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1. *Introduction*

In comparative perspective, German law is firmly rooted in the civil law tradition. The civil law tradition is characterized by the "rationality of codes"[1] and codification.[2] The best-known German codification is the Civil Code of 1900 (*Bürgerliches Gesetzbuch*)[3] that persisted through the 20th century and is still in force today. In general administrative law, Germany has at least partial codifications in the form of the Federal Code of Administrative Court Procedure of 1960 [4] and the (federal) Administrative Procedure Act of 1976. [5] In environmental law, however, things are different. Up until today, there is no federal environmental code in Germany. Rather, environmental law spans across a multitude of statutes and regulations and is a diverse area of the law.[6]

In this article, I will explore the problem of codification in German environmental law. I will give contours to the legal context with regard to federal competence allocation and the emergence of modern environmental legislation

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[1] H-P. GLENN, *Legal Traditions of the World*, 5th ed. 2014, pp. 144-155.

[2] J. H. MERRYMAN, R. PÈREZ PERDOMO, *The Civil Law Tradition*, 4th ed. 2019, 27 ff.; the authors (id., p. 5) define codification as "the process of compiling and systematizing laws into a code" and code as "the collection of laws of a country or laws related to a particular subject".

[3] On formation and symbolic meaning of the Civil Code of 1900 in the German *Kaiserreich* of 1871 R. ZIMMERMANN, *Characteristic Aspects of German Legal Culture* in J. ZEKOLL, G. WAGNER (eds.), *Introduction to German Law*, 3rd ed. 2019, p. 1 (8-12).

[4] Federal Code of Administrative Court Procedure (*Verwaltungsgerichtsordnung*), BGBl. 1960 I, 17.

[5] (Federal) Administrative Procedure Act (*Verwaltungsverfahrensgesetz*), BGBl. 1976 I, 1253.

[6] See O. DILLING, W. KÖCK, *Germany,* in: E. Lees, J.E. Viñuales (eds.), The Oxford Handbook of Comparative Environmental Law, p. 191 (197).

(at 2.) and give an account on the elaborated and ambitious initiatives for a federal environmental code in the 1990s (at 3.) and 2000s (at 4.). I will also discuss relevant developments of the law in the last decade (at 5.) and draw a conclusion (at 6.).

2. *Federal competence allocation and environmental legislation since the 1970s*

Given the federal structure of Germany, the enactment of a code of environmental law with nation-wide legal scope requires that the Federal Constitution grants adequate legislative powers to the federal level. The Federal Constitution of Germany is also known as the *Grundgesetz* (in German language) or Basic Law (in English translation).[7] According to the default rule in Art. 70 Basic Law,[8] the right to legislate lies with the 16 German states, not with the federation. Any federal legislation depends upon an explicit competence title in the federal constitution that grants legislative authority to the federation. The original version of the Basic Law of May 23, 1949 included three types of federal legislative competences. In case of an exclusive legislative competence of the federation the states could legislate only when expressly authorized by federal law (see Art. 71, Art. 73 Basic Law 1949). In case of a concurrent competence, states could legislate so long and to the extent that the federation has not exercised its legislative power (see Art. 72, Art. 74 Basic Law 1949). In case of a framework competence, the federation could set rules with framework character, but cannot fully legislate on the issue (see Art. 75 Basic Law 1949).

The original version of the Basic Law contained only few federal competence titles related to the environment. Moreover, the most important of these were framework competences, the weakest category of federal competences – namely the framework competences for rules on nature conservation and on water management (see Art. 75 Nr. 3 and 4 Basic Law 1949). In 1972 the Basic Law received a significant amendment that granted the federation a concurrent

[7] In the following I will refer to the *Grundgesetz* as "Basic Law".
[8] In this article, the terminology used for the analysis of the *Grundgesetz* (Basic Law) follows largely the English translation of the *Grundgesetz* by C. TOMUSCHAT, D. P. CURRIE, D.P. KOMMERS, R. KERR, see https://www.gesetze-im-internet.de/englisch_gg/ (visited 30 November 2021).

competence title to legislate on waste disposal, air pollution control and noise abatement (see Art. 74 Nr. 24 Basic Law 1972).[9]

