The GLJ Editorial Board Recognizes Co-Editor Peer Zumbansen's Recent "Habilitation" (Johann Wolfgang Goethe University, Frankfurt am Main) and His Receipt of a Canada Research Chair at Osgoode Hall Law School of York University, Toronto, Canada

Book Review – Peer Zumbansen, *Ordnungsmuster im modernen Wohlfahrtsstaat. Lernerfahrungen zwischen Staat, Gesellschaft und Vertrag*, Baden-Baden, Nomos Verlagsgesellschaft, 2000, 363 S., 56 Euro.

By Volker Neumann

The *Ordnungsmuster* (patterns of order) in the welfare state are those mentioned in the secondary title: state, society and contract. The thesis starts form the assumption that any theoretical treatment of new challenges was determined by the concepts of state, society and "state and society," meaning that considerations on, for example, the accomplishment of new tasks by law, on the declining power of statutory law to control, or on the diverse varieties of informal, *ad hoc* or cooperative administration action has "already always" been influenced by the distinction between state and society and, correspondingly, between public and private law. The conceptual and programmatic narrowing associated therewith would aggravate a reciprocal approximation of public law and private law. "Experiences made and to be made by public law, fundamental rights doctrine and administration within the constitutional-state, the social-state, the environmental-state and the risk-state hence do not expand into the internal problem description formula of private law. And vice versa."[1] The reflexive liquification of this "semantic dead hand" shall enable experiences "beyond the separation of state and society." It is not exactly comprehensible why Zumbansen speaks of patterns of order in the welfare-state, instead of choosing the correct constitutional term "social-state." This applies all the more, as

[1] PEER ZUMBANSEN, ORDNUNGMUSTER IM MODERNEN WOHLFAHRTSSTAAT. LERNERFAHRUNGEN ZWISCHEN STAAT, GESELLSCHAFT UND VERTRAG 16 (2000).

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he himself points to the fruitlessness of demarcating welfare-state from social-state.[2]

The three patterns of order mirror the rough structure of the thesis. Under A. the "state" and the "state discourses" of the past centuries are dealt with. The battles and skirmishes over the state, its modifications and its alleged termination are described fastidiously: governability, limits of the law's ability to control, status of the public and evolutions towards a cooperative state. Even the reformalisation debate associated with the names Helmut Ridder and Dieter Grimm is mentioned. The change of the parliamentary-state of legislation into state of administration, described by Carl Schmitt and Otto Kirchheimer, is traced as well as Ernst Forsthoff's analysis of the order arranging state of public existence provision. Particularly the intervening social-state and the social-state discussion connected with the names Wolfgang Abendroth and Forsthoff is expatiated. This is insightful since Zumbansen understands the social-state as a substantial enhancement of the constitutional-state and as the governing perspective for the dramatic changes of the state by continuing impulses of legalisation. Searching for patterns of explanation "beyond the separation of state and society" he eventually meets with the "principles of social law"[3] and hence with Maximilian Fuchs's predominantly positively absorbed Habilitation thesis *Zivilrecht und Sozialrecht*. The consent is particularly directed at the aimed ending of the "compartmentalisation" of social and private law. However, the understanding of social law from which Zumbansen commences has not completely revealed itself to me. Today, social law is understood as the law of the Social Security Code (formal notion of social law) or the law of social benefits (substantial notion of social law). Zumbansen also seems to proceed from this comprehension. Indeed, he speaks casually of social law in the terms of Otto Gierke,[4] who named this category the "cooperative community law," allegedly located between constitutional law and private law.

What, then, has become of the state? Zumbansen considers it being overcharged, but protests against not taking it seriously any more.[5] Anyway he adjourns to the search for a "law of democratic self-governance," "which structurally would have learnt from the excessive demands made upon the constitutional-state and from the exhaustion of the activity and capacity potentials of the social-state."[6] This search

[2] *Id*. at 113-118.

[3] *Id*. at 120, *et. seq*.

[4] *Id*. at 122.

[5] *Id*. at 91, *et. seq*.

[6] *Id*. at 126.

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begins in the second pattern of order, in society, which is paraphrased as "a catch-all term for the fragmented units of individuals and social groups pursuing diverse interests ..., whose worlds of being and divisions of systems are subject to increasing state standardization."[7] Society has thus become a negative term, attained by distinguishing it from the state. The main perspective of this pattern of order is the search for theoretical drafts of models of self-regulation.

