

Constitutional Standards, Working Time and Pharmacy Opening Hours: The FCC's Message to Managers and Law Makers

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[1] The First Senate of the *Bundesverfassungsgericht* (Federal Constitutional Court), in its decision from 16 January 2002, found one section of Germany's heavily debated *Ladenschlussgesetz* (LadschlG -- Shop Closing Act) to be unconstitutional.(1)

[2] The Shop Closing Act sets out a network of intricate, sometimes incoherent,(2) regulations regarding the business hours that shops and stores may keep in Germany. The base-line is established by § 3 of the Shop Closing Act,(3) which obligates shops and stores to close: (a) Sundays and holidays; (b) Mondays-Fridays before 6 a.m. and after 8 p.m.; (c) Saturdays before 6 a.m. and after 4 p.m.; (d) on the four consecutive Saturdays preceding December 24, before 6 a.m. and after 6 p.m.; and (e) on December 24, in the event that it is a workday, before 6 a.m. and after 2 p.m. Section 3.1 of the Shop Closing Act, itself, contains an exception to this base-line,(4) as do the remaining sections of Chapter Two of the Act (§§ 4-16) which provide exceptions for various locations, goods and types of shops. The Federal Constitutional Court, in previous decisions, has (approvingly) explained that the objects of the Shop Closing Act include the protection of employees in the retail sector from abusive work schedules and the protection of fair competition in the market.(5)

[3] The case that led to the Court's decision from 16 January 2002 was brought before the Court as a constitutional complaint (6) from a Pharmacist practicing and maintaining her Pharmacy in the Federal State Baden-Württemberg. The Complainant alleged that the provisions of the Shop Closing Act that touch specifically upon the work of Pharmacists constituted a violation of her right to occupational freedom established by Article 12.1 of the *Grundgesetz* (German Basic Law)(7) and the prohibition against discrimination established by Article 3.1 of the Basic Law.(8)

[4] The specific provisions at issue in the case involved the complex of exceptions to the base-line business hours, as established by § 3, applicable to Pharmacies. This complex of rules are based in §§ 14 and 4 of the Shop Closing Act. Section 14 of the Shop Closing Act provides a general exception to the base-line business hours, called the *Verkaufssonntage* (Shopping Sundays). Pursuant to this provision, and in association with special events like a fair, shops may remain open on four Sundays or holidays each year.(9) This opportunity is limited by a number of conditional provisions: (a) on the Saturday preceding one of these four, Shopping Sundays, the shop must close at 2 p.m.:(10) (b) the Federal State will designate which days constitute Shopping Sundays;(11) (c) the Shopping Sundays can be limited to specific locations, specific wares and specific types of business;(12)(d) the time-frame for the Shopping Sundays is also at the discretion of the Federal State but may not last longer than 5 hours, may not extend past 6 p.m. and may not conflict with the time of the main church service;(13) and (d) the business hours of pharmacies, established by § 4 of the LadschlG, are unaffected by the Shopping Sundays provisions.(14)

[5] Section 4 of the Shop Closing Act, unaffected by the provisions of § 14 involving Shopping Sundays, provides a general exception to the base-line business hours for pharmacies: (a) Pharmacies may do business every day of the week (including Saturdays, Sundays and holidays) during the base-line business hours (between 6 a.m. and 8 p.m.); (b) at those times when other shops would have to be closed, as well as on Sundays and holidays, pharmacies are only permitted to sell pharmaceuticals and personal-hygiene products;(16) and (c) pursuant to the regulation of a State agency and on a rotating basis, a number of pharmacies must remain closed during regular business hours, with those pharmacies that are closed being obliged to hang a sign in a shop window indicating the name and address of the nearest pharmacies that are open.(17)

[6] The Complainant claimed that her constitutional rights were violated after she received an administrative fine for keeping her pharmacy open on one of the four Sunday Shopping days (LadschlG § 14), at a time when her pharmacy had been ordered closed by State authorities pursuant to required, rotating closures (LadschlG § 4). The fine had been upheld by two State courts.(18) The Complainant pointed to the "discriminatory" inequality created by the complex of laws, disadvantaging the Complainant as against other business and particularly other pharmacies. The Complainant also argued that the complex of laws infringed upon the free exercise of her occupation.

