Between Law and Necessity: The Federal Constitutional Court Confirms the Right of the Federal Government to Warn the Public *(In Reply to Marion Albers)*

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A. Introduction

[1] The *Bundesverfassungsgericht* (BVerfG -- Federal Constitutional Court) recently issued two leading decisions on the competence of the Federal Government to warn the public of poisoned wine and psycho-sects. (1) In these recent decisions the court affirmed an earlier ruling (2) and at the same time ignored the almost unanimously harsh criticism of it. For some two decades the question of furnishing information to the public on the part of the Federal Government has kept busy, to a remarkable extent, all levels of the judiciary and a great number of scholars.

[2] No matter in which form they appear -- warnings of anti-freeze in Austrian wines, chicken feet in egg-noodles, environmentally harmful hygienic toilet items, dangers to health by smoking, dangers stemming from AIDS, suspect methods of religious sects and, recently, warnings of Mad-Cow-Disease (CJD) involving British and other European beef – all these have something in common: On the one hand public warning on these issues by the Federal Government is helpful, and to the consumer its necessity self-evident. On the other hand they obviously cause damage to the profits of the producer of the goods or damage the reputation and self-esteem of the spiritual groups in question.

[3] At the heart of all these issues lie two legal problems of constitutional nature. First, the dogmatic question arises, whether such warnings constitute an *Eingriff* (intrusion or impairment) into the *Schutzbereich* (protected scope) of the Fundamental Rights of the applicants. Secondly, the Court had to find a way to justify such an intrusion, including the difficult question of competence of the *Bund* and *Länder* (Federal and the State) Governments in matters of public warnings. In the following, the author will briefly present the history and outcome of the two cases (B.), provide the dogmatic background of the constitutional legal issues (C.) and finally draw several conclusions regarding the legal consequences of this new case law by taking issue with the arguments of Marion Albers in her recent article, "Rethinking the Doctrinal System of Fundamental Rights: New Decisions of the Federal Constitutional Court" (D.). (3)

B. Brief History and Outcome of the Proceedings (4)

I. The OSHO-Case

[4] The OSHO- and former Bhagwan-movement mainly claimed that several pieces of information on the movement provided by the Federal Government constituted a violation of the Freedom of Religion guaranteed by Article 4 of the *Grundgesetz* (GG – Basic Law) . Amongst other information the Government had referred to the movement as a "sect," "youth sect," "youth religion," "Psycho Sect." Further, the Government had described the group's practice and appearance as "destructive," "pseudo-religious" and as "manipulating their members under exclusion of the public." While, in the first instance proceedings, the claims of the OSHO-movement were partly upheld, the higher courts dismissed the case, including the Seventh Senate of the *Bundesverwaltungsgericht* (BVerwG -- Federal Administrative Court). (5)

[5] The Federal Constitutional Court ruled that the principle of religious neutrality on the part of the public is central to the Freedom of Religion guaranteed by Article 4 of the Basic Law. (6) The Court held that public warnings by the Federal Government were not, in general, in breach of this principle. Even though there was no Statute or Act of Parliament to empower the Federal Government, it could refer to the concept of *Staatsaufgabe* (the public task of providing information to the public), which is not explicitly mentioned in the constitution but has been interpreted to be an underlying principle of several provisions of the Basic Law. As far as the competence to is concerned, the Court ruled that such activities of the Federal Government were not Administrative but Governmental and as such were not subject to the privileged State competence of the *Länder*. However, as limitations on this Governmental tasks, the principle of proportionality had to be observed. In the OSHO-case the Court found that the public warnings were in breach of that principle especially to the degree that the Government had referred to the group as "destructive," "pseudoreligious" and "manipulative." For this reason (proportionality) the case was, in part, upheld.

