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Fritz Ossenbuhl

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*Fritz Ossenbühl**

I. THE MARKET AS A CONSTITUTIONAL ISSUE

THE state relies upon a functioning economy, and the economy, even the free market economy, cannot fulfill its function without state protection and the infrastructure of a legal order. This connection suggests that the constitution, as the basic legal order of a state, makes the relationship between the state and the economy one of its subjects by making a direct statement on it.[1] The German Basic Law, however, remains silent. The Bonn Constitution does not contain any specifically shaped economic order or any explicit statement on the institutionalization of a particular economic system.

The fact that the Basic Law does not explicitly declare a particular economic order part of the constitution has its obvious reason in the history of the origin of the Basic Law. Its drafters, of course, did recognize the importance of an economic order for the state. However, among and within the various political forces involved, namely the political parties, there was an irreconcilable disagreement on how an economic order should be developed so that—on the basis of the experiences and views at that time—no consensus on that issue could be reached.[2] Thus, the absence of a constitutional provision on the economic order is neither the result of a mistake on the part of the constitutional legislator, nor an involuntary gap in the Basic Law, but rather is an "eloquent silence" of the drafters of the constitution. It is rather a conscious, deliberate non-decision to leave open a controversial question. While it is true that the Basic Law has not explicitly installed a particular economic order as a whole, it does contain many single provisions that are relevant to the economy. These provisions show themselves to be constituent elements of a market order, its brick and corner stones that give clear and constitutionally well-founded instructions for the development of an economic system.

These constituent elements encompass contractual liberty, economic freedom, the guarantee of private property, the freedom of price fixing, the freedom of competition, the freedom of movement, the freedom of

* Institute for Public Law, University of Bonn, Germany.

1. For a constitutional market theory, see Peter Haberle, *Soziale Marktwirtschaft als "Dritter Weg"*, ZRP 383 (1993).

2. *See* Martin Kriele, *Wirtschafisfreiheit und Grundgesetz*, ZRP 105 (1974).

expression, and the freedom to advertise. These elements and foundations, which both make the market possible and constitute it at the same time, are guaranteed by corresponding constitutional civil rights in the Basic Law. The civil rights that are relevant to the economy ensure that the market is a "spontaneous order" and contain the basic pattern of an economic system that constitutes a "model of a free market order." Without prejudice to the legislature's discretion in its economic policy, the Federal Constitutional Court seems correct in its formulation: "The existing economic constitution contains, as one of its basic principles, free competition between the entrepreneurs acting as supplier and demander."[3]

The discussion on the economic order, which, in particular, took place in the early period of the Basic Law,[4] was curtailed in the following years. In accordance with the adjudication of the Federal Constitutional Court, the discussion shifted to the individual economic rights, particularly occupational liberty and economic freedom protected by Article 12, section 1 of the Basic Law. In light of the developments in the last decade, however, a renaissance is not to be expected to stem from this discussion. Notably, two developments historically overtook each other and showed that the issue of economic order cannot be viewed solely from the perspective of a national constitution, which, in the case of Germany, is the Basic Law: the reunification of Germany and the advanced European integration by the Maastricht Treaty of 1992.

One of the main problems of German reunification, apart from restoring legal unity, was integrating the east German states (*Länder*) into the economic order of the Federal Republic. The collapse of the former German Democratic Republic was a political and economic bankruptcy. The socialist economic system with its emphasis on a centrally controlled market had led the German Democratic Republic into financial ruin. The revolution of 1989 was not only a vote for a free democracy but also a vote for an economic order as it existed in West Germany, which was seen as the economic system of constitutional democracy. The transition from the ruined socialist economic system of the German Democratic Republic to a free market order was thus a central subject of the Treaty on Monetary, Economic, and Social Union of May 18, 1990[5] that preceded reunification.

Article 1, section 3 of this treaty between the Federal Republic of Germany and the German Democratic Republic states, "The economic union is based on the principle of social market economy[6] as the economic or-

3. BVerfGE 32, 311 (317); *see also* RUPERT SCHOLZ, ENTFLECHTUNG UND VERFASSUNG 90 (1981).

4. *See* REINER SCHMIDT, ÖFFENTLICHES WIRTSCHAFTSRECHT 68 (1990).

5. Treaty on Monetary, Economic, and Social Union, v. 18.5.1990 (BGBl. II S. 537); *see also* KLAUS STERN & BRUNO SCHMIDTBLEIBTREU, STAATSVERTRAG ZUR WÄHRUNGS-, WIRTSCHAFTS- UND SOZIALUNION (1990).

6. The term "social market economy" must not be confused with "socialist market order." While the latter is based on the concept of a state-controlled market, the former

der of both parties."[7] Seven elements of social market economy were listed in a common protocol that became part of the treaty pursuant to article 4, section 1.[8] The protocol thus laid down in a legal form those components that are commonly considered characteristic elements of a social market economy.

