind these individual manifestations, as it were, and which these individual guarantees enable us to infer.[56] In support of this argument, reference may be made to the specific basic rights which have been examined, and in particular to the basic right to human dignity.[57]

Considering the particular significance of human dignity in the context of the Basic Law, the individual mosaic pieces of an environmental basic right, as they were derived from the basic rights discussed above, appear, according to this reasoning, in a different light: according to Art 1(1) clause 1 of the Basic Law, the dignity of man is inviolable. The State is not only under an obligation to respect human dignity, but must also protect it (clause 2). According to the so-called objective formula, the State thereby has a duty to prevent the devaluation of man to a mere object and to make it possible for the individual to lead a life which is essentially self-determined.[58] This is obviously placed in jeopardy if the individual is deprived of possibilities of development by poor environmental conditions which affect his physical and emotional well-being.

Accordingly, it has been argued that Art 1 (1) of the Basic Law points to an (unwritten) defensive right against conduct which damages the environment.[59] In assessing the persuasive force of this argument, one might ask in particular whether such an interpretation can be regarded as cogent in view of the manifold, and frequently system-inherent, impediments to the development of the individual (which could then be combated by resort to Art 1 of the Basic Law). There is, however, a further objection in principle. As explained above, it is legitimate in constitutional law to draw normative inferences from overall meanings. However, before an overall analogy based upon several individual provisions is permissible, the meaning of these provisions must be fully

56 J Lücke, "Das Grundrecht des einzelnen gegenüber dem Staat auf Umweltschutz – zugleich ein Beitrag zu einigen Parallelen des deutschen und amerikanischen Umweltrechts" (1976) 29 Die öffentliche Verwaltung 289; H Kulz, "Umwelt und Verfassung" (1975) 90 Deutsches Verwaltungsblatt 189; H H Rupp, "Die vertfassungsrechtliche Seite des Umweltschutzes" (1971) 26 Juristenzeitung 401.

57 Chr Sening, *Bedrohte Erholungslandschaft. Überlegungen zu ihrem rechtlichen Schutz* (1977) 166; A Rossnagel, *Grundrechte und Kernkraftwerk* (1979) 42.

58 See I von Munch, *Grundbegriffe des Staatsrechts* vol 1 (1979) 130.

59 See Sening, supra n 57.

ascertained by interpretation. We have shown that particular aspects of the environment are protected by particular basic rights and that Art 2(1) is capable of more extensive interpretation. As long as this is possible, the way to an overall analogy is barred, for as long as the "written" basic right of Art 2(1) contains relevant legal declarations, an "unwritten" environmental basic right need not (and may not) be developed by extrapolation.

(f) *Individual entitlements based on international law*

In German Federal law there is, finally, a possibility of individual rights enforceable in municipal courts being derived from international law. International law norms require transformation if they are to obtain internal validity.[60] In relation to international treaties, Art 59(2) of the Basic Law requires transformation by means of an ordinary Act of Parliament. Municipal law then no longer regards the norms of the treaty merely as international law norms. Rather, they become "ordinary" laws, even though they are laws attributable to international law and have no real constitutional status. By virtue of Art 25 of the Basic Law, international customary law, on the other hand, is part and parcel of the law of the Federal Republic, insofar as it contains "general principles of public international law"; and these rules take precedence over municipal laws. Some authors have inferred from this Article that the "general principles" of customary international law (and it is generally agreed that this phrase refers to norms which have universal or quasi-universal validity[61]) must be regarded as constitutional norms or at least as having a status equal to that of such a norm.[62] If this view were correct, it would be necessary to inquire whether customary international law recognised a right to a clean environment which could have come into being as an individual entitlement in the context of the more recent developments in human rights.[63] However, this interpretation of Art 25 (2) of the Basic Law would appear to be incorrect. For it would have the consequence that new developments in international law could bring about changes to the Constitution regardless of the procedures prescribed by the Basic Law for constitutional amendment. It follows that the rules of customary international law have a higher status than ordinary laws, but do not possess the status of constitutional norms.[64]

(ii) *The ordinary law of the Länder*

The constitution of the Free State of Bavaria of 2 December 1946[65] contains, in Art 141(3) clause 1, the following formula:

> "Everyone is permitted to enjoy the beauties of nature and to seek recreation in the open air, in particular to sojourn freely in forest and mountain meadow, to travel over the waters and to appropriate wild growing fruits of the forest to an extent which accords with local usage."

