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Case-law on the constitutional protection of economic rights of citizens in Germany

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Case-law on the constitutional protection of economic rights of citizens in Germany

Ladies and gentlemen,

I am glad to have the opportunity to participate in this informative seminar. Before going into the subject of my paper, I would like to briefly introduce myself:

My name is Rosanna Sieveking. I am a judge at the *Verwaltungsgericht* (Administrative Court) Berlin.

For 1½ years now, I have been working for the Federal Constitutional Court in Karlsruhe as a law clerk. I am assigned to the Second Senate of the Federal Constitutional Court, which is presided by the president of the Court, Professor Limbach. As a law clerk, I am directly assigned to Judge Sommer.

The subject of my paper is: "Case-law on the constitutional protection of economic rights of citizens in Germany". I would like to start by stating that German law does not interpret the term "case-law" in the same way as Anglo-American law does. German law is not based on judicial decisions which serve as precedents for other cases. Instead, German jurisprudence is essentially based on codified law. Beyond the particular case, the interpretation and implementation of codified law by the courts has no binding effect on other courts. This means that case-law only deals with the particular case in question. In spite of this, the decisions of the Federal Constitutional Court are, of course, of great importance. The courts below the constitutional court level must base their decisions on the interpretation that the Federal Constitutional Court gives to rules of constitutional law.

In the following, I will first of all outline the economic rights that are contained in the German constitution and will give some examples of Federal Constitutional Court decisions in this sphere. As concerns the subject of the seminar, "Economic transition", I will also touch upon the jurisprudence in the context of the German reunification.

I. Economic Order and the Constitution

When dealing with the economic rights of the citizens and their constitutional protection, the first question is: On which understanding of the economy and on which economic system is the German constitution based? A look into the German constitution, the Basic Law, shows that its architects did not make an explicit decision in favour of a particular economic system. As the Federal Constitutional Court puts it: the Basic Law is neutral as regards economic policy. As

concerns the design of legal regulations, this confers a great freedom to the parliament. This freedom also includes the possibility of adapting economic policy to changes in society and of taking new insights into account. This does not mean, of course, that the state is absolutely free in its economic policy, because the Basic Law guarantees the economic liberty of the individual and the possibility of the individual's economic development. At the same time, it guarantees freedom in the sense of social justice. Neither a socialist planned economy nor a market economy that is absolutely free and only determined by market prices, supply and demand is compatible with the Basic Law. Central to economic policy are, on the one hand, the clause on the social state, which prescribes corrective measures in favour of the weak, and, on the other hand the fundamental rights of the citizens.

The fundamental rights of the citizens that are of importance in this context are, in particular:

- the guarantee of property (Article 14 of the Basic Law),
- the right to freely choose and practice an occupation or profession (Article 12 of the Basic Law),
- and – as a general fundamental right – the general freedom to act, *i.e.* the right to free development of one's personality (Article 2.1 of the Basic Law).

The Basic Law, however, does not explicitly provide the right to freely engage in economic activities as an autonomous fundamental right. Nor does it contain a fundamental right to entrepreneurial freedom or to free competition, nor a right to work.

II. A Detailed View of the Economic Fundamental Rights

1. Property (Article 14 of the Basic Law)

Certainly, the guarantee of the freedom of property is of essential importance, because the freedom to develop economically can hardly be realised without this freedom. German constitutional law guarantees private property. Pursuant to the jurisprudence of the Federal Constitutional Court, this guarantee serves to safeguard a secured sphere of freedom for pecuniary rights. This sphere of freedom makes it possible for the individual to engage in private and economic activities to facilitate the development of one's personality and to enable the individual to plan his or her life autonomously.

Article 14 of the Basic Law says:

> "(1) Property and the right of inheritance shall be guaranteed. Their content and limits shall be defined by the laws.
> (2) Property entails obligations. Its use shall also serve the public good.
> (3) Expropriation shall only be permissible for the public good. It may only be ordered by or pursuant to a law that determines the nature and extent of compensation. Such compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. In case of dispute respecting the amount of compensation, recourse may be had to the ordinary courts."

