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The Environment as a Challenge for Governmental Responsibility – The Case of the European Water Framework Directive[1]

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Abstract

The European Water Framework Directive is shaping a new conception of integrative water protection. In this article, the consequences of the Water Framework Directive in respect to national environmental policy will be discussed in referring to the notion of responsibility which is a central concept of political philosophy and theory. It will be shown that the new conception of integrative water protection entails a fundamental change in European water protection policy and also environmental policy at all. It implies that environmental policy has not only to prevent environmental damage but in particular has to warrant a good status of the environment, such that it must maintain a good status of water or even achieve it if this status does not exist. Achieving and maintaining a good status of the environment is, however, an encompassing task. Thereby, state power and will eventually be overexerted. The threat of such overexertion has to be kept in mind in discussing the perspective of the so called New Environmental Governance. It will be pointed out that the New Environmental Governance is not primarily a form of some sort of democratic participation but rather designed to improve state power in environmental politics.

Keywords

Environmental politics; European Water Framework Directive; Responsibility; Environmental Governance

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1. Introduction

Over the past three decades the European Community has enacted a series of directives relating to all areas of environmental policy. These directives have exerted a major influence on the national environmental policies of EU Member States. While the earlier directives drew heavily on German environmental legislation, which was characterised by technical standards and emission thresholds, more recent Anglo-Scandinavian legislation in the mid-1980s has become more and more influential. The consequences have been a shift from sectoral environmental protection to a more integrated form as well as the establishment of mandatory environmental objectives that provide an explicit description of a desirable environmental standard or status (Durner/Ludwig 2008, 457).[5] One prominent example of such a modern directive is the European Water Framework Directive (WFD, European Communities 2000) which came into force in 2000. Its ambitious objective is that, in principle, all groundwater, surface and coastal waters in the European Union should achieve "good status" by 2015. Water protection is one of the traditional tasks of environmental policy. At first sight, the WFD appears merely to extend national environmental policy to the European level; however, this view is misleading because the WFD entails major changes in environmental policy processes.

In this article we will argue that the WFD imposes new and even revolutionary forms of responsibility on the EU Member States. First we will analyse the aforementioned forms of responsibility and elaborate our hypothesis regarding the overburdening of governmental capacity by the WFD. We will then discuss the question of whether new forms of "environmental governance" are helpful for dealing successfully with the tasks posed by the WFD.

The structure of this paper is as follows: Section 2 deals with the WFD approach to water policy and its specific novelty in contrast to traditional water policy. In Section 3 concepts of state sovereignty and responsibility are outlined which are indispensable for a general understanding (and differentiation) of governing and governance. Specifically, different types of responsibility are introduced that refer to corresponding commitments to pursuing certain objectives. Against this background, it is then demonstrated in Section 4 how the governmental tasks of (i) "guaranteeing the legal order" (ii) "encouraging economic

[5] Milestones in this development have been the Environmental Impact Assessment Directive (85/337/EEC), the Directive Concerning Integrated Pollution Prevention and Control (96/61/EC) and the Strategic Environmental Assessment Directive (2001/42/EC).

development" and (iii) "protecting the environment" are related to these different types of responsibility. In Section 5 it is argued that the WFD extends governmental responsibility beyond that which is taken by the state when it seeks to provide "environmental protection". The consequences of this extension of responsibility for modern states are analysed in Section 6. In Section 7 we discuss whether governance approaches are suitable for dealing with the new challenges posed for Member States by the WFD. Finally, in Section 8 we scrutinize the relationship between environmental governance and state sovereignty.

2. A new approach to water policy

It is widely recognized that the WFD introduces a high degree of novelty to water policy (Moss 2003, Rumm/von Keitz/Schmalholz 2006). Some of the most important novel aspects are:

1. *"Good status" as an environmental objective*: In contrast to older water-related EU directives, such as the Drinking Water Directive, the Urban Wastewater Directive or the Nitrates Directive, and in contrast, for example, to German water legislation in the past, the WFD defines comprehensive and mandatory environmental objectives for all waters under the rubric "good status" (Article 4.1). With regard to surface water, for instance, good status is composed of several elements, including ecological as well as chemical qualities. A river or a lake has good ecological status if it shows only "low levels of distortion resulting from human activity" (WFD, Annex 1.2.1). For artificial and heavily modified water bodies, such as canals and dams, the WFD (Art. 4.3) replaces the objective of "good status" with "good ecological potential". In exceptional cases the directive allows for the extension of deadlines (Art. 4.4) or a mitigation of environmental objectives (Art. 4.5). Exemptions are justified if (i) natural conditions or (ii) technical reasons preclude the achievement of good status (within the deadline), or (iii) if the induced costs are (estimated to be) disproportionately high.

