Risk Decisions in German Constitutional and Administrative Law

Professor Dr. Peter M. Huber, München

Content

I. Introduction

Speaking about risk decisions in German Constitutional and Administrative law means to look at them under the perspective of public law, i.e. of the legal order dealing with relationships between the individual and the state. This constrains the subject to decisions of the state and its authorities or to its idleness.

In order to understand, in which way public law has to deal with risks, it is firstly necessary to understand what a "risk" is in the legal sense of the word and

how can it be placed into the framework of the constitution. In a third step it is necessary to look at the requirements, the legislator has to fulfil dealing with risk decisions and to which extent it is subject to judicial control. I will close by showing, how the legislator delegates risk decisions to the public administration and what characteristics risk decisions have, if they are taken by the administration.

II. The definition of "risk"

To understand the dogmatic environment of the legal term "risk", it is necessary to understand, that the term is closely linked to the legal term of "danger", which somehow can be considered as the archimedic point of the German administrative law system.

1. The term "danger" and the liberal concept of statehood

After the turmoils of the French Revolution, the Napoleonic wars and the reestablishment of the "Ancien régime" following the Vienna Congress in 1815, and under the influence of the liberal and democratic movement the liberal concept of the state emerged.

Although there had been tendencies towards a stronger social emphasis in political theory and legislation at that time – the French Constitution of 1793 contained a "right to work" and the famous "Allgemeines Landrecht für die Preussischen Staaten" from June 1st 1794[1] entailed plenty of presricptions, which resembled modern labour laws or social security directives of the European Union - those tendencies did not prevail.

In this concept – not without reason – the state was regarded counterpart to the subject / citizen, whose life, liberty and property it rather threatened than protected. The state – and it is only then, that in continental Europe the state is conceived as a body corporate itself, separated from the person of the reigning monarch – had to refrain from interference into the rights, privileges and

[1] PrALR II, 1 § 185 f. concerning the maintenance between husband and wife.

interest – spheres of its subjects / citizens without empowerment by the law (so called legal reserve ("*Vorbehalt des Gesetzes*").

The only reason, why an interference was considered legitimate, was to protect people from dangers and damages for life, liberty and property – from outside as well as from inside society. This "*Nachtwächterstaat*" was allowed a military, because it had to fight dangers abroad, and it was allowed a police, in order to fight dangers at home – dangers emerging from criminals, fire, pollution from industrial plants etc.

Beside this however, there wasn´t almost any legitimate task for the state. The most famous ruling reflecting this liberal concept of statehood, which still today can be considered the birth of modern public law in Germany, is the so called Kreuzberg – Urteil of the "Preussische Oberverwaltungsgericht" from June 14th 1882:

> In Berlin, in the district of Kreuzberg, there was – and still is - a monument commemorating the victory in the wars of liberation over Napoleon. The police authorities of Berlin had decreed an ordinance, in which was stated, that no building should be built so high, that it spoiled the view onto that monument, because they wanted to maintain and foster patriotic feelings among the citizens. A land owner, who wanted to build a house with four floors, therefore was turned down by police authorities of Berlin and sued them successfully. The *Preussische Oberverwaltungsgericht* ruled, that police authorities were not entitled to keep land owners from building whatever they wanted under the general police – clause of § 10 II 17 ALR[2], because maintaining a nice view onto a monument had nothing to do with that legal empowerment to counteract dangers.

a) Danger – Gefahr

[2] PrOVG 9, 353, 355 ff.

Since then German administrative law has developed the dogmatic figure of danger (*Gefahr*) to certain perfection, first and foremost in the area of police and security law, but not only there. Still today, in many areas of administrative law the assumption of a “danger” is decisive, when comes to the question of the empowerment of state authorities. If a danger does not exist, authorities in these cases are not entitled to any act of administration.

