

THE MEANING OF ‘ENVIRONMENT’ IN THE GERMAN LEGAL ORDER

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INTRODUCTION

The term ‘environment’ (‘Umwelt’) is a basic term that is eponymous for environmental law. It is, to all intents and purposes, fundamental for life sciences as well as protection of the environment. The intent of environmental law is to protect the environment. But how, you may ask, can a lawyer deal with environmental law if he doesn’t even know what the ‘environment’ is? Indeed, this question was raised 33 years ago. A well-known German lawyer¹ phrased it that way: “Can one even talk about ‘law’ if one poses the question of regulability of its subject matter, with the knowledge that one cannot answer it?”² Even in international and European environmental law this lack of definiteness is stressed: “How broadly or narrowly defined the environment is, is not clear and of course a central problem to environmental law”³.

In Germany, due to the fact that the term ‘environment’ – in the absence of an Environmental Law Code (Umweltgesetzbuch) – is not defined, it needs to be interpreted.

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The contribution is dedicated to prof. dr hab. Konrad Jerzy Nowacki.

¹ Prof. Dr. Horst Sendler[†], former President of the German Federal Administrative Court (1980-1991) and Chairman (1992-1997) of the so-called independent committee of experts (Unabhängige Sachverständigenkommission) on a (German) Environmental Law Code (Umweltgesetzbuch).

² Horst Sendler, ‘Ist das Umweltrecht normierbar?’ [1981] *Umwelt und Planungsrecht* 1, 9 – translated into English by the author.

³ Emily Barritt, ‘Conceptualising Stewardship in Environmental Law’ (2014) 26 *Journal of Environmental Law* (JEL) 1, 6; Nicolas de Sadeleer, *EU Environmental Law and the Internal Market* (1st edn, Oxford University Press 2014) 5: “What exactly is the environment?”

I. INTERPRETATION AND ITS ELEMENTS

What a lawyer aims at with an interpretation is to identify the objective, the meaning and the content of a term or even a statute. To find out the objective, the meaning and the content of a term, lawyers use various tools and methods of interpretation, including traditional canons. In reply to the query what is ‘environment’ in the legal sense, I use the instruments of legal interpretation, the art of hermeneutics. To this effect, I follow the canons of (respectively the theory of interpretation of) Friedrich Carl von Savigny (1779-1861).

Following Savigny, we distinguish four elements of interpretation⁴:

- grammatical interpretation,
- historical interpretation,
- systematic interpretation and
- (teleo-)logical interpretation.

1. *Grammatical interpretation*

The grammatical interpretation method is based on the consideration that each act of interpretation has to start with the literal sense or meaning of a term. It concentrates on a determination of general linguistic usage.

The term ‘Umwelt’ was assimilated into the German vocabulary about 200 years ago⁵. There is a dispute in literature about the question of whether the term derives from the Danish word ‘omverden’ – which means something like “the outer world” – or the French word ‘milieu’⁶. However, the final entering of the vocable into the German treasury of words (Wortschatz) is traced back to a German “lawyer”, whom most people know from another profession. It is the same person who asked through the very German storybook character Dr Heinrich Faust in the famous Night Scene “whatever binds the world’s innermost core together”⁷. It is supposed that Johann Wolfgang von Goethe (1749-1832) used the word in a social context⁸.

Based on the conventional meaning in German, ‘environment’ is the space surrounding a human being, everything that surrounds a human, exerts impact on somebody and influences living conditions⁹. Depending on

⁴ Friedrich Carl von Savigny, *System des heutigen Römischen Rechts*, vol 1 (first published 1840 in Berlin) para 33 212, <http://www.deutschestextarchiv.de/savigny_system01_1840/268> accessed 21 March 2014. See also Karl Larenz, *Methodenlehre der Rechtswissenschaft* (6th edn, Springer 1991) 11; Ulrich Huber, ‘Savignys Lehre von der Auslegung der Gesetze in heutiger Sicht’ (2003) 58 *JuristenZeitung* 1, 5.