Superimposed on this is the European development. To further develop the European Union by creating a distinct economic and monetary union, the Maastricht Treaty of February 7, 1992, inserted article 3a into the EC Treaty. This provision obliges both the European Community and its member states to adopt an economic policy that is "conducted in accordance with the principle of an open market economy with free competition."[9] While it is true that the member states keep the responsibility for their "own" economic policy, article 1 02a of the EC Treaty reaffirms the obligation set up in Article 3a by repeating that the member states shall conduct their economic policy "in accordance with the principle of an open market economy with free competition."[10] This statement ranks as so-called primary community law; its application has, therefore, priority over the Basic Law of the Federal Republic of Germany. At the same time, article 3a, section 1 of the EC Treaty restricts the national constitutional legislator in that it bars constitutional changes that would lead away from the "open market economy with free competition."[11] It follows that the Basic Law cannot be interpreted other than for the purposes of an "open economic market with free competition."

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means a free market economy with social elements, such as minimum wages, minimum social security benefits, pension plans, protection against unfair dismissal, etc. *See* Horst Siebert, *Principles of the Economic System in the Federal Republic—An Economist's View*, *in* 14 GERMANY AND ITS BASIC LAW: PAST, PRESENT, AND FUTURE: A GERMAN-AMERICAN SYMPOSIUM 293 (Paul Kirchhof & Donald P. Kommers eds., 1993) .

7. Treaty on Monetary, Economic, and Social Union, *supra* note 5.

8. *See id.* These elements are:

1. Economic production and services shall primarily be made and rendered by private enterprises and in a competitive market.

2. Contractual liberty is guaranteed. The freedom of commercial activities shall be restricted as little as possible.

3. Entrepreneurial decisions are unrestricted by plan targets (*i.e.*, in terms of production, supply, delivery, investments, employments, prices, and the allocation of the net profit).

4. Private enterprises and free professions shall not be treated less favorably than state enterprises and co-operative enterprises.

5. Price fixing is free, unless there are urgent and compelling reasons concerning the national economy to allow the state to fix prices.

6. The freedom to acquire, to dispose of, and to use land and other means of production for commercial activities is guaranteed.

7. Enterprises that are directly or indirectly owned by the state are managed in accordance with the principle of profitability. They are to be structured as competitors on the market and to be transferred into private property as soon as possible. By doing that, smaller and medium-sized enterprises in particular shall get their chances.

9. Maastricht Treaty, v. 7.2.1992 (BGBl. II S. 1253) (in French, "principle d' une économie de marché ouverte").

10. *Id.*

11. *Id.*

II. STATE INFLUENCE ON THE MARKET

A. STATE AND MARKET—TWO SIDES OF THE EXISTENCE OF POLITY

A basic feature of German constitutional history and theory is the differentiation between state and society.[12] The terms "state" and "society" describe two distinct systems and legal structures. The term "state" stands for the exercise of constitutionally legitimated power, while the term "society" denotes the exercise of self-determination in freedom. The society's system of order is rooted in the principle of freedom and autonomy. In contrast to the principle of constituted state order, in a society the *societas* of free men convenes. In an ideal conceptual generalization, "state," understood as an enforced order, contrasts with the freedom of "society."[13] In this contextual system the market belongs to society. It represents the institutionalized embodiment of economic freedom in society, a part of social freedom and autonomy.

According to classical theory, market and society alike are subject to their own, quasi-natural rules. The nice picture of free interplay of economic forces that, guided by an "invisible hand,"[14] automatically lead to an acceptable economic order is a mere metaphor which is long since outdated. It is true that the state can become the enemy of the market. In a democratic constitutional system, however, its purpose makes it a friend and a promoter of the market instead.

The state's task is to care and provide for the preservation and functioning of the market. State influence is necessary, therefore, as long as it serves as market protection. If state influence controls the market itself, it leads to market intervention, which can turn into state dirigisme.

B. REASONS FOR AND OBJECTIVES OF STATE INFLUENCE

The reasons for and objectives of exercising state influence on the market are quite different. The state assumes its original function when it protects the working of the market mechanisms in that it protects and preserves, in particular, a workable competition and constituent elements of a free market order.[15] Above all, this involves the prevention of monopolies and the combat against unfair competition.

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12. *See* ERNST WOLFGANG BÖCKENFÖRDE, DIE VERFASSUNGSTHEORETISCHE UNTERSCHEIDUNGZ VON STAAT UND GESELLSCHAFT ALS BEDINGUNG DER INDIVIDUELLEN FREIHEIT (1973); *Die Bedeutung der Unterscheidung zwischen Staat und Gesellschafi im demokratischen Sozialstaat der Gegenwart, in* FESTGABEFLR WOLFGANG HEFERMEHL 11 (1972); Hans Heinrich Rupp, *Die Unterscheidung von Staat und Gesellschafi, in* HANDBUCH DES STAATSRECHTS § 28 (Josef Isensee & Paul Kirchhof eds., 1987).