A first attempt is the principle of subsidiarity, which is said to have gained topicality by Article 3b EC-Treaty and "by an increasing adoption of political theory, especially from the United States." Admittedly, Zumbansen seems to rate the principle's potential – and rightly so! – rather humbly. By all means, he writes, the principle was neither a complete instruction of how to act nor a legal principle. It was unclear, above all, where the boundary of self-government runs, beyond which it is allowed to intervene from outside in a helpful way. On the other hand, he recognises an objective target in this principle with which he apparently sympathises, namely the enabling of social self-government and of responsible self-governance.[8] Accordingly, the principle of subsidiarity would be blurred, but would point in the sociopolitically correct direction. This explains why Zumbansen orients himself to a sphere of law which is time and again accredited with the implementation and concretisation of the principle of subsidiarity, *i.e.* the law that performs social assistance and thus the maintenance of the welfare-state.[9]

This focal point is well chosen. For open welfare maintenance has been a preferred subject of academic legal discussions on the relations between state and society ever since. Considering welfare maintenance, Josef Isensee (1968), Alfred Rinker (1971) and Roland Wagner (1978) discussed the principle of subsidiarity, the status of the public, as well as public tasks. Fortunately, Zumbansen does not resume those approaches but examines the details of social assistance, *i.e.* in particular for the law of institutions that provide social assistance.[10] Correctly it is stated that the legislature abolished the primacy of open social welfare institutions at the conclusion of agreements in 1996.[11] However, the importance of this amendment may not be overestimated. According to the case law, the rule of primacy was of no practical impact, and the distinguished position of open welfare maintenance in sec. 10 of the

[7] *Id.* at 143.

[8] *Id.* at 145.

[9] *Id.* at 149, *et. seq.*

[10] *See, e.g.*, Sec. 93 of the Federal Act on Social Assistance.

[11] *See*, Sec. 93 para. 6 sentence 1 of the Federal Act on Social Assistance (former version).

Federal Act on Social Assistance was, contrary to the then governmental bill, explicitly kept in 1996. By opening the circle of offerors for the benefit of commercial institutions the legislature only acknowledged that these institutions had increasingly been engaged as agreement bound deliverers of services. This was possible because the courts, in particular the higher administrative courts of Northern Germany, had resisted the tendency towards a closed system of service deliverers (keyword "governance of offers by verification of demands"). As a consequence of this opening, competition among deliverers of services indeed is promoted. But neither thereby, nor by introduction of a prospective allowance – as the author writes on page 157, has a "market of social services" emerged.[12] The central requirement of a market is not fulfilled, because the person taking up the services and the institution paying them and determining the services' kind, amount and quality are not identical. Since the person entitled to social assistance does not pay the social services himself there is a structural danger that he and the deliverer of services expand, consuming up to the limit of satisfaction. Economists call this supply driven phenomenon "moral hazard." However, competition is not tantamount to market, but a fundamental sociological fact of life which, as yet a look into a nursery shows, takes place everywhere in society. The equation of competition with the market is not correct.

Zumbansen writes that the legislature proceeded to "deconcentration of the trust-like net of welfare associations,"[13] thereby enabling the "dissolution of neo-corporatist arrangements."[14] This view has little to do with reality in welfare maintenance. "Bureaucratised major entities of associations" are out of the question.[15] This field is rather characterised by extremely lose federal structures. To formulate this finding less benignly: The institutions do as they please with their association, and the left hand often does not know what the right hand is doing. The associations' structures are so weak that the ability to cooperate mandatorily with state institutions of social benefits is endangered. As a consequence the legislature has started to strengthen the associations' importance. In other fields, as, for example in long term care insurance, a converse policy is aimed at and the associations' structures are weakened by a cartelisation of the care funds. It is not correct, in any case, that in the fields of welfare maintenance there are inflexible, bureaucratised and hierarchical major organisations safeguarding their beneficiaries on the one hand, and smaller, more flexible private providers satisfying the needs of the persons concerned on the other hand. Another has to be added. Demonising the commercial

[12] Zumbansen, *supra* note 1, at 157.

[13] *Id*. at 160.

[14] *Id*. at 162.

[15] *Id*. at 160.

providers for aiming at profit and romanticising welfare maintenance for being non-profit would be wrong. But one difference shall be recorded. It can typically be assumed that it is the primary aim of non-profit enterprises to fulfill their social task. Hence, on condition that the quality of services cannot be noticed or would have to be controlled constantly, these enterprises are the superior providers. Thus I cannot comprehend why private providers should be able "to warrant highly personally defined help."[16]

Zumbansen is interested in elaborating a social concept of self-governance which is neither orientated to "the market" nor relies on the traditional model of sovereign control.[17] To him a model of such a conception seems to be the arbitration board under sec. 94 of the Federal Act on Social Assistance. It is safe to say that this board is no institution based on private autonomy, bringing the principle of freedom of contract to fruition. According to the predominant opinion it is rather an authority reaching its decisions administratively. Zumbansen praises a decision of the Federal Administrative Court, granting the arbitration board scope for judgment evaluation and retracting judicial control of the arbitral award. In my opinion this decision is problematic because the fixation of payment by the arbitration board is no examination-like inspection but a forecast on the development of costs in a given period and forecasts are typically subject to full judicial review. The decision can be legitimised by the principles on the scope for judgment evaluation by bodies of experts. For the professional competence is absolutely available, by contrary interests, to powerfully neutralise fundamental decisions leaving the neutral chairperson's vote to regularly turn the balance. The arbitration board is typically overstrained and therefore the intended point of fracture in the cooperation between deliverers of service and the social-state. The decision mentioned rejects effective legal protection for the private and effectively shapes the framework of a closed, if one likes, corporatist system. Hence, the arbitration board is not a good example of a concept of societal self-regulation under state supervision. Altogether I cannot find clues for the "solidarity hope," the market of providers could be supplemented "by application of communitarist models of societal self-organisation – due to solidarity practised in small entities."[18] Moreover, I have some doubts whether the realisation of this hope would serve the persons concerned.

