DEVELOPMENTS

The Allocation of Cultural Policy Powers in the Federal Republic of Germany

*By Markus Ogorek and Tian Pu**

A. Introduction

The Federal Republic of Germany is a state that shows a strong support for culture of any kind. While it is not explicitly stated anywhere in the *Grundgesetz* (Basic Law), it can be argued that very few nations regard the promotion of the arts, sciences and education as a public undertaking to the extent that Germany does. The federal structure of the German constitution is reflected in the allocation of governmental tasks between the federal government and the individual federal states, or *Länder*. Under this structure, the *Länder* bear the primary responsibility for cultural matters[1]. However, contrary to widely-held belief, the Basic Law also grants the federal government a range of legislative, administrative and financial powers with respect to cultural matters. Although when taken together these do not add up to a comprehensive promotional authority of the federal government in the cultural sector, due to numerous individual empowerments, the federal government is without doubt in a position to take an active role in cultural affairs to a significant extent.

In view of the sweeping powers which the *Länder* enjoy in culturally related matters in comparison to the federal government, it is no surprise that the concept of the *Kulturhoheit der Länder* (cultural sovereignty of the *Länder*) has become a common feature in case law and scholarly literature[2]. Institutionally, this cultural

* Dr. Markus Ogorek LL.M. (Berkeley), is research associate at the Institute for Ecclesiastical Law and Church-State Law at the University of Cologne; Tian Pu, is LL.B. candidate at the University of Cologne. Email: markus.ogorek@gmx.net; pu_tian@hotmail.com.

[1] Zippelius/Würtenberger, DEUTSCHES STAATSRECHT (31ST ed. 2005) 310-311; Hufen, *Gegenwartsfragen des Kulturföderalismus*, BAYERISCHE VERWALTUNGSBLÄTTER 1, 35 (1985); Mahrenholz, *Die Kultur und der Bund*, DEUTSCHE VERWALTUNGSBLATT (DVBL.) 857 (2002).

[2] See BVerfGE 37, 314, 322; Geis, *Die "Kulturhoheit der Länder"*, DIE ÖFFENTLICHE VERWALTUNG (DÖV) 522 (1992); Hense, *Bundeskulturpolitik als verfassungs- und verwaltungsrechtliches Problem*, DVBL. 376, 379 (2000).

https://doi.org/10.1017/S2071832200014358 Published online by Cambridge University Press

sovereignty is embodied in the *Ständige Konferenz der Kultusminister der Länder in der Bundesrepublik Deutschland* (Standing Conference of the Ministers of Education and Cultural Affairs of the *Länder* in the Federal Republic of Germany)[3], which deals with matters of cultural policy of supraregional significance with the aim of "forming a common viewpoint and a common will and representing common interests"[4]. In recent years, however, the oft-touted cultural sovereignty of the *Länder* has been subjected to a process of gradual erosion. Particularly since German reunification, the federal government has become active in cultural policy to a previously unparalleled extent. On numerous occasions, the *Länder* have tacitly endorsed actions of the federal government in the cultural sphere in spite of constitutional reservations in order to pave the way for funding from the federal budget. However, the federal government's activities in the area of cultural policy are increasingly being met with resistance from the *Länder*. Signs of this are apparent not only in the successful application of some individual *Länder* to the *Bundesverfassungsgericht* (Federal Constitutional Court) to overturn legislation establishing junior professorships[5] and prohibiting fees for higher education[6]. The disputes to be found in the legal literature respecting the constitutionality of the *Kulturstiftung des Bundes* (National Culture Foundation)[7], the creation of the office of a Federal Government Representative for Culture and Media[8] and the funding

[3] The Standing Conference of the Ministers of Education and Cultural Affairs of the Länder in the Federal Republic of Germany unites the ministers and senators of the Länder responsible for education, higher education and research as well as cultural affairs. It is based on an agreement between the *Länder*.

[4] See the preamble of the Standing Orders of the Standing Conference of the Ministers of Education and Cultural Affairs of the *Länder* in the Federal Republic of Germany of 19 November 1955, in the version published on 2.6.2005 (*Geschäftsordnung der Ständigen Konferenz der Kultusminister der Länder in der Bundesrepublik Deutschland vom 19. November 1955 i.d.F. vom 2.6.2005*).

[5] BVerfG NEUE JURISTISCHE WOCHENSCHRIFT (NJW) 2803 (2004).

[6] BVerfG NJW 493 (2005).

[7] Stettner, *Der verkaufte Verfassungsstaat,* ZEITSCHRIFT FÜR GESETZGEBUNG (ZG) 315 (2002).

[8] See Hense, *supra* note 2 at 381-383. Shortly after he was elected Chancellor, Gerhard Schroeder reorganized the administration of cultural issues by means of an organizational decree (*Organisationserlass* of 27 October 1998, BGBl. I, p. 3288) and created the office of the Federal Government Representative for Culture and Media. The Chancellor stressed the fact that the Federal Government Representative was obliged to respect the cultural sovereignty of the *Länder* and was only allowed to take measures within the scope of the Federation's powers. Before the creation of the new office, federal competences with regard to culture and media were exercised by several Ministries, such as the Ministry for the Interior, the Ministry for Economic Affairs and Labour, as well as the Ministry for Transport, Building and Housing. According to the Chancellor, it was the Federal Government Representative's task to generate new impulses and be a partner for the cultural policies of the Federation, cf. Government Declaration of 10 November 1998, *available at* http://www.bundesregierung.de/Reden-Interviews/Regierungserklaerungen-,11638.69116/regierungserklaerung/Regierungserklaerung-von-Bunde.htm.

for establishing and expanding all-day schools provided to the *Länder* by the Federal Ministry for Education and Research[9] also amply illustrate that constitutional law as it applies to cultural matters is undergoing a period of fundamental change.