On the one hand, Article 14 of the Basic Law guarantees the institute of property as such, on the other hand, it protects the legal position of the owner, whose position may only be interfered with under certain conditions. When dealing with the constitutional protection of property, the

first question that occurs in this context is: What does the constitution mean by "property"? The meaning that the constitution confers to the term "property" is different from its meaning in a civil-law context. Certainly, there is, first of all, movable and immovable property. Article 14 of the Basic Law, however, also protects other specified legal positions which have the value of assets, *e.g.* receivables, shares, copyrights or the tenant's right of possession of his or her home. The decisive aspect in this context is that the holder of a right that has the value of an asset may exercise the powers flowing from this right on his or her own authority and to his or her private benefit. Legal positions under public law in the field of social security that are based on a person's own contribution and serve to secure one's livelihood are protected by Article 14 of the Basic Law. This applies *e.g.* to claims *vis-à-vis* pension insurance funds and unemployment insurance, but not to claims to supplementary welfare benefits. The assets as such, however, do not fall under the concept of property.

Article 14 of the Basic Law protects legal positions of private – natural or legal – persons concerning property. This also applies to land and to the general means of production. German constitutional law does not protect public property, nor does it protect the private property of the public sector. Legal persons under public law are no holders of the fundamental right of property, *i.e.* the German *Länder* (Federal states) and municipalities can be owners under civil law, but do not enjoy the constitutional protection provided by Article 14.1 of the Basic Law.

The parliament has the power to specify what is protected as property by the constitution. This is why *e.g.* legal regulations under public law on the use of property form part of the contents of the legal position of the respective owner. A private individual may own a certain property, the exercise of the individual's right to the property may, at the same time, be restricted by the fact that the property is earmarked for a specific purpose under public law. An ownership position does not mean that the owner's possibility to dispose of the property is unlimited, nor that it may not be limited.

The parliament can define the contents and the limits of property, *i.e.* it can, in a general and abstract manner, determine rights and obligations concerning specific legal interests that are protected under property law. Of importance in this context are the societal restrictions on individual property rights as enshrined in Article 14.2 of the Basic Law ("Its use shall also serve the public good."). Under constitutional law, it is mainly the principle of proportionality that defines the limit of property. This means that the measure that restricts the property right must serve a legitimate purpose, must be suitable and necessary for serving this purpose and must be reasonable. In this context, a balanced relation must be established between the public interest and the individual interests. Here, it can also be of importance whether the holder of the right receives a financial compensation for the restriction of his or her property right. There are different limits to the parliament's power to issue specific legal regulations. To the extent in which property secures the individual's personal freedom as far as pecuniary rights are concerned, property enjoys a particularly high protection. In contrast to that, the freedom to issue specific legal regulations increases to the extent in which the social aspect connected with the property object gets stronger. This is why, pursuant to the jurisprudence of the Federal Constitutional Court, there are special possibilities of restrictions of property rights as regards the use of land and of residential property.

Some examples of permissible measures that restrict the legal position of an owner are:

- legal regulations on the protection of nature and of the landscape that apply to real estate that is worthy of protection;

- restrictions on the use of property to protect it from damage to the environment;
- the obligation to apply for a permission for using lakes, rivers and canals or for extracting mineral resources; or
- the separation of important mining rights or of the use of ground-water from the ownership of the property in the land itself.

The Federal Constitutional Court has shown the limits of a permissible determination of contents and limits of property *e.g.* in a judgement in March, 1999 in which a legal regulation from the area of the protection of monuments was reviewed. Pursuant to the regulation, the removal of a cultural monument was, without exception, only permissible if there was a prevailing public interest in the removal. The Federal Constitutional Court decided that this regulation was unconstitutional, as the parliament must not undermine the core area of the guarantee of property when determining the contents and the limits of property. The core area of the guarantee of property comprises the private benefit of the property, *i.e.* its function to be of benefit to the holder of the property right as a basis of his or her private initiative, and it also comprises, in principle, the holder's power of disposal of the property object. As the protection of property provided by the constitution does not guarantee the right to the most profitable use, the owner of a cultural monument must, in principle, tolerate that he can normally hardly change the use of his property. If, however, there is no possibility left to him of using his property in a useful way, his position as an owner is practically completely devalued, so that it is unreasonable to deny him the permission to remove his property.

