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Free or Limited Dismissal by Enterprise Owners in Germany

—A Classic and Authoritative Discussion

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Multinational corporations pay great attention to the dismissal caused by enterprise owners (Arbeitgeberkündigung), especially in the fierce competition of market economy. In fact, the limits of dismissal rights of employers are also a key issue in human resources management. However, the importance of solving this problem reasonably is beyond the law itself. Once the rationality of the premises that are based on the legislation of dismissal limits is challenged, the solution drawn from deduction or induction be- comes an issue of ambiguity. This paper will discuss the concept of "dismissal", its differentiation with other related concepts, and the concept of dismissal limits from the perspective of German law. The study also discusses the following issue from the view upon legal theory: Are the dismissal's "premises" of leg- islation and judicatory rational? This study also sheds lights on the comparative law in some developing countries.

Keywords: Dismissal; Dismissal Limits; Labor Contract

Introduction

A well-known economist from England once said: "Labor is the mother of wealth, while land is the father of wealth" (William Petty, 1623-1678). Obviously, labor and land are very important in the business life. Multinational corporations pay great attention to the dismissal caused by enterprise owners (Arbeitgeberkündigung), especially in the fierce competition of market economy. In fact, the limits of dismissal rights of employers are also a key issue in human resources management. In order to precisely discuss the above issue, a brief clarification of the concept "dismissal" and its differentiation with other related concepts will be made.

The Concept of Dismissal by Employer

The Definition of Dismissal

A dismissal is a unilateral declaration of will that requires acceptance or approval. By this declaration, an employer (i.e., enterprise owner) terminates a legal labor relationship by dismissal regardless of whether the terms are announced in advance. According to the essence of the law, the dismissal right is a non-independent (unselbstständig) and unilateral right of formation (Gestaltungsrecht) (Plandt, 2003; Nikisch, Artur 1966; Molitor, 1955; Erman-Kühenhoff, 1981; Esser Josef & Schmidt Eike, 1984; Molitor, 1951; Nickel Egbert, 1975)[1]. Moreover, dismissal by an employer can be understood as an act of disposition (Verfügungsgeschäft). However, this kind of disposition is based on the condition that there is no more future delivery obligation or right of claim according to the legal labor relationship. Article 620 Section 2, Article 622 and Article 626 of the German Civil Code provide the legal foundations for dismissal[2].

The Classification of Dismissal

Dismissals can theoretically be divided into two major categories: normal and special. There are other non-normal types of dismissal, including partial (Teilkündigung) (Dornbusch, Fischermeier, Löwisch, 2013)[3], alteration (Änderung kündigung) (Löwisch, 2002; Dornbusch, Fischermeier, & Löwisch, 2013)[4], pre-prepared (Vorsorgliche Kündigung)[5], pressure-type (Druckkündigung) (Löwisch, 2002)[6] and suspicion (Verdachtkündig)