In one last subsection Zumbansen addresses the differentiation between public and private law, which he does not want to see as two diametrically opposed empires.

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[16] *Id*. at 169.

[17] *Id*. at 170.

[18] *Id*. at 179.

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Hence he speaks of the "civilness" of both, private as well as public law and discovers in the interventionist-state the common history of public law and private law as economic law.[19] As is generally known, the delimitation of both partial legal orders presents considerable difficulties. This applies in particular to contracts of service supply under social law, the classification of which has been disputed for decades. Zumbansen contrasts the "model of separation," *i.e.* the differentiation between public and private law as well as between state and society, with his concept of social law as a law of collision: "Here social law fulfils the function of balancing different rights; not determinable by an exactly definable content, social law operates, in considering legal positions, as a principle of governance. Social law, then, itself would no longer be a field of law to be defined and to be furnished with narrowly sketched dogmatics. It would only be evocative of each gap in any partial legal order, of the promise of justice within a simple rule of law, which can only be unfolded by combination with another deficient legal order."[20] Again it is not exactly clear which notion of social law is employed. It cannot, in any event, be the notion of the law in effect, for that social law very well possesses "an exactly definable content."

Contract is the third and last pattern of order, which is approached with the expectation of revealing a way out of the dichotomy that is state and society. It deals also and mainly with the questions, "to what extent consensual elements of political governance replace other, primarily hierarchical patterns of order."[21] "Reliance on the contract at the expense of all hierarchical models of conflict resolution is based on the assumption of intrinsic justice, central to contract as a consensual agreement. Contracts structure situations of cooperative acting, in which settlement, mutual benefit and reliability is concerned."[22] Once more it has to be emphasised that Zumbansen does not want to repress public law in favour of private law, but rather wants "to discover the public contents" of private law: "To the degree, in which social-state motivated interventions into private law allegedly lead to its materialisation, the assumption shall be held that it is rather a matter of discovering and making visible the material content of private law. In this sense private law was not approached with something alien but a certain interpretation regarded as being consistent with the normative wording."[23] Finally, it becomes clear now that social law is interpreted in the meaning of Otto Gierke and Anton Menger, namely "as a

[19] *Id*. at 191.

[20] *Id*. at 204.

[21] *Id*. at 209.

[22] *Id*. at 221, *et. seq*.

[23] *Id*. at 213.

revocation of the distinction between public and private law, taken as fixed constant since Kant."[24]

Also in respect of freedom of contract and private autonomy Zumbansen endeavours to revoke distinctions. It was the problem of contract, that the parties pursue their own respective interests without a commitment to common welfare. Therefore Zumbansen wants to draft a model of social order on the basis of a democratic concept including, however, the principles of private autonomy and freedom of contract.[25] In the centre of this model should stand the contract as an instrument of social self-organisation based on private disposition. In search of this instrument many doubts are discussed and objections are considered. Nevertheless it has not become really clear to me how a society governed by contract should function. The title of the last subsection of the exposition on the pattern of order "contract" is extremely interesting in this respect: "Excessive demands made upon the contract category?" This is exactly the point with which the actual discussion on the cooperative state is focused. As is generally known, contracts affect only the parties to the contract and generally do not bind third parties who do not want to join the contract. In social law the legislature has intervened and has declared the contracts on service supply "directly binding" upon all approved deliverers of service. Something points to the fact that these directly binding contracts are legal norms and that we have dealings with legislation by contract with the participation of private parties. It shall be understood that these norm contracts raise fundamental questions of constitutional law, in particular the question of the democratic legitimacy of such legislation. Unfortunately the reader does not learn about these exciting questions but has to content himself with an appeal for "learning achievements of dogmatics through societal subareas."[26]

Zumbansen has a vast knowledge of literature. The amount of processed literature is impressive. The book imparts multifaceted stimulation and new views on familiar questions. However, it has to be feared that many a reader may miss the "red line" in this exciting, thoroughgoing exposition and, in particular, the formulation of intermediate results. If I am correct, dissertations in law abstaining from a summary of the results in the form of theses have become rare. To abstain from formulating clear results might have to do with a certain awe of notional determination. Sometimes a question is raised but not answered, because it "already always" or "yet ever" contains another question. I have been looking in vain for a clean dis-

[24] *Id*. at 209.

[25] *Id*. at 229.

[26] *Id*. at 285.

charging of problems, their transformation into a coherent structure and their clear solution in a stringent argumentation. Perhaps this notice of deficits is unjust since Zumbansen reveals that he is not concerned with reflexively opening of dogmatics, quasi the "liquefaction of the coagulated." The dogmatist does not object to juristic self-reflection, provided that, in a second step, the "liquefied" is transferred into (new) conceptual basic figures. These very basis figures I miss in Zumbansen's thesis, i.e. – to use a term of German engineering – the "simple parts."

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