The constitutional amendment of federal environmental competences of 1972 was the start signal to the first phase of modern environmental law-making in Germany.[10] Modern German environmental law emerged as a set of sectoral statutes at the federal level. In 1972 the Federal Statute on Waste Disposal was enacted.[11] In 1974, the Federal Immission Control Act came into force, the key sectoral statute for the protection of the environmental medium "air".[12] In 1976, the Water Management Act as the key sectoral statute for protection of the environmental medium "water" (initially established in 1957)[13] and the Atomic Energy Act (initially enacted in 1959) received significant amendments.[14] In the same year – 1976 – the Federal Nature Conservation Act was established as the key sectoral statute for the protection of the environmental medium "soil" and for protection of endangered species.[15] In 1980 the Federal Chemicals Regulation Act[16] was enacted. The emergence of this set of federal sectoral statutes – each of which enabled for a broad sub-set of delegated legislation – created a path dependency for the systematic structure of German environmental law. Each of the mentioned federal sectoral statutes is still in place today.[17]

The plurality of federal sectoral statutes resulted in a complex system of substantial and formal requirements for environmentally relevant industrial and private activities. To reduce complexity, the Federal Immission Control Act contains a "concentration clause" that orders that the federal immission control permit in principle includes other permits. However, the concentration effect does

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[9] Statute on amendments to the Basic Law (*Grundgesetz*) of 12. 4. 1972, BGBl. I 593.
[10] P.- CH. STORM, *Bundes-Umweltgesetzbuch (BUG) – Prolegomena zu einer Kodifikation des Umweltrechts*, JbUTR 1988, p. 49 (51).
[11] Federal Statute on Waste Disposal (*Abfallbeseitigungsgesetz*) of 7. 6. 1972, BGBl. I 873.
[12] Federal Immission Control Act (*Bundes-Immissionsschutzgesetz*) of 15. 3. 1974, BGBl. I 721.
[13] See Water Management Act (*Wasserhaushaltsgesetz*) of 27. 7. 1957, BGBl. I 1110; Statute on Amendments to the Water Management Act of 26. 4. 1976, BGBl. I 1109.
[14] Atomic Energy Act (*Atomgesetz*) of 23. 12. 1959, BGBl. I 814; Statute on Amendments to the Atomic Energy Act of 30. 8. 1976, BGBl I 2573.
[15] Federal Nature Conservation Act (*Bundesnaturschutzgesetz*) of 20.12.1976, BGBl. I 3574.
[16] Federal Chemicals Regulation Act (*Chemikaliengesetz*) of 16.9.1980, BGBl I 1718.
[17] That being said, it should be noted that each of the mentioned federal sectoral statutes received significant amendments over the decades, see, e.g., below at 5.

not extend to water use permits.[18] Thus, many industrial installations do need both a federal immission control permit and a water use permit. The different permits possess very different legal characteristics. Most notably, there is no discretion in the administrative decision upon a federal immission control permit, while the water authorities have a broad "management discretion" (*Bewirtschaftungsermessen*) in decisions upon water use permits. On the one hand, water use permits are either time limited (for a period of 30 years) or subject to a possible revocation for reasons of resource management. On the other hand, the federal immission control permit is generally granted without a time limit.[19]

Over time, several federal statutes in horizontal, cross-sectoral perspective were added to the corpus of environmental law, in particular statutes in implementation of EU environmental law such as the Environmental Impact Assessment Act 1990,[20] the Environmental Information Act 1994[21] and the Environmental Access to Court Act 2006.[22]

In 2006, the system of federal competence allocation in the Basic Law was significantly amended.[23] While the default rule, that vests legislation in principle with the 16 states (Art. 70 Basic Law), remained in place, the system of federal legislative competences was altered profoundly. The category of federal framework competences was entirely abolished. In addition, a new sub-category of concurrent legislation named "divergent state legislation" was introduced (Art. 72 Sec. 3 Basic Law).[24] These developments became immediately important for environmental law, because the former federal framework competences in water management and nature conservation were transformed into concurrent federal legislative competences (Art. 74 Sec. 1 Nr. 29 and 32 Basic Law) that allow for "divergent state legislation" (Art. 72 Sec. 3 Nr. 2 and Nr. 5 Basic Law). It should

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[18] J. ZÖTTL, *Towards integrated protection of the environment in Germany,* JEL No. 12, 2000, p. 281 (283).
[19] J. ZÖTTL, *Towards integrated protection of the environment in Germany*, JEL No. 12, 2000, p. 281 (287); the operator is required to modernize the installation in case of ecologically relevant improvements in the technical state of the art.
[20] Environmental Impact Assessment Act (*Gesetz über die Umweltverträglichkeitsprüfung*) of 12.2.1990, BGBl. I 205.
[21] Environmental Information Act (*Umweltinformationsgesetz*) of 8.7.1994, BGBl. I 1490.
[22] Environmental Access to Court Act (*Umwelt-Rechtsbehelfsgesetz*) of 7.12.2006, BGBl. I 2816.
[23] Statute on amendments to the Basic Law (*Grundgesetz*) of 28.8.2006, BGBl I 2034.
[24] U. MÜLLER, B. KLEIN, *The New Legislative Competence of "Divergent State Legislation" and the Enactment of a Federal Environmental Code in Germany*, JEPPL 2007, p. 181 ff.