[1]Vgl. Plandt, Übbl 33 vor 104, Übertragung 413(5), Ausübg formfrei 31399 (17), Kommentar zum BGB, 72. Aufl., 2013; Hueck-Nipperdey, Lehrbuch des Arbeitsrechts, § 56 I, S. 543, 1963; auch Nikisch, Arthur, Arbeitsrecht, Bd. I, Allgemeine Lehren und Arbeitsvertragsrecht, 3. Aufl. Tübingen 1966 § 48 I 1, S. 687; Molitor, Kündigung des Arbeitsvertrags oder des Arbeitsverhältnisses? in: RdA 1955, S. 41 ff.; Vgl. Erman-Kühenhoff, Handkommentar zum Bürgerlichen Gesetzbuch, Bd. 1, §§ 1-873, 7.aufl. 1981, Rn. 21 zu § 620 BGB; Esser, Josef/Schmidt, Eike, Schuldrecht, Bd. 1 AT, 6. Aufl. 1984, S. 288; Molitor, Die Kündigung, 2. Aufl. 1951, S. 2; Nickel, Egbert, Abschied von der fristlosen Kündigung, ArbuR 1975, 99.
[2]Die § 621, 627 BGB sollen hier nicht behandelt werden, da dort keine Arbeitsverhältnisse geregelt sind, die dem Kündigungsschutz unterliegen.
[3]Vgl. Fischermeier, § 623 BGB, Rn.2, in Dornbusch/Fischermeier/Löwisch, Fachanwaltskommentar Arbeitsrecht, 5. Aufl., Luchterhand Verlag, 2013.
[4]Vgl. Löwisch, Arbeitsrecht, 6. Aufl., Werner Verlag 2002, Rn. 1273ff., 1393ff.; Fischermeier, § 626 BGB, Rn.191f., in Dornbusch/Fischermeier/Löwisch, Fachanwaltskommentar Arbeitsrecht, 5.Aufl., Luchterhand Verlag, 2013.
[5]Vgl.:Fan, On Advanced Construction of Legislation Space by German Judge-Discussion on Dismissals caused by Enterpriser, Macau University (Chinese), P.5, footnote 18, 2008.
[6]Vgl. Löwisch, Arbeitsrecht, 6.Aufl., Werner Verlag 2002, Rn. 1260ff.

(Löwisch, 2002)[7] dismissals.

The Similarities and Differences among Dismissals, Revocations and Changes of Circumstance

1) Similarities

In labor law, as unilateral juristic actions that require approval, both dismissal and revocation can terminate a legal labor relationship. A change of circumstance can also end a labor relationship, and has the same effect as Article 346 of the Civil Code[8] unless the choice of contract modification is acceptable (zumutbar). In addition, special dismissal is similar to revocation in that both require a reason. It would be meaningless to distinguish revocation from dismissal if the reason for the former was to prevent employers from suffering future damages (Ramm Thilo, 1955)[9]. It is less important logically to identify the similarities between dismissal, revocation and changes of circumstance, as they are all distinguishable from a legal standpoint.

2) Main Distinctions

a) Distinctions in Premise

Based on Articles 119, 120, 121, 122 and 123 of the German Civil Code, revocation requires a reason, and that reason should exist when a contract is signed. According to the causes for dismissal listed in Article 626 Section 1 of the Civil Code, the reason for special dismissal appears in the contract duration after the contract is signed (of course, the employee in a professional training relationship could be dismissed for reasons of particular importance after the probationary period. Please refer to §15 Abs. 2 Nr. 1 BBiG.) However, changes of circumstance are based on a legal loophole and still require a reason. Unlike revocation and dismissal, the reason for a change of circumstance usually does not arrive from the action of any contractual party, but because either the parties lacked the foundation for a labor relationship from the beginning or the foundation changed or was lost in the duration of the relationship. In other words, a fundamental barrier can arise between the law and reality.

b) Distinction in Scope

Revocation refers only to the declaration of the will of one contractual party (Willenserklärung). Its validity applies to an entire contract through Article 142 of the Civil Code, i.e., the entire contract is void ab initio. In contrast, dismissal refers to the whole labor relationship, which it makes void (das ganz Arbeitsverhältnis) when the dismissal comes into effect. A change of circumstance represents a revocation of a contract or dismissal caused by the changes to a situation (Palandt, 2013)[10]. This principle touches merely on the foundation of a contractual relationship, a foundation built on constant changes in politics, economy, legislation and judicature. Under some conditions, a change of circumstance could lead to the alteration (Vertragsanpassung) or termination of a contract. Under labor law, it leads to alteration dismissal (Änderungskündigung) or special dismissal (ausserordentliche Kündigung). However, it is a right of exception (Ausnahmerecht).

c) Distinctions in Legal Consequence

According to Article 142 of the Civil Code, a revocation declares one's will void, regardless of whether it has been submitted or has arrived. It also makes the contract void ab initio. The relevant articles of the German Federal Dismissal Protection Statute don't apply in cases of labor contract revocation. On the contrary, dismissal does not make a contract void ab initio, but makes it no longer effective when the dismissal comes into force. While the Dismissal Protection Statute could apply in the case of dismissal, employees other than pregnant and lying-in women would not be absolutely protected in the case of special dismissal.

