Discharge and rent control in Germany

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Residential tenancy law in Gemany (*Wohnraummietrecht*) plays an important role, as tenants make up the majority of the population. Germany is second in Europe in this regard, just after Switzerland. Some 54% of people in Germany live in rented flats, and in big cities this number is even higher. For instance, in Berlin, 84% of the population are tenants.

The level of rented housing (*Mietbelastungsquote*) is constantly increasing. During the "*economic miracle*" (*Wirtschaftswunder*), in the 1950s and 1960s, Germans spent on average some 10% of their income on housing. In the 1980s, this figure increased to 20%. Today, it has reached an average of 30%, after a continuous increase since the global financial crisis of 2008. The property market has become an important financial investment, at the expense of housing access and affordability.

At the same time, the traditionally important public housing sector (*gemeinwohlorientierter Wohnungssektor*) in Germany has shrunk. Tax incentives encouraging social housing were abolished in the late 1980s, and large stocks of municipal housing were sold to the private sector. The number of social housing units, which was still as high as 4 million in the late 1980s in West Germany, has fallen to about 1 million nationwide today.

Germany has not had such a free housing market for more than a century, and yet – or precisely because of this – rents are rising and tenancy law no longer offers tenants a sufficient level of protection.

Historical Overview

From the 1920s onwards, Germany strongly regulated rents and provided a high level of protection against the termination of tenancies by landlords. While tenant protection remained in the "*DNA*" of the GDR until reunification, West Germany experimented with the liberalisation of tenancies and rents in the 1960s. However, due to the rapid rise in rents, the first social-liberal coalition administration in West Germany created the German social tenancy model in 1971, which is still in force today, albeit with some modifications.

In principle, parties can freely conclude a tenancy agreement, in compliance with the law, and this agreement cannot be terminated by the landlord as long as the tenant complies with their obligations. The "*notice for change of rent*" (Änderungskündigung), by which the tenant is required by

the landlord to agree on a higher rent, in order to comply with rent contract, is prohibited. Fixed-term leases are only possible within narrow limits.[1]

During the course of the lease, landlords can only increase the rent up to the "*local reference rent*" (*ortsübliche Vergleichsmiete*): they can ask for the rent that other landlords already charge for comparable dwellings. But in order to protect tenants, the increase cannot exceed 20% or 15%[2] over a three-year period.

Landlords can also modernise their dwellings and modify their equipment, and then pass on the cost of these improvements to the tenants (currently 8% per year without time limit), who cannot object to these improvements.[3] For a long time, this was one of the main ways to evict tenants, but since 2019, the distribution of these modernisation costs is limited to three or two euros per square meter and per month (depending on the initial rent) for a period of six years.[4]

In the last ten years, the legislator tried to come to terms with the development of local housing markets in which housing supply on reasonable terms is especially endangered. To achieve this goal, Germany has placed rent controls (*Mietpreisbremse*) on the re-letting[5] of dwellings in areas

1. § 575 of the Bürgerliches Gesetzbuch (BGB, German Civil Code): *"Temporary tenancy agreement*
(1) A tenancy agreement may be entered into for a fixed period if the landlord, after the expiry of the tenancy period
1. intends to use the premises as a dwelling for himself, members of his family or members of his household,
2. wants to remove the premises in a permissible manner or to alter or repair them in such a substantial way that the measures would be considerably impeded by a continuation of the tenancy, or
3. wishes to let the premises to a person obliged to provide services
and he informs the tenant in writing of the reason for the time limit at the time of conclusion of the contract. Otherwise, the tenancy shall be deemed to have been concluded for an indefinite period."

2. The federal law says 20% but gives the federal states the opportunity to change this to 15% if the sufficient supply of the population with rental housing on reasonable terms in a municipality or part of a municipality is particularly endangered.