13. *See* Josef Isensee, *Steuerstaat als Staatsform, in* FESTSCHR~FIFÜR HANS PETER IPSEN 409 (1997); Klaus Vogel, *Der Finanz-und Steuerstaat, in* 1 HANDBUCH DES STAATSRECHTS § 27 annotation 52 (Josef Isensee & Paul Kirchhof eds., 1987).

14. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS (1776).

15. For the term "workable competition," see CHRISTIAN KOENIG, DIE OFFENTLICHRECHTLICHE VERTEILUNGSLENKUNG 36 (1994).

A delicate question, however, is what kind of further corrections of the market mechanisms are justified or even necessary under the Basic Law. An essential element of a free market economy is the inequality of property and income.[16] This market inequality as a result of the exercise of freedom contradicts a basic element of the constitutional order: the principle of equality. This results in a conflict between economy and law. How much inequality on the market can the constitutional principle of equality endure? According to the German Constitutional Court, one of the main commitments of civil law is "to balance disturbed parity between contracting parties."[17] The Court deduces from the constitutionally guaranteed contractual liberty, a constituent element of the market, the legislator's obligation to restore the equilibrium of the parties in their negotiations in case of a "structural inferiority of one contracting party."[18] Otherwise, the Court explains, self-determination of the contracting party would not be ensured.[19] At this point, the constitutional principles of equality and market freedom oppose each other. This conflict is resolved through state corrections by redefining the market mechanism: freedom is leveled out by equality.

The traditional protection of vocation and branches of business, typical for the German legal system, seems questionable from a constitutional point of view. In light of economic principles, this protection must be considered as being contrary to the system. Protecting branches of business can be indirectly expressed in completely different statutes: prohibiting baking at night, Acts on Discount, or tax provisions, for example. Nevertheless, the German Constitutional Court has declared that these statutes, which are intended to protect the middle classes—in particular, the small and medium-sized bakeries—against competition from large enterprises, give no cause for concern from a constitutional point of view.[20]

The protection of particular professions is accomplished under public law by impeding access or merging to organizations which are cut off from the outside (so-called *Verkammerung*). These are remnants of old guilds and corporations which fiercely defend themselves against any change. The main protective instrument, impeding access to particular professions, resulted in only ten percent of all industrial or commercial enterprises in the Federal Republic of Germany being conducted without a license in the 1950s.[21] There is no indication that this number has now considerably increased. Furthermore, state influence can also be motivated by socio-political objectives. A well-known verdict says that the

16. *See* Ludwig von Mises, *Artikel Markt*, *in* HANDBUCH DER SOZIALWISSENSCHAFIEN 135 (1961).

17. BVerfGE 89, 214 (232).

18. *Id.*

19. *See id.*

20. *See* BVerfGE 41, 360 (372); BVerfGE 87, 363 (382); *see also* Fritz Ossenbühl, *Die Freiheit des Unternehmers nach dem Grundgesetz*, 115 MR 1, 8 (1990); Friedhelm Hufen, *Berufsfreiheit—Erinnerung an em Grundrecht*, NJW 2913, 2920 (1994).

21. *See* EGON TUCHTFELDT, GEWERBEFREIHEIT ALS WIRTSCHAFTSPOLITISCHES PROBLEM 64 (1955).

market is anti-social. This assessment is based, in particular, on the inequality of property and income inherent in the market. In that respect the state can make corrections of market results and decide in favor of a distribution of income and goods that deviates from the market. The constitutional basis for such an intervention is the principle of social justice and the welfare state (*Sozialstaatsprinzip*), which the constitutional law considers to be a binding, basic policy clause of the constitution that is to be further defined and implemented by the legislature.[22]

Another example of a legitimate socio-political objective left untouched by the constitutional principle of equality is health protection of employees. The Federal Constitutional Court has, for example, justified the prohibition on baking at night because of the "protection against health-endangering night work,"[23] even though protecting the middle class against large enterprises has actually played a significant role. The combination of different explanations leads or may lead to pretexts that obscure legal justifications.[24] Thus, the Shop Closing Act, for example, can no longer be justified on grounds of protecting work hours of employees.

C. Approaches and Forms of State Influence

The number of the various approaches and forms of state influence on the economy has so increased over the years due to different economic developments and ideas about economic policy that they now threaten to overpower the market. They are heterogeneous, as are their motives, intentions, and objectives. These differences explain why every effort to systematize them must inevitably fail. Thus, only a few spotlights can be put on the network of "market regulation."