be noted, however, that the 2006 federalism reform did still not constitute a federal legislative competence on "the environment" in general.[25]

3. *Initiatives for a Federal Environmental Code in the 1990s*

In the academia, early reflections on codification of federal environmental law date back to the 1970s and 1980s.[26] In the early 1990s, several law professors jointly published draft proposals for a federal environmental code. In 1990 the draft for a "General Part of an Environmental Code" was released,[27] in 1994 the draft for a "Specific Part of an Environmental Code" followed.[28] The systematic distinction between a general part and a specific part reflected the German tradition of codification. For example, the federal criminal code (*Strafgesetzbuch*), that was first enacted as the Criminal Code of the German *Reich* (*Strafgesetzbuch für das Deutsche Reich*) in 1871, distinguishes between a general part and a specific part.[29] In the Civil Code (*Bürgerliches Gesetzbuch*) of 1900 (see above at 1.), the general part (*Allgemeiner Teil*) is the first of five books.[30]

The draft for a "General Part of an Environmental Code" of 1990 contained general rules and principles for industrial installation permits, environmental procedure, environmental information, public participation and rulemaking. It accounted for 169 articles. The draft for a "Specific Part of an Environmental Code" of 1994 included 399 articles on nature conservation, water resources management, soil protection, immission control, atomic energy, waste

[25] For an overview on various academic proposals for a general federal legislative competence for the law of "the environment" or "the natural foundations of life" see R. GRANDJOT, *Zur Konzeption eines Kompetenztitels "Recht der Umwelt"*, DÖV 2006, p. 511 (514-516).
[26] M. KLOEPFER, *Systematisierung des Umweltrechts*, UBA-Berichte 8/78 (1978); M. KLOEPFER, K. MEßERSCHMIDT, *Innere Harmonisierung des Umweltrechts*, UBA-Berichte 6/86 (1986); P.-CH. STORM, *Bundes-Umweltgesetzbuch (BUG) – Prolegomena zu einer Kodifikation des Umweltrechts*, JbUTR 1988, p. 49 (56 ff.).
[27] M. KLOEPFER, E. REHBINDER, E. SCHMIDT-AßMANN, P. KUNIG, *Umweltgesetzbuch –Allgemeiner Teil*, UBA-Berichte 7/90 (1990).
[28] H. D. JARASS, M. KLOEPFER, P. KUNIG, H.-J. PAPIER, F. J. PEINE, E. REHBINDER, J. SALZWEDEL, E. SCHMIDT - AßMANN, *Umweltgesetzbuch - Besonderer Teil*, UBA-Berichte 4/94 (1994).
[29] T. HÖRNLE, R. VAVRA, *Criminal Law* in J. ZEKOLL, G. WAGNER (eds.), *Introduction to German Law*, 3rd ed. 2019, p. 503 (504 ff.).
[30] R. ZIMMERMANN, *Characteristic Aspects of German Legal Culture* in J. ZEKOLL, G. WAGNER (eds.), *Introduction to German Law*, 3rd ed. 2019, p. 1 (11).

management and further sectors. According to Michael Kloepfer, a law professor and co-author of both professorial drafts, key aims of the codification initiatives of the early 1990s were harmonization, clarification, better implementation and greater uniformity of environmental laws, but also general enhancement of the ecology.[31]

The professorial drafts of 1990 and 1994 were not immediately adopted in the legislative process, but the idea of a federal environmental code found broad support at the level of the federal government.[32] The Federal Ministry of the Environment established the "independent expert commission on an environmental code" that was chaired by the former president of the Federal Administrative Court of Germany Horst Sendler. The independent expert commission released its draft for a Federal Environmental Code in 1997. The so called "commission draft" perpetuated the systematic combination of a "general part" and a "specific part" of an environmental code and encompassed 775 articles over all.[33] Parts of the "commission draft" were adopted by the Federal Ministry of the Environment in 1998 in the draft for a First Book of a Federal Environmental Code (*Umweltgesetzbuch I, UGB I*).[34]