This article seeks to determine where the constitutional limits of a federal cultural policy lie. To this end, the federal powers in the areas of the arts, sciences and education under current constitutional law will first be investigated in detail. This will be followed by an examination of the financial support for establishing and expanding all-day schools – presently one of the federal government's most important culture policy priorities – with respect to its constitutionality. Finally, the last section of this article examines whether the powers of the federal government with respect to cultural policy have been enhanced as a consequence of reunification. In this context, new doctrinal approaches that argue in favor of an increased importance of the Federation in the cultural sector will also be highlighted.

B. The Constitutional Basis of a Federal Cultural Policy

As a federally constituted nation, the Federal Republic of Germany comprises two tiers of government: the federal government and the *Länder*[10]. According to Article 30 Basic Law, the exercise of state powers and the discharge of state functions is a matter for the *Länder*, except as provided for or permitted by the Basic Law. This presumption of authority in favor of the *Länder* is formulated more specifically with respect to legislation in Article 70 Basic Law, to administration in Article 83 Basic Law and finances in Article 104a Basic Law[11]. However, exceptions to the fundamental principle articulated in Article 30 Basic Law are scattered throughout the Basic law; many of them have implications for cultural policy.

[9] Stettner, *Kollusives Zusammenwirken von Bund und Ländern beim Ganztagsschulprogramm*, ZG 315 (2003); Stein, *Die neuen Kinderbetreuungskonzepte als Kompetenzproblem im Bundesstaat*, ZG 324 (2003); Winterhoff, *Finanzielle Förderung von Ganztagsschulen und Juniorprofessuren durch den Bund?*, JURISTENZEITUNG 59 (2005).

[10] Sachs, *Art. 20*, in: GRUNDGESETZ (Sachs ed., 2nd ed., 1999), margin number 59-61, 65-67

[11] Sannwald, *Art. 30*, in: GRUNDGESETZ (Schmidt-Bleibtreu/Klein eds., 10th ed. 2004), margin number 5-6

I. Express Powers of the Federation

1. Exclusive legislation of the federal government and corresponding administrative authority

One of the key activities of the federal government in the cultural sector is international cultural exchange; the legal foundation rests in particular on Articles 32, 73 No. 1, 87 I Basic Law[12]. Article 32 Basic Law stipulates that relations with foreign states shall be conducted by the Federation. Under Article 73 I No. 1 Basic Law, the federal government has exclusive power to legislate matters pertaining to foreign affairs; on matters within the exclusive legislative power of the Federation, the *Länder* have power to legislate only when and to the extent that they are expressly authorized to do so by a federal law (Article 71 Basic Law). These powers are reinforced by Article 87 I Basic Law, which provides that administration of the foreign service be conducted by the federal government. Leadership in the area of international cultural policy rests with the Foreign Ministry. The ministry regularly entrusts implementation of the strategies it develops to intermediate organizations. These include, among others, the *Goethe Institute* (Goethe Institutes)[13], the *Deutscher Akademischer Austauschdienst* (German Academic Exchange Service)[14], the *Internationale Weiterbildung und Entwicklung GmbH* (Capacity Building International Ltd.)[15], and the *Institut für Auslandsbeziehungen e.V.* (Institute for Foreign Cultural Relations)[16]. As a public broadcaster with international mission, the *Deutsche Welle* (German Wave)[17] also contributes greatly to foreign cultural policy. The same is true of the numerous cultural and scientific establishments maintained abroad (particularly in other European countries) using federal funds. Examples of these include the Villa Massimo[18] and the *Deutsches Historisches Institut* (German Historical Institute)[19] in Rome, the Villa Romana in Florence[20] and the *Deutsches*

[12] Zippelius/Würtenberger, *supra* note 1 at 311; Stettner, *supra* note 7 at 321. A concise overview over measures in the area of international cultural exchange is given in *Auswärtige Kultur- und Bildungspolitik* (AUSWÄRTIGES AMT PUBL.), *available at* http://www.auswaertiges-amt.de/www/de/infoservice/download/pdf/publikationen/kupolitik.pdf.

[13] *See* http://www.goethe.de.

[14] http://www.daad.de

[15] http://www.inwent.org

[16] http://www.ifa.de

[17] http://www.dw-world.de

[18] http://www.villamassimo.de

[19] http://www.dhi-roma.it

Studienzentrum Venedig (German Study Center in Venice)[21], as well as the *Deutsches Archäologisches Institut* (German Archeological Institute)[22] with its many branch offices (such as in Madrid, Rome and Athens).

The exclusive legislative power of the federal government with respect to copyrights and publishing specified in Article 73 No. 9 Basic Law also has a strong bearing on cultural affairs in Germany. To cite one example, the Federation exercised the legislative power granted under Article 73 No. 9 Basic Law in its *Gesetz über das Urheberrecht und verwandte Schutzrechte* (Copyrights and Related Intellectual Property Rights Act) enacted 9 September 1965[23]. Moreover, the authority laid down in Article 73 No. 9 Basic Law includes the *Gesetz über das Verlagsrecht* (Law Governing Publishing) passed 19 June 1901[24], during the imperial era, which was accorded continuing applicability and validity as federal law in accordance with Articles 123, 124 Basic Law.

2. Concurrent legislative power of the Federation

Numerous additional cultural policy powers of the federal government are contained in the catalog of Article 74 Basic Law, which enumerates the matters subject to concurrent legislative powers. For example, according to Article 74 I No. 6 Basic Law, the federal government is responsible for matters concerning refugees and expellees. This also includes preserving the cultural heritage of this group. The prevailing consensus holds that the federal legislature also has the power to issue legal provisions respecting the establishment of memorials[25]. This is derived from Article 74 I No. 10a Basic Law, which assigns to the federal government the responsibility for war graves and the graves of other victims of despotism. Moreover, Article 74 I No. 11 Basic Law is potentially a source of legislative powers for the federal government in the cultural sector. This is because power to legislate economic law also implies the authority to promote film, publishing and translation (the legislative powers of the federal government under Article 73 No. 9 Basic Law

[20] http://www.aski.org/institute/villa1.htm

[21] http://www.dszv.it

[22] http://www.aski.org/institute/villa1.htm

[23] BGBl. I, p. 1273 (1965), as last amended by Art. 1 G of 10 September 2003, BGBl. I, p. 1774; BGBl I (2004), 312.