1. Global Control Through Counter-Cyclical Conjunctural Policy (Fiscal Policy)

By the end of the sixties, at the time of the grand coalition, the minister of economics, Schiller, believed that the state could—at least globally—effectively control market conditions and economic crises. Accordingly, in 1967 Article 109 of the Basic Law was revised to provide a basis for global state control of the economy. Pursuant to the new provision, both the federal government and the states (*Länder*) are obliged to take into account the requirements of the macro-economic equilibrium in budgetary matters. This constitutional amendment was accompanied by the adoption of the Act to Promote Stability and Economic Growth of June 8, 1967.[25]

22. *See* Hans F. Zacher, *Das soziale Staatsziel*, *in* 1 Handbuch des Staatsrechts § 25 annotation 80 (Josef Isensee & Paul Kirchhof eds., 1987).
23. BverfGE 23, 50 (58); BVerfGE 41, 360 (370); BVerfGE 87, 363 (385).
24. *See* Hufen, *supra* note 20, at 2920.
25. Act to Promote Stability and Economic Growth, v. 8.6.1967 (BGBl. I S. 582).

The amendment was based on the economic theory of J.M. Keynes, who believed that the continuous economic cycles observed in the second half of the 19th century could be influenced through fiscal measures. According to Keynes, it was economically necessary and politically mandatory both to adjust state fiscal and budgetary policy to a countercyclical control of economic cycles and to provide for the necessary legal instruments, particularly in modern industrialized countries.[26]

The question as to whether such global control measures fall into the scope of civil rights, which are (only) to protect against concrete and individual encroachments, is to be assessed on a case by case basis but is likely to be answered in the negative.[27] Further considerations are unnecessary because the fiscal-political approach in practice was not of a significance worth mentioning.

In addition, the stability-oriented political influence of the state does have a vulnerable flank. Because of the guarantee of trade union freedom and collective bargaining autonomy in Article 9, section 3 of the Basic Law, the influence on wages, which are usually reflected in the prices of goods and services, remains beyond state control. Instead, the influence is handed over to both sides of industry: management and labor, employers and employees.[28]

2. *Supervision of the Economy*

As noted, the borderline between the state as the protective guard on the one hand and decision-making guardian on the other hand can easily and unknowingly be overstepped. Grey areas and intermediate zones exist, particularly in the ramified regulations concerning the supervision of economy, which are typical for the Federal Republic of Germany.[29]

As such, supervision is, in principle, distinct from measures to control the economy. Supervision is not intended to control or influence the market but rather to protect individual and common interests inherent in the market mechanisms against specific endangering.[30] However, the difference between theory and practice can be considerable, and supervision can easily turn into control.

In Germany, state supervision of economy has been a tradition for centuries.[31] At the outset, it was only concerned with the mining industry (as

26. *See* BVerfGE 79, 311 (331).

27. *See* KLAUS STERN ET AL., GESETZ ZUR FÖRDERUNG DER STABILITÄT UND DES WACHSTUMS DER WIRTSCHAFT: KOMMENTAR 87 (2d ed. 1972).

28. *See* ULRICH SCHEUNER, DIE STAATLICHE EINWIRKUNG AUF DIE WIRTSCHAFT 54 (1971). However, it should be noted that the law of collective (wage) agreements has come under pressure due to increasing globalization. *See* Manfred Lowisch, *Arbeitsrecht und wirtschafilicher Wandel*, RDA 69, 75 (1999).

29. *See* Martin Bullinger, *Staatsaufsicht in der Wirtschafi*, 22 VVDSTRL 264 (1965); EKKEHARD STEIN, DIE WIRTSCHAFISAUFSICHT (1967); PETER J. TETTINGER, RECHTSANWENDUNG UND GERICHTLICHE KONTROLLE IM WIRTSCHAFISVERWALTUNGSRECHT (1980); HEINZ MÖSBAUER, STAATSAUFSICHT UBER DIE WIRTSCHAFT (1990).

30. *See* Bullinger, *supra* note 29, at 286; SCHEUNER, *supra* note 28, at 71.