The growing influence of European environmental law was an ambivalent factor. On the one hand, the project of a federal environmental code was seen as a unique chance to adjust the traditional sectoral structures of German environmental law to the integrative approach of European environmental law.[35] In particular, EC directive 96/61/EC[36] concerning integrated pollution prevention and control presented a significant challenge to the traditional duality of federal immission control permit and water use permits in the licensing procedure of

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[31] M. KLOEPFER, *On the Codification of German Environmental Law* in H. BOCKEN, D. RYCKBOST (eds.), *The Codification of Environmental Law*, 1996, p. 87 (91).
[32] For references see M. KLOEPFER, *On the Codification of German Environmental Law* in H. BOCKEN, D. RYCKBOST (eds.), *The Codification of Environmental Law*, 1996, p. 87 (89).
[33] BUNDESMINISTERIUM FÜR UMWELT; NATURSCHUTZ UND REAKTORSICHERHEIT (ed.), Umweltgesetzbuch - Kommissionsentwurf (UGB-KomE), 1998; for a systematic introduction to the „commission draft" see M. KLOEPFER, W. DURNER, DVBl. 1997, p. 1081 ff.
[34] For description and analysis see A. WASILEWSKI, *Stand der Umsetzung der UVP-Änderungs- und der IVU-Richtlinie*, NVwZ 2000, 15 (18-20); for a reprint see H.-W. RENGELING (ed.), *Auf dem Weg zum* Umweltgesetzbuch l, 1999, p. 273 ff.
[35] J. ZÖTTL, *Towards* integrated protection of the environment in Germany, JEL 12 (2000), p. 281 (290).
[36] Council Directive 96/61/EC of 24 September 1996 concerning integrated pollution prevention and control. OJ L 257, 10.10.1996, p. 26.

industrial installations.[37] On the other hand, it was argued that "the dynamic development of EC environmental law threatens the systematic and regulatory unity of any national environmental code".[38]

However, the question of federal legislative competences turned about to be the Achilles heel of environmental codification in the 1990s. On the one hand, the prevailing opinion among law professors and the authors of the "commission draft" was that the then-existing constitutional competences for federal legislation related to the environment (especially then-Art. 75 Nr. 3 and 4 Basic Law and then-Art. 74 Nr. 24 Basic Law), provided a sufficiently stable basis for the intended federal environmental code.[39] It was argued that these competence titles could be combined in the sense of a "mosaic-competence".[40] On the other hand, lawyers of the Federal Ministries of the Interior and of Justice challenged this approach and denied constitutionality. They argued that the federal framework competences for water management and nature conservation did not cover the proposed comprehensive set of environmental rules.[41] As a result of this dispute, the federal government stalled the initiative for a federal environmental code around the millennium even before a legislative proposal had reached the stage of parliamentary debate.[42]

Moreover, EC directive 96/61/EC on integrated pollution prevention and control was implemented through the amendment of "integration clauses" to pre-existing sectoral statutes.[43] The new integration clauses addressed environmental

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[37] J. ZÖTTL, *Towards* integrated protection of the environment in Germany, JEL 12 (2000), p. 281 (285-289).
[38] E. REHBINDER, *Points of Reference for a Codification of National Environmental Law* in H. BOCKEN, D. RYCKBOST (eds.), *The* Codification of *Environme*ntal Law, 1996, 157 (160-161).
[39] M. KLOEPFER, *Empfiehlt es sich, ein Umweltgesetzbuch zu schaffen, gegebenenfalls mit welchen Regelungsbereichen?,* JZ 1992, 817 (820-821); BUNDESMINISTERIUM FÜR UMWELT, NATURSCHUTZ UND REAKTORSICHERHEIT (ed.), Umweltgesetzbuch - Kommissionsentwurf (UGB-KomE), 1998, pp. 84-86; H. SENDLER, Deutsche Schwierigkeiten mit dem EG-Recht – Zur Misere der Umsetzung von EG-Umweltschutz-Richtlinien, NJW 2000, p. 2871 (2871-2872).
[40] H.-W. RENGELING, *Die Bundeskompetenzen für das „UGB I"* in id. (ed.), *Auf dem Weg zum Umweltgesetzbuch I,* 1999, p. 242 ff.
[41] See C. GRAMM, *Zur Gesetzgebungskompetenz des Bundes für ein Umweltgesetzbuch: zugleich ein Beitrag zur Auslegung von Art. 75 Abs. 2 GG*, DÖV 1999, p. 540 (542 ff.); see also FEDERAL MINISTRY OF ENVIRONMENT, Press release 139/99 of 2. 9. 1999 (with implicit references to the position of the Federal Ministries of the Interior and of Justice).
[42] See FEDERAL MINISTRY OF ENVIRONMENT, Press release 139/99 of 2. 9. 1999.
[43] Statute on implementation of EIA-directive, IPPC-directive and other EC-directives on the protection of the environment of 27. 7. 2001, BGBl. I 1950.