If the declaration of will is revoked due to a mistake, trust damage compensation (Schadensersatz) could be claimed according to Article 122 of the Civil Code. For employees, this trust damage compensation may include a charge for the loss of work time, a charge for eviction or others[11]. If it accords with the condition of Article 123 of the Civil Code (fraud or coercion), the damage compensation could be dealt according to culpa in contrahendo (Fan Jianhong, 2004)[12], Article 823 of the Civil Code and Articles 263 and 253 of the Criminal Law, in addition to Article 826 of the Civil Code under some conditions (Erman-Kuehenhoff, 1975)[13]. However, in principle, the compensation caused by dismissal could only be claimed under Article 123 of the Civil Code, and it rarely relates to other Civil Code clauses (Of course, the compensation caused by a violation of a labor contract obligation is another matter.)

A change of circumstance would cause the alteration of a labor contract. It would result in the termination of a contract if the alteration was unacceptable (unzumutbar), and successive problems would be resolved according to Article 346 of the Civil Code. Since the concept of dismissal has been defined clearly now, it's necessary to further research on the social limits implied in dismissal.

The Limits Implied in the Concept of Dismissal

As a non-independent right of formation, is dismissal totally unlimited or limited? What is the proper intension, namely the limits of dismissal? These questions require further discussion, as they comprise the foundation for regulating dismissal-relevant legal problems.

Reasons for Unlimited Dismissal

1) Compulsory Appeal Function

An enterprise owner initiates dismissal as a necessary legal means. It is a compulsory appeal of a legal guarantee (Max W, 1922)[14] Without dismissal rights and corresponding laws, labor contracts would not be labor contracts in the market economy sense. The factors of production are divided into labor (Arbeit), land (Boden) and capital (Kapital) in classical national economics. Labor is always understood as a physical and mental activity that achieves an economic goal[15]. The system of labor usually contains four aspects: 1) the un-free system (Das System der Unfreiheit) 2) the system of the individual liberty (Das System der individuellen Freiheit) 3) the system limited by government authority (Das System der Gebundenheit an die

[7]Vgl. Löwisch, Arbeitsrecht, 6.Aufl., Werner Verlag 2002, Rn. 1259.

[8]End of the contract (ex nunc) or avoidance of contracht (ex tunc), vgl. BGHZ NJW 1967, 721; 1958, 785; JZ 1966, 409; WPM 1973, 752, 753.

[9]Vgl. Ramm, Thilo, Die Anfechtung des Arbeitsvertrags, zur Kritik und Neubegründung der Lehre vom Arbeitsverhältnis, 1955, S. 69 f.

[10]Palandt, § 242 Rn. 113-115(Begriff), Rn 116-12 (Abgrenzung), Kommentar zum BGB, 72.Aufl., 2013.

[11]Vgl. Grossmann/Schneider, Arbeitsrecht, S. 81 ff.

[12]Fan, Jianhong, Culpa in Contrahendo in Macau Civil Code, in: Journal of overseas legal studies, China Renda Social Sciences Information Center, No.12, 12/2004, Beijing 2004;

[13]Erman-Kuehenhoff, Handkommentar zum BGB, Bd. I, 6. Aufl. Münster 1975, § 611 Rn. 95

[14]Vgl. Weber, Max, Wirtschaft und Gesellschaft, S. 399.

[15]Vgl. Kleines Lexikon Wirtschaft, Bonn 1991, S. 11.

Staatsgewalt) and 4) the system limited by corporation (Das System der korporativen Gebundenheit). From an employer's perspective, dismissal is affected by the system of the individual liberty and the system limited by corporation. Both the labor and social systems are made more flexible by the dismissals (Kündigung) in labor and professional contracts[16]. In a market economic system, such a function requires the effects of both contracts and dismissals (Parsons, T. & Smelser, N., 1957)[17]. This could enhance the privatization degree and competitive capacity, and create more employment opportunities.