Well, after all, what is a “danger” in this respect ?
“Danger” is considered as a situation, in which the violation of public security and order (*öffentliche Sicherheit und Ordnung)*, i.e a damage to public or private goods - with sufficient probability is imminent ("*Lage, in der bei ungehindertem Ablauf des Geschehens ein Zustand oder ein Verhalten mit hinreichender Wahrscheinlichkeit zu einem Schaden für das bzw. die Schutzgüter der öffentlichen Sicherheit (oder Ordnung) führen würde)*".

The term of „danger“ thus only refers to goods already existing, so that police laws must not be used to realize political goals of social welfare, culture etc.

In order to decide, whether authorities have to deal with “dangers”, they have to make up their minds about the probability of damages. This means that the authority in charge has to make up a forecast or prognosis.
Seen from the point of view of the authority, the realisation of damage must be likely. It needn´t be sure nor imminent, but according to the experience of a neutral observer likely.

Case: BVerwGE 28, 310 ff. - Advertisements on the wall of a house

Within this decision, there is a certain coherence between the goods at stake and the degree of probability: the higher the value of the goods, the less may the degree of probability be or – the other way round – the lower the ranking of the good threatened, the higher the degree of probability must be. Life under this respect ranks higher than the liberty of movement, human dignity higher than the freedom to assemble.

Fall: BVerwGE 47, 31 ff. – Search of a flat in a student's dormitory: "urgent danger"

b) nuisance - Belästigung

The legal term "danger" has to be distinguished from the term of nuisance, which we find in plenty of statutes dealing with public security, but also with environmental issues. The law traditionally speaks of "nuisance" if impacts have to be described, which do not violate the rights and privileges of individuals, but cause definite molestations.

But, unfortunately, there are also „nuisances", which in a legal respect have to be considered as dangers. So much to the contribution, dogmatics pay to the certainty of the law.

Example:
§ 1 StVO requires, that people participating in traffic act in a way, that others are not annoyed to an unnecessary extent. However, if the traffic is affected by such a nuisance, this has to be considered a danger, empowering police authorities to the necessary acts of administration.

Example:
§ 24 i. V. m. § 22 i. V. m. § 3 I BImSchG states, that authorities are entitled to issue administrative acts in order to avoid „substantial disadvantages" (*erheblicher Nachteile*) or „substantial nuisances" (*erheblicher Belästigungen*) coming from plants such as church bells, sirens of fire brigades, machines for the fabrication of concrete etc. The BImSchG thus puts dangers, substantial disadvantages and substantial nuisances in one.

2. Suspected Danger (Gefahrenverdacht)

If authorities are unable to make up such a prognosis, because they lack the necessary information, but if there are certain indications, that it might come to a disturbance of public security and order, this is considered a "suspected danger" (*Gefahrenverdacht*). The difference to "danger" is, that authorities do need further information, before they can decide on the existence of a "danger".

In legal doctrine, it is not clear, how to deal with "suspected dangers" of that kind. Some say, this has to be handled like any constellation without danger and therefore does not allow any act of administration interfering with rights and privileges of individuals[3].
Jurisprudence and the majority of legal scholars however have chosen a different way. They consider a suspected danger also a danger in the legal sense[4], because it is said to be based only on a lower degree of probability. A second reason for taking the preconditions of a "danger" for granted in these cases is, that authorities otherwise would have to wait idly until some damage occurs, not a very reasonable application of the law.

Case: BVerwGE 39, 190 ff. – Counteracting epidemics

In order not to destroy the limiting effects of police law, the courts and the representatives of this opinion try to limit the legal consequences of administrative acts only based on a suspected danger. Authorities therefore may only deal with clearing the situation, finding proofs for a thorough prognosis, but must not prevent from the possible danger itself. In other words: they are limited to the so called "*Gefahrerforschungseingriff*".

Case: In the case BGHZ 117, 303, 306 ff. authorities suspected, that a flock of calves might have been fed with hormones. As it was not clear, whether this suspect matched reality, it was doubtful, whether the

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[3] *V. Götz*, Polizei- und Ordnungsrecht, Rdnr. 128.