authorities across all levels of government and required them to consider effects across all environmental media in rulemaking and permit procedures. For example, the provisions on statutory aims in then-Art. 1 Federal Immission Control Act and then-Art. 1a Water Management Act were amended with the aims of integrated protection of environmental media and the prevention of adverse cross-medial effects.[44]

4. *Initiatives for a Federal Environmental Code in the 2000s*

The issue of environmental codification returned to the stage in the mid 2000s. The reform of the allocation of legislative competences between federal and state level in the Federal Constitution of Germany in 2006 provided new opportunities for federal environmental codification. As illustrated above (see at 2.), the federalism reform of 2006 had entirely abolished the federal competence category of framework competences, that had given rise to the constitutional challenges against the codification initiatives of the 1990s.

The Federal Ministry of the Environment issued a ministerial proposal for a draft of a federal environmental code in November 2007. A reworked version of the draft was issued in May 2008 and circulated for notice and comments from the 16 German states and societal and economic stakeholders.[45] The systematic concept of the draft differed from the drafts of the 1990s. The distinction between a general part and a special part was formally given up. Instead, the draft code of 2007/2008 was organized as a compilation of consecutive "books" (book I – book V).[46] The systematic change was intended to enable a legislative step-by-step process in which each "book" could be enacted separately over a multi-year-period and the amendment of additional "books" in the future.[47]

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[44] For further examples of integration clauses see H.-J. KOCH, H. SIEBEL-HUFFMANN, *Das Artikelgesetz zur Umsetzung der UVP-Änderungsrichtline, der IVU-Richtlinie und weiterer Umweltschutzrichtlinien*, NVwZ 2001, p. 1081 (1082-1088).

[45] See https://www.bmu.de/gesetz/referentenentwurf-fuer-das-umweltgesetzbuch-vor-anhoerung-mai-2008 (visited 30 November 2021).

[46] The organization in consecutive books resembled the system of federal social security legislation (*Sozialgesetzbuch or SGB I-X)*, see C. TRÜE, *Germany – the Drafting of an Environmental Law Code, European Energy and Environmental Law* Review 2009, p. 80 (84).

[47] W. ERBGUTH, M. SCHUBERT, *Zum Scheitern des UGB – Ursachen und Folgen für das nationale Umweltrecht*, JbUTR 2010, p. 7 (13-14).

The ministerial draft of May 2008 comprised five books. Following the abbreviation of the German term for environmental code (*Umweltgesetzbuch - UGB*) the five books were referred to as "UGB I" to "UGB V". The draft for UGB I included 144 articles and was divided into two main chapters. Chapter 1 (Art. 1-47 UGB I) contained general provisions on, e.g., aims and principles of environmental law, strategic environmental impact assessment and legal remedies in the environmental sector. Chapter 2 (Art. 48-137 UGB I) introduced the integrated environmental permit (*integrierte Vorhabengenehmigung*) into German environmental law. The integrated environmental permit was intended to replace the various environmental permits that were required under the plurality of sectoral statutes of federal environmental law, especially the federal immission control permit and the water use permit.[48] On the controversial issue of administrative discretion, the draft suggested a combination of the pre-existing models (see above at 2.). The competent authority should decide without discretion upon all requirements for the permit, except for aspects of water use that continued to be subject to "management discretion" (*Bewirtschaftungsermessen*) (Art. 54 UGB I) (see above at 2.).[49] The integrated environmental permit was intended to cover a broad range of classified installations that were listed in a draft for a separate legal act referred to as "ordinance on projects under the Environmental Code". In addition to the integrated environmental permit (with its focus on industrial installations), the draft for UGB I included a second type of public authorization for projects referred to as "integrated planning license" (*planerische Genehmigung*) (Art. 63-77 UGB I). The integrated planning license was intended to incorporate the traditional legal instrument of plan approval (*Planfeststellungsbeschluss*) into the UGB I. In German law, the plan approval is the legal instrument to authorize spatially relevant infrastructure such as highways, railway tracks, water ways or gridlines. The administrative decision upon a plan approval involves a balancing of public and private interests.[50]

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[48] See above at 2.
[49] We follow in terminology the English language overview on the content of the draft of May 2008 at https://www.bmu.de/en/law/consultation-with-the-laender-and-associations-on-the-ministrys-draft-of-the-environmental-code-ugb/ (visited 30 November 2021).
[50] C. TRÜE, *Germany – the Drafting of an Environmental Law Code, European Energy and Environmental Law* Review 2009, p. 80 (88).