2) Self-Help Function

A dismissal represents the right of formation (right of possibility/right of capacity), and could lead to the establishment, alteration and termination of a legal relationship by virtue of the obligee's unilateral activity. It could also represent an independent right of formation, such as the right to acquire (Aneignungsrecht) and the un-independent right of formation. It mostly represents the right of formation stemming from an established contract, such as the right to fire, the revocation of a declaration of will and termination (Rücktritt). In principle, each party of a contract has the right of formation. Dismissal is an act of disposition and is directly related to the survival of the legal labor relationship. The extermination characteristic of the law (Dieser rechtsvernichtende Charakter) acts as a kind of self-help function (Selbsthilfefunktion). It is usually evidently reflected when an employees is dismissed, as the obligee could realize his wish through such a dismissal (Bötticher Eduard, 1964; Bötticher Eduard, 1963)[18]. However, it needs to be made clear whether the employee and employer's dismissals have the same powerful self-help function[19]. Because the protection principle stems from the "personal legal community" ("personenrechtlichen Gemeinschaft") or "personal relationship" ("Personenbezogenheit") and from the social state principle according to Article 20 of the Basic Law, the self-help function of the employer's dismissal is limited to some extent. This point is discussed further later in this book. However, in a market economy, an employer cannot give up this self-help instrument, especially when the employer is placed in an insufferably difficult position, such as when an employee does not behave faithfully according to a contract or when the urgent needs of an enterprise arise.

Reasons to Restrict Dismissal

1) The Legal Labor Relationship

The legal labor relationship comprises four different aspects.

a) The Characteristic of Debt

The legislators of the Civil Code (Austauschverhältnis) once considered the labor relationship as a relationship of debt exchange. The Civil Code's legislative mode accommodates this kind of understanding. Article 611 of the Civil Code is designed according to a mode similar to that of Articles 433, 535, 581 and 631. All of these articles relate to Article 320 in the system. If the labor contract (Arbeitsvertrag) is considered a category of the contract of services (Dienstvertrag), then a continuous labor relationship (Dauerschuldverhältnis) (V. Gierke, Otto, 1964)[20] may be entitled to the exchange characteristic (Austauschcharakter) (Nikisch Arthur, 1961; Müller Gerd, 1973)[21]. For instance, consider an employee who is traveling abroad and returns to work 2 days late because of a strike happening at a foreign airport. According to Article 326 Section 1, he would lose the claim for the 2 days of wages. Because the exchange relationship is an important component of the legal labor relationship, Article 320 of the Civil Code could apply in principle to this kind of bilateral contract. Considering only the debt characteristics of the labor relationship, we could say that such a relationship is based on the idea of an unlimited realization of self-determination (Idee der Selbstbestimmung) and the basic theory of freedom. Thus, it could be further concluded that the manners that balance private interests could be applied to balancing the intense relationships within a society to boost the development of the public interest (Reinhardt Rudolf, 1957)[22]. The self-balanced subject of a social system is built on a compound comprising contracts and the market, and the State acts only as a guarantor of the conditions for the market mechanism framework (Garant der Rahmenbedingungen des Marktmechanismus) (Hart Dieter, 1984)[23].

Because employers' sufficient freedom to dismiss employees is founded on this idea, restricting such a freedom has been considered unnecessary.

b) The Characteristic of *Lex Personalis*

Heinz Potthoff (Potthoff, 1922)[24] holds that an employer's payment activity on property is merely one form of personal relationship and should be absolutely distinguished from the property (Tilmann Tobias, 1965)[25]. Potthoff prefers considering the legal labor relationship as a kind of "organizational relationship of social law" ("sozialrechtliches Organisationsverhältnis") (Potthoff, 1922)[26]. As a kind of "social legal organizational relationship" or "personal relationship" ("personenrechtliche Verhältnis"), it cannot be founded on the relationship of debt exchange. Potthoff further holds that this kind of personal relationship relates (Korrelat) more with the employee's rights and the employer's duty of care (Fürsorgepflicht), and that for this reason the latter's freedom to dismiss must inevitably be limited.