2. *Dynamic implementation*: The deadlines for achieving different levels of implementation of the WFD are set over a period of more than 25 years. The most important deadlines are (i) the year 2009 for the adoption of river basin management plans, including a programme of measures specifying how the environmental objectives are to be reached by then (Art. 13 and 11, WFD), and (ii) the year 2015 by which "good status" (or "good potential") is to be achieved. After 2015, new management plans will be devised and exemptions to them revised every six years. These milestones introduce a certain dynamic

into water management. They establish obligations and prompt actors to take initiatives that will be effective over the long term. Furthermore, it is crucial that the objective of "good status" for all waters remains the point of reference, even if exemptions allow for deviations from the objective of "good status" in the meantime.

3. *Integrated River Basin Management (IWRM)*: The concept of IWRM emphasizes the importance of spatial structure and sectoral integration in water management and puts it in the context of sustainable development (OECD 1989, GWP 2000). Hence, the WFD can be seen as an attempt to realize IWRM (Klauer/Rode/Petry 2008). Water management as defined by the WFD is based on hydrological units. The main unit of management are the river basin districts. Such a district is an "area of land and sea, made up of one or more neighbouring river basins together with their associated groundwaters and coastal waters" (Art. 2.15, WFD). Management plans are developed to cover these river basin districts. Frequently, river basin districts extend across two or more Member States, i.e. there is a mismatch between political and hydrological borders. In order to tackle this mismatch, Article 3 obliges Member States to cooperate and to coordinate their actions. The other important management unit of the WFD are *water bodies*: both environmental objectives and exemptions refer to these units. A water body is a sub-basin measuring from approx. 5 to 600 km^2.

4. *Institutional change and environmental governance*. The literature on the WFD emphasizes that its policy approach will bring about a change in political institutions. This prediction of institutional change is often linked to the debate on environmental governance (Moss 2003, Fichter 2003).

Less common than the factors mentioned above is the argument that we develop in this article. Our assessment consists of two parts, which may be summarized briefly as follows: (i) The WFD implies a degree of governmental responsibility for the environment that may cause an overburdening of state capacity. The responsibility of the state – compared with conventional environmental policy – is greatly extended by the requirements of the WFD. (ii) In order to discharge this extended responsibility, the state must rely on new forms of cooperative governing known as "new environmental governance". These alternative forms of governing, however, can not absolve the government from its ultimate responsibility. Thus, the implementation of environmental governance through policy does not contribute to a diminishing of conventional state activity but rather to an increase of it.

3. State sovereignty and responsibility

The obligation of EU Member States to achieve and subsequently maintain good water status has far-reaching implications relating to the role of state and government in environmental policy. We will discuss this issue by examining the concepts of *sovereignty* and *responsibility*, both which are essential to modern state and government. The WFD takes it for granted that governments will be able to fulfil the obligations imposed by it. In order to achieve the environmental objectives of WFD Article 4, governments must be the primary decision-makers and must have the power to enforce implementation in line with their decisions. This implies the ability to overcome all forms of resistance, as well as the capacity effectively to oblige people to abide by its decisions.[6] This particular capacity is not common to all political bodies or institutions but is typical for the modern state. In political theory and philosophy, this capacity is described as "sovereignty".[7] In the German debate on environmental policy, sovereignty has been associated with the government's ultimate responsibility (*Letztverantwortung*) (SRU 2004: No. 1221). This term expresses the notion that the government is the guarantor for law abidance and the implementation of decisions. Sovereignty, as a form of supreme power, is a prerequisite of this ultimate responsibility. It is because the government bears this ultimate responsibility that it can be held responsible for particular political issues such as, for example, good water status as defined by the WFD.

In this article, we seek to demonstrate that the approach to water protection adopted by the WFD entails specific changes with regard to state responsibility. For this reason, we will now turn briefly to the concept of responsibility in general, and then to its meaning in the context of the WFD in particular.

In its primary sense, responsibility is a category of *ascription*, i.e. a person is regarded as the author of his/her deeds.[8] In this sense, a person is seen as responsible for their actions or activities and for the consequences arising from them. Responsibility in this primary sense has three prerequisites: freedom of action, power and knowledge. (i) A person is responsible if he/she acts voluntarily; (ii) he/she must have the power to carry out a certain action; and (iii) he/she must know what he/she is doing. "To know what one is doing" implies being aware of the relevant consequences of an action.[9]

[6] In this respect, the state could be characterized as "a coercive sovereign institution" (Johnston 1989, 120).
[7] See e.g. Thomas Hobbes (1973). As Michael Oakeshott (1996) has pointed out, it is the attribute of sovereignty that distinguishes the modern state from medieval realms.
[8] For a general introduction to responsibility in the realm of environmental policy, see Baumgärtner et al. 2006: 221-267.
[9] The problem of knowledge is also addressed in Baumgärtner et al. 2006; 238-241.