[24] RGBl. 217 (1901); BGBl. III, p. 441-1, as last amended by Art. 2 G of 22 March 2002, in force since 1 July 2002, BGBl. I, p. 1158.

[25] Stettner, *supra* note 7 at 322.

are also significant in this connection)[26]. On the basis of Article 74 No. 11 and 12 (labor law) Basic Law the Federation also has legislative power for out-of-school vocational training. In exercise of this competence, the Federation enacted the *Berufsbildungsgesetz* (Vocational Training Act) of 14 August 1969[27]. According to Article 74 I No. 13 Basic Law, the federal government can exercise legislative influence over education and training grants and the promotion of research. Furthermore, Article 74a No. 1 Basic Law assigns the federal legislature the power to pass laws regulating the remuneration, pensions and related benefits for members of the public service, which includes teachers and scientific and scholarly personnel at institutes of higher education. The federal government exercised this constitutionally authorized legislative power in the *Bundesbesoldungsgesetz* (Federal Pay Law) of 23 May 1975[28] and the *Beamtenversorgungsgesetz* (Official Supplying Law)[29] of 24 August 1976, which regulate remuneration and benefits, respectively.

According to the legal definition articulated in Article 72 I Basic Law, the *Länder* have the power to issue concurrent legislation as long as and to the extent that the federal government has not exercised its legislative power by enacting a law. A federal law that regulates a matter falling under concurrent legislative power has a limiting effect on comparable laws of the individual *Länder* in both a chronological ("as long as") and an objective ("to the extent that") sense[30]. In view of these constitutional provisions, the relative powers granted in Article 74, 74a Basic Law would appear to give the federal government significant scope to become active in the area of cultural policy. However, this is not entirely the case. It must be noted that the Basic Law makes the exercise of the powers set forth in Article 74, 74a Basic Law dependent on specific prerequisites.

Thus, according to Article 72 II Basic Law, the federal government is only empowered to enact laws in the area of concurrent legislation "if and to the extent that the establishment of equal living conditions throughout the federal territory or

---

[26] *See* BVerwGE 45, 1, 3; Müller/Singer, *Rechtliche und Institutionelle Rahmenbedingungen der Kultur in Deutschland*, (WISSENSCHAFTLICHE DIENSTE DES DEUTSCHEN BUNDESTAGES PUBL., 28 JANUARY 2004) 36-37, *available at* http://www.bundestag.de/bic/analysen/2004/2004_07_28.pdf.

[27] BGBl. I, p. 1112 (1969), as last amended by Art. 40 G of 24 December 2003, BGBl. I, p. 2954.

[28] BGBl. I, p. 1173, 1174 (1975), in the version published on 6 August 2002, BGBl. I, p. 3020; as last amended by Art. 3 X G of 7 July 2005, BGBl. I, p. 1970.

[29] BGBl. I, p. 2485, 3839, (1976) in the version published on 16 March 1999, BGBl. I, p. 322, 847, 2033; as last amended by Art. 8 G of 21 June 2005, BGBl. I, p. 1818.

[30] Maurer, STAATSRECHT I (3RD ED. 2003), § 17, margin number 33; Sannwald, *Art. 72*, in: GRUNDGESETZ (Schmidt-Bleibtreu/Klein eds., 10th ed. 2004), margin number 14; Pieroth, *Art. 72*, in: GRUNDGESETZ (Jarass/Pieroth eds., 7th ed. 2004), margin number 2

the maintenance of legal or economic unity renders federal regulation necessary in the national interest". As originally formulated, Article 72 II Basic Law required only the desirability of a federal regulation. However, this "desirability clause" proved inadequate to limit the legislative power of the federal government. According to the Federal Constitutional Court, the question as to whether the desirability of a national legislative regulation exists presumed a political evaluation on the part of the federal legislature that had to be respected by the judiciary. The desirability clause thus became a vehicle for the erosion of the powers of the *Länder*, and concurrent legislation became almost entirely a federal matter[31]. The revision of Article 72 Basic Law in 1994 replaced the desirability clause with a "requirement clause". This was undertaken with the declared aim of restricting the scope for political judgment on the part of the federal legislature recognized by the Federal Constitutional Court[32]. In addition, Article 93 I No. 2a Basic Law empowered the *Länder* to apply to the Federal Constitutional Court should the federal government seek to unduly curtail their legislative powers through an impermissibly broad interpretation of Article 72 II Basic Law. Consequently, there is no longer a broad scope for legislative judgment with respect to the requirements of Article 72 II Basic Law that is not subject to constitutional review[33].

3. Areas of federal framework legislation

In the area of framework legislation as well, federal action in accordance with Article 75 I Basic Law depends on the existence of the prerequisites as defined in Article 72 II Basic Law. Framework powers of the federal government that pertain to culture are by no means rare: under the provisions of Article 75 I No. 1 Basic Law, the federal government may enact laws as a framework for the *Länder* in regulating the legal relations of persons in the public service of the *Länder*, municipalities, or other corporate bodies under public law. The relevance of this requirement to education becomes clear when one considers that this group also comprises teachers and persons performing research and instruction in higher education – just as does the aforementioned Article 74a I No. 1 Basic Law.

Article 75 I No. 1a Basic Law provides the federal government with additional means of influencing the educational sector. This provision confers to the federal government the power to enact framework legislation on general principles

[31] *See* BT-Drs. 12/6000, p. 33. Pieroth, *Art. 72*, in: GRUNDGESETZ (Jarass/Pieroth eds., 7th ed. 2004), margin number 10

[32] Maurer, *supra* 30, § 17 margin number 34.

