## DEVELOPMENTS

# Protective Declarations Against Scientology as Unjustified Detriments to Freedom of Religion: A Comment on the Decision of the Federal Administrative Court of 15 December 2005

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### A. Introduction

In German constitutional law doctrine, the principal problem which state measures are to be qualified as relevant restrictions to activate the protection by basic rights has not yet been conclusively solved.[1] According to the classic definition, a relevant restriction is given if the infringement of a basic right is *final* (not a merely unintentional consequence of an activity that aims at fulfilling other purposes) and *direct* (not only an intended but indirect consequence of the state activity), a legal act *with legal* (not merely *de facto*) *effects* and issued or executed *by order and force*.[2] Restrictions that do not fall under this definition are problematic. This in particular goes for triangle constellations where the *re*action of the addressee of a State

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[1] *See further*: Andreas von Arnauld, DIE FREIHEITSRECHTE UND IHRE SCHRANKEN, 90 (1999); Wolfram Cremer, FREIHEITSGRUNDRECHTE. FUNKTIONEN UND STRUKTUREN, 136 (2003); Horst Dreier in: GRUNDGESETZ-KOMMENTAR, Vol. 1 (Horst Dreier ed., 2d ed., 2004), margin number 123; Josef Isensee, *Das Grundrecht als Abwehrrecht und staatliche Schutzpflicht*, in: HANDBUCH DES STAATSRECHTS, Vol. V, § 111, 58 (Josef Isensee & Paul Kirchhof eds., 2d ed., 2000); Bodo Pieroth & Bernhard Schlink, GRUNDRECHTE, 53 (21st ed., 2005); Michael Sachs, in: DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND, Vol. III/2, 76, 128 (Klaus Stern, 1994); *idem*, in: GRUNDGESETZ. KOMMENTAR, before Art. 1, 78 (Michael Sachs ed., 3d ed., 2003); *idem*, VERFASSUNGSRECHT II: GRUNDRECHTE, A 8, 1 (2d ed., 2003); *idem*, *Die relevanten Grundrechtsbeeinträchtigungen*, 35 JURISTISCHE SCHULUNG (JuS) 303 (1995); Diana Zacharias, STAATSRECHT I: GRUNDRECHTE, 31 (3d ed., 2002).

[2] *See*, *e.g.*, Helmut Siekmann & Gunnar Duttge, STAATSRECHT I: GRUNDRECHTE, 171 (3d ed., 2000); Herbert Bethge, *Der Grundrechtseingriff*, in: 57 VERÖFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER (VVDStRL) 7, 38 (1998); Beatrice Weber-Dürler, *Der Grundrechtseingriff*, *ibid.*, 57, 60; Rolf Eckhoff, DER GRUNDRECHTSEINGRIFF, 176 (1992); Thomas Discher, *Mittelbarer Eingriff, Gesetzesvorbehalt, Verwaltungskompetenz*, 33 JuS 463, 464 (1993).

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measure causes a detriment to *a third person*'s basic rights so that it must be asked whether that restriction can be attributed to the State so that it must justify them, possibly like other direct state measures. A typical example is the case of state warnings against dangerous products; when followed these warnings cause consumers to avoid these products and result in negative effects on the producer's commercial activities, activities that are protected by the freedom of profession or the property right. Connected with the problem of the right classification of such state measures is the question of in what cases restrictions that are found relevant under aspects of basic rights doctrine must correspond with the provision of legality and with other substantive principles in order to be justified.[3] In the case of classical infringements, there is no doubt that a legal authorization is needed and that the principle of proportionality must be observed.[4]

The Federal Constitutional Court in 2002 discussed the issue of indirect *de facto* infringements in two decisions; the first concerned the publication of a list of wines which contained the antifreeze glycol by the Federal Ministry of Health. The second concerned the release of information by the Federal Government about the movement of Rajneesh Chandra Mohan (Osho); the cult was, *inter alia*, described as a "youth religion" and "psycho-sect", as being "destructive", "pseudo-religious" and as manipulating its members.

In the Glycol Case, the Court held that market-related information by the State did not cause detriment to the freedom of professional competition enshrined in Article 12 para. 1 of the Basic Law since the influence on the factors that were relevant for competition did not distort the conditions of the market, and remained within the legal framework for state information measures. The latter objective meant that the communicated information must relate to a state task, comply with the order of competences, and observe the requirement to be correct and objective.[5] An explicit legal authorization for the State to communicate consumer information was, thus, not necessary. Article 12 para. 1 of the Basic Law in principle did not protect against the publication of such information by the State that was substantially correct, complied objectively, and was formulated with the appropriate level of caution.[6] However, the Federal Constitutional Court admitted that the scope of protection of the freedom of competition could be impaired by a state measure that is not limited

[3] *See, e.g.*, Andreas Roth, VERWALTUNGSHANDELN MIT DRITTBETROFFENHEIT UND GESETZESVORBEHALT, 113 (1991).