3. § 555b of the BGB: *"Modernisation measures: Modernisation measures are structural changes:*
1. through which final energy is sustainably saved in relation to the rented property (energy modernisation),
2. through which non-renewable primary energy is sustainably saved or the climate is sustainably protected, unless an energy modernisation according to number 1 has already been carried out,
3. through which water consumption is sustainably reduced,
4. which sustainably increase the utility value of the rented property,
4a. by which the rented property is connected for the first time by means of optical fibre to a public network with very high capacity within the meaning of Section 3 No. 33 of the Telecommunications Act,
5. through which the general living conditions are permanently improved,
6. which are carried out due to circumstances for which the landlord is not responsible and which are not maintenance measures pursuant to § 555a, or
7. new living space is created."

4. § 559 of BGB: "*Increase in rent after modernisation measures*
(1) If the landlord has carried out modernisation measures within the meaning of § 555b (1), (3), (4), (5) or (6), he may increase the annual rent by 8% of the costs incurred for the accommodation. (...)
(2) Costs which would have been necessary for maintenance measures shall not be included in the costs incurred in accordance with paragraph 1; they shall, if necessary, be determined by means of an estimate. (...)
(3a). Where the annual rent is increased in accordance with paragraph 1, the monthly rent may not increase by more than EUR 3 per square metre of floor space over a period of six years, with the exception of increases in accordance with sections 558 or 560. By way of derogation from the first sentence, if the monthly rent before the increase is less than EUR 7 per square metre of living space, it may not be increased by more than EUR 2 per square metre of living space.
(4) An increase in rent shall be excluded if, even taking into account foreseeable future operating costs, it would cause the tenant to suffer hardship which cannot be justified even taking into account the legitimate interests of the landlord. The first sentence shall be disregarded if
1. the rented property has merely been restored to a condition which is generally customary, or
2. the modernisation measure has been carried out due to circumstances for which the lessor is not responsible.
(5) Circumstances that justify a hardship pursuant to subsection (4) first sentence shall only be taken into account if they were notified in good time pursuant to section 555d subsections 3 to 5. The provisions relating to the time limit referred to in the first sentence shall not apply if the actual rent increase exceeds the announced increase by more than 10 per cent.
(6) Any deviating agreement to the detriment of the tenant shall be ineffective."

5. This regulation therefore does not apply to first-time tenants.

under pressure[6]: landlords may not charge rents that exceed the reference rent by more than 10%. For areas where the supply of the population with housing on reasonable terms is particularly endangered, the state government there can enact regulations to protect against terminations in the case of conversions to condominium ownership and to lower the limit for rent increases.

Protection of tenants against dismissal by their landlord

An open-ended lease can be terminated by the tenant with three months' notice and by the landlord with three, six or nine months' notice, depending on the duration of the lease. However, landlords can only give notice if they can show a legitimate interest. Basically, there are two authorised grounds for giving notice to tenants who comply with their contract: "*personal need*" (*Eigenbedarf*) or the prevention of reasonable economic exploitation. Terminations for exploitation are few (although increasing), whereas terminations for personal need are increasing dramatically, especially in urban centres. In this case, landlords can give notice if they need the accommodation for themselves, their family members or members of their household.

The caselaw is very flexible regarding who can benefit from the repossession of the dwelling, and the use that will be made of it, favouring landlords: occasional visits of children living in a foreign city, the moving in of a nephew or an au pair are considered as valid reasons.

Tenants can object to the termination of their contract if it places them in a particularly difficult situation: the recognised reasons for a valid objection are mainly serious illness. Only if the tenant's interest in the accommodation outweighs the landlord's interest can tenants remain in the accommodation, for a limited period of time. The procedures often end in transactions (*Vergleich*): the tenants leave the premises and receive a more or less important financial compensation. Termination for personal reasons is often an excuse for evicting a tenant, but it is rarely possible to prove it.

Termination for non-compliance with the contract is possible without notice for late payment (however, a little more than one month's rent is sufficient), for unauthorised subletting, or for disturbing neighbours.

However, eviction is only possible through execution of a court order. Exceptions are very limited, and are only ordered by the judge following an application for interim measures by the tenant (*einstweiliger Rechtsschutz*). A case usually lasts four to six months. If tenants are ordered to vacate, they are usually given a period of up to one year to find a new accommodation.