[7] The Court granted the complaint with respect to the Complainant's Article 12 right to occupational freedom and in so doing found the § 14.4 LadschlG, referring as it does to § 4 LadschlG, to be incompatible with the Basic Law. The Court ordered the revocation of the provision from the law. The Court remained silent regarding the Complainant's anti-discrimination claim, based on Article 3 of the Basic Law. This result was likely necessitated by the general inapplicability of Article 3 to the Complainant's case, which neither demonstrated nor even alleged discriminatory

intent on the part of the legislature (or the agencies enforcing the law). Furthermore, the Complainant could not assert that the alleged discrimination had its basis in some impermissible categorization (e.g. race, sex or religion). Curiously, it was the plain injustice (inequality) of the situation, that the Complainant was forced by the law to close her pharmacy at a time when all other shops could be open, that made the case compelling.

[8] Instead, the Court was left with the proportionality analysis common to its consideration of Article 12 occupational freedom claims: "Unavoidable limitations of the basic rights which are based on the public well-being are subject to the requirement of proportionality. Infringements upon occupational freedom may not, therefore, go farther than required by the justifying public well-being." (19) The Court began its analysis by identifying the interests in the public well-being that are served by the Shop Closing Act, particularly its provisions regarding pharmacies, including: (a) ensuring the provision of pharmaceuticals to the public; (20) (b) guaranteeing, to the degree possible, that employees of pharmacies have the opportunity to enjoy free-time away from work, especially weekends; (21) and (c) encouragement of fair competition in the market. (22) In addition to these benefits, the respondents to the case argued that the Shop Closing Act also reduced the threat of inappropriate sales of pharmaceuticals or inappropriate advice, a phenomenon that might occur if employees of pharmacies were overworked and tired. The Court was not persuaded, however, that these interests outweighed the significance of the constitutional right to occupational freedom secured by Article 12 of the Basic Law, which in this case manifests itself in the right to do business (within the approved, general limits of the Shop Closing Act's base-line business hours) at the same time as others. The Court expressed special concern for the need to think like a business-person in exercising this choice and explicitly tied these business interests into the protected occupational freedom.

[9] In considerable contrast to the careful balancing done by the Court with regard to the service of the public good by the Shop Closing Act on the one hand and the Pharmacies' tasks of securing the distribution of medicine to the public on the other, the decisive thrust of the Court's reasoning might actually be seen in a mere quantitative assessment of the concrete opening hours in dispute. After opening up what could have led to a more general proportionality test of the Shop Closing Act as it possibly overlaps and eventually violates the public good foundations of the regulations pertaining to pharmacies (or, for that matter, any other store with likewise distributory services), the Court takes a short cut. It calculates that the constitutional complaint is, in fact, concerned with no more than *three additional working hours on a maximum of four weekends per annum*. (24) In a detailed, but speculative assessment of the the question whether or not these additional hours will be worked at under conditions that lie outside the otherwise applicable working time regulations, the Court concludes that there are, indeed, no reason to assume that these regulations will not be applied during the overtime openings of the pharmacy. The Court convincingly mobilizes the quantitative argument that average weekly opening time in a pharmacy is 80 hours and that this is no less than at least a 100% over what governing German working time is collectively agreed on – were these collective agreements to apply. Now, the Court assesses the wide range of flexible working time arrangements that will inevitably have to be found for the managers of a pharmacy with regard to filling the working time necessary for an 80 hour weekly opening schedule. Building on this reasoning, it is an easily found conclusion that the few hours that are now in dispute cannot cause a great concern for the time management that has to take place even without additional opening hours. Finally, the Court can thereby deduce that there are still a number of possibilities available that allow the managers to provide for opening hours while, at the same time, safeguarding an adequate standard of protection for the workers in the pharmacy – which will ultimately make it possible to maintain the highest safety levels as regards the sensibility of products traded.

