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Report

A debate on “Freedom of economic activity in Polish and German legal culture – a comparative perspective”, Gdańsk, March 24, 2021

On March 24, 2021, the Faculty of Law and Administration of the University of Gdańsk held an international debate on the legal conditions of freedom of economic activity in Poland and Germany with the participation of academic staff from the Faculty of Law and Administration of the University of Gdańsk and the Faculty of Law of Justus Liebig University in Gießen (JLU).

The debate was one of the academic activities carried out as part of an international scholarly project entitled “Freedom of economic activity in Polish and German legal culture – a comparative perspective,” supported by the Polish-German Foundation for Science (Gefördert aus Mitteln der Deutsch-Polnischen Wissenschaftsstiftung).

The project manager for the University of Gdańsk was Dr Hanna Wolska from the Faculty of Law and Administration, and for the University of Gießen it was Dr Magdalena Jaś-Nowopolska from the Faculty of Law. The academic team consisted of: Prof. Dr Thilo Marauhn; Prof. Dr hab. Andrzej Powałowski; Dr hab. Anna Jurkowska-Zeidler, Professor, University of Gdańsk; Dr hab. Maciej Nyka, Professor, University of Gdańsk; Dr hab. Paweł Nowicki, Professor, Nicolaus Copernicus University in Toruń; Dr hab. Ewa Przeszło; Dr Michał Biliński, Dr Ayse-Martina Böhringer; Joanna Kiraga, MA; Aleksandra Szydzik, MA; Olga Zinkiewicz-Będźmirowska, MA; and Daniel Mengeler.

The debate began with an official welcome to the participants given by the Dean of the Faculty of Law and Administration of the University of Gdańsk, Dr hab. Wojciech Zalewski, Professor, University of Gdańsk, and the Vice-Rector for International Cooperation at the University of Gdańsk, Dr hab. Anna Jurkowska-Zeidler, Professor, University of Gdańsk.

The substantive introduction to the event consisted of lectures delivered by the Heads of the Departments of Public Law and International Law of the Law Faculty of the Justus Liebig University in Gießen and of Public Economic Law and Environmental Protection of the Faculty of Law and Administration of the University of Gdańsk.

Prof. dr Thilo Marauhn, in his presentation entitled "Democratic constitution and social-ecological market economy," emphasised that professional, property, association, and contract freedoms guaranteed in the German Basic Law, together set the foundation of the rule of law. As a result, constitutional economic law should serve primarily to designate a coordination system enabling the development of a particular economic policy model.

Prof. dr hab. Andrzej Powałowski, in a lecture entitled "Social justice and economic activity," pointed out, *inter alia*, that the category of justice in the realities of economic activity should be related to the principle of equality. In particular, it concerns equality of business opportunities, equality in terms of achieving a certain market position, and equality of rights and obligations of entrepreneurs. The expression of the principle of social justice in the constitution of the Republic of Poland means that the obligation to ensure this belongs to the state.

The first thematic block of the debate was devoted to European and constitutional issues of freedom of economic activity. The following speakers took part in this part of the debate: Prof. Dr Sven Simon and Dr Ayse-Martina Böhringer (from Germany) and Dr hab. Anna Rytel - Warzocha, Professor, University of Gdańsk, and Aleksandra Szydzik, MA (from Poland).

Prof. Dr Sven Simon started the panel by presenting the German economic constitution against the backdrop of the European internal market. In his speech, he discussed European regulations, referring to the competences of the European Union and the member states. EU rules governing broad economic issues, as well as European economic policy, were discussed in detail. The speech highlighted current problems and challenges facing the European Union.

Dr Ayse-Martina Böhringer presented the constitutional basis of freedom of association in the economic sphere referred to in art. 9, Section 1 of the German Basic Law. The presentation highlighted, *inter alia*, the significant role of associations of an economic nature for social development in a democratic and pluralist constitutional state. There was also a need to define a legal framework for this freedom, which should serve to protect the rights of individuals and, finally, the public interest.

