

The German Constitution and the Economic Order — in Particular: Deregulation¹

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1 DEVELOPMENT OF ECONOMIC ORDER IN GERMANY WITHIN THE FRAMEWORK OF THE CONSTITUTION

At the very beginning, I shall reflect on the relation between the three terms:

- Economic order
- Constitution
- Constitutional order of economy

If we talk about regulation/deregulation and this means more or less state government, law, administration, courts activity in economy we have to take in to perspective the world wide contest between two ideas (or ideologies):

- Liberalism and collectivism, market-economy and planned economy, political freedom and representative democracy, economic and social rights and soviet democracy

and in a dynamic sense of development into the future:

- Deregulation and regulation, liberalization
 - the active state, decentralization — centralization

It was Max Weber, the social scientist, who in the early twenties elaborated the idea of pure types — »ideal types» — of describing social and economic strata. For instance the pure types — which in fact never exist in a pure sense in reality — of individualism and collectivism. It was the economist Walter Eucken who — under the pure types idea of Weber — described in the forties the laissez faire market-economy and capitalism on one hand and an economic order where the decisions and the responsibility rest with the state, which might be called socialism.

Later on the philosopher von Hayek applied the ideal types picture to political philosophy and developed the system of liberalism with liberal freedom, civil rights, freedom of speech and representative government on one hand and a more collective socialist order with social freedoms, social rights (like the right to labor, to health, to leisure time), the leading party, the guiding ideology and leadership of a central bureaucracy (like the politbureau).

These are the names of some scholars of our times who strived for providing better information and orientation in the battle of ideologies.

It is true there is a deep rooted divergence between the philosophical, anthropological, social and constitutional conceptions of what we know and how we should live.

Let's start from the point of philosophy. It is the divergence of the epistemological approach Popper vs. Plato. Popper described it quite clearly in his book »The Open Society and its enemies» in particular in the first volume »The spell of Plato».

It is the divergence between verification vs. falsification. Culture of doubt vs. truth. You know the old example. Verification says all swans are white and black. Well, that is true, but the philosophy of falsification says we hold this to be true as long as anybody shows us that we are failing. Let there be green and blue swans in addition.

In an anthropological sense it is John Stuart Mill vs. Marx. The individualistic vs. the collective approach. What counts is the individual. Society is sort of a superstructure which exists only in our minds on the one hand and you are nothing. What counts is society, is your people, your nation on the other hand.

In view of social philosophy it is the liberal approach which is linked with civil rights freeing the individual, competition and the rule of market on the one hand, the dictate of the commonweal, the state who defines what it is, on the other.

And finally we have the same divergence in the political and constitutional philosophy. Montesquieu and Tocqueville vs. Hobbes, Hegel and Marx. It is the divergence in the idea what ought to be the responsibility of state and government. In a minimal state concept on the one hand the state is so to speak responsible only for defence and police and in the maximal state concept on the other the state is responsible for welfare.

And the consequence in constitutional perspective is who should administer the state. It is the philosophy of fragmented power, separation of legislature, executive and judiciary on the one hand and centralism on the other hand.

If we look at the role of the individual in the state, individualism is linked with the traditional political liberties designed to protect him against interference by authorities. It is the free-

dom of speech and religion, civil rights of man vs. the state. This is the liberal message of 1787, of the American Declaration of independence and the message of the French Revolution of 1789.

On the other hand we have what Roosevelt 1941 in his essay »The foundation of an ideal society» mentioned as the freedom from want and fear. The strong and intelligent find their own way. But 95 % of the people need the help and assistance of the state. This idea is leading to an active state, to a welfare state which collects and redistributes. This leads to the notion of social and economic rights, the right to labor, the right to social security.