c) Concurrence of Debt and Personal Relationships

Otto v. Gierke reveals that within the labor relationship, the employee must affiliate part of his personality with that of the employer's. That is why he considers the service contract as a contract with personal content (Dienstvertrag mit personenrechtlichem Inhalt), and believes that the "personal legal relationship" ("personenbezogenen Rechtsverhältnis") necessitates the contract exceeding the pure debt contract with a property

[16]Vgl. Hueck-Nipperdey, Grundriß, § 50 IV 1, S. 224). Soellner, ArbR, § 33 IV 3b, S. 224.

[17]Vgl. Parsons, Talcott/Smelser, Neil, Economy and Society, London 1957, S. 104.

[18]Bötticher, Eduard, Gestaltungsrecht und Unterwerfung im Privatrecht 1964, S. 2 f., auch Besinnung auf das Gestal tungsrecht und das Gestal tungsklagerecht, in: Festschrift für Hans Doelle, Bd. 1, 1963, S. 43.

[19]Vgl. die Ideen der §§ 227, 228 BGB.

[20]Vgl. V. Gierke, Otto, Dauernde Schuldverhältnisse, in: JherJb 1964, S. 355 ff.

[21]Vgl. Nikisch, Arthur, Arbeitsrecht, Bd. 1, Allgemeine Leh ren und Arbeitsvertragsrecht, 3. Aufl. Tübingen 1961, § 19 IV 2, S. 174; Müller, Gerd, Der Leistungsbegriff im Arbeitsverhältnis, Diss. Würzburg 1973, S. 315

[22]Vgl. Reinhardt, Rudolf, Die Vereinigung subjektiver und objektiver Gestaltungsrechte im Vertrag, in：FS für Walter Schmidt-Rimpler, Krlsruhe 1957, S. 115 ff. (S.124).

[23]Vgl. Hart, Dieter, Zur Konzeptionellen Entwicklung des Vertragsrechts, AG 1984, S. 66 ff. (S. 70).

[24]Vgl. Potthoff, Heinz, Ist das Arbeitsverhältnis ein Schuldverhältnis? PArbR IX Sp, 267 ff.; ders., Das Ringen um werdendes Recht, S. 24 f.

[25]Vgl. Tobias, Tilmann, Die Anfechtung des Arbeitsvertrags, Diss. Bonn 1965, S. 48 ff.

[26]Vgl. Potthoff, Heinz, Ist das Arbeitsverhältnis ein Schuldverhältnis? Arbeitsrecht 1922, S. 275 ff.

exchange characteristic (Gierke Otto von, 1914)[27]. In Farthmann's (Farthmann Friedhelm, 1960)[28] view, one of the labor relationship's decisive essences is that it includes not only property as its object, but also the employee's personality. Hereafter, the labor relationship represents the legal theory of social protection for an employee. Dismissal restriction could be accepted conditionally, as legally restricting an employer's freedom to dismiss an employee is a protection manner that complies with the foregoing legal theory.

d) Community Relationship of *Lex Personalis*

During the establishment of a labor relationship, an employer/employee relationship also emerges in which the former performs the duty of care while the latter undertakes the duty of fidelity. Because a labor contract represents a kind of community relationship of lex personalis (ein personenrechtliches Gemeinschaftsverhältnis), it is therefore a jointly established contract (ein gemeinschaftsbegründeter Vertrag) that while not a business contract is like an agreement under company law (Hueck-Nipperdey, 1963)[29]. Nikisch agrees with this opinion, and supplements it by observing that such a labor relationship is a status relationship (Statusverhältnis) that every community possesses and one that reflects care and fidelity (Nikisch Arthur, 1961)[30]. It is necessary to restrict an employer's freedom of dismissal because the notion of duty of care exceeds the consideration of labor devotion as purely a means of input production (Jobs Friedhelm, 1972)[31].

e) Critical Assessment

The aforementioned theory, which declares that the legal labor relationship is characterized by debt, has a defect in that it neglects the continuity of the labor relationship and the particularity that employees affiliate themselves with enterprises. In particular, it does not take into account that inequity between an employer and employee prevents the functions of the contractual freedom principle from operating efficiently. Otto v. Gierke reveals the faulty viewpoint that legislators adopt to solve this social problem, and attributes the mistake to the Civil Code legislators' unitary and Roman-law-style orientation (Menger, 1980; Kindermann, 1981)[32]. Consequently, the idea that an employer could dismiss employees freely without any limitation is not acceptable.