31. *See* Bullinger, *supra* note 29, at 286; MÖSBAUER, *supra* note 32, at 16.

a result of state supreme authority over mining), pharmacies, the restaurant industry, railroads, shipping, and the fishing industry. With an increasing economic development, the range of supervised industries broadened. Today, it also covers areas like banks, trade, aviation, antitrust, passenger transport, trucking, energy supply, nuclear power, emission control, and insurance. State supervision of the economy has a variety of possible measures at its disposal, such as information gathering, inspections, controlling, licensing, and approval of prices. Its objectives are not restricted to protecting against endangering; it also aims at meeting the state's expectations with regard to its policy for the improvement of regional structure and for the promotion of economic growth. From a constitutional point of view, state supervision of the economy reflects the conflict between economic rights and freedoms as guaranteed in the Basic Law on the one hand and the principle of social justice and the welfare state on the other hand. In this area of conflict, it is up to the legislator to define and determine the balance between the rights and principles involved. Because legislators lack regulatory capability, however, the competence to resolve the conflict is often transferred to the administration through ambiguous regulations and, correspondingly, general terms in statutes.[32]

This leads to considerable constitutional and practical problems because the supervisory bodies are thus given the opportunity to overstretch their mandate and to regulate the economic dispositions of enterprises. If this is done with reference to incorrect and legally unfounded assessment criteria, as in the case of the Federal Banking Supervisory Board, state supervision turns not only into guardianship but also into a bureaucracy of constraint and prevention.

3. Market Regulation

In this context, one should mention the privatization of the postal service and telecommunication as well as the economic implications of this process. Postal service and telecommunication are traditionally assigned to the state. Initially, the Basic Law made them part of the functions of the federal government.[33] However, due to increasing stress of competition in the globally-oriented postal and telecommunication market, the German Postal Service (*Deutsche Bundespost*) was closed down in several steps, and the postal service and telecommunication became part of the private sector.[34]

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32. *See* TETTINGER, *supra* note 29.

33. *See* GG art. 87, § 1 (old version).

34. *See* Klaus Stern, *Postreform zwischenPrivatisierungundInfrastrukturgewährleistung*, DVB1. 309 (1997); Peter Badura, *Wettbewerbsaufsicht und Infrastrukturgewahrleistung durch Regulierung im Bereich der Post und Telekomunikation*, *in* FESTSCHR~FTFIIR BERNHARD GROFIFELD 35 (1999); Martin Bullinger, *Von administrativer Daseinsvorsorge zu privatwirtschafilicher Leistung unter staatlicher Rahmengarantie*, *in* FESTSCHR~FIFLIR HANS F. ZACHER 85 (1998).

By adding Article 87f to the Basic Law in 1994, the services of *Deutsche Bundespost*, which until then had been services of the federal administration, were transformed into private services and were rendered thereafter by private enterprises as successors of *Deutsche Bundespost*. This constitutes a real privatization of functions: The state has given up one of its constitutionally assigned functions and put it under the rules of the market, thus opening the market in the field of postal service and telecommunication.[35]

However, this fundamental change of system in a field that concerns and influences the whole economy does involve risks. Due to the traditional monopolistic structure, a functioning market cannot exist right from the beginning. Furthermore, there are some apprehensions that, in view of the now cost-oriented enterprises, gaps in supply might occur in rural regions. That is why Article 87f, section 1 of the Basic Law obliges the state to guarantee that "the field of postal service and telecommunication services are adequately and sufficiently rendered in all areas."[36] This constitutional obligation to guarantee a sufficient infrastructure (in European law terminology, "guarantee of universal services") leads to residual state functions in this field, which are assumed by a newly established regulatory agency (*Regulierungsbehorde*).[37]

Regulation is sometimes considered to be a form of supervision of the economy.[38] However, keeping in mind its intention, one has to admit that it goes beyond mere supervision.[39] Regulation not only involves ensuring fair competition by protecting against monopolies, but also aims at securing a particular economic result: maintaining a sufficient communication infrastructure through a "basic supply in all areas," which must not be sacrificed to the cost-oriented management of private enterprises. That is why the regulation agency is vested with a broad range of far-reaching instruments, which encompass licensing, supervising part performances, and price fixing. The legal literature has already created new expressions for this kind of function, such as "state infrastructure responsibility" and "guarantee state."[40]

From the perspective of a consumer, who has particularly benefited from dramatic price reductions in the field of telecommunication, this development has proved to be a promising start. One can only hope that the state will not dilute this again through a "solicitous siege."

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35. *See* Stern, *supra* note 34, at 310.
36. GG art. 87f, § 1.
37. *See* Badura, *supra* note 34, at 47.
38. *See id.* at 40.
39. *See* JENS-PETER SCHNEIDER, LIBERALISIERUNG DER STROMIFRTSCHAFT DURCH REGULATIVE MARKTORGANISATION 37 (1999).
40. GEORG HERMES, STAATLICHE INFRASTRUKTURVERANTWORTUNG (1998); Wolfgang HoffinannRiem, *Telekommunikationsrecht als europãisiertes Verwaltungsrecht*, DVB1. 125 (1999).

4. Market Control

Market control can occur in the form of direct and indirect behavior control. Both kinds of state influence on the market have their own constitutional problems and aspects.