Of course we believe in liberalism, individual initiative, enterprise and equality. But we have to put the question whether we can worldwide afford liberalism any longer. This question was raised by Kenneth Galbraith in his book »The elements of power» and Fred Hirsch in his book »The social limits to growth». Can we really afford worldwide liberalism any longer? It is the question of ecology. Do we need a human right of freedom from pollution and more over? Liberalism means capitalism and means expansion of the individual, of his consumption, of goods, ground, air, water. If we look at the liberalistic concept world wide we indeed see billions of expanding individuals and the third world having not yet started. It is clearly the issue which is at state: Can the world nourish 10 billion people: Indeed we have to face the Tera mankind. If we recollect our knowledge: A »one» with three noughts is a kilo, a one with six noughts is a mega, a one with nine noughts is giga and one with twelve noughts is tera.

Everybody consumes much more electricity, water and gas than thousand people consumed let's say in the 17th century. Indeed we are a tera mankind and can the world nourish 10 billion people who are consuming in tera dimension and being liberalistic, too.

My belief is there is no alternative to liberalism. We have to find the path out of the problems by strengthening individual intelligence. It is the individual who will find solutions for protecting us from pollution, terrorism, violence. It is the individual at least in the absence of any collective entity, which is better prepared to find truth.

I was talking about the types of economic and constitutional orders. We know that almost everywhere in the world is neither white nor black, but rather grey in different shadows. Finally every society seeks for political freedom as well as for freedom of want, harm and anxiety. In view of Webers »pure types» the economy of Germany is a »mixed economy», a social market economy. It is not that Ludwig Erhard and Alfred Müller-Armack who designed the so-

cial market economy disliked »pure models». Indeed they wanted to free the German economy from war regulations and constraints. They wanted to take care of the social and welfare state obligations of all modern states, especially of Germany in the tradition of Bismarck social security legislation in the late 1880.

A social market economy means basically that the market is regulating the economy on the one hand, but there is a social state responsibility on the other. There are various participants in the economic process: privates, cooperatives, non-profit-making enterprises, public enterprises under public law to deliver public services. These various participants are active in various sectors of the economy: energy and traffic, fields where the economy takes care of basic needs, is more in the public hand, whereas the production of goods and the trade is private. In the social market economy we have mixed instruments of intervention of the state, from supervision and setting the legal framework of economy towards subventions and global steering of economic sector. At least by means of the public budgets.

The constitution of the Federal Republic, the basic law of 1949, reflects the decision for social market economy principle

- in the civil rights sector
- in the basic structures and goals of the state
- in constitutional entitlements for interventions and
- in the distribution of responsibilities on a vertical and horizontal axis

First of all in the civil rights section of the constitution we find the freedom of profession and trade, the guarantee of private property, the freedom of coalitions and the freedom of speech which is essential for instance for advertising. On the other hand we have the social state clause.

- the entitlement that legislation may be enacted with a view to adverting disturbances of the overall economic equilibrium
- and the constitutional entitlement to maintenance of legal and economic unity, uniformity of living conditions in the Federation

Furthermore we find more entitlements for interventions for instance in Art. 15, the provision that the state may socialize land, natural resources, means of production and so on. The legislator never made use of this provision.

Is this framework — namely the economic liberal rights on the one hand and the social state principle on the other —, a constitutional decision for a particular economic order? Is that a speculative question? The Federal Constitutional Court dealt in two famous decisions with this question. The first decision had to do with the admissibility of state intervention and

the second was participation of workers in entrepreneurial decisions. The federal constitutional court took the following stand:

1. The constitution did not adopt a particular economic order
2. But the constitution guarantees some »essentials» of a framework of economy, like civil rights and the social state principle.
3. Within these guidelines every economic policy is admissible.

The litigation shows that the constitutional court sees a lot of flexibility of the legislator to decide on economic principles.

In some other cases the court went into details:

1. Participation of workers in enterprises exceeding 50 % would hurt the property rights of the share holders
2. Tax law must not be expropriatory
3. The collection of economic data must not interfere with entrepreneurial freedom

It is always the same language: admissible is every economic policy within the guidelines of the constitution. Thus the field was and is open for any relatively flexible economic policy. Be it of a more regulatory or deregulatory type.