II. The Case of the Glykol-Wein

[6] In 1985 the discovery of glycol in Austrian wines, which generally is used as anti-freeze and deemed to be significantly unhealthy, had attracted great public attention and had caused enormous financial losses to the Austrian

and German wine industry. To protect the industry from complete breakdown and to re-establish a feeling of security the Federal Government published a list identifying the wines affected by the issue and the bottlers thereof. Two bottlers whose wines and names were on the list claimed a violation of their Freedom of Occupation guaranteed in Article 12 of the Basic Law along with other freedoms guaranteed by the Constitution. These cases were dismissed throughout all instances of the administrative jurisdiction, including the Third Senate of the Federal Administrative Court. (7)

[7] Even though there are quite evident differences in the dogmatic treatment of Fundamental rights between the *OSHO* and the *Glykol*-decision, the Federal Constitutional Court adopted to a large extent the same reasoning, and in some instances even the same wording. Not touching at all on the problem of *Eingriff in den Schutzbereich* (intrusion into the protected scope of a Fundamental Right) the Court held that the Freedom of Occupation in Article 12 of the Basic Law comprehends economic activities on the market. This includes the right to present oneself to the participants in the market, however, the Court concluded that the right does not prevent others from drawing a different picture. As in the *OSHO*-decision, the Government could invoke its public task of informing the public as well as the Federal competence of such a Governmental and not Administrative task. Since, in this case, the information provided was strictly neutral and not pejorative the Court found the warning in compliance with the proportionality principle and dismissed the actions.

C. Dogmatic Background of the Constitutional Legal Issue

[8] It is crucial to provide an impression about how the Federal Constitutional Court generally is supposed to measure court, administrative and parliamentary actions against the provisions of the Constitution. The scrutiny of constitutionality of public actions follows - according to the large majority of the scholars and in numerous judgements of the Federal Constitutional Court - a three-step-test. (8) At the outset the Court will interpret the *Schutzbereich* (protected scope) of a Fundamental Right. It then will go on to check whether there is an *Eingriff* (intrusion) into that protected scope. Finally, the Court will decide whether there is any *Rechtfertigung* (justification) for that intrusion.

[9] The legal interpretation of the word "intrusion" in this analysis has become a classical problem of constitutional law in Germany. An intrusion traditionally was characterised by three elements: *final* meant that the effect of a public measure was intentional; *direct* meant that the effect of the public measure took place without any further developments or actions; *imperative* meant that the public measure could be executed by way of command or prohibition. However, it was possible to conceive of a number of circumstances in which an *intrusion* into the *protected scope* of a Right would occur even though none or not all of these three elements were fulfilled. Therefore the prevailing opinion among scholars demanded an extension of the understanding of an "intrusion" so as to catch situations of only factual and indirect effects on the scope of protection of a Fundamental Right. (9)

[10] The last of the three steps, the *justification*, serves as an umbrella for several different aspects to be examined. In general, the principle of *Vorbehalt des Gesetzes* (legal basis) requires every public measure that effects an intrusion into Fundamental Rights to be based directly or indirectly on a Parliamentary Act. It stems from the constitutional principle of *Rechtsstaat* found in Article 20 Para. 3 of the Basic Law, which is comparable to the Rule of Law. The consequence of the principle of "legal basis" is that administrative measures are held illegal if there is no established Statute that provides a ground to act for the administration. (10) Traditionally, this principle has been applied to intrusions into Rights of Freedom and Property. Whether public measures of the welfare state, *e.g.* state aid, also require a "legal basis" has been debated for some time. Scholars who argued for *Totalvorbehalt*, a "legal basis" for every single administrative or governmental measure, did not succeed with their formalistic stance; flexibility of administrative action was held to be to an important objective. (11)