6. § 556d of BGB: "*Amount of rent permissible at the start of the lease; power to issue a regulation*
(...) Areas with a tight housing market are defined as areas where the provision of sufficient rental accommodation for the population on reasonable terms in a community or part of a community is particularly threatened. This may be the case, for example, if:
1. rents increase significantly more than the national average,
2. the average rental costs of households are significantly higher than the national average,
3. the resident population is increasing without new housing being built to meet the need, or
4. there are few vacant dwellings while demand is high (...)"

Protection against conversion to joint ownership

In Germany, land and building ownership are not separated. However, it is possible to divide up land and buildings and then market "*portions*" of the property by selling the flats individually, thus creating a "*joint ownership*". This is a lucrative business where the sum of the income generated from the sale of individual flats is many times the original value of the entire building sold.

The occupants are then seriously endangered by the terminations that the new owners issue because of personal need. For this reason, when the building is split up into condominiums, purchasers are prohibited for three years from terminating the leases of tenants who had already been living in the property on grounds of personal needs. In tension areas, this period can rise up to 10 years. In addition, the property must be first offered for sale to the existing tenants.

Protection in rent setting

a. The local reference rent *(Ortsübliche Vergleichsmiete)*

The local reference rent is the core of German legislation. It consists of the rents agreed or contractually modified by contract during the last six years in the municipality or in comparable municipalities for dwellings of comparable type, size, equipment, characteristics, including energy, and location. Rents that have not been increased for more than six years are not taken into account in determining the reference rent. These are generally the lowest rents. Structurally, this system allows for an ongoing increase in rents, as the reference rent is regularly higher than the average rent recorded locally.

The reference rents are listed in an official list of rents, called the "*rent mirror*" (*Mietspiegel*), established by the municipalities. In order to be considered "*qualified*", they must be established according to recognised scientific principles[7]. This has to be recognised by the municipalities, landlords' and tenants' representatives. After much controversy about the quality and therefore the compulsory nature of official rent lists, the legislator has now specified the criteria for drawing up such lists and compels municipalities with more than 100,000 inhabitants to draw up such lists. They are accessible and can be obtained free of charge.

In the absence of a valid official list in a municipality, the local reference rent is determined by surveys, the costs of which are often disproportionate with the rent charged and the results of which are generally unfavourable to tenants.

Landlords can increase the rent every fifteen months within a double limit: the new rent requested must not exceed the local reference rent; the increase is limited to 20% over three years. In tension areas, this limit can be lowered to 15% by the Länder government. The current government coalition plans to lower it to 12%.

From a legal point of view, this is a contract amendment. If tenants refuse the amendment, landlords can go to the district court up to three months after the proposed increase. If the higher rent is approved by the Court the tenant will be obliged to agree to it and the rent rises. If the increase is not so approved the rent stays unchanged.

7. This work is usually carried out by specialised institutions through ad hoc surveys of landlords and tenants, differentiating between legal criteria such as location, equipment and age group.

b. Rent control *(Mietpreisbreme)*

In areas where the housing market is tight, the state government may provide that the rent may not exceed the local reference rent by more than 10%. However, there are many exceptions and restrictions. For example, the rent control does not apply to new dwellings or to first-time tenants after a complete modernisation. But, even if landlords have not comprehensively modernized, they can pass on the cost of the modernisation to the rent. Finally, landlords who were charging excessive rents before the regulation came into force were able to maintain those previous higher rents.

If a rent is too high, tenants can complain to their landlord and, if necessary, have the overvaluation established by the civil courts, demanding reimbursement of the overcharge.

Rent controls were introduced by the Great Coalition in 2015 and have been debated since then, which made their implementation very difficult. Since its confirmation of their validity by the Federal Constitutional Court in 2019[8], legal proceedings concerning rent control are increasing. However, non-compliance with the rent controls does not lead to public sanctions.

c. Excessive rent increases *(Mietpreisüberhöhung)*

Section 5 of the Wirtschaftskriminalgesetz (*WiStrG*) prohibits landlords from setting a rent that exceeds the local reference rent by more than 20 %. Any infringement of this rule can lead to a fine.