⁵ *Duden’s Herkunftswörterbuch* (2nd edn, Mannheim, Leipzig 1989). See also Heinrich Freiherr von Lersner, ‘Umwelt’ in Otto Kimminich, Heinrich Freiherr von Lersner, Peter-Christoph Storm (eds), *Handwörterbuch des Umweltrechts*, vol 1 (2nd edn, Erich Schmidt 1994).

⁶ *Duden’s Herkunftswörterbuch* (n 5); Heinrich Freiherr von Lersner, ‘Zum Rechtsbegriff der Natur’ (1999) 21 *Natur und Recht* 61, 63.

⁷ See Goethe’s Faust, *The First Part of the Tragedy*.

⁸ von Lersner (n 6) 63; Anna-Miriam Kane, *Die Gesetzgebungskompetenz des Bundes im Umweltschutz* (Nomos 2013) 50.

⁹ *Duden’s Bedeutungswörterbuch* (4th edn, Mannheim, Leipzig 2010).

the circumstances, one can make out a 'natural', a 'social', or even a 'cultural-civilizing' meaning of the term. To distinguish the various meanings is difficult as "[m]an is both creature and moulder of his environment"¹⁰. Hence, because the grammatical interpretation allows for diversity, it is helpful to apply other elements of interpretation as well¹¹.

2. Historical interpretation

Historical interpretation serves to reveal the intent of the legislator¹². Since the German legislator has not yet comprehensively codified (all) environmental law(s), this method would seem to fail. Nonetheless, we may refer to preliminary studies on a German Environmental Law Code (*Umweltgesetzbuch*)¹³.

Three drafts for codification have been prepared up to now: the 1990 draft of appointed professors¹⁴, the 1997 draft by an independent committee of experts¹⁵ and finally the so-called *Referentenentwurf*¹⁶ which is the 2008

¹⁰ (Stockholm) Declaration of the United Nations Conference on the Human Environment 1972 (11 I.L.M. 1416) recital (1): "Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth."

¹¹ See Larenz (n 4) 344.

¹² von Savigny (n 4) 214.

¹³ For environmental law codifications in Europe see Eckard Reh binder, 'Kodifikationen des Umweltrechts in Europa – Rechtsvergleichende Betrachtungen' in Klaus-Peter Dolde, Stefan Paetow, Eberhard Schmidt-Aßmann, Klaus Hansmann (eds), *Verfassung – Umwelt – Wirtschaft: Festschrift für Dieter Sellner* (CH Beck 2010) 89; Konrad Nowacki, 'Wpływ prawa europejskiego na polski system prawa ochrony środowiska' (2010) 3 *Przegląd Legislacyjny* 11 ff.

¹⁴ Michael Kloepper, Eckard Reh binder, Eberhard Schmidt-Aßmann and Philip Kunig, *Umweltgesetzbuch: Allgemeiner Teil* (Umweltbundesamt (ed), 2nd edn, Erich Schmidt 1991) § 2 (1): "Im Sinne dieses Gesetzes sind

1. Umwelt: der Naturhaushalt, das Klima, die Landschaft und schutzwürdige Sachgüter
2. Naturhaushalt: Boden, Wasser, Luft und lebende Organismen (Naturgüter) sowie das Wirkungsgefüge zwischen ihnen."

¹⁵ Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit (ed), *Umweltgesetzbuch (UGB-KomE)* (Duncker & Humblot 1998) Allgemeiner Teil (§ 2 1.-2.): "Im Sinne dieses Gesetzes sind

1. Umwelt: der Naturhaushalt, die Landschaft, Kulturgüter und schutzwürdige Sachgüter (Umweltgüter) sowie das Wirkungsgefüge zwischen den Umweltgütern;
2. Naturhaushalt: Boden, Wasser, Luft, die Ozonschicht, das Klima einschließlich des Kleinklimas, Tiere, Pflanzen und andere lebende Organismen (Naturgüter) sowie das Wirkungsgefüge zwischen den Naturgütern."