[11] A second feature of the *Rechtfertigung* (justification) stage is the question of competence. The provision of the constitution setting out the basic rule for the distribution of competencies in Germany is Article 30 of the Basic Law, which confers the *Staatsaufgabe* (execution of public tasks) (12) to the *Länder* (Federal States) as long as there is no other, more specific assignment of competence set out in the constitution or it is otherwise, *e.g.* implicitly, admitted by the constitution. There are then specific rules for the Legislative Power (Articles 70-75 GG), the Administrative/Executive Power (Articles 83-85 GG) and the Judiciary (Articles 92-96 GG) assigning these public tasks to specific branches of State authority. The execution of Parliamentary Acts of the *Bund* (Federal State) and of course of the *Länder* (Federal States) themselves is, according to the provision of the Basic Law beginning with Article 83, conferred upon the State Administrations. Without any doubt, the States are empowered to issue public warnings on the grounds of the State Laws. However, there is no such federal law empowering the Federal Government to do so.

[12] Finally, the proportionality principle features as an important element of the *justification* (third) level of analysis regarding an intrusion. The application of this principle proceeds in the following manner. First, there has to be a legitimate task of a public measure to be identified. Then, the court will check whether this measure is *geeignet*

(appropriate), *erforderlich* (necessary) and *angemessen* (proportionate). The measure is appropriate if it is objectively suitable to achieve the task. It is necessary if it is not going beyond what is necessary to achieve the task. And finally, the chosen measure must not be disproportionate to the accomplishment of the task.

[13] With this overview it is now possible to provide an analysis of the Federal Constitutional Court's rulings.

D. Analysis of the Court's Findings

I. The Intrusion: A Change of Paradigm?

[14] The Federal Constitutional Court seems to turn its back on the question of intrusion. At first, only in the *OSHO-case* it elaborates briefly on this. It simply states in accordance with most scholars that factual and indirect effects can also constitute an intrusion. However, no further explanation is given, especially not on how to find out about the borderlines between what is supposed to be an intrusion and what falls outside this dogmatic category. Instead, the Court implies a disregard for the importance of the intrusion element by stating that the Constitution did not bind the protection of Fundamental Rights to the word or meaning of intrusion.

[15] More doubts about the significance of the intrusion element are raised by the fact that the Court does not mention or apply the element in the *Glykol-Wein-case* at all. Instead of following the above-mentioned three-step-test, including the elements *protected scope*, *intrusion* and *justification*, the Court seems to describe the protected scope not by itself but instead it refers to the third step, the *justification* and especially the *proportionality*, to evaluate the effect on the *protected scope* of the Fundamental Right. It does not devote a single word to the problem of *intrusion*, which seems even more remarkable in light of the *OSHO-case*, which dealt with an almost identical problem as the *Glykol-Wein-case*.

[16] These inconsistent findings of the same Senate of the Federal Constitutional Court might be explained by the fact that obviously the two Senates of the Federal Administrative Court followed different dogmatic approaches to the problem in question and the Federal Constitutional Court simply was not willing to show preference to one or the other. The modern interpretation of how to review public measures having an effect on Fundamental Rights, including the *intrusion* element, has been outlined above (*see*, paragraphs 8-13 above). The second path taken by the Court in the *OSHO-case*, non-application of the *intrusion* element, can be identified as an older approach stemming from the dogmatic of Maunz. (13)

[17] Maunz described the protected scope of a Fundamental Right as consisting of three concentric circles. The first circle described the scope that is limited by implicit constitutional statements, such as other Fundamental Rights or the proportionality principle. The second circle described the content of the Right that can be limited by Statute just as the first step in the modern model. The third circle represents the *Wesenskern* (essential heart) of the Right , which is, according to Article 19 Para. 2 of the Basic Law, resistant to any limitation. (14) However, this elder approach proved less clear and more difficult to apply compared to the above-described, modern three-step-test. Moreover the character of Fundamental Rights can be depicted better if the content of a right is clear from the beginning and the entity seeking to infringe the right bears the burden of justifying its intrusion. (15)