If we look at the German economic history of the last forty years in view of this flexibility as far as economic policy is concerned we may distinguish four periods:

1. The history of the republic started with the collapse of the economy at the end of the world war. Afterwards we ran through a period which some people call the »economic miracle». This period of time 1945 til 1960 is linked with the names of Adenauer and Erhard. It is depicted more closely with the European recovery program, the design of a legal order for the economy in particular by the Anti Trust Law (Kartellgesetz, Gesetz gegen Wettbewerbsbeschränkungen).
2. The end of the reconstruction period was around 1960. It was followed by the period of transition under the governments of Erhard, Kiesinger and then the coalition of Kiesinger and Brand. It led into the depression of 1966/1967.
3. Then we have the Seventies, the governments of Brand, Schmidt till 1983. It was a period of unfolding the social welfare state. We faced more regulations. Some fields of state activities expanded enormously. For instance the number of students and the higher education system quadrupled within 15 years.
4. And since 1983 when the government of Dr. Kohl came into politics the German government started deregulation activities.

If we look at constitution and law I must not talk about the reconstruction period. But I would like to share some ideas with you of the

state activities in economy in the Brand/Schmidt-time. Recession of 1966/67 led to some constitutional amendments. Namely larger state's responsibility. For anticyclical fiscal policy it was the law of stability and growth which passed the parliament. It was the period of planning-euphoria, of global steering, of the »Konzertierte Aktion», a coordination of decisions of state employers and unions, a »round table policy» (Schiller).

This policy failed in my view basically due to two reasons:

1. The basic economy policy started from the wrong prognosis of permanent growth which collapsed with the petrol shock in 1973.
2. It is no longer sound to start from fix trade cycles. Moreover we faced sectoral problems in the sectors of minings, steel, ship building, agriculture.

The failing of global steering is quite visible. Instead we have subventions and supporting activities of the state which have more over increased by the EEC-integration.

Certainly economic order has to do with constitutional provisions and so is infected by trends in expounding and applying the constitution. We observe some developments:

1. A seizure of ideological battles. We face a more pragmatic approach.
2. A rise of the social state principle. We have the active state.
3. In the civil rights understanding we have a definite value orientation of interpretation. Civil rights no longer mainly as defending rights, man vs the state, but sharing rights: The individual shares in state offering. And an interpretation of the human rights as participatory rights which is quite obvious in the workers participation in economic decisions in the »Mitbestimmungsgesetz» of 1976.
4. Finally we observe a rise of judiciary. Many people put the question, in particular in view of the impressive importance of the federal constitutional court, whether we have a government of parliament or a government of judges.

If in the following we are talking about deregulation: what are the state instruments of regulation? Basically there are three categories of admissible instruments of regulation under the German constitution:

1. The legal framework as an economic order and state supervision. These are the rules-of-law-state-instruments.
2. Subventions planning and the impact of the fiscal state. This instruments I would parallel to the social state.
3. And then we have new instruments of regulation like protection of consumers, protection of environment, protection of laborers, professional education and so on.

2 DEREGULATION — WHAT IS DEREGULATION

How did deregulation start in the United States of America

In the previous section I tried to give an overview of instruments of regulation under the German law. To widen the perspective to other economic and legal systems let's try to collect some comparative observation.

If we try to define deregulation it might be helpful to state at the beginning that it is the opposite of regulation and regulation means the following:

1. Regulation means more responsibility of state and governments. Means more governmental inroad into society.
2. Means more laws as adopted by parliament.
3. Means bureaucratisation.
4. And means predominance of courts, protection by the courts.

And in view of this picture of regulation as a strong role of legislature executive and judiciary, certainly deregulation might mean the following.

1. Settlement, revision of law.
2. The attempt to make law more flexible including more general clauses rather than very detailed provisions, giving discretionary power to administrative bodies under the law.
3. Deregulation means increasing informal state activities like dealing with economy by contracts, agreement, coordination rather than orders.
4. Deregulation means settling conflicts in the shadow of the law rather than by law.
5. And deregulation means decentralized steering by cooperative power, by coalitions and means privatization.