It is positive and respectful to human dignity to position the labor relationship as a legal relationship between humans, even under family and official law. However, this kind of attribution and its rules have thus far not obtained any support[33]. If this category of lex personalis is to be introduced to the labor relationship, it is necessary to study the value standard of the constitution more deeply. Wolf (Wolf, 1970[34]); and Wiedermann (Wiedemann Herbert, 1966)[35] object to this viewpoint. Wolf holds that the objective of a contract is neither a thing nor a person, but always the payment activity conducted by a person. As a matter of fact, the theory of starting completely from personal dignity is not always successful in every legal relationship. The "dignity is inviolable" principle is unfortunately not effective for every legal relationship in a market economy (Petra Kässer, 1979)[36]. In a context where lex personalis and the legal principles of a labor relationship have not specifically excluded labor contracts, a hypothetical decision does not make much sense in terms of its legal application. Because there is no such available personal law, the restriction of employers' freedom of dismissal is one remaining option.

Although the idea of a community of personal law would be very meaningful in promoting people's community-related tendencies, it does not prove that the opponent "division theory" (Eingliederungstheorie) is false. The "division theory" holds that the interests of employers and employees cannot match perfectly in the development of economic and ownership reforms. Therefore, the idea of viewing the labor relationship as a community relationship cannot be established in a specifically empirical sense. For instance, it not only disobeys the elements of community relations under Article 741 of the Civil Code, but also conflicts with the elements of cooperation under Article 741 (Söllner Alfred, 1990; Zöllner Wolfgang, 1983; Hanau Peter & Adomeit Klaus, 1986; Tobias Tilmann, 1965)[37]. For this reason, the labor relationship is a type of continuous legal relationship with personal characteristics, and it must consider the duty of care and fidelity to limit employers' freedom of dismissal.

The following conclusion can be made on the legal labor relationship. If one person receives orders from another, he is handing over his financial independence to an employer (Wiedemann Herbert, 1966)[38], and even gives up his own professional skills. He then takes his labor, abilities, imagination and wisdom into an enterprise, and establishes a living according to the rules made by a master. At the same time, the employee must constantly acquire the abilities and knowledge required by the enterprise to cater to the master's scope of economic activities (Aktionsradius des Arbeitgebers). Therefore, the protection of employers is somewhat equal to the domination of labor (Äquibalenz für die Verfügung der Arbeitskraft) (Wiedemann Herbert, 1966; Schwerdtner, 1970)[39]. The need to limit employers' freedom of dismissal arrives not only from the personal community (personenrechtlichen Gemeinschaft) theory, but also from personal characteristics (Personenbezogenheit).

2) Justifications Derived from Articles 20, 28 and 3 of the Basic Law

[27]Vgl. Gierke, Otto von, Die Wurzeln des Dienstvertrags, in: FS für Heinrich Brunner, München-Leipzig 1914, S. 68. chen-Leipzig 1914, S. 68.

[28]Vgl. Farthmann, Friedhelm, Der "personenrechtliche Charakterdes" Arbeitsverhältnisses, RdA 1960, S. 5 ff.

[29]Vgl. Hueck-Nipperdey, LB des Arbeitsrechts, Bd. 1, 7. Aufl. Berlin und Frankfurt 1963.

[30]Vgl. Nikisch, Arthur, Arbeitsrecht, Bd. 1, Allgemeine Lehren und Arbeitsvertragsrecht, 3. Aufl. Tübingen 1961,§ 5 I 3, S. 32.