[4] BVerwGE 39, 190/193 ff.

calves could be slaughtered. Though it turned out, that the calves had been fed according to legal requirements, it considered the slaughter of the calves lawful, because there was no other way to clarify the situation. [5]

3. Risk

The biggest problem occurs in those constellations, where there is either no sufficient probability or no sufficient scientific insight and experience to decide, whether a situation contains a danger or not and the necessary knowledge can not be achieved in a predictable or reasonable time.

Examples: Whether drugs, industrial colours, food preservatives, the exposition to a certain radiation etc. is harmful to the health.

State decisions in such cases necessarily contain risks, and therefore are called risk decisions.

That shows, that risk decisions are only loosely linked to the precautionary principle and are not identical with laws or administrative acts, which try to diminish the probability, that damages may occur to certain goods. It is true, that at the end of that scale we arrive at the so called "*inherent residual risk*" (*Restrisiko*), but the Federal Statute imposing this risk stemming from the use of nuclear energy (AtG) therefore can not be considered a risk decision.

Nevertheless, there are links, as the following questions show: Do the legislator or public authorities have to counteract risks ? Under what circumstances are they entitled to impose such risks onto the people ? To what extent are they submitted to judicial review in those areas ?

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[5] BGHZ 117, 303/306 ff., "Verdacht oder Anschein".

II. The constitutional framework for the state dealing with risks

1. Political theory

After the experience of religious and civil wars in 17th century Europe *Jean Bodin*[6] and *Thomas Hobbes*[7] laid the grounds for modern statehood, the latter formulating the basic paradigm, which until today contains its atavistic and most essential justification: "Homo homini lupus". Although *John Locke* later was able to mitigate Hobbes´ harsh alternative between anarchy and tyranny, it has remained the first and foremost function of the state to protect its subjects / citizens from all kinds of dangers and risks[8].

This function influenced the Bills of Rights in New England[9] and the U.S. constitution of 1787[10]. And it has also shaped the political thinking in Europe. The provision of safety legitimized the state´s monopoly of force (*staatliches Gewaltmonopol*[11]) and laid the grounds for the use of liberties in an open society. In this sense, the Federal Constitutional Court, in its famous "*Brokdorf*" – decision, the leading case concerning the right to assemble (Art. 8 Basic Law), ruled for example:

> „Auf deren Vermeidung [force against people or goods] muß eine Rechtsordnung, die nach Überwindung des mittelalterlichen Faustrechts die Ausübung von Gewalt nicht zuletzt im Interesse schwächerer

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[6] *J. Bodin*, Lex six livres de la République, 1577, cit. *A. Bergsträsser / D. Oberndörfer*, Klassiker der Staatsphilosophie, 1962, S. 150; *K. Doering*, Allgemeine Staatslehre, 2. Aufl., 2000, § 8 Rdnr. 190.

[7] *Thomas Hobbes*, Leviathan, Nachdr. 1992, Kap. 17 S. 131: " Verträge ohne das bloße Schwert sind bloße Worte und besitzen nicht die Kraft, einem Menschen auch nur die geringste Sicherheit zu bieten. Falls keine Zwangsgewalt errichtet worden oder diese für unsere Sicherheit nicht stark genug ist, wird und darf jedermann sich rechtmäßig zur Sicherung gegen alle anderen Menschen auf seine eigene Kraft und Geschicklichkeit verlassen."

[8] *Chr. Calliess*, Sicherheit im freiheitlichen Rechtsstaat, ZRP 2002, 1, 4; *Chr. Linck*, Staatszwecke im Verfassungsstaat – nach 40 Jahren Grundgesetz, VVDStRL 47 (1990), 7, 27.

[9] Virginia Declaration of Rights (1776), Section One: „all men .. have certain inherent rights", "namely, the enjoyment of life and liberty .. and pursuing and obtaining hapiness and safety".

[10] Preamble of the U.S. Constitution: „We the People ... establish Justice, insure domestic Tranquillity, provide for common defence, promote the general Welfare ...".

[11] *M. Weber*, Wirtschaft und Gesellschaft, 5. Aufl., 1972, S. 821 ff.