We may keep in mind that deregulation activities started under the administration of President Carter and were widened under the administration of President Reagan since 1981. In depicting deregulation experiences in the United States one may point out at political lessons, economic lessons and unsolved problems.

1. The first political lesson is that participants of the economic process — enterprises, unions, others — first thought the deregulation commission of the president was captive, then had to learn that it was very effective. Public support at the beginning was very small although the consumer would gain most of deregulation.

The strongest opposition came from managers of firms, which had advantages of the former regulation, namely unions of these sectors. The deregulation started at a

time when »social regulation» — regulation in health, security, ecology, energysaving — began. This led to frictions. The reduction of economic regulation thus did not reflect a general reaction against regulation but was a response to conditions specific to these industries.

Finally deregulation was first accepted by elites, supported by the president. It gained speed and success finally by cooperation of experts and public opinion.

2. If we look at economic lessons, for economists the success of deregulation was not surprising. In the transport sector (road, air) the gain of productivity was significant: 140 new airports, discount prices in road traffic, the number of firms doubled. The concern that deregulation may have compromised security proved to be not valid. The opposite was true. We observed a decline of accidents and fatality rates. In the telephone and data-communication sector the monopoly of ATT was broken. In 1981 the termination of oil price control increased the production. The energy crisis of 1970 was ended by a stroke of a pen.

The commercial and saving banks had been subject to interest rate ceilings since the 30s. Severe problems arose when market interest rates increased. Then the congress removed the ceiling. We observed in a short period of time an increase of the interest payments to depositors by 3.6 Bill \$ a year, with no significant effect on interest rates to borrowers.

The general price and wage control (Nixon 1971) was not successful, merely postponed the inflation. Reagan abolished the whole control system.

3. Of course deregulation in the United States left some unsolved problems. Some consequences of deregulation, for instance the congestion of air traffic, the shortage of frequencies, the problems of saving institutions and insurance companies deserve solution. Other sectors have to be deregulated like agriculture, gas, electricity. The regulatory review process in the vice presidents office of management and budget has not yet fully started. The result is: deregulation is possible. Deregulation generated benefits to consumers and opportunities for new firms. Indeed the way to deregulation seems to be not without rocks, but a road to prosperity and opportunity.

3 DEREGULATION IN PARTICULAR IN THE FEDERAL REPUBLIC OF GERMANY

In the Federal Republic of Germany deregulation results till now are significantly smaller.

Let's put the questions:

- Who is deregulating?
- What are the fields of deregulation?
- Is that sufficient deregulation?

On the federal level to start with we have a federal commission of reducing legislation and bureaucracy. It is composed of members of parliament and high ranking administrators and released reports in 1985 and 1986 which really improved legislation. In all states we have similar commissions. In some states they were screening the whole legislation and deleted a quarter of provisions as obsolete outdated already having been amended.

Then we have the German association of legislation which in practice fosters deregulation, by meetings and conferences, by practical seminars («Bonner Forum») and by initiating in 1991 a European congress on the improvement of legislation. The courts have a new sensibility judicial restraint, which is deregulation as well.

If we look at the fields of deregulation we have some of them. First of air traffic. The Lufthansa, which held the monopoly, had to accept that there are competitors like the German Wing and Aero Lloyd. Aero Lloyd offers 20 % lower airfares and German Wing a better service. Till now there is no perfect network of interbooking. By decision of the court of Düsseldorf of 19th March 1989 the Lufthansa has been forced to accept German Wing tickets.

We have an increased cabotage in goods road traffic.

The insurance of property sector has been regulated. European partners are now entitled to be active in Germany.

We have a breaking of the monopoly of the federal postal service. Private firms like the United Parcel Service are admitted to parcel transport.