[18] In this context, Marion Albers rightly pointed out the extensive treatment of the economic concept of the "market" in the Court's ruling. (16) Albers seems to interpret this part of the *Glykol-Wein-decision* as a limitation of the protected scope of the freedom of occupation, criticising the lack of constitutional fundament of the term and its content. Indeed, the Court's remarks strongly remind us of the economic concept of regulation for compensation of informational deficits on the market (17) and it is true, as Albers pointed out, that the concept of the market lacks a constitutional foundation. However, it can be doubted that the Court wanted to trigger a discussion of incorporation or developing the market as a new constitutional concept to limit the protection of Occupational Freedom. According to the case law of the Court the German Constitution contains the *Wirtschaftspolitische Neutralität des Grundgesetzes* (Neutrality of the Basic Law towards the economic order"). (18) Due to that principle, it is only natural that the existence of what in German is called *Marktwirtschaft* (free market economy or competitive market) is not laid down in the constitution itself but rather in several statutes of non-constitutional nature. Nonetheless, due to the mere existence of fundamental freedoms in the Basic Law, there seems to something of a constitutional preference for an economic order based on the of freedom of the market. Moreover, in the Treaty of Economic and Monetary Union between Eastern and Western Germany, the special German concept of *Soziale Marktwirtschaft* with its preference for the market (with roots dating back to the *Ordoliberal* or Freiburg School of Walter Eucken) played a significant part. Still, the German Constitution contains a provision allowing the nationalization of property (Article 15 of the Basic Law) even though this provision, so far, has had little practical significance. But its mere existence serves as proof of the constitutional principle of neutrality in the economic sphere. (19)

[19] Moreover, with respect to Albers, it seems important to recall that the starting point of the Court's reasoning

about the market was not the concept of the market itself. Instead, in the scope of outlining the scope of protection and before getting to potential limitations, which it deals with later in the decision at paragraph 47, the Court defines what falls under the scope of occupational freedom of Article 12.1 Basic Law. Here, the Court finds that, apart from other protected goods under this article, the *berufsbezogenes Verhalten einzelner Personen oder Unternehmer* (actions of single persons or undertakings related to work) constitute the general object of protection under Article 12.1 of the Basic Law. The market only comes in as a background for the actions of the persons or undertakings, comparable to the existing system of education in Germany serving as the background for the freedom of choice of education, which is also protected under Article 12 of the Basic Law. Coming back to the above-described diverging approaches of the Court, applying the *Eingriff* in the *OSHO-case* and applying Maunz' older scheme disapplying the *Eingriff*, the following conclusion might be seen as a consensual.

[20] Since the Court, in these cases, seems to be applying both approaches in spite of their obvious differences it is difficult to speak of a clear turn away from the three-step-test rendering the *intrusion* element superfluous. However, the significance attached to it by scholars is clearly reduced by the fact that the Court turns a blind eye on the question in one of the cases. Even in the *Glykol-Wein-case*, which still takes up the *intrusion* element, the Court showed its indifference by pointing out the lack of a constitutional foundation for this term. That such a lack of constitutional foundation does not hinder the Court itself from creative jurisprudence becomes obvious in regard to the *competence* and *legal basis* elements.

II. A New Shape for the Principle of Legal Basis?

[21] As outlined above, according to the principle of *legal basis* (*see*, paragraph 10 above) there must be a Parliamentary Statute empowering the authorities to act or at least a Statute which sets out the basis for a governmental decree to act upon. A *gesetzesfreier Grundrechtseingriff* (statute-free *intrusion*) is, according to the prevailing opinion amongst scholars, unconstitutional. Whereas the Police and Security Law of the States provides for a *legal basis* to warn the public, there is no such law for similar activities of the Federal Government. There have been different approaches to try and overcome this lack of law.

[22] One way had been to suggest that the funds provided in the budgetary plan for governmental publicity constitutes a satisfying *legal basis*. This solution was successfully applied to the granting of state aids. (20) Another suggestion was to interpret the obligation on the State to protect the individual's subjective Fundamental Rights as the legal basis. The reasoning was that an obligation to act necessarily corresponds to a power to act. This, however, would lead to an imbalance of the system of competence, turn the original nature of Fundamental Rights as rights against the State into exactly their opposite and in the end could not satisfy the requirement of an explicit empowerment to the public authorities.