> Minderheiten beim Staat monopolisiert hat, strikt bestehen. Das ist Vorbedingung für die Gewährleistung der Versammlungsfreiheit als Mittel zur aktiven Teilnahme am politischen Prozeß und – wie die Erfahrungen mit den Straßenkämpfen während der Weimarer Republik gezeigt haben – für eine freiheitliche Demokratie auch deshalb unverzichtbar, weil die Abwehr von Gewalttätigkeiten freiheitsbegrenzende Maßnahmen auslöst“[12].

The ECJ too held in the case Commission / France, concerning the frequent blockades of French farmers, that the Single Market for goods, today guaranteed by art. 28 EC, was – is - threatened by the lacking determination of the French government to provide for a free traffic of agricultural goods.[13]

Today, in Germany there are several hundred laws – laws of the Federation as well as state – laws – which aim at the prevention from risks, and there have even been amendments to the Basic Law in order to enable the state to provide for more safety – for the people and for itself.[14]

So, the state´s function to prevent citizens from risks has been unaltered since the dawn of modern statehood. This function has been put into concrete form and developed according to the needs of a post industrial society, which depends on an advanced technical infrastructure and it has gained importance.[15]

Though this state function is the ideological and constitutional basis for risk decisions of the state and its authorities, and although it seems somewhat self-evident or plain, it is necessary to stress, that in the constitutional architecture of the Basic Law it is only second to the principle of freedom. Risk decisions such as the licensing of drugs, genetic engeneering or nuclear plants have to be

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[12] BVerfGE 69, 315, 360 – Brokdorf.

[13] EuGHE 1997, I – 6959 ff. – Commission / France.

[14] Gesetz zur Änderung des Grundgesetzes vom 26.3.1998, BGBl. I 1998, 610 – art.13 par. 3 to 6 Basic Law; Gesetz zur Änderung des Grundgesetzes vom 28. 6. 1993, BGBl. I 1993, 1002 – art.16a, 18 s.1 Basic Law.

[15] *Chr. Calliess*, ZRP 2002, 1, 4.

justified because they put risks under state control at the expenses of entrepreneurs, scholars etc.

2. The prevention from risks and the rule of law

It isn´t really astonishing, that after the experience of the omnipresent and patronizing nazi – state the adoption of the Basic Law came along with an essential swift of paradigm in Germany´s legal system. Although the original idea, to state in art.1 of the Basic Law: "The state exists for man´s sake" had been dropped, the state since 1949 is no longer considered the archimedic point of the legal system, but the individual. Legal thinking gradually stopped to approach constitutional issues under the perspective of the state and its functions, and began to look at it under the point of view of civil rights and liberties and the necessity of an empowerment to interfere. This swift of paradigm has been so fundamental, that even after 50 years of constitutional practice not all of its consequences are really clear or generally acknowledged.

art.1 par.1 Basic Law, proclaiming the dignity of man untouchable and art.1 par.3 Basic Law binding executive, judiciary and – for the first time in German history – also legislature to the fundamental rights laid down in art.1 – 19 Basic Law, were the technical instruments for this change of paradigm or perception.

Consequently, every act of state has become relevant under the point of view of fundamental rights, and almost every law dealing with rights and duties of individuals is considered an interference ("*Eingriff*") into the fundamental rights of the citizens. As such it must be justified. Justification however is possible if legislator or administration can name dangers, threats or risks to public or individual goods, which they try to avoid . If, for example, the legislator fails to do so, the law in question has to be declared null and void by the Federal Constitutional Court.

Looking at the state along these lines of liberal tradition means to consider it primarily as a threat to individual rights and interests and entails a tendency to keep the state out of society as far as possible. It (theoretically) points at a reduction of the state´s role within society and at a strict requirement of

legitimation for any of its actions - the prevention from risks being just one of the reasons among others.