State market control through direct behavior control concerns, in particular, market access, or, in terms of civil rights, the freedom to choose one's profession, as guaranteed in Article 12, section 1 of the Basic Law. In most cases, career choice, and thus market access, are dependent on individual qualifications and characteristics. In that sense, it is subject to a particular access control in the form of a prohibition with the reservation of the granting of permission. In trade and industry law, personal "reliability," defined in relation to the concrete business concerned, plays an important role. Access to a particular commercial activity can be impeded not only through personal prerequisites, but also by regulating the management (quota restrictions, numerous clauses, monopolizing) in various fields such as passenger transport, admission as social health insurance doctor, or access to municipal markets.[41] In addition, numerous provisions regulate the exercise of professions to ensure quality standards in order to protect the consumer or to regulate prices.

The Federal Constitutional Court applies the standard of Article 12, section 1 of the Basic Law when reviewing statutes that are relevant for professions. Its adjudication started powerfully and courageously in 1957 with the "pharmacy-judgement,"[42] which redressed the public need test and was therefore regarded as a landmark decision. It soon weakened, however, with the so-called "handicraft-decision,"[43] which involved the question of whether a master craftsman's qualifying examination is a necessary prerequisite for conducting an independent trade. In general, from today's point of view the Federal Constitutional Court's adjudication is considered to be too favorable toward the legislature.[44]

In these days, the old instrument of indirect behavior control has come into fashion again. It can be found, in particular, in environmental law.[45] Through financial incentives a certain desired behavior is promoted, whereas undesired behavior is hoped to be prevented. Public duties and taxes, in the form of taxes linked to production or emissions, for example, are supposed to make the use of the environment a factor of internal corporate costs. Thus, the use of the environment becomes part of the market mechanisms; through product prices, competition mechanisms and preventive effects are therefore triggered. This concept of internalization of environmental costs as a method of environmental policy that is

41. *See* Rudiger Breuer, *Die staatliche Berufsregelung und Wirtschafislenkung, in* IV HANDBUCH DES STAATSRECHTS § 148 annotation 47 (Josef Isensee & Paul Kirchhof eds., 1989).

42. BVerfGE 7, 377.

43. BVerfGE 13, 97.

44. *See* Friedhelm Hufen, *Berufsfreiheit—Erinnerung an em Grundrecht*, NJW 2913 (1994).

45. *See* MICHAEL KLOEPFER & THIOL BRANDNER, UMWELTRECHT 263 (2d ed. 1998).

in conformity with the market is generally accepted today. Its legal implementation, however, involves considerable problems. The tax state as an element and the basis of the constitutional state dedicated to social justice contradicts, in principle, the vision of an "environment state."[46]

The tax state guarantees liberty and equality of its citizens in that it does not force them to behave in a particular manner but rather levies taxes on them according to their individual ability to bear public costs. There is a fundamental conflict between the exercise of personal freedom and environmental protection. Effective environmental protection can call for far-reaching interferences with civil rights and freedoms and can lead, through environmental taxes, to behavior control. This control not only limits the exercise of freedom but also is likely to contradict the principle of equality and the principle of social justice and the welfare state. These, however, are dangers that depend on the design of concrete concepts of control.

Also feasible are effective instruments which work in a way that gives no cause for concern from a constitutional point of view.[47] One of the instruments of indirect behavior control is the state subsidy. Here, the constitutional problems are less severe. The "giving state" can much easier be justified than the "taking state." In the economic sector, subsidies to individual enterprises can lead to distortion of competition or, in terms of civil rights, to an infringement of competitive equality and freedom of competition.[48] This, however, does not mean that subsidies, as such, are excluded. The existence of subsidies instead depends on the extent of preferential treatment of the individual enterprise and, respectively, on the degree to which its competitor is put at a disadvantage. Since there is no concrete constitutional criterion for this extent or degree, everything depends on the assessment by the court.[49] Thus, economic subsidies are less a constitutional problem than a financial problem. According to figures provided by the Institute of World Economy, state subsidies have reached the amount of DM 290 billion, which is more than one third of public revenue.[50]

D. Review of State Market Intervention by the Federal Constitutional Court

Judicial review of state market intervention primarily takes place

46. Michael Kloepfer, *Droht derautoritäre okologische Staat?*, *in* WEGE ZUM OKOLOGISCHEN RECHTSSTAAT: UM WELTSCHUTZ OHNE ÖKO-DI KTATUR 42 (Hubertus Baumeister ed., 1994).

47. *See* KLOEPFER, *supra* note 45, at 316 (waste water levy).

48. *See* Breuer, *supra* note 41; PETER-MICHAEL HUBER, KONKURRENZSCHUTZ IM VERWALTUNGSRECHT: SCHUTZANSPRUCH UND RECHTSSCHUTZ BEI LENKUNGS—UND VERTEILUNGSENTSCHEIDUNG EN DER ÖFFENTLIECHEN VERWALTUNG 135 (1991).