This sense of responsibility as a *principle of accountability* for activities and their consequences constitutes a prerequisite of responsibility in the secondary sense of the term. In this sense, responsibility is a *principle of competence* and is related to the conservation, well-being or good condition of an object or person. Responsibility, therefore, is related to the condition or status, of somebody or something. The proposition "I am responsible for a person or a thing" means: "I am *obliged* to care in a certain way for this person or thing."

Responsibility as a principle of competence may in turn be further differentiated into negative and positive responsibility. *Negative responsibility* for someone or something means that one is not allowed to inflict damage on them. We could characterize negative responsibility as (a form of) indirect responsibility, since it does not entail any obligation to improve the status of the person or thing but merely requires that this status should not be damaged or allowed to deteriorate. *Positive responsibility* for someone or something denotes that the obligation is to contribute positively to the well-being or conservation of someone or something, as, say, parents have the responsibility to care for their children. Positive responsibility may vary in its extent. In some cases, it may require that the actor does everything within their power to meet their responsibility; in other cases, less may be expected of the actor.

In order to address the specific character of governmental responsibility, it is necessary to introduce a specific type of positive responsibility as a competence: we refer to this responsibility as *guarantor responsibility*.[10] The guarantor vouches for whom or whatever is within the scope of his/her responsibility. For example, it is the government's task to guarantee the robustness and stability of the legal system. This responsibility is the government's *raison d´être*. Thomas Hobbes (1973: 89-90) emphasized that the government must guarantee the status of peace at all times, i.e., it must maintain the legal order and prevent citizens from breaking the laws and from violating other persons. In other words, the government bears the ultimate responsibility for the legal order and is hence its guarantor. This capacity, however, relies on the power of enforcement of compliance to existing laws.

Those in the position of guarantor not only have to exercise their power and to maintain control over the consequences of their activities; they are also obliged to monitor the behaviour of third parties and to deter them from endangering that for which they are responsible. Finally, in marked contrast to the notion of simple positive responsibility, the status demanding the guarantor's protection requires precise definition.

[10] The term "guarantor responsibility" is – to the authors' knowledge – a new term coined by the authors of this paper. In a similar sense, the SRU (2004: No 1231, 1302) speaks of a "Garantiepflicht" (guarantor obligation) of the state. Also closely related is the notion of "institutional obligation" by Arnold Gehlen (2004: 95).

To sum up, we can differentiate the term of responsibility for a person, a state or an object as follows:

- *Negative responsibility* or the commitment to avoiding damage. This is fulfilled when no harmful activities are engaged in.
- *Positive responsibility* or the commitment to promoting the conservation, well-being or good condition of a person or object within reasonable boundaries.
- *Guarantor responsibility* or, in principle, unlimited commitment of an actor to the conservation, well-being or good condition of a person or object.

Responsibility demands *power*, i.e. the ability decisively to influence the environment by means of one's own activity. This requirement of power on the part of the acting party is of moderate significance in cases of negative responsibility whereas it is of major significance – and is simultaneously highly problematic – in the case of guarantor commitments. Under severe circumstances, the guarantor may not even be able to retreat to the principle of *ultra posse nemo obligatur* (no-one can be obligated beyond their own assets). In any case, however, responsibility in the sense of competence presupposes that the party is aware of the consequences of its own activity and can keep these consequences within the sphere of its control.

4. How the government assumes responsibility

There are three kinds of governmental responsibility. We address them here in turn.

a) Responsibility for the legal order

Since its origins the modern state has assumed guarantor responsibility for the legal order by ensuring that everybody living in its territory abides by the law. This implies that violations of the law are prosecuted and subject to sanctions, and that legal conflict between different actors is resolved by the judiciary. The state maintains the legal order solely through the exertion of command and control. In other words, the government enforces its legal order through a system of rules and sanctions. Hence, its enforcement is neither a matter of persuading citizens to abide by the law nor a form of negotiation over whether or how they will do so.

The legal order can be guaranteed because it depends exclusively on the behaviour and actions of the state's subjects, i.e. the people. Legal order can be understood as a specific *status* of human society which is maintained and guaranteed by the government. It is

important to note that legal order as a status is nothing other than the continuous law-abiding behaviour of (almost) all individuals. In other words, the status of legal order is not an outcome that we could separate or distinguish from law-abiding behaviour. Thus, no specific outcome of legal behaviour is guaranteed, only this very behaviour itself.

In this respect, what the modern government can (and must) guarantee in each instance is some form of coordination regarding the behaviour and actions of its citizens. To this end the state makes and enforces rules. Thus, for example, people have to obey traffic rules, such as driving on the right side of the road, etc. These rules enforced by the state provide a framework for spontaneous coordination and cooperation among individuals in a market economy, for example.