The most famous case in this respect is the so called "*Apotheken – Urteil*" of June 11th 1958[16], which every German law student has to learn in his first semester. In this opinion, the Federal Constitutional Court nullified a Bavarian law restricting the number of pharmacies in order to preserve the economic profitability of those already established. Because the effects of that law on the freedom of profession were quite heavy, and there was no present and imminent danger for public health or any other public good intelligible, if the number of pharmacies would have significantly increased, the law was considered not only an interference, but also a violation of art.12 par.1 Basic Law.

This jurisdiction gave not only birth to the constitutional principle of proportionality ("*Grundsatz der Verhältnismäßigkeit*")[17], but made also clear, that the state´s function to prevent its citizens from dangers, remained unchallenged on the one hand, but was subdued to a differentiated system of legal restrictions on the other. The scope of action thus depends on the degree of the probability of dangers, the goods threatened and the liberties at stake.

3. The discovery of "Schutzpflichten"(1975 – 1990)

This changed, when – during the 1970ies – people became more aware of the dangers coming from the inside of society - environmental pollution, nuclear energy, terrorism and other threats. All of a sudden it became clear, that life, liberty and property are not only and not even primarily threatened by the leviathan (state), but by the activities of fellow – citizens.

The dogmatic incentive was the abortion problem. In its first opinion concerning this topic, the Federal Constitutional Court held, that the state was

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[16] BVerfGE 7, 377 ff. – Apotheken – Urteil.

[17] *P. Lerche*, Übermaß und Verfassungsrecht, 1961.

obliged to use criminal law to keep pregnant women, fathers, families and doctors from abortion[18]. Although it later diminished this demand and held, that art. 2 par.2 and art.1 par.1 GG only require, that abortion regularly is not treated as lawful and financed by public health insurance[19], this ruling remains of lasting importance, because it stated, that the fundamental rights of the constitution, the right to live (art.2 par.2 GG) and human dignity (art.1 par.1 GG), force the state to shelter and foster those who are too weak to care for the effectivness of their fundamental rights themselves.

The duty of protection was developed to perfection. Legal doctrine extended it from dangers to risks, holding, that the state was not only obliged to counteract dangers, but also to avoid any sort of risk.
This may be illustrated, if we look at nuclear energy law. As danger in the tradition of the ancient Prussian ALR is defined as a situation, in which with high probability the next act will cause harm to life, liberty or property or to the institutions of the state, nobody would have been willing to accept a situation, in which state surveillance over nuclear plants would only come into effect at this late moment. Instead, the legislator and the courts developed the "precautionary principle", which forced the state to diminish risks to such a low degree of probability, that according to all experience it seems practically impossible, that a nuclear plant will cause any harm (so called "*inherent residual risk*" , "*Restrisiko*")[20].

This "*Schutzpflicht*" (duty of protection) at the time formulated in favour of the unborn children, was later applied also in favour of hostages taken by terrorists[21], neighbours of nuclear plants, airports and genetic engineering factories as well as consumers. The "Schutzpflicht" - doctrine was extended to almost every branch of modern life, so that we can find it today in the law of house- renting, in labour law, consumer´s protection law and many other areas.

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[18] BVerfGE 39, 1 ff.

[19] BVerfGE 88, 203 ff.

[20] BVerfGE 49, 89, 137 f., 141 – Kalkar.

[21] BVerfGE 46, 160 ff. – Schleyer.

In this perspective, the concept of "*Schutzpflicht*" lost its close and direct connection with the state function of counteracting dangers. It was rather considered the constitutional basis for social legislation and the goal of environmental protection, which today itself is regarded as a new state function[22]. After reunification, when Parliament discussed, whether the goal of environmental protection should explicitly be laid down in the constitution, many lawyers argued, that – given the "*Schutzpflichten"* for life, liberty and property – there was no corresponding need.