[4] *See, e.g.*, BVerfGE 43, 242, 288; 61, 260, 275; 88, 103, 116.

[5] BVerfGE 105, 252, 268.

[6] BVerfGE 105, 252, 272.

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to providing participants of the market with relevant information on the basis that participants could make their own interest-guided decisions about their market behavior. This could especially be the case if the information activity of the State, because of its objective and effects, was a substitute for a state measure that must be qualified as an infringement of a basic right. By choosing a *functional equivalent* of an infringement, the special constitutional bindings of the legal order could not be circumvented; rather, the state communication of consumer information must fulfill the legal requirements that apply to infringements of basic rights.[7]

In the Osho Case, the Federal Constitutional Court made use of these principles in the context of the right to free exercise of religion and ideology in Article 4 paras. 1 and 2 of the Basic Law. It decided that the freedom of religion did not guarantee protection against the State and its organs publicly criticizing the subjects of this basic right as well as their goals and activities. Moreover, the Federal Government, because of its leadership obligations, was entitled to communicate information in all fields where it had responsibility to care for the State as a whole that could be fulfilled by the help of information. Even if the Government, by acting on its responsibility to protect the general public, brought about a *de facto* restriction of a basic right, there was no need for special authorization to do so. However, this analysis must comply with the principle of State religious neutrality and, thus, had to proceed with caution. The State was not allowed to draw defamatory, discriminating, or distorting portrayals of a religious or ideological community.[8]

The two decisions of Federal Constitutional Court rightly received harsh criticism in literature: it was argued that they mixed the scopes of protection and the limits if the rights in Articles 12 para. 1 and 4 paras. 1 and 2 of the Basic Law; lacked a clear position towards the criteria for infringements of basic rights; disregarded the provision of legality and underestimated its performance; followed an undifferentiating and, with regard to its results, fixed notion of what State leadership or responsibility was; and, finally, violated the federal system of powers laid down in the Basic Law.[9]

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[7] BVerfGE 105, 252, 273.

[8] BVerfGE 105, 279 (headnote).

[9] *See, e.g.*, Peter M. Huber, *Die Informationstätigkeit der öffentlichen Hand – ein grundrechtliches Sonderregime aus Karlsruhe?*, 58 JURISTENZEITUNG (JZ) 290, 292 (2003); Dietrich Murswiek, *Das Bundesverfassungsgericht und die Dogmatik mittelbarer Grundrechtseingriffe – Zu der Glykol- und der Osho-Entscheidung vom 26.6.2002*, 22 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT (NVWZ) 1, 2 (2003); Herbert Bethge, *Zur verfassungsrechtlichen Legitimation informalen Staatshandelns der Bundesregierung*, 25 JURISTISCHE AUSBILDUNG (JURA) 327, 328 (2003); Hans-Joachim Cremer, *Der Osho-Beschluss des BVerfG*, 43 JUS 747, 748 (2003); Michael Sachs, *Informationsinterventionismus und Verfassungsrecht*, in: STAAT, WIRTSCHAFT, FINANZVERFASSUNG. FESTSCHRIFT FÜR SELMER, 209, 210 (Lerke Osterloh ed., 2004); *see also* Kurt Faßbender, *Wettbewerbsrelevantes Staatshandeln und Berufsfreiheit: Quo vadis, Bundesverfassungsgericht?*, 57

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It is within the context of this criticism that the Federal Administrative Court considered the case of protective declarations against the Church of Scientology. With this case the Court had the opportunity to take into account the reaction to the above cases and to clear up how far the principles that had been developed by the Federal Constitutional Court were applicable, and to decide what distinctions or modifications, if any, were necessary. Furthermore, the Court had to address the question of how far members of the Church of Scientology in Germany can assert claims on the basis of Article 4 paras. 1 and 2 of the Basic Law. That question arises because the common opinion holds that the Church made use of religious and ideological arguments only in passing and as a pretext for its economic purposes; it was in "substance" a business enterprise and not a religious or ideological community.[10]

## B. Facts of the Case

The Federal Administrative Court was confronted with the following facts: The defendant was the Free and Hanseatic City of Hamburg. Aiming at the protection against dangerous commercial practices of pseudo-religious groups, the City routinely handed over a declaration document that a business owner or company could use to force their clients or business partners to disclose their relationship or attitude towards Scientolgy. With this declaration document, the defendant focused

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NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 816 (2004); Vanessa Hellmann, *Eine Warnung vor dem Bundesverfassungsgericht. Die Glykol-Entscheidung des BVerfG vom 26.6.2002*, 24 NVwZ 163, 165 (2005); Christoph Möllers, *Wandel der Grundrechtsjudikatur. Eine Analyse der Rechtsprechung des Ersten Senats des BVerfG*, 58 NJW 1973, 1975 (2005).