[31]Jobs, Friedhelm, Die Bedeutung Otto von Gierkes für die Kennzeichnung des Arbeitsverhältnisses als personenrechtliches Gemeinschaftsverhältnis, ZfA 1972, S. 305 ff. (340 f.).

[32]Vgl. Menger, A., das bürgerliche Recht und die besitzlosen Klassen, 4. Aufl. 1980, dazu: Kindermann, Die Antwort des BGB auf die soziale Frage, Rechtstheorie 1981, 209.

[33]Vgl. Söllner, Alfred, Arbeitsrecht § 28 III.2.

[34]Vgl. Wolf, Ernst, Das Arbeitsverhältnis—Personenrechtliches Gemeinschaftsverhältnis oder Schuldverhältnis? Marburg 1970, S. 37 f.

[35]Vgl. Wiedemann, Herbert, Das Arbeitsverhältnis als Austausch-und Gemeinschaftsverhältnis, Karlsruhe 1966, S. 25 ff. und 36 ff.

[36]Vgl. die Formulierung von Petra Kässer, der fehlerhafte Arbeitsvertrag, Berlin 1979, S. 34.

[37]Vgl. die Formulierung von Söllner, Alfred, Grundriß des Arbeitsrechts, 10 Aufl. München 1990, § 28, S. 253; Zöllner, Wolfgang, Arbeitsrecht, 3. Aufl. München 1983, § 11, S. 130 ff.; Hanau, Peter/Adomeit, Klaus, Arbeitsrecht, 8. Aufl. Frankfurt/M. 1986, S. 157, Fn. 22.; Tobias, Tilmann, Die Anfechtung des Arbeitsvertrags, Diss. Bonn 1965, S. 21 ff.; Kässer, Petra, der fehlerhafte Arbeitsvertrag, S. 26-29.

[38]Vgl. Wiedemann, Herbert, Das Arbeitsverhältnis als Austausch-und Gemeinschaftsverhältnis, Karlsruhe 1966, S. 16 f.

[39]Vgl. Wiedermann, das Arbeitsverhältnis als Austausch-und Gemeinschaftsverhältnis,1966,S.16;Auch Schwerdtner, Fürsorgetheorie und Entgelttheorie im Recht der Arbeitsbedingungen, 1970, S.162.

The provisions under Article 20 Section 1, Article 28 Section 1 and Article 3 (equitable right) of the Basic Law lay the legal foundation for the protection of socially and economically weak groups. The new constitutional and administrative laws have noted and emphasized the inseparability of industrialization from citizens' increasing reliance on the country's care and protection (Hippel E. V., 1982)[40]. The principle of equality indicates that essential inequality requires different treatments. This principle is meaningful in judging which party involved in a contract should be protected better, as legal requirements differ according to contracting parties' different social positions and economic circumstances. This point is embodied clearly in the Dismissal Protection Statute.

Conclusion

Comparative law by far has been completely liberated from national restriction. To some extent, it has become a kind of Universaljurisprudenz (Max Rheinstein, 1987)[41]. It indicates how comparative law has its ups and downs from the philosophy of its transnational character. In fact, comparative law can help scholars and lawyers think critically, enhance their abilities of problem solving, and to extend their knowledge about the relativity of their national law (Konrad Zweigert & Hein Kotz, 2003)[42]. This study of dismissal and its limits in German law are one of the initial studies in the field of comparative functional law. Furthermore, this study can be surely useful for judges, lawyers, and citizens of some developing countries.

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[40]Vgl. Hippel, E. v., Der Schutz des Schwächeren, 1982, UTB 1203; Forsthoff, Lehrbuch des Verwaltungsrechts, 10. Aufl., S. 368.

[41]Vgl.: Max Rheinstein, Einführung in die Rechtsvergeichung 2. Aufl., München 1987,S.6.ff.

[42]See Einfuhrung in die Rechtsvergleichung, Konrad Zweigert and Hein Kötz, translated by Pan Han Dian/Mi Jian/Gao hongjun/He weifang, first edition, January 2003, Law Press. Page21 and Page 40.