However, the figure of "danger" has kept its significance especially under the aspect of administrative discretion – if there is a danger and not only a risk, the discretion of administrative bodies, whether they act or not may be reduced to null – and, even more important, concerning the "standing". Laws, which protect the individual from "dangers" contain a corresponding "subjective right", which under § 42 par.2 Administrative Courts procedure Act (VwGO) gives him a standing, if the administration violates the law. In spite, laws, that only put the "precautionary principle" into concrete form, laws which only try to minimize "risks", according to the prevailing theory only protect the general interest and therefore do not enable the individual to go to court.

4. The change of instruments (1980 – 1995)

In the 1980ies, the state to a certain extent has begun to change the instruments, with which it tried to fulfil its tasks and functions – especially in the fields of the "Schutzpflichten". Government began to prefer warnings, recomendations and information to the classical instruments of acts of administration, because these informal instruments reach more people, are rather flexible and less subdued to judicial control than traditional ordinances or administrative acts. They may on one hand be considered as a new vehicle for the state's function to counteract dangers. But on the other hand, they shed a peculiar light on the rank, this function has within the political and legal system.

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[22] *R. Schmidt*, Der Staat der Umweltvorsorge, in: Huber (Hrsg.), Das ökologische Produkt, 1995, 97, 98 ff.; *R. Steinberg*, Der ökologische Verfassungsstaat, 1998.

For it's obvious that the state has to resort to these means of doubted effectiveness only because it lacks the practical an legal possibilities to use the classical instruments such as laws, ordinances and administrative acts. Legal theory is still struggling with the problem of how to insert these instruments into the constitutional order[23]. The administrative courts, especially the Federal Court of administration, have held, that the application of these instruments can be qualified as an interference into subjective rights and legally protected interests of individuals and therefore has to be based on a permission settled down directly in the constitution or at least in a parliamentary statute (legal reserve)[24]. The Federal Constitutional Court in two opinions from june 26th 2002[25] however stated, that the fundamental rights laid down in the constitution do not protect against disadvantages caused by such acts of the "preceptoral state"[26].

IV. Prognosis problems and judicial control

Whether a concrete situation allows the forecast, that with sufficient probability it will turn into a disturbance of public security and order or that there is at least a significant risk that such a disturbance may occur, has to be judged by state authorities on the basis of the scientific knowledge available and general experience.

This has far reaching consequences as far as judicial control is concerned. Because if you accept, that every prognosis can be wrong, simply because nobody knows the future, not even the legislator or public authorities, then you allow them to act on the basis of forecasts, which also can be wrong. Consequently, the standard for judicial control cannot be whether that forecast

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[23] See *P. M. Huber*, Die Informationstätigkeit der öffentlichen Hand – ein grundrechtliches Sonderregime aus Karlsruhe ?, JZ 2003, 290 ff.

[24] BVerwGE 71, 183 ff.; 75, 109 ff.; 82, 76 ff.; 87, 37 ff.; 90, 112 ff.; *P. M. Huber*, Allgemeines Verwaltungsrecht, 2. Aufl., 1997, S. 240 f. m.w.N.

[25] BVerfG, Beschl. v. 26. 6. 2002 – 1 BvR 558 / 01 und 1428 / 91 (Glykol); 1 BvR 670 / 91 (Sekten).

[26] *U. Di Fabio*, Grundrechte im präzeptoralen Staat am Beispiel hoheitlicher Informationstätigkeit, JZ 1993, 689 ff.

was right or wrong, but only, whether it had been drawn up diligently enough (valid prognosis).

An error concerning the facts, the state of the art or general experience however leads to an unlawful – invalid - prognosis, affecting either the act of administration or the law in question.

Constitutional doctrine has drawn these consequences indeed, and it has put it into concrete form also for risk decisions of the legislator.
In areas, where there isn´t enough scientific knowledge available or a lack of experience – for example in the area of radiation coming from mobile phones and telecom plants -, the legislator is entitled to a sort of experimental legislation. Acting on the basis of a valid prognosis, which means, that he has to collect all information available before taking the decision, he may allow risks, even if they later turn out to be concrete dangers, without violating the constitution and the fundamental rights at stake.

If his knowledge improves later and a risk turns out to be a danger or a threat under the precautionary principle significantly bigger than before, he has to amend the legislation (*Nachbesserungspflicht*).

