



**SOCIAL RIGHTS, CONSTITUTIONALISM, AND THE  
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## **SOCIAL RIGHTS, CONSTITUTIONALISM, AND THE GERMAN SOCIAL STATE PRINCIPLE**

## **DIREITOS SOCIAIS, CONSTITUCIONALISMO, E O PRINCÍPIO DO ESTADO SOCIAL ALEMÃO**

JEFF KING<sup>1\*</sup>

Bidborough House  
38-50 Bidborough Street  
London  
WC1H 9BT  
jeff.king@ucl.ac.uk

**Abstract:** In this article I focus on the constitutional role of the German social state principle and the questions it generates for foreign jurists. Although the German Basic Law contains no set of social rights, the social state principle has invigorated readings of the basic rights constitutional provisions in a manner that invites comparison with, and raises the same competence questions, as the adjudication of social rights. On the other hand, the principle focuses on a general state duty to take responsibility for the ‘social ‘social question’, and take an active role in the society. Although the German Constitutional Court has found that the Basic Law is neutral as in what regards economic policy, the commitment to the social state principle does not appear neutral or apolitical under in the Anglo-American sense. There are two ways in which the social state principle seems to have had an important impact. Firstly, the German Constitutional Court has developed the principle as a basis for interpreting the Constitution, using it occasionally “in conjunction with” other basic rights provisions to provide affirmative entitlements. Secondly, there is a clear link between the social state principle and the major achievements of the legal protection of social rights in Germany: the Social Code. Finally, I underline the important role of the social state principle in a nation that takes seriously both the welfare state and the rule of law (Rechtstaat), and raise some questions concerning its relevance from the point of view of constitutional comparative law.

**Keywords:** Social Rights, Constitutionalism, *Sozialstaatprinzip*, German Social State Principle.

**Palavras-chave:** Direitos Sociais, constitucionalismo, princípio da socialidade,

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1. \* Senior Lecturer, Faculty of Laws, University College London (UCL). This article is an elaboration of themes presented at a conference given at the School of Law, University of Lisbon on 19 May 2014, and also subsequently delivered, in 2014, at the Max Planck Institute for Social Law (Munich), Humboldt University (Berlin), and the law faculties at the universities of Oxford, Glasgow, Edinburgh, and UCL. The commentators are too numerous to thank individually. I would in particular like to thank STEFAN THEIL for crucial and highly competent research assistance on a broad range of matters and especially in gathering and digesting the voluminous jurisprudence of the Federal Constitutional Court as well as other federal courts.

Princípio do Estado Social Alemão.

**Summary: I. Introduction – Roosevelt’s Vision and the Second Bill of Rights; II. The Modesty of Constitutional Social Rights; III. Background and Antecedents to the Sozialstaatsprinzip; A. The Weimar Republic; B. State (Land) Constitutions; IV. The Social Constitutional State in the Federal Basic Law of 1949; A. The Text of the Basic Law of 1949; B. The Influence of the Social State Principle on German Law; 1. Constitutional Law and Politics; 2. Codification and Doctrinal Elaboration of Social Law; V. Concluding Observations and Further Questions.**

## 1. Introduction – Roosevelt’s Vision And The Second Bill Of Rights

It is a delight and an honour to contribute to a conference hosted by the University of Lisbon’s School of Law, in the company of such speakers (both Portuguese and foreign), all while concentrating on a theme of the very utmost importance. ROOSEVELT’s vision of the second bill of rights provides an apt departure point for the study of social rights and constitutionalism. His Four Freedoms speech was an early expression of the idea that economic freedom – freedom from want in particular – is to be ranged in equal importance alongside other basic civil and political freedoms.<sup>2</sup> We also know that his wife, ELEANOR ROOSEVELT, played a crucial role in the political negotiation of what became the Universal Declaration of Human Rights – the first international legal document that proclaimed social rights as universal human rights, part of the common heritage of humankind.<sup>3</sup> Of equal interest, however, was that ROOSEVELT articulated these freedoms, characterized them in language reminiscent of liberal rights rhetoric, precisely at a time, or just after, he had been locked in a pitched battle with the courts of the land over which branch of government had constitutional authority to carry out the reforms ROOSEVELT felt necessary to give effect to the second bill of rights. ROOSEVELT certainly never envisaged his second bill of rights being protected by the American courts of law.

This story has been told elsewhere,<sup>4</sup> and the American experience is exceptional in so many ways that in searching for comparative lessons about law and welfare it is advisable to look elsewhere as well. In this article, I will focus on the constitutional role of the German social state principle (*Sozialstaatsprinzip*, article 20(1)<sup>o</sup>) and what questions the German experience generates for foreign jurists.<sup>5</sup> More specifically, I will explore the way such a principle fits into any broader understanding of social rights adjudication (Part II), some important

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2. The speech is examined in detail and in context in CASS R. SUNSTEIN, *The Second Bill of Rights*, New York, 2004.

3. Universal Declaration of Human Rights, Articles 22-28<sup>o</sup>, GA res. 217A (III), UN Doc A/810 at 71 (1948); MARY ANN GLENDON, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*, New York, 2001.

