Summary

Rechtsstaat und Vorsorgestaat

by Christian Calliess

Back in 1792, Wilhelm v. Humboldt wrote wise words when he noted: “There is no security without freedom“. If there is anywhere that freedom and security belong together, then in the constitutional state. A state under the rule of law is defined by procedural specifications, such as separation of powers, reservation of statutory powers and effective legal protection on the one hand and by the recognition of basic rights on the other. To this extent, the rule-of-law premises are the state monopoly on the legitimate use of force as well as the corresponding duty of state authorities to protect individual rights on the one hand and the “freedom-preserving“ individual rights protection against state authorities on the other hand, both aspects based on human rights.

In addition to a multitude of chances, the dynamic development of trade and industry, science and technology also brings with it as an unintentional side-effect new risks which extend way beyond the hazards of the first industrialisation phase. In a situation of this kind, in which it is not possible to attribute responsibility to an identifiable individual, thus causing the failure of private liability law as well as traditional laws to avert imminent danger, safety and security expectations are directed once again to state institutions from whom precautionary measures to protect against damage can be justifiably expected.

With regard to the fact, that responsible state authorities face often a considerable lack of knowledge on behalf of the question, if a substance, a product or a process causes a concrete danger (hazard) for individual or public goods, it becomes nevertheless difficult for them to correspond their constitutional duty to protect. In this situation risk management is geared towards the control of risk situations defined by unpredictability and uncertainty. Via the precautionary principle which corresponds with this term, the sphere of influence of the state institutions is expanded in such a way that protective measures can be taken in the event of an abstract concern and not only in the event of concrete danger (hazard) for which there is concrete evidence. The precautionary principle has embarked on a remarkable legal career, which began with and focuses on environmental, health and consumer protection law. To establish a reason for precaution, it is sufficient to have an abstract potential for concern and therefore reasonable suspicion in theory only – as opposed to purely speculative suspicion supported by scientific plausibility grounds – which does not have to be well substantiated empirically or even scientifically proven in the sense of a majority opinion.

The precautionary principle (together with the rebuttable presumption of danger that is inherent to it) legitimises early regulatory action by the state. It can provide for the

enactment of precautionary regulations and permit the authorities to intervene on a broader, risk orientated basis. As a consequence a constitutional conflict may arise with regard to the rule of law, especially the freedom guaranteed by human rights. If an appropriate level of protection cannot be derived directly from scientific findings due to lingering uncertainty, under the rule of law there is a growing necessity to back up precautionary decisions with procedural rules. In light of the rather political character of risk assessment, the decision-making process not only has to be made transparent, it must also enable a pluralistic discussion of values, which should be held under the institutionalised involvement of representatives of social groups which participate in public life. This is why there have been calls outside the sphere of jurisprudential debate (in the fields of philosophy and sociology, which deals with issues such as environmental ethics and the social dimensions of technological risks) for a general shift of the burden of proof from state authorities to the responsible actors in society to address the risks of new technologies (“in dubio contra projectum“). A risk decision of this kind pushes the rule-of-law limits of our liberal constitution. As a result, the precautionary principle can only be employed in conformity with the rule-of-law concept if it is based on the model of a rebuttable presumption of danger. If we adopt the idea of apportioning the burden of proof based on the theory of spheres, an idea that also corresponds to the “polluter pays“ principle in the field of environmental law, this appears justified if for no other reason than it is the substance or product producer who confronts the public at large with a potential risk.