49. *See* Breuer, *supra* note 41 ("strangulating subsidies").

50. *See* Wolfgang Mulke, *Der schwere Kampf gegen die Subventionitis*, BONNER GENERALANZEIGER, Apr. 24-25, 1999, at 32.

through the Federal Constitutional Court.[51] Its adjudication is very extensive, encompassing, in ninety-eight volumes of official records, 300 decisions involving interferences with occupational liberty.[52]

1. *Constitutional Criteria for Judicial Review*

Constitutional criteria for judicial review are economic rights and freedoms, such as contractual liberty, freedom of competition, occupational liberty, liberty to establish and carry on any trade and industry, freedom of opinion, freedom of movement, and freedom of association. The most important criterion is occupational liberty, as guaranteed in Article 12, section 1 of the Basic Law. Less important is the constitutional guarantee of the right to property, as embedded in Article 14 of the Basic Law.

The Federal Constitutional Court only concerns itself with state market intervention by means of statutes adopted by Parliament. Statutes that interfere with occupational liberty or other economic rights and freedoms also include tax statutes if they have an "objective tendency to regulate professions"[53] in that their actual effects relate to the exercise of a profession. Market interventions in the form of profession-regulating statutes need a sufficient justification under the Basic Law. Such a justification is possible if public interests are concerned, as long as both the interference and public interests are appropriate under the principle of proportionality.[54] The more intensive the interference, the more important and obvious justifying public interests must be. This method of justification, as a rule, refers to the entire sector of the economy concerned, rather than to the concrete and individual case. Thus, a generalizing and typifying approach of the legislature is possible.[55]

2. *Standard of Review Formula and Discretion of the Legislature*

Economic policy is particularly ambivalent in terms of constitutional law. On the one hand, the Basic Law does not contain any guideline as to the economic policy, thus leaving a maximum of political discretion to the legislature. On the other hand, almost all economically relevant statutes interfere with economic rights and freedoms. Economic discretion and responsibility of economic policy thus conflict with the protection of civil rights and freedoms. This conflict cannot be resolved by a simple "Eco-

51. This, in particular, is true for market intervention by means of a statute. As to market interventions through individual regulation (*e.g.*, subsidies, warning of particular products), legal protection can be sought from administrative courts or civil courts (*e.g.*, in case of violations of the Act Against Unfair Competition). Judgments of administrative or civil courts of last instance can be brought to the Federal Constitutional Court by means of a constitutional complaint based on an allegation of infringement of constitutional rights.

52. *See* Winfried Kluth, *Bundesverfassungsgericht undwirtschafilenkende Gesetzgebung*, ZHR 657 (1998), who counts 299 decisions in ninety-six volumes of official records. In the meantime, further judgments involving occupational liberty have been rendered.

53. BVerfGE 95, 267 (302).

54. *See* Fritz Ossenbühl, *Die Freiheiten des Unternehmers nach dem Grundgesetz*, 115 AöR 10 (1990).

55. *See* BVerfGE 68, 193 (219).

nomic-Question-Doctrine," as is sometimes evoked in legal literature.[56] The Federal Constitutional Court has always seen the Basic Law as a constitution that is normative through and through. It has also emphasized this nonnativity where constitutional standards of review can hardly be translated into applicable formulas, as is the case, for example, in the constitutional financial system.[57] The field of economic law also espouses this view. The question is not whether, but to what extent, economic law is subject to judicial review by the Federal Constitutional Court. This review cannot be conducted according to a standardized scheme. Rather, it depends on the rationality of the particular statute that is subject to review and on other circumstances, such as the intensity of interference or the uncertainty of economic predictions that form the basis of the statute.

Such a flexibility of judicial review adjusted to the subject matter and statute in question can easily be achieved through the use of review formulas. This kind of review essentially involves the question of whether the statute under review can be justified by public interests. These interests, however, are not defined in the Basic Law,[58] but are instead subject to the disposition of the legislator, who decides on his or her own what does and what does not serve public interests.

In this way, even the "preservation of a productive domestic wine growing industry" assumes the status of constitutionally relevant public interests that may justify interferences with civil rights. Furthermore, economic laws are often based on highly debatable economic predictions and assessments that are not undisputed. In that case, it depends on the reviewing judge to decide the extent to which he is willing to get involved in the irrationality of predictions.