The link between sovereignty and ultimate responsibility in the modern state is the mainstay of our argument. The state's sovereignty, its irresistible power, is the prerequisite that enables the state to guarantee the legal order at all (see previous section). Maintaining the legal order is the very essence of the state. Its own existence depends on the existence of this legal order. Thus guaranteeing the legal order is the means by which the sovereignty of the state is manifested: any state that does not guarantee the enforcement of law is not a sovereign state. Sovereignty and the guarantee of legal order are equivalents in the modern state.[11]

The equivalence between sovereignty and guarantor responsibility for the legal order is a dominant theme in modern political philosophy, from authors such as Jean Bodin and Thomas Hobbes through to Robert Nozick (1974). Here it is recognised that no rights under law – not even human rights – can be enforced if there is no institution to guarantee them. Thus, for example, James Buchanan's constitutional political economy accords crucial significance to the state's sovereign power to enforce the law and to its guarantor responsibility for the legal order: only when rights are clearly and unequivocally defined and when legal claims can be enforced are processes of exchange and mutual gains from trade possible (cf. Buchanan 1975: 10).

What happens, though, when the state fails to fulfil its guarantor responsibility? Since the state itself is the supreme power, it cannot be subject to sanctions from a higher power. However, because its own sovereignty must be manifested in the guarantee of the legal order,

[11] This does not mean that the state can not be imperfect. Generally speaking, the guarantee of legal order is not total in the sense that there are no legal violations that go unpunished. However, there is a certain "pain threshold" in this regard. This threshold is obviously exceeded when laws are openly disregarded and the state no longer wishes to or is unable to impose sanctions in response. This is emphasized, for example, by political philosophers such as Hobbes and Kant; however, contemporary political economist James Buchanan (1975, chap. 5) also makes it clear that in such a situation the modern state enters a critical phase.

this sovereignty is destroyed if it fails to maintain the legal order.[12] Thus the "sanction" imposed on the state is that it becomes a failed state or else disappears completely.

b) Responsibility for economic development

We have argued that the state assumes the role of guarantor of the legal order, which is a specific *status* of human society. In addition, the modern state assumes responsibility for welfare, economic growth and a certain distribution of income. In contrast to the legal order, which equates with a particular type of behaviour on the part of individuals, welfare, economic growth and income distribution are *consequences* or *results* of human actions and behaviour; they are not to be equated with these actions and behaviour per se. Welfare, economic growth and a fair distribution of income cannot be achieved through governmental command and control.

Furthermore, whereas the existence and robustness of the legal order are the *conditio sine qua non* and the *raison d'être* of the state, the permanent stabilization of a prosperous economy is not of equal priority. Although poverty, unemployment and unjust income distribution may endanger social stability and may, eventually, even endanger the existence of the state, welfare and so on is not – unlike the legal order – an indispensable prerequisite for the state's existence. Therefore, the establishment of a particular economic state cannot be argued to be an obligation on the part of the state. Generally speaking, the government will not (and can not) act as guarantor for the direct or indirect results of the behaviour and actions of the people. It will not guarantee full employment, for example, because in a market economy the state has no adequate means to achieve that objective. It does not follow from this, however, that the state renounces all responsibility for the status of the economy. Welfare, economic growth and a fair distribution of income are core policy objectives, but the government will only accept a limited *positive responsibility* for these objectives. That is, it will actively undertake efforts to achieve full employment, for example, but will not give any guarantees for it. In Germany's constitution (*Grundgesetz*), such objectives are anchored in the form of national objectives (*Staatsziele*). Evidently, the responsibility for these national objectives is less binding than the guarantor responsibility for the legal order.

[12] In such a case it may happen that other agencies of law enforcement are formed against which the state is no longer able to assert its authority (cf. Harnischfeger 2001).

c) Conventional environmental policy

In the course of the 19th century, governments in Europe and the USA acknowledged their responsibility not only for the legal order but also for their countries' economy. In the 20th century, environmental problems turned out to present an entirely new challenge for modern societies which demanded state action. In order to cope with these problems, governments tried to prevent their citizens from causing environmental damage.

Once the natural environment had been recognized as a common good and as a prerequisite for both the well-being of mankind and the existence of economic welfare, it had to be protected by the state. To achieve this aim, governments have assumed a *negative responsibility* for the environment. In conventional environmental policy, actual state activity does not generally go beyond prohibition as a *command and control* measure: one is not allowed to emit pollutants beyond the specified limits. In this way, the government does not guarantee a defined status of the environment; it merely guarantees that the damages subject to prohibition do not occur unsanctioned or do not occur at all.

One typical example of this sort of conventional environment policy is German water legislation. Paragraph 1a of the German Water Resource Act, which remained unaltered in the course of integrating the WFD into German law, demands that water bodies "have to be secured", and that this is to be achieved by preventing "avoidable impairments". This statement is completely in line with conventional environmental policy, which seeks only to prevent environmental damage by controlling behaviour. What is guaranteed here is not the state of the environment but only a specific behaviour that is in accordance with the law.