Referring to the above statement, Aleksandra Szydzik MA pointed out that, unlike in the German legal order, the principle of freedom of economic activity in the Polish Constitution is not derived from freedom of association, but has its independent constitutional basis (art. 20 of the Constitution of the Republic of Poland). Consequently, the doctrine of Polish constitutional law indicates that economic organisations are not protected as associations under art. 58 of the Constitution of the Republic of Poland, but as entrepreneurs on the basis of art. 20.

In her presentation, Dr hab. Anna Rytel-Warzocha, Professor of the University of Gdańsk, presented the most important constitutional aspects related to the principle of economic activity in the light of the Constitution of the Republic of Poland of 1997. Contrary to the German solutions, the freedom of economic activity directly expressed in art. 20 of the Constitution was recognized as one of the structural elements of the principle of the social market economy, and thus one of the most important systemic

principles underlying the Polish economic system, alongside such values as private property and solidarity, dialogue and the cooperation of social partners. The speech also included the most important judgments of the Polish Constitutional Tribunal, which have had a significant impact on the definition of the constitutional principle of freedom of economic activity.

The next thematic block included a discussion on the freedom of economic activity from the perspective of economic law and environmental law. In this part the following speakers gave presentations: Dr Magdalena Jaś-Nowopolska, Daniel Mengeler (from Germany), Dr hab. Maciej Nyka, Professor, University of Gdańsk, and Dr Hanna Wolska (from Poland).

Dr Hanna Wolska pointed out that according to art. 22 of the Constitution of the Republic of Poland, any restriction of freedom of economic activity is permissible only by law and only by virtue of important public interest. This restriction can only have an exceptional character, as is clearly indicated by the double use of the word "only" in art. 22 of the Constitution of the Republic of Poland. In addition, the constitutional legislator's use of the "and" conjunction, makes a restriction of the freedom of business possible only by statutory means, and if it is justified by a "valid public interest." As regards the admissibility of the restriction of business activities during the COVID-19 epidemic, Dr Wolska drew attention to the judgment of the Opole Regional Administrative Court of 27 October 2020, in which the court found that none of the provisions of the Act of 5 December 2008 on the Prevention and Control of Human Infections and Communicable Diseases provides for the establishment of prohibitions on business activities in the regulation.

Dr. Magdalena Jaś-Nowopolska, referring to the constitutionally guaranteed freedom to exercise a profession (art. 12 of the German Basic Law) and the guarantee of ownership (art. 14 of the German Basic Law), mentioned the detailed regulations introduced by the German legislator in connection with the need to counter the COVID-19 pandemic. Several categories of legal measures which are meant to stop the spread of the SARS-CoV-2 coronavirus and the COVID-19 disease were referred to in presentations. Attention was drawn to the dilemma present in Germany: whether existing legal acts are a sufficient basis for the legal measures introduced and whether adequate instruments have been chosen.

Dr hab. Maciej Nyka, Professor of the University of Gdańsk, referred to the issue of the impact of climate protection law on the area of economic activity in Poland. In his presentation, the greatest importance was attached to art. 31 Section 3 of the Constitution of the Republic of Poland on the permissibility of restricting freedom of economic activity due to the necessity of environmental protection. At the same time, it was noted that the relationship between the issue of climate protection and the protection of human rights is complex. On the one hand, climate change itself poses a significant threat to human rights. From a different perspective, activities in the area of climate change mitigation, or adaptation to such changes, are also to some extent dangerous.

Referring to the above-mentioned issue, Daniel Mengeler presented the issue of the public duty to protect the climate in the light of current case law. The example given was the judgment of the Supreme Court of the Netherlands (Hoge Raad) of 20 December 2019, in which the Dutch state was obliged to reduce its gas emissions, in connection with art. 2 and art. 8 of the European Convention on Human Rights. In the case of environmentally harmful activities undertaken by private entities, attention was drawn to the practical complexity of balancing fundamental rights.

The debate ended with a concluding lecture by Dr hab. Anna Jurkowska-Zeidler, professor of the University of Gdańsk, who moderated the whole debate. Her presentation (statement) referred to the most important theses presented during the event and signalled directions of cooperation within the framework of academic projects planned for the future.