Most significant is the deregulation in the broadcasting sector. Till the beginning of the 80th we have had eight big public broadcasting stations. Now we have some 60 private besides them. If cable and satellite communication is fully established we'll have some 120 stations.

And finally deregulation makes small steps on the labor market. We have a better flexibility of working norms, some flexibility of contracts in order to improve employment, and even the new program of the social democrats will again be less orthodox, more market oriented.

Let me put the question whether that is sufficient deregulation. I think the German economy lacks energy, verve, swing of the so called »conservative revolution« (Reaganomics, Thatcherism): reducing of taxes, breaking of

monopolies, public industry exposed to unfriendly competition.

But there are first signs of a progress of deregulation: the tax reform of 1987, the health reform of 1988 and the next will be the old aged security reform. Let me discuss some reasons and (possible) remedies for the rather modest approach to deregulation in Germany.

If we look at reasons, I see three of them:

1. The first is a lack of vision. We have a rather short period policy. Economic policy as all policy looks at the next election and this means maximizing votes. This indicates a discrepancy between long range economic rationality and short range vote-flattering political rationality.
2. We have a trend to the center. The social democrats as well as the conservatives are parties of the center. And this doesn't allow too much of a distinct policy which deregulation is in fact.
3. The third reason is our labor law. It is too much a collective labor law rather than an individual labor law. The power of the unions is enormous and it is not very flexible. The union of workers is losing permanently unemployed persons who would like to see the market opened. Indeed I see new clients of deregulation who would gain from liberalization of the labor market.

If I look at possible remedies for that slackening down of deregulation I may mention three:

1. First of all it is necessary to strengthen competition. On the domestic market in Europe after the common market has been completed in 1993 and world wide in particular in competition with the United States and the South Asian market.
2. I think that secondly we need another social revolution like the industrial revolution of the 19th century. This social revolution has to take care of the unemployed, has to redistribute work. Indeed we are running out of work. I think the market is better adapted to do this work rather than the state.
3. And thirdly we have to have a closer look at the constitution. I started as a constitutional lawyer. We have to strengthen the liberal parts of the basic law. The legal system of western constitutions and in particular of the basic law is prepared to be the framework of a new change. It is liberal and social, too. Let's rely on the individual to be one's fate's master.

4 DEREGULATION IN EUROPE

By the end of 1992 the common market will have been completed and the community will start its progress into a political union. May

countries, member states expect deregulation or even more regulation? Will the national deregulation processes furthered or enhanced by the EEC? To anticipate the results of the following remarks:

1. I think, as the first step the progress might bring about more regulation, more bureaucratization and more centralization.
2. But only as the second step we will face more deregulation, more liberalization, more decentralization.
3. And a third step will further liberalization in the market and in the world outside. I think there is not too much a chance to do the second and third step before the first has been done.

Let me start by saying: There is consent that »1992« is necessary. 1992 will bring the final step to economic integration and the starting of political integration. Only on the horizon is visible the United States of Europe. For Germany the integration is the greatest economic reform since the currency reform and the »economic miracle« in 1947/48 under the concept of the social market economy. The integration gains speed. 40 % of legislation applicable to German citizens is no longer endorsed in Bonn, letting alone Stuttgart, Munich, Düsseldorf and the other capitals of the Länder but in Bruxelles. Paolo Cecchini and a group of experts in these days has calculated the costs of »Noneurope« and found that it will be around 400 Bill. Marks. The integration finally will bring an increase of growth of 4.5 %.

The member states are preparing for competition by free flow of goods, free flow of services, in particular banking, insurance, I will not hide that some people in Germany look at the integration as a threat. In particular in the field of free flow of trained people we have a rather short education in France and Great Britain. This is true in particular for lawyers, doctors and others and we have a very high civil servant status, for instance of teachers. People fear that this status may be a danger after a stronger competition.