[10] *See further*. BAGE 79, 319, 338; Ralf B. Abel, *Sekten, Psychogruppen, neue Heilskonzerne. Religionsrecht als Mittel zum Zweck?*, in: RELIGIONSFREIHEIT ALS LEITBILD. STAATSKIRCHENRECHT IN DEUTSCHLAND UND EUROPA IM PROZESS DER REFORM, 141, 146 (Hartmut Kreß ed., 2004); Peter Badura, DER SCHUTZ VON RELIGION UND WELTANSCHAUUNG DURCH DAS GRUNDGESETZ. VERFASSUNGSFRAGEN ZUR EXISTENZ UND TÄTIGKEIT DER NEUEN "JUGENDRELIGIONEN", 65 (1989); Marc-Daniel Dostmann, *Kirche und Staat: Kooperation oder Konfrontation? – am Beispiel Scientology als Religionsgemeinschaft*, 52 DIE ÖFFENTLICHE VERWALTUNG (DÖV) 993, 996 (1999); Stefan Muckel, in: BERLINER KOMMENTAR ZUM GRUNDGESETZ, Art. 4, 12 (Karl Heinrich Friauf/Wolfram Höfling eds., August 2006); *idem*, *Religionsfreiheit für die "Church of Scientology"?*, 5 KIRCHE UND RECHT (KuR) 81, 110, 127 (1999); *idem*, *The 'Church of Scientology' under German Law on Church and State*, 41 GERMAN YEARBOOK OF INTERNATIONAL LAW (GYIL) 299 (1998); Gregor Thüsing, *Ist Scientology eine Religionsgemeinschaft?*, 45 ZEITSCHRIFT FÜR EVANGELISCHES KIRCHENRECHT (ZevKR) 592, 616 (2000); Manfred Wenckstern, in: GRUNDGESETZ. MITARBEITERKOMMENTAR UND HANDBUCH, Vol. 1, Art. 4 I, II, 44 (Dieter C. Umbach & Thomas Clemens eds., 2002); dissenting: Ferdinand Kopp, *Religionsgemeinschaften als wirtschaftliche Vereine i. S. von § 22 BGB*, 42 NJW 2497, 2502 (1989); Higher Administrative Court of Baden-Württemberg, 23 NVwZ 1516 (2004) with comment by Ulrich Segna, *Die Scientology Church: (k)ein wirtschaftlicher Verein?*, 23 NVwZ 1446 (2004).

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particularly on companies that feared damage to their reputation if their goods were sold by Scientologists or if sellers, when distributing their goods, proclaimed the doctrine of L. Ron Hubbard, the founder of Scientology, towards end consumers. The plaintiff was member of the Church of Scientology Germany and ran a nappy studio for babies where she also offered customers vitamin supplements. In 1997, the producer of the supplements sent her one of the declarations prepared by the defendant. According to that declaration, the plaintiff should assure that she does not work with the "technology" (meant are probably either the so-called e-meters and other equipment like that, or mental techniques to manipulate or rather influence people) of Hubbard, that she neither is being educated in this technology nor attends pertinent courses, and that she refuses to use this technology when running her company. The plaintiff did not sign the declaration and, in consequence, the producer of the vitamin supplement ended the business relationship. The plaintiff applied to the court to order the defendant to cease recommending third persons to use the declarations in their business, or to circulate them for the use in business, and in any other way promote their use. After the Administrative Court refused the application, the Higher Administrative Court delivered judgment against the defendant according to the plaintiff's application. The defendant's appeal to the Federal Administrative Court was not successful.

### C. The Federal Administrative Court's Reasoning

The Federal Administrative Court argued that the basic rights and in particular Article 4 paras. 1 and 2 of the Basic Law were a basis for the citizen's claim to compel the State to refrain from unlawful restrictions of any kind and, thus, also in the form of an administrative action.[11] In this case, the Court examined the claim in a well-structured manner using four steps. In step one, the Court pointed out the decisive role of Article 4 of the Basic Law. In step two, it considered the relevant detriment to the plaintiff's freedom of religion by the official action of the defendant. In step three, the Court examined the unlawfulness of the information measure, and, finally, in step four, the Court stated that there was a danger of repetition:

[11] *See* BVerwGE 82, 76, 77.

