**equality /平等(Píng Děng)**

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| European Perspective | Prof. Thomas GERGEN | 17 Feb 2022 |

The term concerned belongs to the triad of liberty, equality, and social welfare that are intertwined with one another like communication pipes. The latter component of this triad certainly echoes the sentiment known by many from the annals of history of the French Revolution, namely “brotherhood” (*fraternité*). At present, we can speak of “neighborliness”, converting this social responsibility into “social welfare”.

**I. Classification**

Protection against attacks on one’s private sphere (especially one’s life, physical integrity, personal freedoms, right of property or inheritance, see key word “private property”) is supported by a history of liberal individualism and the notion rooted in (natural law) contractualism that certain pre-state rights are inalienable and involatile. In addition to these guarantees, there is also equality of treatment. This principle of justice currently plays an important role in democracy, and is and must be valid, independent from all the liberal and democratic tenets. We can examine universal suffrage, guaranteeing that every vote has equal value in political elections: Only so can democratic decision-making occur. Article 3 of the Basic Law for the General Republic of German (*Grundgesetz*) elevates equality of treatment to a fundamental right. The citizens’ sense of justice functions when decisions on the equality of treatment are made and measured “with the same gage”; ethically secured symmetry for the citizen is manifested only then, resulting in a balanced sense of justice and legal security, as merely formal equality is insufficient.

Striving for equality can ultimately lead to conflict with the free development of character and the “equality at the start of the race that quickly devolves into inequality” (Radbruch) if people are subjected to unequal starting conditions, a fact which competition law conversely seeks to remedy.

**II. The Guarantees of Freedom and Equality**

The relation between freedom and equality requires a fine rebalancing. The constitutionalist Leibholz offers his view: “Let us not forget that the inequality of strata created by liberty cause the value of liberty to appear problematic and that it can only be the deeper meaning of progressive political and social equalization to enable those who have become inhibited by liberty with the help of equality, …that those who have been disenfranchised by liberty once again attain liberty.” Justice should never be the subordinate of one principle; thus, the constitution is to be understood as a unit (Federal Constitutional Court (*Bundesverfassungsgericht*) 3, 225, 23, 98; previously: BVerfG 1, 14 on the basic principles of the constitution which are so fundamental, that they bind the constitutional legislator himself and, therefore, other constitutional provisions that do not have this fundamental status and/or infringe on it are void). Furthermore, all principles must be examined at the very least and brought into harmony and concordance, therein requiring that the criteria for the limitation of freedoms and justice to be passed be created and defined, keeping in pace with the times.

Constitutional rights can be divided into guarantees of liberty and equality. The former offers a general, comprehensive guarantee of free personal development but also encompasses special types of guarantees of liberty, such as freedom of religion, of opinion, and of occupation. The general principle of equality (as described in Art. 3 I GG) and the specific guarantees of equal rights (such as Art. 3 II, 33 I, II, 38 I S. 1 GG), and the legal prohibition of discrimination (Art. 3 III, 33 III GG) also comply in a similar relationship to one another.

Under the Constitution of the German Reich from 1919, the belief prevailed that a legal person generally could not be the bearer of constitutional rights as according to Art. 19 III GG: “The basic rights shall also apply to domestic legal persons to the extent that the nature of such rights permits.”

Those who abuse certain civil liberties, such as freedom of expression, freedom of teaching, etc., forfeit these constitutional rights according to Art. 18 S. 1 GG: “A right is forfeited if the person entitled has waited a long time to exercise the right (element of time), and the party liable could therefore assume to no longer carry out that which he intended to, and the present fulfilment the right or claim with consideration of all circumstances of the individual case is no longer feasible in good faith (element of circumstance)” (Federal Labor Court, decision dated 01.12.2004 – 7 case no. 198/04, cited according to juris, line 32). Human dignity or the right to equal treatment, on the other hand, are not forfeitable (Art. 1 and 3 GG). While the forfeiture should take the abused right from the person, it should not be considered a punishment that is inflicted upon said person.

The same applies to the limitation of constitutional rights, especially in regard to the general relationship of power: civil servants, soldiers, detainees as well as those who find themselves in an extraordinary relationship of power, such as primary and secondary school students (see e.g. current pandemic legislation), generally or temporarily have their rights curtailed; this curtailment, however, may never apply to human dignity or basic principle of equality.

**III. Equality in the Workplace and Individual Labor Law**

Thoroughly scoured, this field of law reveals diverse aspects of equality, equality of treatment, and equalization. Within supra-national law (especially EC law), we encounter Art. 45 of the Treaty on the Functioning of the EU (*Vertrag über die Arbeitsweise der Europäischen Union*) (movement for workers) and Art. 157 (wage equality). The intention of this legislative alignment leads to equal treatment within the EU.