[23] Due to the dissatisfying alternative approaches to the issue the prevailing opinion has been to persist in the requirement of a *legal basis*, also for the Federal Government's informational activities. There have been remarkable attempts to set up a dogmatic system for governmental information activities. Gröschner argued for a strict difference between *Öffentlichkeitsarbeit* (publicity activities) of the government on the one hand and *Öffentlichkeitsaufklärung* (informational activities) on the other. The former contained the right and duty of the Government to inform the public and Parliament about it's political activities and objectives. The power to do so flew from the democratic principle of the Constitution (Article 20 Para. 2 of the Basic Law). The latter did not have any legal basis but this basis could be *de lege ferenda* developed in accordance with the terms used in several Statutes of other legal areas. Gröschner suggested the use of three different terms depending on the intensity of the *intrusion*. The least intense measure was an *Aufklärung* (mere provision of information), an intermediate measure was the *Empfehlung* (recommendation) and the strongest was the *Warnung* (warning). (21) This system could have been the foundation of a new Federal law empowering the Federal State to issue public warnings.

[24] The Court rejected all of these dogmatic approaches to resolve the problem of absence of a *legal basis* in these cases. Instead, it simply restricted the general scope of the principle, excluding informational activities. At first, the Court explained that for public warnings on all thinkable issues to be covered the *legal basis* necessarily had to be a very general clause. The Court explained that such a wide formulation neither offered any advantage nor was it at all possible to set it up in a way to catch all the potential situations. (22) This argument seems to have little value. Not only have the State Police Laws proven practicable in comparable situations, but especially the latest draft of the Federal Government's Ministry for Consumer Protection includes in Section 6 "Information of the Public," exactly the kind of general provision scholars have demanded. It is intended that this provision will serve as a legal basis for the publication of names of products and producers for the benefit of consumers. (23)

[25] The Court's second line of reasoning, permitting it to uphold the statute-free *intrusion* (lacking a legal basis), concerned the historical development of *intrusion* and *legal basis*. It conceded that due to the extension of the term "intrusion" beyond the classical understanding, the protection of Fundamental Rights as well as the principle of *legal*

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basis have been expanding at the same time. This, however, does not mean that the scope of the principle of *legal basis* expanded to the same degree of the growth in scope of protection of Fundamental Rights. Whether this was the case depended on the nature of the subject-matter in question. This position of the Court means that for public measures which do not constitute a classical *intrusion* but still fall within the protected scope of a Fundamental Right, the principle of *legal basis* does not necessarily apply. This is especially the case if there is or can be deduced from the constitution a *Staatsaufgabe* (public task) for the execution of the measure. In short, this line of argument effects a restriction of the principle of legal basis.

III. Setting Up New Competence: Governance and Public Warnings

[26] Whereas the principle of *legal basis* as limitation of public informational activities is regarded as dispensable for the case of public warnings, the Court instead referred to the system of competence in striking the actions at issue in these cases. The main focus here was the question of *Verbandskompetenz*, that is, whether the Federal or the State Governments were entitled to act. The answer is enshrined in Article 30 of the Basic Law, which provides that the execution of public action and accomplishment of public tasks is primarily up to the States unless the Constitution provides or admits otherwise (*see*, paragraph 11 above).