This conventional approach was subsequently modified by the introduction of economic instruments. These instruments set incentives for limiting pollution. Although these instruments differ from simple *command and control* measures, the state, in employing them, remains within the limits of negative responsibility for the environment. Only recently has a shift been observed towards more positive forms of responsibility. One example is that, in 1994, the preservation of the environment was made a national objective for Germany. A much larger step towards positive responsibility has now been taken by enacting the WFD, as we will show in the following section.

5. The Water Framework Directive

We have discussed three types of state responsibility: guarantor responsibility, which the state assumes for the legal order, positive responsibility for economic and social issues, and

negative responsibility for the environment. We argue that the WFD approach to water protection differs substantially from the conventional policy approach. According to WFD Article 4.1, Member States are obliged, in principle, to achieve good water status within a period of 15 years. Does this formulation correspond to our notion of guarantor responsibility?

Generally speaking, the responsibility of a guarantor requires that the object of responsibility and the status to be preserved or achieved are defined in precise terms. This is not the case with positive responsibility. For example, social justice and public welfare, as objects of positive responsibility, are always rather vague concepts open to various interpretations and objectives. Good water status, in contrast, is not a vague objective like social justice or public welfare. The WFD requests that Member States themselves specify within the narrow boundaries described in Annex V the guidelines and targets for determining good status. Further, a time frame divided into development levels, within which good water status is to be achieved, is set by the WFD. Thus, the achievement of good status implies concrete obligations which may ultimately be enforced judicially by the European Commission. If this interpretation is correct, then good water status is a matter of guarantor responsibility and is hence a political novelty.[13] Thus, the WFD is of paradigmatic importance in relation to the issues, problems and potential solutions relevant to environmental policy in the long term.

The novelty of the WFD may become more evident if illustrated by an analogous example in the field of social politics. An analogy to the guarantee of good water status would be the obligation of the government to achieve good social status according, say, to Plato's *nomoi* (laws), in which the richest citizens are not allowed to possess more than five times the amount of wealth of the poorest. Up to now, no modern state has ever been prepared to adhere to such a precisely defined status of distributive justice.

Our discussion of the WFD might provoke the following rejoinder, however. Although it is true that the WFD requires good water status as a precise obligation for state activity, Member States of the EU have, as regulated in Article 4.4 (extension of deadlines) and Article 4.5 (less stringent environmental objectives), various opportunities open to them to derogate from the

[13] An early example of the difficulties in specifying positive responsibility for the environment occurred in England and Wales. As far back as 1974, the so-called "Regional Water Authorities" were established to achieve certain environmental quality objectives for water. However, their power was not sufficient to enforce these objectives effectively. The Regional Water Authority regularly had to concede defeat in conflicts with the Ministry of Agriculture, Fisheries and Food. To improve their standing, the Regional Water Authorities were merged in 1989 to become the National River Authority, which was later integrated in 1996 into the Environmental Agency of England and Wales (Newson 1992).

prescriptions of the WFD. Experts expect that, at least during the first planning cycle (2015-2021), exemptions will constitute the rule rather than the exception (Klauer et al. 2008).

In view of potential derogations, can we seriously uphold our thesis that the state assumes guarantor responsibility in the context of the WFD? And what follows from this for the intention of the WFD? Are the ambitious formulations of the WFD regarding good water status anything more than pure rhetoric? According to this rejoinder, the WFD does not imply any substantial change in environmental policy, but has rather turned out to be "business as usual" in a new guise.

However, this rejoinder is not convincing, as we will substantiate below. The WFD introduces the environmental objectives as a standard to be reached within a clearly stated time frame. This establishes a point of reference for state action in the domain of water policy. All public water management is bound to this point of reference:

1. Derogations from good status are permissible. However, they need to be justified in a sound and transparent manner according to the stipulations included in the WFD.
2. Extensions are limited to a maximum of two further updates of the river basin management plan (2027) ("except in cases where the natural conditions are such that the objectives cannot be achieved within this period", Art. 4.4 (c)) and less stringent environmental objectives need to be reviewed and justified again every six years (Art. 4.5 (d)).
3. Article 4.8 states: "When applying [the exemptions] a Member State shall ensure that the application does not permanently exclude or compromise the achievement of the objectives of this Directive in other bodies of water […]" This prescription seems rather severe. For example, a contaminated site may allow for less stringent environmental objectives. However, the possibility that this contamination may permanently affect neighbouring water bodies is excluded explicitly. Thus, Article 4.8 is a supplementary restriction to the application of exemptions contained in Articles 4.4 and 4.5.
4. Article 4.1 is an irreversibility clause, in that it prohibits the deterioration of good water status once it has been achieved. For surface water, for example, the directive states: "Member States shall implement the necessary measures to prevent deterioration of the status of all bodies of surface water […]", except in some special cases.