According to Art. 3 GG, all persons are equal before the law. It is a tenet of the labor law that an employer may not arbitrarily treat comparable employees differently. This principle of equality is expressed in many legal standardizations as well as in the general principle of equal treatment within the labor law. Article 3 II GG incorporates a particular structuring of the principle of equality: Men and women are thereafter equal before the law, with all genders that are biologically recognized by jurisprudence for diversity reasons later incorporated. Freedom of religion and freedom of conscience are also granted equal treatment with regard vis-à-vis the structuring of one concrete right of freedom: Article 4 GG protects freedom of faith, of conscience as well as religious and ideological beliefs. For freedom of religion and freedom of conscience, the Federal Constitutional Court outlines that “this term particularly encompasses – **neutrality**, whether it concerns a religious belief or a non‑religious or secular ideology – not only the inner freedom to believe or not believe, to recognize a belief, to refuse to tergiversate from a long-held belief, and to turn to a different belief, but also the freedom of cult-like behavior, of advertising, of propaganda.”

In national constitutional law, positive and negative freedom of association are also treated equally: Article 9 para. 3 S. 1 GG guarantees the right to form associations to safeguard and improve working and economic conditions (freedom to form a coalition). It also guarantees the so-called position freedom of association, the right of the individual to form coalitions, to join them, and to maintain membership in them. Likewise, negative freedom of association is also protected, including the right of the individual to stay away from a coalition or withdraw from one. In accordance with this right, an agreement between an employer and a labor union that requires the employer to hire only union members would be unlawful.

As constitutional rights are the primary right of defense against the state, constitutional rights such as Art. 4 GG (freedom of religion and conscience), Art 5. GG (freedom of opinion), Art. 6 GG, Art. 1. GG, Art. 12 GG, and Art. 14 GG do not directly come into effect in individual employment relationships. Nonetheless, in accordance with the judgement of the Federal Constitutional Court, the constitutional rights take effect through the general clauses of the German Civil Code (*Bürgerliches Gesetzbuch*) (§§ 138, 157, 242, 315, 826) and, therefore, have a direct effect on the employment relationship. While the immediate third-party effect of fundamental rights is recognized today, it was harshly criticized a few years ago as an extreme intrusion into private law (see e.g. Diederichsen); still, judicature, including judicature of private law, considers the incorporation of constitutional rights as self-evident, especially with regards to human dignity and equality. According to the general principle of equal treatment within the labor law developed by Federal Labor Court (*Bundesarbeitsgericht*), an employer may not, without objective grounds, exclude individual employees from benefits that he generally affords to a group of employees, even if there is no legal obligation to do so. The establishment of groups also may not be arbitrary in this respect. This particularly includes fringe benefits such as bonuses or voluntary increase of actual renumeration in order to compensate for cost-of-living.

**IV. Compensation in the community of heirs**

Under the law, equality ultimately includes reconciliation in order to achieve equal treatment or justify unequal treatment. A look at the *societas hereditatis* can confirm this: Coheirs under the meaning of § 2032 BGB are only the actual heirs actually entitled in the line of succession; therefore persons who will not inherit on the grounds of disinheritance (§ 1938), disclaim (§ 1953), debarment from succession (§ 2344), or renunciation of inheritance (§ 2346) are not included. Through the Succession Equality Act of December 16, 1997 (Federal Law Gazette 1997 I 2968), the special provisions in §§ 1934a–1934e BGB were discarded without replacement. Upon the death of the father (and vice versa for the father and his descendants upon the death of a child) Illegitimate children and their descendants could also be considered legal heirs and members of a community of heirs, meaning they could sit at the heirs’ table as equals before the law.

In the event of multiple heirs, the interests of the creditors of the estate, those of the individual coheirs as well as the various affairs they have between one another may be conflicting. The creditors of the estate would like to be satisfied from the undivided estate so that they are not confronted with an army of defaulters once the recoverable assets have been divided up. Coheirs either push for the assets to be divided up as quickly as possible in order be able to dispose over the value of their allocation or to obtain the entirety of the estate for themselves e.g. owing to a strong family connection; the latter aspect can also be sensible from an economic standpoint. Within the community, there is the necessity that all members participate in the management; at the same time, the community may not be impeded by the special requests of a single heir. Insofar as individual coheirs are entitled to claims against the estate or equalization claim, their interests correspond to those of the creditors of the estate to a large extent.

It is the task of the legislator to manage the multiplicity in different constellations of interests, as this has great significance for the interpretation of legal provisions for a community of heirs – as well as for the entire system of regulations in the wake of an observed legal unity.

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