[27] Since there is no explicit competence regarding informational activities this task normally was reserved to the States. However, the Court sets up a separate public task of *Staatsleitung* (Governance) which empowers the Federal authorities not only to inform the public about governmental activities, a task which already has been approved by the Federal Constitutional Court in earlier judgments, but moreover entitles the Federal Government to issue public warnings. This specific public task flows from the constitutional provisions on the formation and tasks of the government (Article 62 and following of the Basic Law) and the duty of the government to inform Parliament and its committees. This inference of an implicit public task is in line with the wording of Article 30 of the Basic Law, which states that public tasks are left to the States unless the constitution otherwise provides, (explicitly) *or* admits (implicitly). It shows that the Court is not willing to set up public tasks beyond what can be drawn out of the constitution. The limit to any deduction of public tasks is the constitutional text. (24)

[28] After having establishing the public task of "governance" and including among its terms the provision of public warnings the Court was confronted with the problem distributing the execution of this task to the Federal Government or the States, since the identification of a public task, deduced from the constitution, does not pre-empt the question of competence. (25) Article 83 and following of the Basic Law contain specific provisions for the competence of administrative actions and clearly laying the execution of Statutes into the hands of the States. This obstacle was removed by introducing a new distinction between administrative and governmental actions. According to the Court, Article 83 and following of the Basic Law were not applicable because they were concerned only with administrative actions while informational activities consisted of governmental action. While the Federal Government was not entitled to execute statutes under Article 83 of the Basic Law it was entitled to act under the implicit competence of Governance. (26) With that, the Court established a separate competence for governmental action beyond the explicit catalogues of the constitution and has treated it as equal to the explicit competence of legislation, administration and judiciary in Articles 74, 83, 92 of the Basic Law. This seems to be a rare case of the implied competence of *Kraft Natur der Sache*, which the Court has developed in its case law for topics which can by their nature only be legislated on by the *Bund* (Federal State). (27)

[29] At first sight, this line of argument seems to be plausible. However, the Court speaks of parallel competencies of Federal and State Governments in the field of public warnings. (28) Such parallel competencies are not in accordance with the general system of competence laid down in Articles 74, 83 and 92 of the Basic Law. These provisions identify one or the other as competent to act. The distribution of competencies does not allow a parallel competence for the legislation on one and the same issue or the parallel execution of one and the same administrative issue by *Bund* and *Länder*. (29) Moreover, at the heart of the argument lies an astonishing absurdity: Governmental actions on the ground of the public task of Governance do not entitle the Federal Government to execute Statutes. Since there was no such Statute to execute in these cases the Government could act upon the task of Governance and issue public warnings. This means, however, that for the Government the non-existence of such a Statute has been a mere stroke of luck; otherwise it could not have invoked the non-administrative task of Governance. This seems to reduce the principle of *legal basis* to absurdity.

IV. Proportionality as a Manual for the Government

[30] Having set up the general entitlement of the Federal Government to issue warnings, the Court went on to state specific guidelines and requirements for the implementation of such activities. The location of these requirements is the principle of *proportionality* (*see*, paragraph 12 above). According to that principle, public warnings are not suitable, necessary and appropriate if they do not meet the requirement of correctness, objectivity and self-restraint and if they are in any way defamatory. (30) Apart from the fact that these requirements serve as an additional

restriction on public actions the background to the principle seems to be the case law of German high courts granting the undertakings concerned damages flowing from the law of state liability in case of violation of these requirements. (31)

E. Conclusion

[31] The Federal Constitutional Court has put an end to legal proceedings lasting, already, for almost 20 years. With its findings the Court has decided on behalf of the *raison d'etat* as well as on behalf of the consumers. At the same time it has refused to embrace the legal opinion of the greatest part of the scholars. (32) Even though the indirect and factual intrusion has been held up, its significance has been diminished and different approaches in the two decisions cause a lack of coherent dogmatic. Contrary to the prevailing opinion amongst scholars, the Court upheld public warnings by the Federal Government on the grounds of the public task of Governance of the State of which informational activities form a part. According to the Court this is constitutional without a legal basis and thus without being in breach of the principle of legal basis. This finding basically sets up the "statute-free intrusion." As far as the competence according to Article 30 of the Basic Law is concerned, the Court made some remarkable statements. Here it equated the implicit competence of Governance assigned to the State with the explicit competences assigned by Articles 70, 83 and 92. And finally, the Court set up specific guidelines for informational activities of the Government. With the rulings the proceedings might be closed, the legal problems however are not satisfactorily solved. Therefor it does not take the skills of a fortune-teller to foresee further arguments in that area.