[33] *See* BVerfG NJW 41, 51 (2003); NJW 2805-2806 (2004).

respecting higher education. In 2002, the federal government invoked Article 75 I No. 1a Basic Law in the enactment of the *5. Gesetz zur Änderung des Hochschulrahmengesetzes* (Fifth Higher Education Framework Act)[34], which provided for the creation of so-called junior professorships, thereby at least practically abolishing the *Habilitation* (postdoctoral dissertation) as traditional qualification of university professors. In its decision of 27 July 2004, however, the Federal Constitutional Court found the preference given to the junior professorship unconstitutional within the context of framework legislation and declared the Fifth Higher Education Framework Act null and void[35]. That decision required that the junior professorship be placed on a new legal basis. This was achieved through the *Gesetz zur Änderung dienst- und arbeitsrechtlicher Vorschriften im Hochschulbereich* of 27 December 2004 (Law Modifying the Labor Law Requirements in the Area of Higher Education)[36].

The right of the federal government to enact framework legislation in the higher education sector was recently the focus of a controversy which culminated in the failure of the *Kommission von Bundestag und Bundesrat zur Modernisierung der bundesstaatlichen Ordnung* (Commission of the Federal Parliament and the Federal Council on Modernizing the Federal System)[37]. The federal government and the *Länder* had reached agreement on eleven issues, and resolution of four others was, according to the committee co-chairmen Edmund Stoiber (Christian Democratic Union) and Franz Müntefering (Social Democratic Party of Germany), within reach[38]. However, the opposing sides were ultimately unable to come to an agreement respecting the distribution of powers between the Federation and the *Länder* in the area of education. In the negotiations, the *Länder* laid claim to complete authority for educational policy, while the federal government wanted to retain some core powers, including that of enacting framework legislation respecting higher education. As no consensus was possible on this one issue, no changes were made at all. From the vantage of constitutional law, this is scarcely

---

[34] BGBl. I, p. 693 (2002).

[35] BVerfG NJW 2803 (2004). *See* further Zippelius/Würtenberger, *supra* note 1 at 317; Epping, *Der "Juniorprofessor" auf dem rechtlichen Prüfstand*, FORSCHUNG UND LEHRE 75 (2001); Janz, *Aus für die Juniorprofessur? – BVerfG, NJW 2004, 2803*, JURISTISCHE SCHULUNG (JuS) 852 (2004).

[36] BGBl. I, p. 3835 (2004).

[37] Compare Schultze, *Föderalismusreform: Zwischen Anspruch und Wirklichkeit*, AUS POLITIK UND ZEITGESCHICHTE (2005) 13, *available at* http://www.uni-augsburg.de/institute/kanada/foederalismusreform.pdf.

[38] FRANKFURTER ALLGEMEINE ZEITUNG, *available at* http://www.faz.net/s/Rub61EAD5BEA1EE41C-F8EC898B14B05D8D6/Doc~E98DE0CC188F849459668353A443A0FA5~ATpl~Ecommon~Sspezial.html

ideal, as German law as it pertains to education lacks a clear and unambiguous allocation of responsibilities between the federal government and the *Länder* in many respects. In this regard, the provisions of Article 75 I No. 1a Basic Law are symptomatic.

Article 75 I No. 2 Basic Law also displays a clear relevance to cultural matters. This article empowers the federal government to enact framework legislation regulating the general legal relations of the press. To date, however, the Federation has not fully exercised this power, with its great potential impact on cultural policy. Consequently, press matters are regulated primarily by the press laws of the *Länder*[39].

Finally, any discussion of framework legislation must examine Article 75 I No. 6 Basic Law, which reserves to the federal government the power to regulate the protection of German cultural assets against expatriation. A comparable authority was originally contained in Article 74 I No. 5 Basic Law, and empowered the Federation to enact concurrent legislation in this matter. As part of the constitutional reform enacted in 1994[40], federal authority respecting protection of cultural assets was transferred to the catalog of Article 75 I Basic Law in order to better serve the "fundamental responsibility of the *Länder* for cultural matters"[41]. This modification of the constitution may be explained by the fact that the legislative powers of the federal government under framework legislation are less extensive than under concurrent legislation. This is clearly reflected in Article 75 II Basic Law, which stipulates that framework regulations may contain provisions that regulate specifics or have direct application only by way of exception. A framework law must allow the legislatures of the *Länder* substantial scope so that they may enact law on their own responsibility[42]. According to the Federal Constitutional Court, this criterion would not be met by any provision which would restrict the parliaments of the *Länder* to choosing among specified options or executing federal law as a subordinate instance[43].

---

[39] BVerfGE 36, 193, 201-202; Sannwald, *Art. 75*, *supra* note 11, margin number 71.

[40] BGBl. I, p. 3146. (1994)

[41] BT-Drs. 12/6000, p. 34.

[42] BVerfG NJW 2803, 2804 (2004)

[43] *See* BVerfG NJW 2803, 2804 (2004); Sannwald, *Art. 75*, *supra* note 11, margin number 21a; Hufen, *Unvereinbarkeit der "Juniorprofessur" mit dem Grundgesetz – Grenzen der Rahmengesetzgebung des Bundes*, JuS 67, 68 (2005).

4. Joint tasks

Further culturally relevant powers of the federal government are described in Articles 91a and 91b Basic Law. These regulate the extension and construction of institutions of higher education including university clinics as well as the promotion of research institutions and research projects of supraregional significance. Educational and research institutions that are the product of a cooperation between the Federation and the *Länder* are, for example, the *Deutsche Hochschule für Verwaltungswissenschaften* (German Academy for Administrative Sciences) in Speyer and the *Deutsche Richterakademie* (German Academy of Judges) in Trier. The legislation of general principles (Article 91a II Basic Law), governing the performance of the functions set forth in Article 91a I Basic Law, is similar to framework legislation in that it is addressed to the legislative branch. But unlike the framework legislative power of the federal government, which pertains to the legislatures of the *Länder*, the legislation of general principles is binding for both the federal and state legislatures. Although the federal legislature may alter a general principle to which it no longer wishes to adhere, this requires not only a corresponding resolution of the *Bundestag* (Federal Parliament), but the consent of the *Bundesrat* (Federal Council), as well (compare Article 91b II Basic Law). In this way, the *Länder* can materially influence the formulation of general principles: if the Federal Council, the constitutional organ of the Federation that represents the interests of the *Länder* (compare Article 50 Basic Law), withholds its consent to a general principle, this proposal has been rejected entirely. The Parliament cannot then enact this measure, however great the majority – not even unanimously. Finally, it must be noted that, in variance to the principle of the separation of powers of the federal and state governments, the provisions of Articles 91a and b Basic Law regulating joint tasks permit mixed administration[44].