In view of the standards and formulas of review, the standard of review of economic laws is restricted in two respects. First, the Federal Constitutional Court has repeatedly emphasized that the legislature "in the fields of labor market and social and economic order . . . has a particularly wide discretion in assessment and prediction."[59] This discretionary power, however, depends on various factors: in particular, the peculiarities of the subject matter in question, the possibility to form a sufficiently well-founded opinion, and the significance of the rights at stake.[60] Thus, the adjudication of the Federal Constitutional Court so far shows different degrees and standards of review of predictions. They include a review standard that restricts the court to ask only whether the statute in ques-

56. *See* HORST EHMKE, WIRTSCHAFT UND VERFASSUNG 467 (1961); Hans Spanner, *Zur Verfassungskontrolle wirtschaftspolitischer Gesetze*, DOV 217 (1972). *But see* PETER J. TETTINGER, RECHTSANWENDUNG UND GERICHTLICHE KONTROLLE IM WIRTSCHAFTSVERWALTUNGSRECHT 332 (1980); Reiner Schmidt, *Staatliche Verantwortung fir die Wirtschafi, in* III HANDBUCH DES STAATSRECHTS § 83 annotation 34 (Josef Isensee & Paul Kirchhof eds., 2d ed. 1996).

57. *See* BVerfGE 72, 330 (388).

58. See Ossenbühl, *supra* note 54, at 11.

59. Ossenbühl, *supra* note 54, at 11.

60. *See* BVerfGE 87, 363 (373).

tion is evidently faulty, a review standard merely involving the question of whether the statute is acceptable, and a review standard that enables the court to thoroughly scrutinize the content and the objectives of the statute.[61] In other words, judicial review goes as far as can be rationally and plausibly conducted in the light of subjectively verifiable criteria and standards. As to economic predictions, the emphasis is on the review of the methodological approaches upon which the predictions are based, rather than on their results.

In addition, by constituting monitoring and follow-up obligations of the legislature, the Federal Constitutional Court has created a certain corrective for predictions that afterwards fail to reflect the future development accurately.[62]

3. *The Problem of the "Individual Interference Approach"*

Judicial review of statutes in light of civil rights necessarily restricts the constitutional review to assessing the interference in the individual case. The subject of assessing whether or not economic rights are justified and not unproportionally restricted is always (only) the concrete challenged statute that regulates market access, the exercise of a profession, or the fixing of prices. There is no "collective reflection" on all statutes that restrict economic rights and freedoms. In other words, the cumulative or synergetic effects of all statutes restricting occupational liberty remain outside the scope of consideration.[63] Thus, nobody can define the exact range of economic freedom that actually remains. It is only perceptible in each individual case. For example, the processes involved in starting up a new enterprise often lead to the complaint about the path to economic independence as being a "bureaucratic hurdling." However, it is also possible that this picture has the effect of playing down the issue and that in some cases quantity has already changed into quality. One needs to recognize that the "individual interference approach" leads to a somewhat hidden overgrowth of economic rights and freedoms by state regulations. It is important to uncover this overgrowth and to find methods of avoiding such restrictions of freedom.

4. *Previous Leading Cases*

The standard of review formulas and review schemes for a constitutional review of economic laws show that everything depends on how firmly the Federal Constitutional Court tightens the reins. At the beginning of the Court's adjudication stands the already mentioned "pharmacy decision,"[64] which declared the public need test for choosing a profession

61. *See* BVerfGE 50, 290 (332).

62. *See* CHRISTIAN MAYER, DIE NACHBESSERUNGSPFLICHT DES GESETZGEBERS (1996).

63. *See* KLUTH, *supra* note 52, at 673; Friedhelm Hufen, *Berufsfreiheit—Erinnerungan em Grundrecht*, NJW 2913, 2916 (1994).

64. BVerfGE 7, 377.

to be unconstitutional. Therefore, the decision was seen as a sign of liberty. That was in the year 1958. Today, more than forty years later, the prevailing feeling is that the Federal Constitutional Court has missed the chance to broaden the scope of economic freedoms.[65]

Considering the numerous and extensive regulations in the field of economic law, one might doubt whether the German legal system fully meets the requirements of an "open market order with free competition," as postulated by European law. Also, lobby and group interests and an emphasis on sticking to tradition have taken a toll on economic policy. The endless and much-disputed question as to how much state influence the market can endure, or is even necessary, will hardly ever lead to a consensus. That is why defining borderlines will always be subject to political battles. In the Federal Republic of Germany the reduction in measures of exercising influence on the market only makes slow progress. The necessity of such a reduction is not always completely realized because economic laws are always seen individually in terms of their effects on economic rights and freedoms. What we need are empirically well-founded and proven data on the cumulative effects of all laws that do restrict the market, regardless of the time of their enactment, their different motives, and their different objectives. Such an empirical study would be both necessary and likely to verify the general uneasiness about the statutory restriction of economic rights and freedoms and to promote efforts in achieving a substantial deregulation.

65. *See* Hufen, *supra* note 44; Peter J. Tettinger, *Verfassungsrecht und Wirtschaftsordnung*, DVB1. 679, 684 (1999).

Comment


SOUTHERN METHODIST UNIVERSITY
DALLAS, TEXAS