Integration of the EEC: Regulation or deregulation? My assumption that there will be fields of new regulation. We'll see

- Directives
 - We'll have more norms and standards.
 - The social dimension will need more regulation.
 - We certainly need a common ecology policy.
 - Organisation of enterprises might undergo a coordinated reshaping.
- And finally the perfection of the common market may even need more organisation of administration in Bruxelles:

Let me explain these assumptions a little bit further.

1. Directives: The EEC at the moment consists of different worlds. The social and economic status of Portugal and the Federal Republic are quite on different levels. The commission has prepared 300 directives most of them are decided upon already. There are designed to adapt the economic regulations in twelve countries. And this in fact means a network regulation.
2. Norms and standards: In particular the community needs coordinated security standards (tools, machines). The diversity could be a measure of deregulation and competition. But one would lose quality and security. What is intended are directives for minimum standards for security and health. They will be lower than in Germany but higher than in Italy and Portugal. The same is true for a quality standard, for instance for beer, meat and wine. Deregulation has started already, for instance by a European Courts decision, which forces Germany to open border lines for foreign beer. We might have some common moral and economic standards for television and broadcasting. For instance as far as advertising (tobacco) is concerned.
3. The social dimension: We need an adaptation of the social security standards, of workers participation, of health and security for working conditions. For instance the workers participation as I mentioned, in Germany is almost 50 %. Will that be true after a new European Law of Association on shares is established? The unions in particular in Germany are afraid of a new competition: They say: Who is going to reduce the social factor spoils the whole project of the market. They are furthering the idea of implementing claimable social rights to the protected human rights amendments of the constitution of Europe. This means regulation. The employers on the other hand expect the adaptation of enterprises taxation. They expect flexibility in wages and working times. They expect shorter times of education and training. You see, aims and goals in this particular sector, the social dimension, are still very much in divergence.
4. Ecology policy: Some people say by virtue of the EEC the threat for ecology is growing in transport, in chemical industry, in biotechnology. It is true that the unification would lower the high standards of some member states, for instance of the Federal Republic. So do we need more regulation?
5. Organization of enterprises: This touches upon the Anti-Trust Law. In competition with Far East competitors and with American Multis: do we lose our established princi-

ples of economic order? For instance the merger of Messerschmidt—Bölkow—Blohm and Mercedes, which might bring about a gigantic trust covering car technology and air space technology: is this a first example of deviating from the right path? Do we need more anti-trust regulation?

6. Centralizing and decentralizing administration: Some fields of the common market certainly need more central administration, for instance waste and energy. Centralizing means strengthen the Bruxelles bureaucracy and regulation. Although the trends and findings of organization theory show the opposite and advocate decentralization. Small is beautiful. Deregulation instead of regulation. Probably, although on the surface a contradiction, Europe will undergo a phase of »regulated deregulation«.

Let me end with two final remarks.

1. The trend to regulation which we observe at the moment is only a first step. Surely European countries need integration and help to find their identity. For some 320 Mill. people this does not follow a natural process. It needs assistance, administration, regulation. Probably the next step is deregulation, because deregulation needs relatively comparable living and working conditions which have not yet been reached at in Europe.
2. Does this mean a retreat into the security of an inner citadel? There are some anxieties that the EEC might become a fortress of

regulation. Separate from the world outside the economy in the hands of a couple of trusts and the Eurocrats? I think that is overdone. The building of the Federation of Europe needs all our strength. It needs a concentration on domestic issues and needs some inwardness on the one hand. But on the other we are prepared to apply as much liberal principles as possible. We gain from trade, exchange with the world outside the European market. All the strength of the market economy derives from its export and its leading position in the world economy. After the European states have built up a strong market Europe may be even more open and liberal to other partners.

But again: Its a gigantic step to reach the economic and political integration. This is the first step. The second step certainly will be deregulation and the third step is to complete deregulation to the world outside. I would like to see the second and the third step to be taken almost at the same time. The EEC is designed to foster economic and political integration. I believe the member states are doing their job as well for the better sake of all Europe and the world.

VIIITTEET

1. Lecture given at A Conference of the Council of Economic Organisations in Finland (March 1989).