5. Article 135 IV Basic Law

A "special competence"[45] of the federal government with cultural implications lies "concealed" in the transitional and concluding provisions of the Basic Law. Under certain circumstances, the federal government can, under Article 135 IV Basic Law, promulgate regulations regarding the assets of *Länder* that no longer exist. This provision provided the constitutional basis that enabled the Federal Parliament to

[44] Krüger, *Art. 91a*, *supra* note 10 at margin number 6, and *Art. 91b*, margin number 6.

[45] The Federal Constitutional Court described Article 135 IV Basic Law as a "special competence" that enables the federation to establish administrative authorities directly accountable to the federal government, even if the prerequisites of Article 87 III Basic Law have not been met (*see* BVerfGE 10, 20, 45; 12, 205, 253).

pass the *Gesetz über die Errichtung der Stiftung Preußischer Kulturbesitz* (Act establishing the Foundation of Prussian Cultural Heritage) on 21 February 1957[46]. An application by the state governments of Baden-Württemberg, Hesse and Lower Saxony to the Federal Constitutional Court to declare this law unconstitutional, was unsuccessful[47]. In their decision of 14 July 1959, the justices in Karlsruhe held that Article 135 IV Basic Law also applied to the collections formerly belonging to the state of Prussia. The Court ruled that the federal legislature had the authority to establish a foundation for the cultural heritage of Prussia that is directly accountable to the federal government, and to assign this organization the corresponding administrative authority together with transfer of the cultural assets formerly belonging to Prussia. As the act establishing the *Stiftung Preußischer Kulturbesitz* (Foundation of Prussian Cultural Heritage) did not require the consent of the *Länder* stipulated in Article 135 V Basic Law, the legislation did not violate the rights of the *Länder* to participate in the conception and formulation of federal legislation.

6. Other (express) administrative powers of the federal government

With respect to the administrative authority of the federal government in the cultural sector, it is not possible to exercise the enumerated powers described above (with the exception of Articles 32, 87 I, 91a and b, 135 IV Basic Law). These have no bearing on the question as to how far the federal government can claim executive powers, but instead define legislative powers. However, a proceeding under Article 87 III Basic Law is conceivable in the cultural sector. This article provides that autonomous federal higher authorities as well as new federal corporations and institutions under public law may be established by a federal law for matters on which the Federation has legislative power (Article 87 III 1 Basic Law). The federal government has exercised the administrative powers accruing to it from Article 87 III 1 Basic Law e.g. in providing for foreign broadcasting through the German Wave[48]. Finally, in the event of an urgent need, the federal government may establish federal authorities at intermediate and lower levels, with the consent of the Federal Council and of a majority of the Members of the Federal Parliament, Article 87 III 2 Basic Law.

---

[46] BGBl. I, p. 841 (1957).

[47] *See* BVerfGE 10, 20. *See* further Dietlein, *Art. 135*, in: GRUNDGESETZ VOL 3 (v. Mangoldt/Klein/Starck eds., 4th ed. 2001), margin number 7-9.

[48] Dörr, DIE VERFASSUNGSRECHTLICHE STELLUNG DER DEUTSCHEN WELLE (1998) 23.

II. Implied legislative and administrative powers of the Federation

In its rulings, the Federal Constitutional Court recognizes implied legislative and administrative powers of the federal government within narrow limits. These comprise *Kompetenzen kraft Natur der Sache* (powers by virtue of the nature of the matter), *Kompetenzen kraft Sachzusammenhangs* (powers by virtue of the objective context) and of comparable *Annexkompetenzen* (corollary powers)[49].

A power by virtue of the nature of the matter derives from the unwritten legal principle founded in the nature of things, not requiring express acknowledgement in the national constitution, whereby certain areas, which by their very nature represent essential matters of the Federation that are *a priori* beyond the scope of the specified legislative powers, can be regulated by the Federation and by it alone[50]. This traditional formula, developed by Gerhard Anschütz[51], is still applied by the Federal Constitutional Court today in arriving at decisions. The Federal Constitutional Court has considered conceding to the federal government legislative authority for the presentation of the Federal Republic abroad by broadcasting means on account of the nature of the matter[52]. On the other hand, the literature rightly points out that such a power of the federal government may be derived from Article 73 No. 1 Basic Law. To this extent, it is thus not necessary to invoke unwritten federal powers[53].

The Federal Constitutional Court deems a power by virtue of the objective context to exist when "a matter expressly allocated to the Federation cannot reasonably be regulated without at the same time regulating a matter not expressly assigned as well, i.e. when an intrusion (of the Federation) into matters not expressly assigned is an essential prerequisite for regulation of a matter assigned to the Federal legislative power."[54] This power by virtue of the objective context originates from

---

[49] *See* Zippelius/Würtenberger, *supra* note 1 at 397; Maurer, *supra* note 30, at § 10, margin number 27-31; Ehlers, *Ungeschriebene Kompetenzen*, JURISTISCHE AUSBILDUNG 323 (2000) with further references; Bullinger, *Ungeschriebene Kompetenzen im Bundesstaat*, ARCHIV DES ÖFFENTLICHEN RECHTS 96 (1971); Hense, *supra* note 2 at 378-379; Geis, *supra* note 2 at 527.

[50] *See* BVerfGE 11, 89, 98-99; 12, 205, 251; 26, 246, 257; Sannwald, *Art. 30*, *supra* note 11 at margin number 35; Stettner, *supra* note 7 at 324.

[51] *See* Anschütz/Thoma, HANDBUCH DES DEUTSCHEN STAATSRECHTS VOL. 1 (1930) 363, 367.

[52] *See* BVerfGE 12, 205, 242.

[53] Stettner, *supra* note 7 at 325.