The Federal Ministry for the Environment, Nature Conservation and Nuclear Safety issued a blueprint (*Arbeitsentwurf*) for the first book (*Allgemeiner Teil*) of a German Environmental Law Code in 1998, see Hans-Werner Rengeling (ed), *Auf dem Weg zum Umweltgesetzbuch I: Zur Änderung der IVU- und der UVP-Änderungsrichtlinie* (Carl Heymanns 1999) 273. According to this blueprint (§ A 6) 'environment' was defined almost synonymously with the draft of the independent committee of experts:

"2. Umwelt: der Naturhaushalt, die Landschaft, Kulturgüter und schutzwürdige Sachgüter (Umweltgüter) sowie die Wechselwirkungen zwischen den Umweltgütern;

3. Naturhaushalt: Boden, Wasser, Luft, die Ozonschicht, das Klima einschließlich des Kleinklimas, Tiere, Pflanzen und andere lebende Organismen (Naturgüter) sowie die Wechselwirkungen zwischen den Naturgütern."

¹⁶ Bundesministerium für Umwelt, Naturschutz und Reaktorsicherheit, *UGB-Referentenentwurf* (2008),

<<http://www.bmub.bund.de/service/publikationen/downloads/details/artikel/ugb->

draft by the Federal Ministry for the Environment, Nature Conservation and Nuclear Safety.

Even though none of these drafts became law¹⁷, taken together they comprise a comparatively uniform definition of the term 'environment' as a whole. According to the drafts, and following the historical interpretation method, 'environment' in the sense of German environmental law is thus composed of: natural balance (Naturhaushalt), landscape and material property (assets and cultural heritage). Under the term 'natural balance', each of the drafts incorporate – *cum grano salis* – soil, water, atmospheric air and living organisms (animals and plants) as well as the interaction between those components, such as climate and biological diversity¹⁸.

3. Systematic interpretation

In order to round out the current examination it is essential to undertake a systematic interpretation of the term 'environment' as well. The systematic interpretation method relies on the assumption that the legal order as a whole is self-consistent: no law shall be inconsistent with another. In the words of Savigny, "*alle Rechtsinstitute und Rechtsregeln [sind] zu einer großen Einheit verknüpft*"¹⁹.

In this respect it is necessary to analyse if out of the multitude of the comprehensive body of single legislation – laws to protect air, soil, water, nature, forest, animals, plants, and so on – we can dig out a substrate that leads us to a uniform understanding of 'environment'.

Such a sifting through of environmental legislation does in fact lead to an understanding, just as the historical interpretation method did. The single German environmental laws serve:

medial: the protection of water, soil and atmospheric air;

vital: the protection of humans, animals and plants;

natural-cultural: the protection of landscapes as well as

objective: the protection of certain material assets.

The interaction between these components shall be protected comprehensively.

However, this finding needs to be verified by means of teleological interpretation.

4. Teleological interpretation

As the term implies, teleological interpretation serves to identify the spirit and purpose of a law. Here, one has to scrutinise the *raison d'être* or *ratio legis* of environmental law.

[referentenentwurf/](#)>accessed 20 March 2014, Erstes Buch Umweltgesetzbuch (UGB I: § 4 1.): "Für das Umweltgesetzbuch gelten folgende Begriffsbestimmungen: 1. Umwelt[:.] Tiere, Pflanzen, die biologische Vielfalt, der Boden, das Wasser, die Luft, das Klima und die Landschaft sowie Kultur- und sonstige Sachgüter (Umweltgüter)." For *UGB-Referentenentwurf* see Eberhard Bohne and Michael Kloepfer (eds), *Das Projekt eines Umweltgesetzbuchs 2009* (Duncker & Humblot 2009) *passim*.