The Federal Constitutional Court will accept this and practice a certain self restraint.

V. Risk decisions in administrative law

In most cases however, Parliament will not take the risk decision itself, but will delegate it to the public administration. As there are so many and heterogeneous risks – from nuclear energy to thousands of chemical substances, drugs and food - and as knowledge and experience concerning those risks change constantly, the legislator would be simply overcharged if he had to take all risk decisions himself. Consequently, he has to refrain from settling the details and must be satisfied formulating the principles and the big guidelines.

Against this background we find such guideline legislation in the overwhelming part of environmental law, e.g. in the Federal law dealing with chemical substances (*ChemikalienG*), in the Federal law protecting plants (*PflSchG*), in the Federal law concerning food (*LMBG*) in the Federal law on genetic engineering (*GenTG*) or in the Federal Code on Drugs (*AMG*).

During the last 10 – 15 years thus a new type of administrative decisions has been created, profoundly analyzed by *Udo Di Fabio*, professor of public law in Bonn and judge to the Federal Constitutional Court in his habilitation paper "*Risikoentscheidungen im Rechtsstaat*", 1994. See also *M. Möstl*, Die staatliche Garantie für die öffentliche Sicherheit und Ordnung, 2002, S. 252 ff.

Using the example of drug concessions – today issued by the Federal Institute for Drugs (*Bundesinstitut für Arzneimittel*), § 77 Abs.1 AMG, if the case doesn´t fall into the competences of the Commission or the Council according to Art.3 EU-regulation No. 2309/93 – he has shown, that prognoses concerning a "danger" regularly are impossible, because administration and scientific community lack the experience with the new substance, the drug is made of. In a detailed analysis he has worked out several characteristics of a risk decision in administrative law:

- (1.) The laws empower the public administration to interfere with individual rights and liberties under conditions, that do not fulfil the requirements of "danger" and enable them to balance advantages and risks of the measures, the license is dealing with.

One consequence is, that entrepreneurial activities are limited to a broader extent than under the old police laws, and – under the auspices of the legal reserve – therefore require an empowerment by a parliamentary statute.

(2). The statute´s interference into individual rights and liberties is further intensified by the fact, that the empowerment of the administration also entails scope for discretion, administrative prognosis

etc., which is not (completely) submitted to judicial control by the administrative courts.

To understand this legal argument, one has to know, that, according to the prevailing doctrine in Germany, judicial control is a substantial part of every individual right and liberty, so that any restriction to the intensity of judicial control is also considered a restriction of the fundamental right or liberty itself.

(3.) Licenses, concessions and similar administrative acts, which can be considered as risk decisions, do not have the same administrative finality (*Bestandskraft*), regular administrative acts have. The reason is, that the public administration – similar to what has been shown for the legislator – might have to amend its decisions, when it turns out, that the risk allowed was too big or even a danger.

(4.) The fourth characteristic is, that authorities are not entitled to take there decisions on their own, but they have to grant an interest to commissions of experts, scientists etc.[27] This can be considered as a sort of due process for the goods threatened by the risk in question.

The consequence of the foresaid characteristics is, that the licenses and concessions in question change their appearance and start to resemble prohibitions, from which exemptions are possible (*Verbot mit Befreiungssvorbehalt*).

VI. Conclusion

Risk decisions pose quite a few problems in German constitutional and administrative law. Their mere existence proofs, that peaceful coexistence under the conditions of an industrialized, technologically advanced society can no longer be guaranteed only along the dogmatic lines of 19th century´s police law. Though this branch of public law has not lost its importance – especially after

[27] *U. Di Fabio*, Risikoentscheidungen im Rechtsstaat, 1994, S. 456; *M. Möstl*, a.a.o., S. 262.

the events of September 11th – the state today has to deal with uncertainty in constantly enlarging fields of modern life. Risk decisions are one instrument to deal with this problem. They ´ve just been invented. And there is still a lot of legal work to do.