[54] BVerfGE 3, 407, 421; 98, 265, 299. Zippelius/Würtenberger, *supra* note 1 at 397. More restrictive Erbguth, *Art. 30*, in: GRUNDGESETZ (Sachs ed., 2nd ed., 1999) margin number 38-39.

an existing legislative or administrative power and extends this to associated issues. A corollary power of the federal government, on the other hand, is deemed to exist when the preparatory and executive phases of a matter expressly assigned to the federal government are additionally included within the scope of federal powers[55]. As a rule of thumb, one may say that powers by virtue of the objective context have a "broadening" effect, and corollary powers have a "deepening" effect[56]. For example, as a corollary to the power ("defense") expressly assigned to the federal government in Article 73 No. 1 Basic Law, the Federation has e.g. the right to establish military institutions of higher learning. The federal government exercised this power in 1973 to found the Universities of the Federal Armed Forces in Munich and Hamburg.

C. Prohibition of mixed financing

Article 104a Basic Law, which was added to the constitution as part of the finance reform of 1969[57], formulates the fundamental principle with respect to the financing powers of the federal and *Länder* governments: "The Federation and the *Länder* shall separately finance the expenditures resulting from the discharge of their respective responsibilities insofar as this Basic Law does not otherwise provide." Application of this separation principle of Article 104a I Basic Law results in financial powers for the federal government within the context of its administrative powers[58]. This stipulates that the federal and *Länder* governments will support their expenditures individually, and must finance only their own obligations. This linking of spending power and functional power is also termed the "connectivity principle"[59]. From this follows the general prohibition of mixed financing[60].

---

[55] Maurer, *supra* note 30 at § 10, margin number 29.

[56] Compare März, *Art. 30*, in: DAS BONNER GRUNDGESETZ VOL. 2 (v. Mangoldt/Klein/Starck eds., 4th ed. 2000), margin number 68; Maurer, *supra* note 30 at § 10, margin number 29.

[57] *See* Siekmann, *Art. 104a*, in: Sachs ed., *supra* note 10 margin number 23-24; Hofmann, in: HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND VOL .1 (Isensee/Kirchhof eds., 1987), margin number 65.

[58] BVerfGE 26, 338, 390; BVerwG JZ 1992, 460, 461; Pieroth, *Art. 104a*, in: Jarass/Pieroth eds., *supra* note 30 margin number 3; Siekmann, *Art. 104a*, in: Sachs ed., *supra* note 10 margin number 4; Trapp, DAS VERANLASSUNGSPRINZIP IN DER FINANZVERFASSUNG DER BUNDESREPUBLIK DEUTSCHLAND 180 (1997).

[59] Hellermann, *Art. 104a*, in: v. Mangoldt/Klein/Starck eds., *supra* note 47, margin number 159.

[60] BVerfGE 26, 338, 390; BVerwGE 44, 351, 364; 102, 119, 124; Pieroth, *Art. 104a*, in: Jarass/Pieroth eds., supra 30, margin number 3; Hellermann, *Art. 104a*, in: v. Mangoldt/Klein/Starck eds., *supra* 47 note,

On the basis of decisions of the Federal Constitutional Court, the Federation and the *Länder* governments developed a draft *Verwaltungsvereinbarung über die Finanzierung öffentlicher Aufgaben von Bund und Ländern* (Administrative Agreement Respecting the Financing of Public Works by the Federation and the *Länder*)[61] in 1971, sometimes referred to informally as the *Flurbereinigungsabkommen* (Consolidation Agreement). This agreement formulated a list of tasks which the federal government may finance even though the Basic Law does not explicitly grant it authority in this matter. In Article 1 I No. 1, 2 and 6, the Consolidation Agreement names numerous financial powers of the federal government that relate to culture: exercise of the rights and obligations of the federal state as a whole that are proper to the federal government by their nature (No. 1: representation of the state as a whole); promotion of foreign relations that are important for the Federation, particularly to non-governmental international and foreign organizations and bodies (No. 2: foreign relations); and the promotion of central facilities and events of non-governmental organizations in the area of the federal legislative authority which are important for the entire nation and whose aims by their nature cannot be effectively promoted by one state alone (No. 6: non-governmental central organizations). With respect to the power of representation of the state as a whole, the following statement was recorded in the minutes: "In accordance with the criteria of No. 1, representation of the state as a whole may also comprise bodies and events of particular historical, scientific, cultural and athletic significance in which the standing and dignity of the state as a whole or the German nation are expressed." Although the *Länder* never signed the Consolidation Agreement, all parties have since acted in accordance with its provisions. The *Länder* themselves have repeatedly accepted this limitation of authority in specific individual projects and used it in determining their own actions[62]. A powerful example for this attitude is the statement of the Federal Council to the federal budget 1995: "The federal government is requested to significantly increase the financial means for culture promotion. The applied means are by far not sufficient to secure the existence of the cultural institutions of national importance in all the *Länder*." [63]

---

margin number 40; Siekmann, *Finanzzuweisungen des Bundes an die Länder auf unklarer Kompetenzgrundlage*, DÖV 629, 632 (2002).

[61] For the text of the agreement *see* Sannwald, *Art. 30*, in: Schmidt-Bleibtreu/Klein eds., *supra* note 11, margin number 40.

[62] Nida-Rümelin, *Die kulturelle Dimension des Nationalstaates*, *available at* http://www.bundesregierung.de/Reden-Interviews/Namensbeitraege,11642.72068/namensbeitrag/Staatsminister-Nida-Ruemelin-D.htm.

[63] BRat-Drs. 1050/93 of 20 January 1995, p. 7.

It is not clear wherein the legal significance of this agreement lies. One could initially assert that this agreement codified financial responsibility of the federal government that was not expressly specified in the Basic Law but which according to the constitution belonged to the financial authority of the federal government. But as previously explained, the finance authority is linked to functional authority. Thus, according to the majority view in the academic literature, financial powers of the federal government that do not derive from a corresponding administrative authority can no longer be recognized since Article 104a Basic Law took effect[64]. The purpose of the Consolidation Agreement however could be to enumerate the administrative powers of the federal government that are not explicitly named in the Basic Law. If the federal government held an administrative power in any of the areas mentioned, it would also hold the financing authority[65]. However, the problem then is that in the past, the federal government often provided only co-financing for the functions named in the Consolidation Agreement. As the unwritten powers referred to in the Consolidation Agreement are always exclusive powers, according to constitutional principles the federal government actually ought to have assumed the complete financing[66].