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(1) BVerfG, Decisions of 26 June 2002, 1 BvR 670/91 (Jugendsekten - OSHO) and 1 BvR 558/91 and 1428/91 (Glykol-Weine), http://www.bverfg.de/. Generally, English translations of decisions of the Federal Constitutional Court can be obtained from the series "Decisions of the *Bundesverfassungsgericht*-Federal Constitutional Court- Federal Republic of Germany," published by the Nomos Verlag in several volumes.

(2) BVerfG, Decision of 15 August 1989, 1 BvR 881/89 (Transzendentale Meditation - TM), 1989 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 3269.

(3) Marion Albers, *Rethinking the Doctrinal System of Fundamental Rights: New Decisions of the Federal Constitutional Court*, 3 GERMAN LAW JOURNAL 11 (1 November 2002) http://www.germanlawjournal.com.

(4) The facts and outcome of the cases have been laid down in detail in the article of the GERMAN LAW JOURNAL'S foregoing issue by Marion Albers. Therefor I provide only a brief summary. *See*, Albers, *supra*, note 3.

(5) BVerwGE, 90,112 (27.3.1992 – 7 C21.90). An analysis of this judgement provided by Lege, *Nochmals: Staatliche Warnungen*, 1999 DEUTSCHES VERWALTUNGSBLATT (DVBl.) 569, 572.

(6) In spite of the legal principle of religious neutrality of the state deriving from Article 4 of the Basic Law, it seems to be obvious that German and also Western society is largely influenced by the Christian tradition. On the factual effects of this influence, *see*, Britz, *Der Einfluß christlicher Tradition auf die Rechtsauslegung als verfassungsrechtliches Gleichheitsproblem? - Zu den praktischen Grenzen religiöser Neutralität im säkularen Staat*, 2000 JURISTENZEITUNG (JZ) 1127.

(7) BVerwGE, 87, 37 (18 October1990 – 3 C2.88). An analysis of this judgement provided by Lege, *supra*, note 5 at 569.

(8) *See*, Pieroth/Schlink, GRUNDRECHTE (17th ed.), Para. 206.

(9) Representing this wide-spread opinion, *see*, Dreier, *Vorbemerkung*, *in* GRUNDGESETZ I 80-82 (Dreier ed.); Pieroth/Schlink, GRUNDRECHTE (17th ed.), Para. 238-251.

(10) Schulze-Fielitz, *Art. 20 (Rechtsstaat)*, *in* GRUNDGESETZ II Para. 95 (Dreier ed.); Wehr, 1997 JURISTISCHE SCHULUNG (JuS) 419.

(11) Schulze-Fielitz, *supra*, note 10 at Para. 97; Degenhart, STAATSRECHT I (14th ed.), Para. 281.

(12) On the theory of *Staatsaufgabenlehre* (public tasks), *see*, Bull, STAATSAUFGABEN NACH DEM

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GRUNDGESETZ 1977; Peters, *Öffentliche und staatliche Aufgaben*, *in* FESTSCHRIFT NIPPERDEY, BD. II (1965).

(13) So did Lege, *supra*, note 5 at Para. 570.

(14) Maunz, DEUTSCHES STAATSRECHT 118 (20th ed., 1975). *See*, Lege, *supra*, note 5 at Para. 570.

(15) Lege, *supra*, note 5 at Para. 571.

(16) Albers, *supra*, para 22 and 23.

(17) *See*, Baldwin/Scott/Hood (Ed.), 1998 A READER ON REGULATION; Baldwin/Cave, 1999 UNDERSTANDING REGULATION; Ruge, GEWÄHRLEISTUNGSVERANTWORTUNG DES STAATES UND REGULATORY STATE, PhD -- Jena (forthcoming).