The ministerial draft of May 2008 intended UGB II to cover the law of water management (93 articles), UGB III the law of nature conservation (77 articles), UGB IV the law of non-ionising radiation (15 articles) and UGB V the law of greenhouse gas emissions trading (26 articles). The draft of May 2008 did not include a separate book on the law of renewable energy expansion, that had been part of the earlier draft of November 2007.[51] All five books of the draft of May 2008 contained provisions that enabled the federal legislature to delegate substantial parts of the regulatory tasks to the federal government.

The codification initiative of 2007/2008 was much more influenced by EU environmental law than the drafts of the 1990s. The increased influence was due to the significant expansion of EU environmental law in the meantime.[52] For example, UGB I on general rules incorporated, among others, the environmental impact assessment directive, the directive on integrated pollution prevention and control, the environmental information directive, the directive 2003/4/EC on implementation of the Aarhus convention and the EMAS directive. UGB II on water management incorporated the EU water framework directive and other legal acts of EU water law. UGB III incorporated the broad body of EU nature conservation law (Natura 2000). UGB V incorporated the EU ETS directive. Particularly UGB II (water management) and UGB III (nature conservation) contained much sectoral EU law that Germany as an EU member state was obliged to implement.

However, in German political discourse, the draft of the Federal Ministry of the Environment of May 2008 was controversially received. While the existence of adequate legislative competences of the federation was mostly affirmed,[53] a political controversy about bureaucratic costs emerged. While the proponents of the draft expected the integrated environmental permit to reduce

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[51] The draft of November 2007 had included an additional book of the UGB on renewable energy expansion.

[52] G. GAENTZSCH, *Modernisierungsbedürfnis des UGB-KomE* in M. KLOEPFER (ed.), *Das kommende Umweltgesetzbuch*, 2007, p. 77 ff.; C. CALLIES, *Vorgaben für ein Umweltgesetzbuch: Europarecht* in M. KLOEPFER (ed.), *Das kommende Umweltgesetzbuch*, 2007, p. 35 ff.

[53] M. KOTULLA, *Umweltschutzgesetzgebungskompetenzen und „Föderalismusreform"*, NVwZ 2007, p. 489 (492, 495); M. KLOEPFER, *Föderalismusreform und Umweltgesetzgebungskompetenzen*, ZUR 2006, p. 338 (339); H. SCHULZE-FIELITZ, *Umweltschutz im Föderalismus - Europa, Bund und Länder*, NVwZ 2007, p. 249 (253-259); but see the discussion of competence limits associated with the category of "divergent state legislation" C. SANGENSTEDT, *Umweltgesetzbuch und integrierte Vorhabengenehmigung,* ZUR 2007, p. 505 (506).

bureaucratic costs, others argued to the contrary and assumed a steep increase in the overall number of required permits.[54] In terms of legislative structure, the "book approach" was challenged and confronted with the alternative of a "satellite model" of environmental legislation, in which a number of "satellite statutes" on specific areas of environmental law would circle around a "General Statute on Environmental Law" (*Allgemeines Umweltgesetzbuch*).[55] Eventually, the initiative for a federal environmental code of 2007/2008 was dropped, most notably in a public statement by the Federal minister of the environment in February of 2009.[56]

5. *Recent developments*

Since the 2007/2008 initiative for a federal environmental code had been given up in early 2009, the issue of codification has not returned into the spotlight of environmental law discourse in Germany. Neither the Federal Ministry of the Environment nor the academia have launched a third, nationally visible initiative for codification. Rather, in mid-2009 significant parts of the draft for the UGB of May 2008 were implemented through amendments of the relevant sectoral statutes.[57] In particular, the content of the draft for UGB II on the law of water management was incorporated in the Federal Water Management Act, the content of the draft for UGB III on the law of nature conservation was incorporated into the Federal Nature Conservation Act.[58] Thus, both federal sectoral statutes underwent a comprehensive modernization that reflected the abolishment of the category of federal competences for framework legislation in 2006 (see above at 2.) and replaced many rules of framework character by directly applicable