Apart from the determination of the contents and the limits of property, the German constitution, of course, also provides the possibility of expropriation. The aim of expropriation is to withdraw, completely or partially, a specific legal position, which is protected by Article 14.1 of the Basic Law, in order to fulfil specific public tasks. If, for instance, only the possibility of use of an object is restricted in a general manner, this is no expropriation, irrespective of how great the burden is that this restriction places on the owner. An expropriation is effected either by a law that withdraws concrete property rights from a specific group of persons, or by an executive order issued by a public authority that must be based on a legal authorisation. Expropriations that are directly executed by a law diminish the possibility of recourse to the courts and are therefore only permissible in very narrowly circumscribed cases. There are only very few examples of this type of expropriations. In 1964, for example, the Federal Constitutional Court confirmed that, due to the urgency of restructuring the dike system, a law that transferred real estate situated on dikes to exclusive state control was constitutional. There is a more recent decision, from 1996, in which the plans of a high-speed train connection were at issue. The planned railway line was to run between Hanover and Berlin, *i.e.* largely on the territory of the former GDR. The plans already specified the property that was to be used for the line. The Federal Constitutional Court held that the extraordinary situation after the German reunification provided cogent reasons for directly executing the corresponding expropriations by a law. The immediate construction of transport infrastructure was regarded as indispensable for the building up of the economy in the new Federal states.

It is mandatory that an expropriation is compensated. The law on which the expropriation is based must determine the nature and the extent of compensation. Pursuant to Article 14.3 of the Basic Law, the amount of the compensation shall be determined by establishing an equitable balance between the public interest and the interests of those affected. This means that the decisive factor for establishing this equitable balance is not the current market value of the property in question. In practice, however, the current market value is often taken as an orientation.

I would like to draw your attention to a constitutional regulation, which, however, has not yet been of importance in practice. Pursuant to Article 15 of the Basic Law it is permissible to transfer specific types of property (land, natural resources, and means of production) to public ownership, *i.e.* socialisation is permissible against a compensation.

Property Rights and German Reunification

One of the tasks that resulted from German reunification was to convert the socialist economic system of the former German Democratic Republic (GDR) to the system of social market economy. The Treaty on the Creation of an Economic, Monetary and Social Union, which the Federal Republic of Germany and the GDR concluded in May 1990, contains –as opposed to the Basic Law – an explicit declaration in favour of the social market economy. Since the end of the 1980s, many Central and Eastern European countries have gone (and still are going) through a similar development. The characteristic feature of the case of (East) Germany was that there was no need to develop and stabilise a new constitutional basis at the same time. With its accession to the Federal Republic of Germany, the GDR also joined the area of applicability of the Basic Law and thus faced an already existing constitution on which the jurisprudence of the Federal Constitutional Court had left its impression.

As I have already shown, the concept of public property is not contained in the German constitution, and the economic system is not based on the idea of property owned by society. This brought up the question of how to restructure the order of property and how to privatise property owned by society. In particular, the following issues had to be decided in this context: (1) to which extent were expropriations and transfers from private to state ownership that had taken place during the last decades to be reversed; or (2) to which extent were the former owners to be compensated at least; and (3) which constitutional standard was to be the basis of these activities.

The German parliament dealt with these problems in various laws, in particular in the so-called Assets Act. Apart from the principle of indemnification, the parliament took the aspect of the protection of confidence into account to the extent in which GDR citizens had acquired either property rights that were worthy of protection or rights that are similar to property rights. In doing so, the German parliament decided to follow the principle "Restitution prevails over compensation". There are, however, many legal regulations that preclude restitution, *e.g.* if property has been acquired in good faith by third parties. In particular, property that was expropriated between 1945 and 1949 on the basis of occupation law or of sovereign acts of the occupying power is excluded from restitution. As a result, the so-called land reform was not reversed. The main idea behind this was that the transformation process of the economic system, which had been ordered and implemented by the former Soviet Union, was not meant to be rated as injustice by reversing it.

This decision of the German parliament was approved by the Federal Constitutional Court. In its fundamental decision of April 1991, which was confirmed in April 1996, the Federal Constitutional Court decided that neither claims to retransfer nor compensation and compensatory payments that are based on laws below the constitutional level are consequences of the guarantee of property. The expropriations on the territory of the former Soviet occupation zone are not to be measured by the standard of the Basic Law, as they were conducted outside its area of applicability. These expropriations cannot be assigned to the area of responsibility of the state power of the Federal Republic of Germany, which is obliged to comply with the Basic Law.

The fact that owners are treated differently depending of if they have lost their property before or after 1949 is justified by the fact that otherwise, the reunification of Germany would not have been possible.