In the years immediately after its enactment, this provision was generally regarded as a classic example of a basic rights guarantee which

60 Cf W Rudolf, *Völkerrecht und deutsches Recht* (1967).
61 W Rudolf, supra n 60 at 240.
62 Cf G Dahm, *völkerrecht* vol 1 (1958) 67.
63 Cf J Lücke, "Das Recht des einzelnen auf Umweltschutz als internationales Menschenrecht" (1975) 16 Archiv des Völkerrechts 387.
64 Cf F Berber, *Lehrbuch des Völkerrechts* vol 1 (2nd edn 1975) 101.
65 *Bereinigte Sammlung des bayerischen Landesrechts* 1802-1956, vol 1, 3; *Verfassungen der deutschen Bundesländer* (1978) 40.

was entirely ineffectual.[66] However, nowadays this provision has become the object of a lively controversy: most of the Bavarian courts and the preponderance of publicists[67] have taken the view that this provision is concerned only with the use that can be made of existing areas; but others are of the opinion that the Article is also concerned with the condition of these areas in the sense that they must remain suitable to make "enjoyment" and "recreation" possible, with the consequence that a defensive right in relation to the beauties of nature exists.[68] In support of the latter view, it can be argued, as in the case of the interpretation of Art 2(1) of the Basic Law, that the constitutional legislature has created this right in order to render secure, with its assistance, the enjoyment of nature. If this is the true purpose of the provision, then its confinement to the use of what is already there must appear superficial. Other State constitutions merely contain general appeals to the State to protect nature and the environment (Baden-Württemberg, Art 86; Hesse, Art 62; North Rhine-Westphalia, Art 18 (2); Rheinland-Palatinate, Art 40 clause 3). It is not possible to derive individual entitlements from these provisions.

(5) *Some concluding policy considerations*

It has not been possible within the framework of this paper to examine the arguments for and against the introduction of a basic right to a clean environment *de lege ferenda.*[69] Problematical questions would be, first, the relationship of such a norm with presently existing basic rights, and secondly, the question of the legitimacy of a judicial concretisation of such an environmental basic right (which inevitably would have to be formulated in somewhat vague terms). This second question raises issues as to the principle of the separation of powers. Contrary to views which were entertained earlier (in particular by the Free Democratic Party which once advocated the introduction of a basic right to a clean environment in the catalogue of basic rights of the Basic Law) there is now a good deal to be said for the suggestion that, even in the life of the current Parliament (1980-1984), at least a policy declaration (the exact phrase is "state aim determination") which essentially aims at the preservation or creation of federal environmental conditions be inserted in the Constitution. The organs of the State would then be constitutionally obliged to consider, in all their deliberations, the requirements of environmental protection — a requirement which, with a little benign imagination, could be seen as already implicit in existing provisions. However, such a provision would not be justiciable except to a very limited extent. It would have no particular impact upon the existing legal position as described in this article.

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66 H Steiger, "Report" in *An Individual Right or an Obligation of the State? International Colloquium on the Right to a Humane Environment* (1976) 19.

67 Bavarian Administrative Court (1975) 21 Bayerische Verwaltungsblätter 419; Bavarian Constitutional Court (1977) 23 *Bayerische Verwaltungsblätter* 208.

68 Administrative Court of Munich (1975) 21 *Bayerische Verwaltungsblätter* 421; Administrative Court of Ansbach (1975) 21 *Bayerische Verwaltungsblätter* 26; Bavarian Administrative Court (1974) 20 *Bayerische Verwaltungsblätter* 220.

69 See Dellmann, "Zur Problematik eines Grundrechts auf menschenwürige Umwelt" (1975) 28 Die öffentliche Verwaltung 588; M. Kloepfer, *Zum Grundrecht auf Umweltschutz* (1978); P-Chr Storm, *Umweltrecht* 39. There is the proposal for an Art 20 a GG: "Der Schutz der natürlichen Lebensgrundlagen gehört zu den Aufgaben der Staatlichen Ordnung" (The protection of the environment is one of the responsibilities of the state).