[54] Account on the controversy by M. KLOEPFER, *Einführung*, in: E. BOHNE, M. KLOEPFER (eds.), Das Projekt eines Umweltgesetzbuchs, 2009, p. 9 (11-12).
[55] G. WINTER, Das Umweltgesetzbuch – Überblick und Bewertung, ZUR 2008, p. 337 (339-340).
[56] FEDERAL MINISTRY OF THE ENVIRONMENT, Press release Nr. 33/09 of 1.2.2009.
[57] Statute reforming the Law of Nature Conservation of 29. 7. 2009, BGBl. I 2542; Statute reforming Water Law of 31. 7. 2009, BGBl. I 2585.
[58] On the incorporation strategy see then-Federal Minister of the Environment S. GABRIEL, Speech in Federal Parliament of 20 March 2009, BT-Plenarprotokoll 16. WP, 22979 (A).

norms.[59] In addition, relevant EU law was sectorally implemented.[60] The content of the draft for UGB IV was enacted as a separate federal statute on the law of non-ionising radiation.[61]

Moreover, the systemic challenges of the EU-industrial emission directive 2010/75/EU (IE-directive)[62] were also resolved through amendments to an existing sectoral statute, the Federal Immission Control Act. The IE-directive applies to many industrial installations and activities listed in the annexes to the directive. It requires integrated prevention and control of pollution arising from industrial emissions into air, water and land and demands to prevent the generation of waste. However, these integration requirements did not spark another major initiative for the introduction of an integrated environmental permit or further reaching codification. Rather, the German federal legislature implemented the IE-directive in 2013 [63] through significant systematic, procedural and substantial amendments to the Federal Immission Control Act.[64]

In both instances – the sectoral incorporation of several "books" out of the draft of May 2008 and the implementation of the EU- IE-directive – German environmental law proved by and large to be able to cope with significant systematic challenges within the traditional framework of sectoral federal statutes. As a result, the case for a federal environmental code lost significantly in momentum.

In addition, federal climate change legislation became ever more important, especially under the auspices of the Paris Agreement on Climate

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[59] See for details and discussion W. ERBGUTH, M. SCHUBERT, *Zum Scheitern des Umweltgesetzbuches – Ursachen und Folgen für das nationale Umweltrecht*, JbUTR 2010, p. 7 ff.; M. GELLERMANN, *Naturschutzrecht nach der Novelle des Bundesnaturschutzgesetzes*, NVwZ, 2010, p. 73 ff.

[60] B. BECKER, *Das neue Umweltrecht 2010*, 2010, p. 213 ff.

[61] Statute on Protection against Non-ionising Radiation in Application on Humans, 29. 7. 2009, BGBl. I S. 2433.

[62] Directive 2010/75/EU of the European Parliament and of the Council of 24.11.2010 on industrial emissions (integrated pollution prevention and control), OJ L 334, 17.12.2010, p. 17.

[63] Statute on Implementation of the Directive on Industrial Emissions of 8. 4. 2013, BGBl. I 734.

[64] Notably, the IE-Directive did not require a single permit system for the industrial installations, but rather allowed explicitly for the existence of a plurality of permit requirements at the member state level as long as "the conditions of, and the procedures for the granting of, the permit are fully coordinated" (Art. 5 Sec. 2 IE-Directive).

Change of 2015[65] and growing ambitions of EU climate change law.[66] In 2019 the first German Federal Climate Change Act was enacted[67] – a new key statute of federal environmental law. The Federal Climate Change Act has framework character. It sets out general and sectoral climate change mitigation goals and mechanisms for climate plans and programs of the federal government. The Federal Climate Change Act was challenged before the Federal Constitutional Court of Germany. On March 24, 2021 the Federal Constitutional Court issued a far reaching decision on the constitutional foundations of climate change legislation.[68] The Federal Constitutional Court particularly highlighted the constitutional obligation of the state under Art. 20a Basic Law to protect the natural foundations of life in responsibility toward future generations. The court emphasized that Art. 20a Basic Law includes a duty to protect the climate. It assessed this duty with detailed references to studies and recommendations of expert committees including the Intergovernmental Panel on Climate Change (IPCC)[69] and the German Advisory Council on the Environment.[70] The court concluded that the goal of the Paris Agreement to limit the "increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels"[71] that is implemented in the Federal Climate Change Act[72] is in line with the