Thus, good water status imposes an obligation on Member States and exerts continuous pressure on them to justify their action or inaction. This precludes exemptions becoming the rule in the long run.

To sum up our argument, it can be stated that the formulation of concrete environmental objectives to be reached within a specified time frame has a major impact on water policy. Despite the various possibilities for derogating from good water status, it is nonetheless established as a point of reference for environmental policy and has increasingly binding character – Member States are obliged to integrate good water status into their legislation and into their administrative practices. Finally, good water status can form an integral, indispensable part of environmental policy. In most cases, it will then be much easier to alter or even to eliminate the derogations rather than to modify substantially the aims of good water status. All these factors – the binding character of the directive and the incentive created by the irreversibility clause – reinforce our main hypothesis suggesting that the WFD imposes guarantor responsibility for good water status.

What might be the reason for introducing guarantor responsibility into environmental policy? It might be the recognition that the environment is similarly essential to the existence of the modern state, society and the economy as is the legal order. However, the evidence indicates that the state is not able to guarantee a given status of the environment in the same way as it guarantees the legal order.

6. The matter of state responsibility according to the Water Framework Directive

From our arguments in the previous section it follows that the WFD imposes a strong obligation on EU Member States to achieve good water status. Our findings entail the question of whether – and how – national governments can fulfil this obligation.

First, they have to take into account – and also keep control of – all physical factors that influence the status of groundwater, surface and coastal waters, as well as all the actions of third parties that affect the quality of water. In addition to conventional water management, such as wastewater treatment, the action required affects, among others, the agriculture, industry and transport sectors. Water management is thus to become integrative and cross-sectoral. To meet this objective, governments need to acquire extensive knowledge, including scientific expertise, and have access to the practical know-how of the relevant actors.

Measures must be developed on the basis of this knowledge that are suitable for achieving good water status.

Second, once developed and decided upon, these measures are to be implemented. For this purpose, governments must have power, since such measures may encounter various kinds of resistance which has to be overcome. Two prerequisites are necessary in order to implement such measures effectively. On the one hand, state power has to be sufficient to ensure the compliance of the relevant actors. In environmental policy, actor compliance is a crucial point, since it includes not only law-abiding behaviour but also voluntary cooperation, which is urgently needed for the success of the measures. On the other hand, the internal organization of the government has to render possible the deployment of state power; in other words, the various governmental institutions need to be coordinated. Thus, water protection measures will probably fail if, for example, environmental policy is systematically thwarted by agricultural policy. In addition, political units at different national and federal levels have to cooperate effectively in their actions, such as in the field of river basin management (cf. Larrue 1995: 47-48).

Some of these problems are alluded to in the WFD. With respect to the voluntary compliance of actors, Article 14 is dedicated in its entirety to the participation of all relevant parties and actors, according to which “Member States shall encourage the active involvement of all interested parties in the implementation of this Directive.”

With regard to coordinated state activity, an integrative environmental policy is outlined in Recital 16: “Further integration of protection and sustainable management of water into other Community policy areas such as energy, transport, agriculture, fisheries, regional policy and tourism is necessary”. Article 3 is dedicated to the issue of cooperation between different political units, since it concerns the “coordination of administrative arrangements within River Basin Districts”.

So far, we have identified the tasks to be fulfilled by governmental environmental policy and how governments can meet these challenges. There are, however, two more open questions remaining: (1) whether the voluntary compliance of actors can be secured, and (2) how “Further integration of protection and sustainable management of water into other Community policy areas” might be achieved. The answers to these questions are difficult ones. The difficulty is indicated by the WFD itself. Although integration and coordination are required when establishing a river basin management plan for successful water protection (Art. 3.4), such coordination obviously cannot be enforced. It remains quite unclear how this

coordination is ultimately to be achieved. This dilemma is revealed rather than resolved by the following WFD statement: “At the request of the Member States involved, the Commission shall act to facilitate the establishment of the programmes of measures” (Art. 3.4). Evidently, such coordination and cooperation can be enforced by the EU and the national governments only to a limited degree. In a sense, one could say that both the EU and the national governments are lacking in power and capacity to achieve the ambitious objectives imposed by the WFD.

To summarize our argument: the WFD imposes tasks on EU Member States that may overburden governmental capacity. Due to the institutional structure of modern constitutional governments, the state can ensure neither the necessary cooperation of actors nor the internal coordination of the relevant policy areas. Does this mean that the state can not assume the type of responsibility for environmental issues that is required in order to implement the WFD? That type of responsibility, as we argued in the previous sections, is a guarantor responsibility, meaning that the state ultimately guarantees the achievement of good water status. This responsibility, combined with a lack of suitable means for enforcement, generates a political dilemma. The dilemma is this: either the state accepts that it is unable to guarantee the objective of good water status, thereby weakening public trust in the legal order as a whole; or else it may be tempted to appropriate additional power for itself at the expense of civil liberties.