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*I. Applicability of Article 4 of the Basic Law*

With regard to the prerequisites of a religious or ideological belief according to Article 4 para. 1 of the Basic Law, the Federal Administrative Court explained: "A religion or ideology is a certainty about certain expressions concerning the world as a whole, the origin and purposes of human life, what it means to be human; thereby, religion takes as a basis a reality that both exceeds and includes the man (in other words, transcendental), whereas ideology is limited to worldly (immanent) relations. […] The Higher Administrative Court has, in the general sense, recognized that Hubbard's doctrines intended to determine the goals of human kind, to improve a person in the core of his personality, and to explain in an extensive manner the meaning of the world and of human life. In that context, it has, for example, pointed to Hubbard's teachings about the immortal soul as bearer of a life energy that changes in the course of uncountable lives, and shows the way to higher levels of existence, as purpose of human life that reminds [us] to the way of achieving higher levels of redemption. The Higher Administrative Court has rightly come to the conclusion that such expressions of Scientologist doctrine were suitable for fulfilling the notion of religion or ideology."[12]

The Federal Administrative Court rejected the objections of the defendant that aimed at questioning the religious quality of certain expressions in the teachings of Hubbard as they appear to be Science Fiction. Instead, the Court stressed that the prevailing religious or ideological community's understanding about what was the central element of its doctrine was, in principle, the only relevant factor.

Regardless the general qualification of the thoughts of such a community, the Federal Administrative Court focused on the individual belief of the plaintiff as member of the Church of Scientology. It was decisive that the plaintiff herself believed the transcendental contents of Hubbard's doctrine and felt the rules connected with that doctrine to be binding. There was no need to oppose the plaintiff with the argument that the founder or the later leaders of the movement, with the ideological targets they propagated, in reality were actually pursuing economic interests. The behavior of third persons did not take away the plaintiff's protection by her basic right in Article 4 para. 1 of the Basic Law; the question whether the Church of Scientology should be regarded as a religious or ideological community in Germany could be let open for consideration.[13]

[12] Federal Administrative Court, 59 NJW 1303 (2006).

[13] *See* BVerwGE 61, 152, 162; 105, 313, 318.

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*II. Restriction of the Freedom of Religion*

When examining the legitimacy of the defendant's claim for the restriction of the freedom of religion or ideology, the Federal Administrative Court turned to the defendant's facilitation in ceasing business connections through the use of the protective document (although it is, at first glance, not an action of the State but of a private person who is not directly bound by the basic rights).[14] The Court held that the ceasing of business connections restricted the basic right in Article 4 para. 1 of the Basic Law because it was based on the plaintiff's religious or ideological beliefs that were protected by this provision. Insofar, it is sufficient for the Court that the declaration concerning Hubbard's technology, which cannot be separated from the religious or ideological contents of the Church of Scientology, in fact required a confession to or a distance from the teachings and ideas of the movement. In particular, the Federal Administrative Court considered that the declaration, according to its preconditions, aimed at Scientologists who should be exposed in the circle of employees or business partners and with whom the working contract should be ended or rather to whom the social relationship in general should be broken off.

After these explanations, the Federal Administrative Court acknowledged that the restriction of the basic right enshrined in Article 4 para. 1 of the Basic Law was based on a state action and must, therefore, be accounted to the defendant. The decision reads: "Handing over the declaration document to third persons so that they use it towards business partners or employees is a state measure in the form of a merely administrative action. The declaration document, according to its prerequisites, is for forcing the business partner or employee to reveal their adherence to Scientology. It aims to end the business relationships of Scientologists, who are forced to reveal themselves with the help of the declaration document. Even before having received the declaration document, the user may be determined to separate from business partners who are members of Scientology. According to the assertion of the defendant, she has given the declaration document only to such companies or persons that, because of her general warnings and information, were already willing to undertake this step. However, when handing over the protective document, she makes the intentions of the user her own and supports their execution. She is accountable for the resulting consequences of the use of the protective document".[15]

[14] *See*, *e.g.*, Dreier, *supra* note 1, at 98 with further references.

[15] Federal Administrative Court, 59 NJW 1303, 1304 (2006).