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[65] Paris Agreement, 12 December 2015, in force 4 Nov. 2016, see http://unfccc.int/paris_agreement/items/9485.php (visited 15 November 2021).
[66] Communication from the Commission to the European Parliament, the European Council, the Council, the European Economic and Social Committee and the Committee of the Regions, *The European Green Deal,* , COM (2019) 640 final, 11. December 2019, p. 4; Regulation (EU) 2021/1119 of the European Parliament and of the Council of 30 June 2021 establishing the framework for achieving climate neutrality and amending Regulations (EC) No 401/2009 and (EU) 2018/1999 ('European Climate Law'), OJ 2021, L 243/1.
[67] Federal Climate Change Act (*Bundes-Klimaschutzgesetz*) of 12. 12. 2019, BGBl. I 1513.
[68] Federal Constitutional Court (*Bundesverfassungsgericht*), Decision of 24. 3. 2021, 1 BvR 2656/18 et. al., NJW 2021, 1723.
[69] See the references to the IPCC special report on the impacts of global warming of 1.5 °C of 2018 (in German) at Federal Constitutional Court (*Bundesverfassungsgericht*), Decision of 24. 3. 2021, 1 BvR 2656/18 et. al., NJW 2021, 1723 (at 1729, 1733, 1734).
[70] See the references to the German Advisory Council on the Environment (*Sachverständigenrat für Umweltfragen*, *SRU*) (in German) at Federal Constitutional Court (*Bundesverfassungsgericht*), Decision of 24. 3. 2021, 1 BvR 2656/18 et. al., NJW 2021, 1723 (at 1728, 1729, 1744, 1745, 1746).
[71] See Art. 2 Sec. 2 Paris Agreement, 12 December 2015, in force 4 Nov. 2016, see http://unfccc.int/paris_agreement/items/9485.php (visited 15 November 2021).
[72] See § 1 Sentence 3 Federal Climate Change Act (*Bundes-Klimaschutzgesetz*) of 12. 12. 2019, BGBl. I 1513.

requirements of Art. 20a Basic Law. Moreover, the Federal Constitutional Court gave emphasis to the fundamental rights dimension of climate change law and developed a new intergenerational dimension of fundamental rights that adds to the weight of the state to protect the climate.[73]

The decision of the Federal Constitutional Court prompted amendments of the Federal Climate Change Act in mid-2021. These amendments sharpened and detailed the German climate change mitigation goals (e.g., climate neutrality for Germany in 2045; sectoral goals for energy sector, housing sector etc.).[74] In effect, the emergence of climate change legislation as an increasingly significant part of modern environmental law made it even more difficult and practically less realistic to reorganize core structures of German federal environmental law in a universal code.

6. *Concluding remarks*

In the Federal Republic of Germany, the possibilities of codification of environmental law depend upon the constitutional allocation of legislative competences. Modern environmental law emerged as a set of sectoral federal statutes in the 1970s. The sectoral patterns of early environmental legislation dominate the structure of German environmental law until the present. In the 1990s and 2000s, initiatives for a federal environmental code received broad academic and governmental support, but were eventually given up. In recent years, other issues dominated the discourse in German environmental law, e.g., the sectoral incorporation of the EU-industrial emission directive and the enactment of the first Federal Climate Change Act in Germany. Looking to the years ahead, there is no new initiative for a universal federal environmental code at the level of the federal government in sight. However, specific elements of the codification initiatives of the 1990s and 2000s may well return to the agenda to be reconsidered as objects of legal reform, e.g., the integrative extension of

[73] Federal Constitutional Court (*Bundesverfassungsgericht*), Decision of 24. 3. 2021, 1 BvR 2656/18 et. al., NJW 2021, 1723, 1732; for explanation and discussion see S. SCHLACKE, *Klimaschutzrecht – Ein Grundrecht auf intertemporale Freiheitssicherung*, NVwZ 2021, p. 912 ff.
[74] First Statute on Amendments to the Federal Climate Change Act of 18. 8. 2021, BGBl. I 3905.

concentration effects of environmental permit procedures across the environmental media air, water and soil.[75]

ABSTRACT

Johannes Saurer – *The problem of codification in German environmental law*

The paper discusses the problem of codification in German environmental law with particular regard to the constitutional allocation of legislative competences between the federal and the state level. It illustrates that modern German environmental law emerged in the 1970s as a set of federal sectoral statutes that has largely persisted until the present. The paper shows that in the 1990s and 2000s the Federal Ministry of the Environment and members of the legal profession developed a range of elaborated and ambitious drafts for a federal environmental code. It addresses structure and content of these drafts, reasons why they were eventually given up, and the influence of EU law.

[75] See above at 4.; for a recent discussion of reform options see W. DURNER, *Die integrierte Vorhabengenehmigung – Bilanz und Perspektiven*, DVBl. 2019, p. 145 (151-152).