To the extent in which a retransfer of property is precluded, the German parliament has provided for the payment of compensation, which is regulated in a separate law. The amount of compensation is not calculated according to the current market value of the property today or at the time of expropriation, but on the basis of the last assessed value of property that was determined before the loss. If the calculated amount of compensation is higher than DM10,000, it is reduced by a certain percentage. The higher the amount of compensation, the higher is the percentage of the reduction; the minimum reduction is 30%, and if the amount exceeds 3 million DM, it is reduced by 95%. In November, 2000, the Federal Constitutional court rejected as unfounded constitutional complaints that had been lodged against this legal regulation. The Federal Constitutional Court decided that an obligation of an indemnification for financial losses for which a state power that is not bound to the Basic Law is responsible is not to be measured against Article 14 of the basic law, but that such obligation can result from the obligation to establish and maintain a social state. For the details of the specific regulations, the principle of the rule of law and the principle of equality before the law (prohibition of arbitrariness) are of importance. As concerns the design of the specific regulations, however, the parliament has a broad scope of possibilities. In particular, the parliament can take into account the financial means at its disposal; when doing so, the other tasks of the state are to be taken into consideration as well. In this context, it must also be considered that the indemnification for wrongs done by the State is not restricted to the restitution of property but that other legal interests, like life, health, and freedom, have been impaired as well. The First Senate of the Federal Constitutional Court unanimously declared that the basis on which compensation is calculated (*i.e.*, that there is no full compensation for the assessed value of the property) is constitutional. However, four of the eight judges were of the opinion that, if the amount was reduced by more than 50%, there was, at least in the case of lower to medium-sized claims (*i.e.*, of up to DM500,000), no longer any recognisable relation between the value of the compensation and the value of the property. These judges held that such a reduction was not justified by social considerations and therefore constituted a violation of the prohibition of arbitrariness. If there is an equality of votes, it can not be stated that a legal regulation is unconstitutional; therefore the constitutional complaints were unsuccessful. *(This was one of the very few cases of a 4:4 decision.)*

2. Freedom to practice an occupation or profession, Article 12.1 of the Basic Law

The guarantee of property is mainly object-related and, so to say, protects what a person has acquired. The freedom to practice an occupation or profession, which is guaranteed by Article 12.1 of the Basic Law, secures the citizen's freedom to make the particular economic activity which he or she believes to be qualified for the basis of his or her livelihood. The freedom to practice an occupation or profession, however, does not establish a subjective "right to work".

Art. 12.1 of the Basic Law says:

> "All Germans shall have the right freely to choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law."

"Occupation or profession" is to be understood as any permitted activity of a permanent nature that serves to secure and maintain a person's livelihood. Apart from the choice and the practice of an occupation or profession, this Article also guarantees the free choice of the place of work. Article 12 of the Basic Law protects self-employment as well as dependent employment. It also comprises the freedom to set up and manage a business. This also applies to the activities of large-scale enterprises and of groups of affiliated companies. Commercial companies can invoke the protection of Article 12 of the Basic Law, and so can private-law legal persons who engage, for profit-making purposes, in an activity that, by its nature, can also be conducted by a natural person. The freedom to practice an occupation or profession also comprises *e.g.* the freedom to use a specific designation of a profession, the freedom to employ other persons and the freedom to engage in advertising for one's occupation or profession.

To assess acts of interference with the freedom to practice an occupation or profession, the Federal Constitutional Court developed, in its so-called "Pharmacy Judgement" of 1958, a three-stage theory. This theory establishes three categories of encroachments upon the freedom to practice an occupation or profession: (1) mere restrictions of the manner in which an occupation or profession may be practised; (2) subjective restrictions of the freedom of choice of an occupation or profession, *i.e.* of the access to the desired profession; and (3) objective restrictions of the freedom of choice of an occupation or profession. The requirements placed on the considerations of public interest that can justify an encroachment upon the freedom to practice an occupation or profession depend on the category of the interference with this freedom. The requirements are especially high in the case of objective prerequisites for the admission to a certain occupation or profession, *e.g.* in the case of a quota system for business licences. As regards regulations concerning the practice of an occupation or profession, the parliament, however, has a wide scope for assessment and for issuing specific regulations. This applies, in particular, in cases in which the parliament pursues economic policy aims, labour market aims or social policy aims.

Permissible regulations that restrict the freedom to practice an occupation or profession in Germany are *e.g.* the Shop Closing Hours Act and the introduction of a closing hour in pubs and restaurants, the scales of fees for doctors and lawyers or the prohibition for bakeries to bake at night. A ban *e.g.* on operating vending machines out of the shop opening hours is impermissible.