D. Federal Funding for All-day Schools – an Unconstitutional Form of Mixed Financing?

With its investment program *Zukunft Bildung und Betreuung* (Education and Child Care Future), the federal government is providing the *Länder* with funding to establish and expand all-day schools on a broad, nation-wide scale. The Federation sees its authority to grant financial assistance as deriving from Art 104a IV Basic Law. However, the most recent literature is increasingly challenging the proposition that the federal government is justified in supporting the *Länder* in promoting all-day schooling[67].

As the Basic Law grants the federal government no authority to regulate school

---

[64] Siekmann, *supra* note 60 at 635; Sachs, *Art. 104a*, *supra* note 10, margin number 2; Hellermann, *Art. 104a,* in v. Mangoldt/Klein/Starck eds., *supra* note 47, margin number 149; Vogel/Kirchhof, *Art. 104a,* in: BONNER KOMMENTAR (Dolzer/Vogel/Graßhof eds., lose leaflet: May 2003), margin number 130.

[65] Hellermann, in v. Mangoldt/Klein/Starck eds., *supra* 47 at *Art. 104a*, margin number 149; Siekmann, *supra* 60 at 635.

[66] Stettner, *supra* note 7 at 327. Critical with regard to the exclusive nature of implied powers Siekmann, *supra* note 60 at 636.

[67] *See* Stettner, *supra* note 9 at 315; Stein, *supra* note 9 at 324; Winterhoff, *supra* note 9 at 59.

systems, legislation and administration in this sector are the exclusive preserve of the *Länder*[68]. Consequently, Article 104a I Basic Law cannot be cited to justify a financing authority of the federal government for school development. However, the second clause of Article 104a I Basic Law makes clear that the Basic Law provides for a deviation from the principle of separate financing of expenditures. Such exceptions are provided for by, among others, Article 104a IV Basic Law, which the federal government cites in the promotion of all-day schools.

Under Article 104a IV 1 Basic Law, the federal government can grant the *Länder* financial assistance for especially important investments of *Länder* and municipalities (associations of municipalities) where such investments are necessary to avert a disturbance of the overall economic equilibrium, to equalize differing economic capacities within the federal territory, or to promote economic growth. Further details, particularly the types of investments to be funded, are regulated by federal law that requires the consent of the Federal Council or by executive agreements under the Federal Budget Law, cf. Article 104a I 2 Basic Law. In compliance with this provision, the federal government and the *Länder* concluded an executive agreement respecting execution of the investment program Education and Child Care Future on 12 May 2003[69]. However, the federal government is also obligated to fulfill the criteria of Article 104a IV 1 Basic Law in promoting all-day schools. The participation of the federal government in financing all-day schools therefore has to serve at least one of the investment aims enumerated in Article 104a IV 1 Basic Law.

The first of these three alternative grounds of Article 104a IV 1 Basic Law obviously fails as a constitutional justification for the financial involvement of the federal government in establishing and expanding all-day schools: Even if one could describe Germany's current economic situation as "a disturbance of the overall economic equilibrium", there are no indications that promoting all-day schools might in any way ameliorate such a disturbance. That the establishment and expansion of all-day schools does not serve to avert a disturbance in the economic equilibrium within the meaning of Article 104a IV Basic Law is underscored by the limitation of this investment program to a period of five years. This limitation fails to take into account economic developments in any form whatever[70].

---

[68] Stein, *supra* note 9 at 335.

[69] The text of the administrative agreement is *available at* http://www.bmbf.de/pub/20030512_verwaltungsvereinbarung_zukunft_bildung_und_betreuung.pdf.

[70] Winterhoff, *supra* note 9 at 62.

The question then arises as to whether the federal government may undertake these expenditures on the grounds of the second variant of Article 104a IV 1 Basic Law ("equalization of differing economic capacities"). According to the executive agreement concluded between the federal government and the *Länder*, the financial assistance is to be distributed among the *Länder* in proportion to the number of pupils, and thus according to a criterion that ignores the economic capabilities of the respective *Länder* entirely[71]. As all *Länder* benefit from federal funding, it is at least conceivable that the federal investment program intended to promote all-day schools could further reinforce existing inequalities between the *Länder*. Thus, it cannot be assumed that the federal government is seeking to equalize differing economic capacities within the federal territory by means of this investment program. Accordingly, the second variant of Article 104a I 1 Basic Law does not provide a legal basis for the financial assistance provided by the federal government to the *Länder* for the purpose of achieving and expanding the availability of all-day schools.

At best, therefore, the investment program Education and Child Care Future may be justified by the third variant of Article 104a I 1 Basic Law. The prerequisite here is the necessity of the measure for promoting economic growth. The third variant of Article 104a IV 1 Basic Law does not cover investment programs that focus primarily on education policy, as in this sector funds are not invested in tangible assets intended to bring a future return. As businesses that establish operations in the Federal Republic profit from the quality of the German education system in selecting their work force, however, the federal government might, under certain circumstances, be considered to create the prerequisites for economic growth through its financial commitment to all-day schools. The changes in the production, organizational and decision-making structures in the private sector have undeniably changed the requirements for a great number of occupations. Employees today must be able to plan and organize their work independently, understand complex and networked systems and to think outside the "box" of their individual job description. This requires higher qualifications and presents enormous challenges for the educational system. Education has thus become a decisive competitive advantage for the nation's economy as a whole.

However, an undertaking so uncertain and so chronologically indeterminate in its contribution toward the future qualifications of the employed population as the investment program "Education and Child Care Future" ultimately fails to meet the requirements of the third variant of Article 104a IV 1 Basic Law. It must be considered that the federal investment program benefits schools in general. In other

[71] Winterhoff, *supra* note 9 at 62.

words, the funding is not restricted to facilities and instruction for imparting knowledge specifically to enhance occupational qualifications. If federal financial assistance for schools is permissible at all, the aim of promoting economic growth must be emphasized more strongly in the design of the investment program[72].