¹⁷ See Michael Kloepfer (ed), *Das kommende Umweltgesetzbuch* (Duncker & Humblot 2007) 9, 10: "Wer kodifizieren will, braucht einen langen Atem."; Lothar Knopp, 'Umweltgesetzbuch – ein Trauerspiel ohne Ende?' [2009] *Umwelt und Planungsrecht* 121.

¹⁸ Jan Hoffmann, 'Umwelt – ein bestimmbarer Rechtsbegriff?' (2011) 33 *Natur und Recht* 389, 395.

¹⁹ von Savigny (n 4) 214.

In order to determine the purpose of a law, it is instrumental to refer to the highest source of law in the German legal order. While the German constitution (Grundgesetz)²⁰ does not contain a distinct title addressing 'environment', in Article 20a²¹ – as a constitutional principle and policy objective – it is set forth that the state “shall protect the natural foundations of life” (natürliche Lebensgrundlagen).

This intention seems to be consistent with the understanding of the interpretation offered. Insofar a constitutionally consistent interpretation²² is provided too, even though there remain differences between the terms 'environment' and 'natural foundations of life'²³. Notably, under Article 20a Grundgesetz there seems to be no need for the inclusion of material assets within the meaning of *natural* foundations of life.

5. Evaluative comparison

Transeunt to the canons of Savigny, it has been suggested in modern times to consider a fifth means of interpretation as an enhancement of historical and systematic reflections, labelled an evaluative-comparative one (wertende Rechtsvergleichung)²⁴. The 'comparison' regards other (public) legal orders (konstitutionelle Komparatistik²⁵).

Due to the fact that environmental law is square in the middle of fields that are highly influenced by European Union law, such a reflection has the valour of being constructive. The phenomenon referenced here is called Europeanization²⁶. By Europeanization I mean the enormous influence of legal acts (most notably Directives) of the European Union on the content of – subsequent – German domestic law. At the same time, we have to bear in mind that EU law has primacy in application also; it overrides German environmental law in case of interference.

The rounding out of the interpretation by means of evaluative comparison not only confirms the previous findings, but also demonstrates the huge influence of EU law on national environmental law: the German meaning of 'environment' in the legal sense can be definitively traced back to EU Directives. To name just a few:

- the Directive on public access to environmental information²⁷,

²⁰ Grundgesetz für die Bundesrepublik Deutschland vom 23.05.1949 (Basic Law of the Federal Republic of Germany 1949).

²¹ Art 20a Grundgesetz (translated into English by the author): “Mindful also of its responsibility toward future generations, the state shall protect the natural foundations of life and animals by legislation and, in accordance with law and justice, by executive and judicial action, all within the framework of the constitutional order.”

²² See Larenz (n 4) 339.

²³ Hoffmann (n 18) 395.

²⁴ Peter Häberle, 'Grundrechtsgeltung und Grundrechtsinterpretation im Verfassungsstaat: Zugleich zur Rechtsvergleichung als „fünfter“ Auslegungsmethode' (1989) 44 JuristenZeitung 913, 916.

²⁵ ibid 917. See also Axel Tschentscher, 'Dialektische Rechtsvergleichung: Zur Methode der Komparistik im öffentlichen Recht' (2007) 62 JuristenZeitung 807, 812.

²⁶ See Lothar Knopp and Jan Hoffmann, *Progredientes Europäisierungsphänomen im Umweltrecht* (Nomos 2010) passim.

²⁷ Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC [2003] OJ L 41/26, see Art 2 1. (a) of the Directive: “‘Environmental information’ shall mean any information [...] on: (a) the state of the elements of the environment, such as air

- the integrated pollution prevention and control Directive²⁸ as well as
- the environmental impact assessment Directive²⁹.

Not only by looking to Brussels, but also by taking a comparative look over the German border at Warsaw confirms the identified understanding of the term ‘environment’ in Germany: the Polish Environmental Protection Act (*Prawo ochrony środowiska*³⁰) contains in its Article 3 (39) a general legal definition of the term that almost exactly coincides with the one resulting from the interpretation of the term in the German legal order³¹.