The gap between the power of enforcement and political objectives has assumed increasing importance during the last few decades, in particular in the course of globalization. Its significance is reflected in the ongoing debate on governance. We will now turn to this debate in order to examine whether it can provide solutions to this political dilemma.

7. Governance

As has been pointed out in the previous sections, the WFD imposes on Member States the responsibility of a guarantor for good water status. Good status, therefore, is not a mere governmental objective the state should actively aim to achieve, but rather an objective the state *is obliged to achieve*. How this might be done, however, is left an open question by the WFD. There are two major problems to be resolved.

1. Achieving good water status is a highly complex task, even from a purely physical and ecological perspective. All natural factors, causalities and interactions have to be taken into account. This requires wide-ranging knowledge and appropriate ways of acquiring,

integrating and organizing this knowledge for purposes of implementation. These tasks are left to the Member States.

2. Although the problems of natural complexity remain outside the WFD, the Directive itself highlights the fact that problems of political complexity exist. It also emphasizes the fact that effective water protection – because of its intrinsic spatial nature, its pervasive influence on all parts of society and its border-transgressing character – depends crucially on the integration of environmental policy with other political sectors and on the cooperation of different governmental and non-governmental actors at different levels.

These fundamental problems are widely recognized in scientific debates on environmental policy. There is a lack of instruments by means of which state power in environmental issues could be improved. Such improvements are a key focus of the current debate on *governance*.

Generally speaking, the term "governance" refers to an area of scientific research concerning political processes in different institutional settings and forms of cooperation between different public and private actors (Pierre/Peters 2000, Kooiman 2003, Hooghe/Marx 2003, Benz 2004). In a more specific sense, "governance" is used as the opposite to "government". Whereas government is understood as a hierarchical structure of command and control, governance is associated with non-hierarchical, decentralized governing and with the participation and voluntary cooperation of all actors involved.[14] In this sense, the notion of governance plays an important part in the debate on alternative instruments in environmental policy. It is expected that governance will contribute to the achievement of ambitious policy goals by facilitating cooperation, initiating collective enterprises, and fostering individual as well as cooperative voluntary commitment.[15]

These expectations may, to some extent, be justified. Governance and its respective policy instruments have the potential to improve the effectiveness and efficiency of state policy. Thus, by participation in politics, relevant actors can be induced to cooperate voluntarily and to share their knowledge. If governments are prepared to cooperate with non-governmental actors, policy aims can generally be better determined and achieved (SRU 2004: No. 1299).

[14] See Benz (2004: 16, 18), Mayntz (2004: 66) and Moss (2003). In this perspective, governance processes are often seen as some kind of democratic improvement: "Increasingly, non-participatory forms of policy making are defined as illegitimate, ineffective and undemocratic, both by politicians and by stakeholders themselves" (Bulkeley/Mol 2003: 144).

[15] It is also expected that governments can improve their knowledge base through the participation of non-governmental actors, since "lay people may have access to knowledge which is unknown to officially sanctioned experts" (Yearley et al. 2003: 247).

Governance is thus an ambiguous phenomenon. The government, in some respects, divests itself of the role of sovereign commander and assumes the role of a negotiator and mediator instead. State power does not seem to be diminished by this, as is sometimes supposed (Bostrom 2003), but is rather extended. There is, however, one specific hazard which emerges from governance processes. If policy objectives and political purposes depend on voluntary cooperation, negotiation and bargaining among different governmental and non-governmental actors, none of these actors will be able to assume ultimate responsibility for these purposes and objectives. Hence, the achievement of these objectives cannot be guaranteed.

So far, our argument has led to a paradoxical result. Governance processes may, on the one hand, substantially facilitate the achievement of complex and ambitious environmental goals such as those contained in the WFD. On the other hand, however, governance processes typically bring about elements of contingency and arbitrariness that are not conducive to command and control processes, because they involve many different actors with particular interests, knowledge, and so on. It follows from this that the achievement of good water status, were it left completely to governance processes, would come with a relatively higher risk of failure in improving water quality or might even lead to a degradation of water quality.

Therefore, the German Advisory Council on the Environment (SRU), among others, emphasizes the requirement of a "guarantor who accepts ultimate responsibility should solutions to environmental problems fail" (SRU 2004: No. 1232). In particular, it is the WFD that presupposes such a form of responsibility being assumed by the government. Hence, governance, understood as cooperative governing, cannot replace a command and control structure. In environmental policy, governments must be able to intervene in social and political processes if they detract substantially from achieving desired environmental objectives.