[10] It is by quiet and cautious steps that an eventually loud finding is prepared by the Court. The apparently speculative assessment by the Court of the possibilities available to the managers of pharmacies to choose certain opening hours is an invitation to the managers to make use of this discretion and to do so within the confines set up by a mixture of working time regulations and public welfare considerations. The Court, after having found this discretion available to the owners and managers of pharmacies, cannot do otherwise than to strike down a statutory provision which unproportionally – i.e. with regard to the constitutional values at stake – limits this discretion in a such a way as to make the discretionary, flexible arrangement of working time impossible. This reasoning does place a great sense of autonomy on the private actors while it places a correlative degree of responsibility upon the law making body.

(1) BVerfG, 1 BvR 1236/99, 16 January 2002, <http://www.bundesverfassungsgericht.de> (visited on 28 February 2002). The Shop Closing Act was adopted on 28 November 1956 [see Bundesgesetzblatt – *German Official Bulletin* BGBl I 1956, p. 875], last amended on 29 October 2001 [BGBl I 2785], the statute is available, in German language, at: <http://jurcom5.juris.de/bundesrecht/ladschlg/index.html>.

(2) To make matters more confusing, the regulations are inter-mixed with state and local laws concerned with a range of specifics over which the Bundestag (federal legislature) has deferred competence to the *Länder* (Federal States)

and *Gemeinde* (municipalities).

(3) LadschIG § 3.1(1-5).

(4) Shops that sell baked goods may open at 5:30 a.m. LadschIG § 3.1 Sentence 2.

(5) *Supra*, note 1, Para. 12, *citing* BVerfGE 13, 237 (240); BVerfGE 1, 283 (297).

(6) Pursuant to Article 93.1(4a) of the *Grundgesetz* (German Basic Law), any person may lodge a constitutional complaint with the Constitutional Court "alleging that one of his basic rights . . . has been infringed by public authority." See, also, Article 90 of the *Bundesverfassungsgerichtsgesetz* (BVerfGG -- Federal Constitutional Court Act).

(7) Article 12.1 of the Basic Law reads: "All Germans shall have the right to freely choose their occupation or profession, their place of work, and their place of training. The practice of an occupation or profession may be regulated by or pursuant to a law."

(8) Article 3.1 of the Basic Law reads: "All persons shall be equal before the law."

(9) LadschIG § 14.1 Sentence 1.

(10) LadschIG § 14.1 Sentence 2.

(11) LadschIG § 14.1 Sentence 3.

(12) LadschIG § 14.2 Sentence 1.

(13) LadschIG § 14.2 Sentences 2 and 3.

(14) LadschIG § 14.4.

(15) LadschIG § 4.1 Sentence 1.

(16) LadschIG § 4.1 Sentence 2.

(17) LadschIG § 4.2 Sentences 1 and 2.

(18) Landesberufungsgerichts für Apotheker, LBG 2/99, 26 April 1999; Bezirksberufungsgerichts für Apotheker, BBG 3/98, 7 October 1998.

(19) *Supra*, note 1, Para. 34 (translation by the author), *citing* BVerfGE 19, 330 (336); BVerfGE 54, 301 (313); BVerfGE 101, 331 (347). See also, *The Constitutional Court's "Traditional Slaughter" Decision: The Muslims' Freedom of Faith and Germany's Freedom of Conscience*, 3 GERMAN LAW JOURNAL 2, Paras 14-16 (February 2002), <http://www.germanlawjournal.com> (search: slaughter) or, directly at http://www.germanlawjournal.com/current_issue.php?id=128

(20) *Supra*, note 1, Para. 36.

Id.

Id.

See, for an overview of recent policy arguments for and against the eternally disputed Shop Closing Act, e.g. <http://www.tu-dresden.de/jfoeffl4/OeRimWWW/OeRAktuell.html>.

Id., Para. 38.