CONCLUSION AND FINAL REMARKS

Applying the instrumentarium of hermeneutics I analysed the meaning of the term ‘environment’ within the German legal order. In German law ‘environment’ (Umwelt) means:

medial: water, soil and atmospheric air;

vital: humans, animals and plants;

natural-cultural: landscapes;

objective: certain material property (assets and cultural heritage);

integrative: the observance of the interaction between these components.

The inclusion of man-made material assets into the term ‘environment’ does reflect our new(ton)-age mechanistic understanding of

and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements.”

²⁸ Directive 2010/75/EU of the European Parliament and of the Council of 24 November 2010 on industrial emissions (integrated pollution prevention and control) [2010] OJ L 334/17, see Art 3 (2) of the Directive: “‘pollution’ means the direct or indirect introduction, as a result of human activity, of substances, vibrations, heat or noise into air, water or land which may be harmful to human health or the quality of the environment, result in damage to material property, or impair or interfere with amenities and other legitimate uses of the environment”.

²⁹ Directive 2011/92/EU of the European Parliament and of the Council of 13 December 2011 on the assessment of the effects of certain public and private projects on the environment [2012] OJ L 26/1, see Art 3 of the Directive: “The environmental impact assessment shall identify, describe and assess in an appropriate manner [...] the direct and indirect effects of a project on the following factors:

(a) human beings, fauna and flora;

(b) soil, water, air, climate and the landscape;

(c) material assets and the cultural heritage;

(d) the interaction between the factors referred to in points (a), (b) and (c).”

³⁰ Ustawa z dnia 27 kwietnia 2001 r. – Prawo ochrony środowiska (Journal of Laws 2013, item 1232, as amended) [Polish Environmental Protection Act]: „Art. 3. Ilekroć w ustawie jest mowa o: (39) środowisku – rozumie się przez to ogół elementów przyrodniczych [...] a w szczególności powierzchnię ziemi, kopaliny, wody, powietrze, krajobraz, klimat oraz pozostałe elementy różnorodności biologicznej, a także wzajemne oddziaływania pomiędzy tymi elementami”. [Within the meaning of this act the term ‘environment’ means the entirety of natural elements [...] in particular the earth’s surface, soil resources, waters, atmospheric air, landscape, climate and other elements of biological diversity as well as the interaction among these elements.] – translated into English by the author.

³¹ Kamila Kwaśnicka and Jan Hoffmann, ‘Rechtsbegriff "Umwelt": Deutschland und Polen im Vergleich’ [2012] *Wirtschaft und Recht in Osteuropa* 272, 274.

nature³². Moreover, by also dealing with questions of noise – from airplanes or children in Kindergarten – we are on track to include issues of social dimension into environmental law.

The necessity to observe the interaction between the single components of the environment is called internal integration, in opposition to the equal need for external integration. This means that environmental protection requirements must be integrated into the definition and implementation of other policies and activities, with a view to promoting sustainable development³³.

Even though there is a need for a firm definition of the term 'environment', in order to make it operational for lawyers, as analysis has demonstrated one may navigate this issue only with umbrella terms in use today. This situation will likely continue for as long as we do not know what it is that "binds the world's innermost core together".

³² Günter Hager, 'Naturverständnis und Umweltrecht' (1998) 53 *JuristenZeitung* 223, 226. See also Hasso Hofmann, 'Natur und Naturschutz im Spiegel des Verfassungsrechts' (1988) 43 *JuristenZeitung* 265, 268; Klaus Bosselmann, *Im Namen der Natur – Der Weg zum ökologischen Rechtsstaat* (Scherz 1992) 373.

³³ See Art 11 TFEU (Consolidated version of the Treaty on the Functioning of the European Union) [2012] OJ C 326/47.