In conclusion, we will once again attempt to make our argument clear. We are not – at least not primarily – concerned with how the WFD works in practice. We decline to make any predictions about whether the objectives of the WFD will actually be achieved by the Member States. Our point, instead, is that the WFD is pushing Member States towards making these objectives a legal obligation they have to guarantee. At the same time, however, this guarantee is to be made dependent on processes of bargaining and governance – and this is unprecedented in the history of the modern state. Of course, bargaining and lobbying and so forth have always been present in the state's legislation, but they have never had a role in the

enforcement of the law which legislation has produced.[16] If, however, environmental objectives – the realisation of which depends on bargaining – themselves become part of the legal order on which the state stands, then the validity of the legal order as a whole is thrown into doubt.

8. Governance, Responsibility and Sovereignty

Our discussion of the WFD approach leads us to the following conclusion: ultimate state responsibility is indispensable for the achievement of essential objectives in environmental policy. Since the assumption of this ultimate responsibility by the state is made possible only by its sovereign power, as mentioned in Section 3, state sovereignty is a requirement of successful environmental policy. This does not imply, however, that political processes, usually subsumed under the term "governance", are dispensable. Although governance cannot replace state sovereignty, it is obvious that, given the complexity of environmental problems as well as social and political processes, the state must rely on governance processes in order to achieve its objectives.

The current debate on governance addresses a common topic in classical political philosophy. Philosophers and political thinkers such as Baruch de Spinoza, David Hume, and the Federalists, have conclusively argued that the government, even in maintaining the legal order, must rely on the voluntary cooperation of citizens.[17] As a consequence government and its sovereign power cannot be based on violence, threat or enforcement. Governments in general are not able to coerce all their citizens to obey the law. The idea of "command and control" therefore often evokes misleading associations, since it seems to imply that the government achieves its aims primarily by enforcement. However, even in predominantly command and control structures, enforcement is only the *ultima ratio* of governing and is to be used only in cases of emergency.

An important difference between the politics of command and control on the one hand and governance on the other is that the government in the latter appears as mediator and negotiator rather than as sovereign power.[18] In other words, the government can choose to appear as one negotiating party among others (Mayntz 2004: 68). However, this attitude can only be

[16] Modern constitutional political economy refers to these different state functions as productive state (legislation) and protective state (law enforcement) (see Buchanan 1975: 68-70 and 95-98; Bernholz/Faber). Buchanan in particular stresses the point that bargaining processes have to be excluded from the protective state and should only take place in the productive state.
[17] Hume (in his essay "Of the First Principles of Government", 1994: 16) and the Federalists conceive the government to be founded on opinion, i.e. on the voluntarily formed convictions of the citizens.
[18] As Bostrom (2003: 161) remarks, the "decreasing centrality of the state's political role is striking".

maintained as long as governance processes bring about the desired results. If they fail, it is up to the government to make and enforce a final decision.

Our discussion of the WFD has led us to some central questions of contemporary political theory. From the rather general perspective taken above, we should now point out some implications for the implementation of the WFD and for the field of environmental policy as a whole.

The complex relationship between ultimate responsibility or state sovereignty and governance requires statecraft. With regard to achieving the objectives of the WFD, governments have to be able to make way for free participation and cooperation of non- governmental actors in political decisions. At the same time, governments have continuously to monitor and control governance processes in order to assess whether and how these processes contribute to achieving environmental objectives. If governance processes fail, however, the government must make use of its capacity to intervene.

Since such interventions are costly, statecraft in this context manifests itself mainly in avoiding "governance failures". Avoidance of governance failures is not primarily a matter of the personal prudence of political and administrative actors.[19] In fact, it relies crucially upon conducive institutional settings and resources. Governance processes such as those prompted by the WFD require the "building of additional capacities in management, communication and evaluation" (SRU 2004: No. 1301, our own translation).

Discussions on governance sometimes suggest that governmental activity could be reduced to a "lean state" or a "minimal state". At least in the field of environmental policy, we find that the opposite is the case. The implementation of governance processes will not result in a reduction of governmental activity, but rather in its extension and augmentation. This is demonstrated not least by the WFD.

9. Final Remarks

The introduction of binding environmental objectives appears to us to be an appropriate response to the fact that the modern state and, with it, modern society and the economy depend existentially not only on the effectiveness of the legal order but also on the preservation and protection of the natural environment. Using the example of the WFD, we have demonstrated that this gives rise to considerable challenges for the structure and

[19] Personal prudence of state officials is nonetheless important. See, for example, Faber et al. 2002: 330/331.

sovereignty of the modern state. Such challenges may remain neglected for a long time amidst the constraints of day-to-day politics, but they will acquire a certain political momentum in times of serious crisis. In allocating responsibility to the state for the environment in a particularly complex area, the WFD is playing a pioneering role.

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