Age limits for midwives and for test engineers for statics are permissible, age limits for lawyers are not. Regulations that prescribe a proof of qualification for artisans and tradesmen or prescribe examinations are also permissible if the proof of qualification serves to secure an important public interest (*e.g.* the health of the population) and if the examination requirements show a connection to the desired occupation or profession.

If the admission to a specific occupation or profession is restricted objectively, *i.e.* independently of the personal characteristics of the applicant, *e.g.* if there is a quota system that is determined by an assessment of the public need for a specific occupation or profession, such a restriction is only justified if strict prerequisites are met. The Federal Constitutional Court only permits such restrictions only to resist established, or at least highly probable, threats to a public interest of pre-eminent importance, like *e.g.* the health of the population or the functioning of the administration of justice. In contrast to that, for instance, general reasons of economic and transport planning are impermissible. A denial of permits for operating taxis that is justified with a lack of public need or that serves to protect existing companies violates the freedom to practice an occupation or profession as long as the existence of the entire taxi business is not jeopardised.

3. Personal freedoms and freedom of contract (Article 2.1 of the Basic Law)

Article 2.1 of the Basic Law guarantees the right to the free development of one's personality and the general freedom to act. It says:

> "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."

Article 2.1 of the Basic Law also comprises freedom in the economic sphere, in particular the freedom to enter, in principle, into contracts on any subject matter with any contracting party. To the extent in which no other, more specific, fundamental rights apply, for instance because the contract involves the possibilities of disposing of assets, *e.g.* real estate (Article 14 of the Basic Law) or facilitates the practice of an occupation or profession (Article 12 of the Basic Law), Article 2.1 of the Basic Law guarantees the personal freedoms in any case. The personal freedoms, however, only exist in the framework of the existing laws, and the existing laws, in turn, are bound to the fundamental rights.

In principle, the state is to respect the contents of a contract. The Federal Constitutional Court, however, has assumed that there is a limit to the freedom of contract if there is such a fundamental inequality between the parties to a contract that the subject matter of the contract is factually determined unilaterally. In this case, one party to the contract does not act in a self-determined manner but acts under orders. If such a case involves legal positions that are protected by fundamental rights, the state must act in a compensatory manner to safeguard the protection of these fundamental rights. If the parliament has not established a specific law of contract for a certain sphere of life, the judges must, if necessary, resort to the general clauses in civil law. Thus, the Federal Constitutional Court goes beyond the guarantee of a formal freedom of contract by also giving attention to the freedom of designing the subject matter of contracts.

In this context, the Federal Constitutional Court held in its 1990 "Commercial Representative" decision that a non-competition clause that not only obliges commercial representatives, after a notice of dismissal for cause, to observe a prohibition to compete but at the same time denies them a compensation for this is unconstitutional because it violates Article 12 of the Basic Law.

In its 1993 "Suretyship" decision, the Federal Constitutional Court assumed a violation of Article 2.1 of the Basic Law because the court that had originally dealt with the case had not felt obliged to examine the contents of a suretyship contract. There is an obligation to examine the contents of a contract that: (1) places an extraordinarily heavy burden on one of the parties; and (2) that is the result of a structural inequality in the parties' negotiating power. In the concrete case, a 21-year old woman had guaranteed for her father's entire business risk, waiving almost all protective provisions provided by German civil law. The scope of the liability risk that she assumed by far exceeded her economic means, and she herself did not pursue economic interests of her own.

4. Securing one's livelihood

Under German constitutional law, every person also has a right to secure his or her subsistence level. This right follows from the dignity of every human being - which, pursuant to Article 1.1 of the Basic Law, is inviolable - in conjunction with the principle of the social state. The claim that can be derived from this, however, does not go beyond public welfare and does not oblige the parliament *e.g.* to design the network of social services in such a way that it enables the individual to maintain his or her former standard of living.

5. Principle of equality before the law (Article 3.1 of the Basic Law)

Additionally, I want to briefly draw your attention to Article 3.1 of the Basic Law. It says:

> "All persons shall be equal before the law."

It is obvious that in commercial law, apart from the rights of individual liberty I have described, the principle of equality before the law is of considerable importance. This applies in particular to measures of economic steering by the state, to levies on capital or, *vice versa*, to the distribution of subsidies. Such measures are not prohibited, but they must be based on an appropriate differentiation to be justified.