Under this provision, which dates back to the 1970s, the public administration could ensure the stability of the general level of rents. This was a simple and inexpensive procedure for tenants. At the same time, tenants could themselves claim back the amount that was charged above the statutory limit by their landlord.

In 2005, the Federal Court of Justice put an end to this practice and considerably narrowed the scope of this provision. According to the current caselaw of the Court, a proof that landlords took advantage of the tenants' distress when concluding the tenancy agreement is now required for Section 5 WiStrG to apply. Since then, this regulation has hardly played any role.

d. The rent ceiling *(Mietendeckel)* **in Berlin**

In Berlin, a city that has been affordable for tenants for decades, rents are rising at a much higher than average rate and are now approaching the levels of Hamburg, Frankfurt and Munich.

In 2019, a rent freeze (*Mietendeckel*) was introduced for five years with a maximum rent allowed on re-letting, based on 2013 rents: rents were capped at 20% above, under penalty of a fine for non-compliance by landlords. All tenants had to be informed by their landlord of this maximum allowed rent, which was much lower than the local reference rent. Rents were sometimes drastically reduced. The issue of rent and the idea that it could be too high was thus fully appreciated by the tenants. As expected, the freeze gave Berliners a break from the stress of daily rent hikes.

The regulation was adopted by the state of Berlin for the whole city. The adoption of this cap, which partly changes federal tenancy law, was considered as legally justified thanks to the legislative competence in the field of housing that was partially transferred to the Länder in 2006,

8. The decision in German: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2019/07/lk20190718_1bvl000118.html ; Its summary in English: https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2019/07/lk20190718_1bvl000118en.html.

following a reform of the German Constitution. However, in April 2021, the Federal Constitutional Court annulled the Berlin law on the grounds that rent legislation is an exclusive competence of the federal state, leaving no place for regulation at state level. This hopeful project thus failed, despite having the approval of over 70% of Berliners.

Housing subsidies

The level of rents in Germany is very difficult to bear for many people. Those with low incomes can apply for housing subsidies through the unemployment benefit (*Sozialgesetzbuch II*) and social assistance.

However, only reasonable rents are subsidized, i.e. rents for reasonably equipped dwellings in a simple residential area. If the actual rent exceeds the reasonable rent, it is not covered. If the rent increases during the course of the lease beyond the reasonable limit, tenants are asked to look for new accommodation within six months. However, there is hardly any low-cost housing left in the major cities and poor tenants are gradually being excluded.

People with a slightly higher income can claim for a housing allowance (*Wohngeld*). But it is so low and formalised that it cannot compensate for the lack of solvency.

Conclusion

As has been demonstrated above, the German Federal Court of Justice interprets tenancy law often at the expense of tenants. As it is politically difficult to reduce tenants' rights by changing the legislation, because of the high proportion of tenants, the conservative judiciary does it.

In practice, therefore, protections are insufficient, even more so when the market is under pressure, as it is today. They need to be strengthened to better protect low-income people.

The possibilities for the landlord to terminate the lease for personal need and for late payment (and other breaches of contract) should be further restricted. All rents should be included in the determination of the local reference rent, even the oldest and thus the lowest ones. The rent freeze (*Mietenstopp*) should be allowed in particularly stressed areas facing a housing crisis and §5 WiStrG – as originally applied – should be reactivated.

A rent ceiling should be introduced into federal law and not only in the federal states local legislation, with the possibility for the states or municipalities to place it where the tightness of the rental market justifies it. A reform along these lines would be simple. However, so far, local initiatives to this end have all failed in the Federal Council (*Bundesrat*).

At the same time, it is essential to strengthen the public housing sector. This is what the new federal government has announced. We are waiting to see whether and how this will be implemented. The prospect of nationalising large housing firms, as demanded by Berliners in a referendum (on 26 September 2021), is also hopeful.