(18) BVerfGE 4, 7, 17,18, Decision of 20 July 1954 (Investitionshilfegesetz); Decision of 1 March 1979 (Mitbestimmungsgesetz); for more, *see*, Maurer, 2001 STAATSRECHT I, 2nd ed., para 85 and following.

(19) A similar principle is contained in the Law of the European Union: Principle of Neutrality of the EU towards the property order of the Member States, Art. 295 EC Treaty. On that, *see*, Ruge, *Goldene Aktien und EG-Recht*, 2002 ZEITSCHRIFT FÜR EUROPÄISCHES WIRTSCHAFTSRECHT (EuZW) 241.

(20) Schulze-Fielitz, *supra*, note 10 at Para. 98. Rejecting this approach, *see*, Degenhart, *supra*, note 11 at Para. 288.

(21) Gröschner, *Öffentlichkeitsaufklärung als Behördenaufgabe*, 1990 DEUTSCHES VERWALTUNGSBLATT (DVBL.) 619.

(22) BVerfG, Decision of 26 June 2002, 1 BvR 670/91 (Jugendsekten – OSHO), Paras. 80-82, http://www.bverfg.de.

(23) *See*, Bundestags-Drucksache 14/8738 and 14/9065.

(24) This opinion is not shared by Hermes, STAATLICHE INFRASTRUKTURVERANTWORTUNG, 352 (1998), who proposes deducing public tasks from necessities lying beyond the constitutional text. Criticising this stance, *see*, Ruge, GEWÄHRLEISTUNGSVERANTWORTUNG UND REGULATORY STATE, PhD -- Jena (forthcoming).

(25) *Compare, Pernice*, *Art. 30*, *in* GRUNDGESETZ II, para 27 (Dreier ed., 1998); Hermes, *Art. 83*, *in* GRUNDGESETZ III, para 36 (Dreier ed., 2000).

(26) BVerfG, Decisions of 26 June 2002, 1 BvR 670/91 (Jugendsekten – OSHO), Para. 85; 1 BvR 558/91 and 1428/91 (Glykol-Weine), Para. 55, http://www.bverfg.de.

(27) Apart from the competence *Kraft Natur der Sache* there is the *Annexkompetenz* and the *Kompetenz kraft Sachzusammenhang* as two other forms of implied competencies of the Federal State. They have been scarcely used. In principle, they are applicable not only for the legislative but also for the administrative competencies. *See*, Pernice, *supra*, note 25 at para 33; Stettner, *Art. 70*, *in* GRUNDGESETZ III, para 54 and following (Dreier ed., 2000); Hermes, *supra*, note 25 at para 39 and following.

(28) BVerfG, Decisions of 26 June 2002, 1 BvR 670/91 (Jugendsekten – OSHO), Para. 86; 1 BvR 558/91 and 1428/91 (Glykol-Wein), Para. 56, http://www.bverfg.de.

(29) *See*, Pernice, *supra*, note 25 at para 24; Hermes, supra, note 25 at para 49; Erbguth, *in* GRUNDGESETZ, paras. 6 and 17 (Sachs ed., 2003). This is approved by the Court, which points out that forms of cooperation are not prohibited, BVerfGE 63, 1, 38-40, Decision of 12 January 1983 (Schorsteinfeger).

(30) BVerfG, Decisions of 26 June 2002, 1 BvR 670/91 (Jugendsekten – OSHO), Paras. 91-94; 1 BvR 558/91 and 1428/91 (Glykol-Wein), Paras. 57-59, http://www.bverfg.de.

(31) *See*, Oberlandesgericht Stuttgart, 1990 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2690; Stillner, 1991 NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 1340.

(32) Representing this position, *see*, Degenhart, *supra*, note 11 at 281; Gröschner, *supra*, note 21 at 619; Gusy, 1989

JURISTENZEITUNG (JZ) 1003; Lege, *supra*, note 5 at 569; Schoch, 1991 DEUTSCHES VERWALTUNGSBLATT (DVBl.) 667.