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*III. Justification of the Restriction*

Concerning the justification of the restriction of the plaintiff's basic right the Federal Administrative Court examined whether a legal authorization had been necessary for issuing the protective document or whether it could be based on the immediate constitutional task of Federal State's government to lead the State. Insofar, the Court referred to the explanations of the Federal Constitutional Court in its Glycol and Osho decisions saying that the provision of legality did not require a special authorization by the legislator for information activities that went beyond the task of leading the State and only brought about an indirect *de facto* restriction of basic rights. Against the background of that legal opinion, the Federal Administrative Court differentiated as follows:

> "The situation is different if the official activity, according to its purpose and effects, constitutes a state measure which must be qualified as an infringement of basic rights in a conventional sense. By choosing such a functional equivalent of an infringement, the requirement of a special legal authorization cannot be circumvented. […] The handing over of the declaration document is such a functional equivalent that must be qualified as an infringement of a basic right in a conventional sense. This [infringement] is characterized by the fact that the State wants to bring about a success that is directed to oppressing a certain affected person, by reason of the public interest. [The State's] measure must unambiguously aim at a negative effect that shall occur with the affected person, and it must not cause that effect solely as a concomitant. […] By issuing the protective document, the defendant is not satisfied with generally warning the public against dangers that might occur from activities of the Scientology movement in the economic field. Rather, she passes it over to fight against the generally assumed dangers with regard to individual cases, so that the business relationships of business enterprises, by the use of the protective document, are held free from contacts with Scientologists. When handing over the declaration documents to companies, the defendant aims at disclosing the Scientologists in the line of business partners of the users and excluding them from the business relations with him. Thereby, she enables and supports concrete steps against individual members of the Scientology movement. That the producer of the vitamin supplement, which had been sold by the plaintiff, broke off the business relations with her, is, thus, no disadvantage that happens more or less by chance or incidentally as a consequence of general information activities of the defendant. Rather, this disadvantage is an inevitable and sure effect of the advice given to that company by the defendant. The

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> defendant's measure in question was directed to that result. According to its content and purpose, it was a typical administrative action related to an individual case, which serves the protection of legal goods by fighting against assumed dangers. […] It is irrelevant that the negative effects of issuing the declaration document of the defendant arise only because of the behavior of a third person who is the business partner. The aim pursued by the defendant when issuing the declaration document classified the whole course of event under a uniform, infringing action."[16]

*IV. Danger of Repetition*

Finally, the Federal Administrative Court deduced the danger of repetition simply from the fact that a restriction had taken place. It argued that the public authorities regularly held that their measures were in accordance with the law and, thus, did not see any reason to change their administrative practice in future.

## D. Conclusions

The decision of the Federal Administrative Court contains some correct and important clarifications concerning the adverse effects of state public information policies on basic rights. With regard to the scope of Article 4 para. 1 of the Basic Law, the decision confirms that public authorities who want to find out the contents of the teachings certain religious or ideological communities espouse must, above all, refer to the way these communities themselves see them. Furthermore, the Court stressed that for the protection of the basic rights of the individual, it is the person's own religious beliefs that must be taken into account, and not the possibly dubious orientation of the religious community. That aspect is particularly relevant for the numerous cases where Muslim people claim to follow their religious convictions and, until now, public authorities often opposed them by saying that these convictions were not based on the Quran, or were not shared by prominent experts of the Shariah.[17] In any event, the Court rejected the opinion qualifying religion as a mere collective phenomenon where there was no place for

[16] Federal Administrative Court, 59 NJW 1303, 1304 (2006).

[17] *See further* Diana Zacharias, *Das deutsche Staatskirchenrecht vor den Herausforderungen der Gegenwart*, 11 KuR 101, 106, 110, 265, 270 with references.

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singularity;[18] rather, it recognized protection even for deviationists and individualists.

Remarkable in the context of Article 4 of the Basic Law is also the statement that inducing economically damaging consequences by referring to religious beliefs of affected persons could as such restrict the freedom of religion or ideology so that there was no need to examine whether the *intensity* of the economic effects makes the affected persons change their behavior towards religion. Apart from the explanations to Article 4 of the Basic Law, the decision underlies with regard to the general dogma of basic rights that relevant restrictions of basic rights are possible even beyond classical infringements. The Court did not formulate the relevant criteria conclusively, but it becomes clear that at least activities that are directed to have an effect on the protected sphere must be accounted to the State. Concerning the range of the provision of legality in the context of state information activity, the decision of the Federal Administrative Court fastens the attempts of the Federal Constitutional Court's Glycol decision and requires a special legal authorization at least in such cases where the jurisdiction appears to be a functional equivalent of a classic infringement. Relevant for that qualification is, again, the *finality* of the state measure.

[18] *See, e.g.*, Claus Dieter Classen, RELIGIONSFREIHEIT UND STAATSKIRCHENRECHT IN DER GRUNDRECHTSORDNUNG, 22 (2003).

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