This conclusion is confirmed when one considers that the material prerequisites of Article 104a IV 1 variant 3 Basic Law are formulated in an extremely broad manner. There is thus the danger that prematurely resorting to this provision will deprive the remaining objectives enumerated in Article 104a IV 1 Basic Law of any independent meaning. This must be counteracted through a restrictive application of this provision.

E. Conclusion: Constitutional Limits to an Expansion of Federal Authority in Cultural Affairs

The constitutional problems posed by the funding for all-day schools are not an exception. Reservations have also been expressed respecting other forms of federal intervention in the promotion of culture. These include support for child care facilities, financial assistance for equipping vocational schools, funds for an "Action Program against Right-Wing Extremism, Xenophobia and Anti-Semitism" and support for cultural facilities and events in the *Land* of Berlin[73].

Advocates for the cultural ambitions of the federal government often argue that German reunification has resulted in a greater need for a federal culture policy. According to this view, meeting the need for a sufficient representation of the Federal Republic of Germany requires a generous interpretation of unwritten legislative and administrative authority[74]. However, in view of the manifold powers that the federal government can exercise in the cultural sector, this argument is not convincing. Unwritten authority may be exercised only with care, as otherwise the federal system that the Basic Law mandates would be turned on its head. As discussed above, representation of the Federal Republic abroad, including cultural matters, lies within the authority of the Federation. It is not apparent that the nature of foreign cultural policy has changed as a result of German reunification. Whether or not reunification has resulted in a greater need for raising the profile of the federal government domestically is immaterial: domestic

[72] Stettner, *supra* note 9 at 322-323; Winterhoff, *supra* note 9 at 62-64.

[73] Siekmann, *supra* note 60 at 629 (2002).

[74] Nida-Rümelin, *supra* note 62.

representation on the part of the state may be realized through a cautious extension of unwritten authority, without the necessity of the federal government interfering in spending areas reserved to the *Länder*. In the past, the federal government has exercised unwritten powers primarily with the argument of the supra-regional nature of particular measures. The Federal Constitutional Court was initially opposed to this line of argument[75]. In particular, the Court cited the ability of the *Länder* to coordinate their efforts in the form of conferences of ministers and state treaties. Ultimately, however, the Federal Constitutional Court sided with the federal government[76]. Scholarly literature has repeatedly – and rightly – warned of the dangers that such governmental practice pose to the federal structure. Extreme care is to be exercised in every expansion of the unwritten powers of the federal government, not least because Article 79 III Basic Law elevates the federal structure to the immutable core of the German constitutional order[77].

Neither does Article 35 of the Treaty of Unification, which is often cited in this context[78], justify a comprehensive cultural policy on the part of the federal government. Article 35 I of the Treaty of Unification contains an affirmation of the Federal Republic of Germany as a cultural nation. Under Article 35 IV, co-financing from the federal government is not prohibited in certain exceptional cases respecting cultural facilities in the acceding territory, particularly in the *Land* Berlin, that were previously centrally administered. Additionally, Article 35 VII of the Treaty of Unification empowers the federal government to provide financing for individual cultural activities and facilities for a transitional period to promote the cultural infrastructure, with the aim of compensating for the effects of the division of Germany. Under the provisions of Article 45 II of the Treaty of Unification, this treaty acquired the status of federal law on accession of the new *Länder* to the Federal Republic. However, the Treaty of Unification may not contravene the provisions of the Basic Law, except where it entails amendments of the Basic Law (cf. Article 4 of Treaty of Unification). As Article 35 of the Treaty of Unification was never adopted as an amendment to the Basic Law, it cannot represent a written exception to the principle of separate financing; at best, a constitutionally permissible unwritten authority may be cited. Consequently, no federal authority *contra constitutionem* can be derived from the cultural nature of the German state affirmed in Article 35 of the Treaty of Unification. It is thus only logical that Article 35 III of the Treaty of Unification expressly refers to the authority of the Basic

[75] BVerfGE 12, 204, 252.

[76] BVerfGE 22, 217,218.; Stettner, *supra* note 7 at 325-326.

[77] Geis, *supra* note 2 at 528.

[78] Mahrenholz, *supra* note 1 at 865.

Law[79].

Some commentators maintain that the allocation of powers between the Federation and the *Länder* set forth in the Basic Law cannot be considered as absolutely binding with respect to the promotion of culture[80]. Consequently, they argue, there is no fault to be found in the Federation providing funding for undertakings of cultural policy that do not fall within its administrative authority, as cultural policy does not seek to restrict the freedoms of individual citizens. The problem with this viewpoint however is that there is no support for it to be found in the wording of the Basic Law[81]. There is thus no justification for making the division of powers between the Federation and the *Länder* provided for in the Basic Law dependent on the existence of a situation involving overt restrictions.

Finally, not even the reference to governmental practice of many years' standing can justify federal authority in the area of cultural policy. A constitutional change that derogates the provisions of the Basic Law, i.e. a divergence of constitutional law and constitutional reality that distorts the constitution, is prevented by Article 79 I 1 Basic Law[82]. This provision stipulates that only a law expressly amending or supplementing the text of the Basic Law may alter the constitution.

Cultural sovereignty is one of the essential features that constitute the nature of the *Länder*. In the words of the Federal Constitutional Court, it is a part of the constitutional *Hausgut* (personal property) of the *Länder*[83]. In view of this, it is to be welcomed that the *Länder* are showing a greater concern for their cultural sovereignty – thus asserting the federal system provided for by the Basic Law.

[79] Stettner, *supra* note 7 at 332-333.

[80] *See* Mahrenholz, *supra* note 1 at 861, 863, 867.

[81] Stettner, *supra* note 7 at 329-330.

[82] Pieroth, *Art. 79, supra* 30, margin number 3.

[83] BVerfGE 34, 9, 19-20; 87, 181, 196.