4. G EDWARD WHITE, *The Constitution and the New Deal*, Cambridge, Massachusetts, 2000; BRUCE ACKERMAN, *We the People: Transformations*, Cambridge, Massachusetts, 2000, Part 3. In administrative law, see REUEL E SCHILLER, “The Era of Deference: Courts, Expertise, and the Emergence of New Deal Administrative Law”, *Michigan Law Review*, 106, 2007, pp. 399ff.

5. Some key general introductions to the principle include KLAUS STERN, *Das Staatsrecht der Bundesrepublik Deutschland*, 2<sup>nd</sup> edition, Vol. 1, Munich, 1984, ch. 21; HANS F ZACHER, “Das Soziale Staatsziele”, in JOSEF ISENSEE and PAUL KIRSCHOF (eds), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*, Heidelberg, 1987, vol. 1, ch. 25; THEODOR MAUNZ and GÜNTER DÜRIG (eds), *Grundgesetz Kommentar*, Munich, 2011, Vol. III, pp. 295-326. More recently, see HANS M HEINIG, *Der Sozialstaat im Dienst der Freiheit. Zur Formel vom “sozialen” Staat in Art. 20 Abs. 1 GG*, Tübingen, 2008. See also the work of JOHN P THURN, *Welcher Sozialstaat?: Ideologie und Wissenschaftsverständnis in den Debatten der bundesdeutschen Staatsrechtslehre 1949-1990*, Tübingen, 2013.

German historical constitutional antecedents to the principle (Part III), and how such a principle is manifested in both the text of the 1949 Basic Law of Germany as well as the jurisprudence of the Federal Constitutional Court, with brief consideration of its impact on the field of social law (Part IV). I conclude with reflections on which areas of further research would be enlightening from the comparative perspective.

## **II. The Modesty Of Constitutional Social Rights**

Constitutional social rights have really come of age and their adjudication is a rapidly growing phenomenon around the world. In *Judging Social Rights*,<sup>6</sup> I argued that in countries that have the background political conditions prevailing in most of Europe today (the EU 15), the adoption of justiciable constitutional social rights can be a worthwhile way of protecting our basic social human rights. But there is some danger in submitting complex questions of social policy for judicial resolution, and we are in need of a detailed theory of judicial restraint to address a range of good objections to doing so. The book presents that theory, based around four key principles: democratic legitimacy, polycentricity, expertise and flexibility. The ultimate default position I argue for is that of judicial incrementalism: judges should ordinarily but not always take relatively small steps in advancing the protection of social rights, focusing their review on the political process of decision-making in relation to social welfare, being prepared to strike down particular decisions in that process, or extend the reach of social principles or provision, but not impose too much inflexibility on the system and being prepared to revisit past rulings if they turn out to promote dysfunctionality in the bureaucracy. I claim that this is the ‘default position’ because I think that the principles of restraint *normally* counsel incrementalism, but they do not always, and there are a range of situations where judges can go further – for instance when there is a clear failure of expertise, or the administration is itself acting inflexibly, there is a patent breakdown in institutional cooperation, or there is a need to spur the bureaucracy or even political process into action. I also argue that sometimes incrementalism can be too much – judges should not, in my view, strike down statutes in these countries unless the claimant belongs to a group that is particularly vulnerable to majoritarian bias or neglect. If one wonders whether that approach would have argued against the Portuguese Constitutional Court’s ultimate decision to set aside the austerity measure that removed entitlements to Christmas and vacation benefits in the Budget Law of 2012,<sup>7</sup> my view is that it does, because the beneficiaries of the social policy were not only not marginalized

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6. JEFF KING, *Judging Social Rights*, Cambridge, 2012.

7. Judgment of the Constitutional Court 353/12; Judgment of the Constitutional Court 396/11. I have benefitted greatly from the enlightening contextual analysis of these judgments contained in MIGUEL NOGUEIRA DE BRITO, “Putting Social Rights in Brackets? The Portuguese Experience with Welfare Challenges in Times of Crisis”, in CLAIRE KILPATRICK and BRUNO DE WITTE (eds), *Social Rights in Times of Crisis in the Eurozone: The Role of Fundamental Rights Challenges*, Florence, EUI Institute Working Paper, 2014, pp. 67-77 (available at <http://cadmus.eui.eu/handle/1814/31247>).

politically, but on some accounts are at a distinct political (clientelist) advantage within the Portuguese political system.<sup>8</sup> This says nothing about my view on the desirability of the social policy itself, I might add.

The conclusion that the judge's role ought to be incrementalist is one that, from the point of view of social policy writ-large, will ordinarily mean judicially enforced constitutional social rights will make small (but worthwhile) rather than revolutionary differences. That sounds like a rather flat conclusion – it is definitely rather modest from the legal point of view. One criticism of this type of approach is to say that it is only focused on process, and thus fails to protect the substance of human rights. Yet this criticism generates demand-style arguments for judicial review without contemplating the supply-side problems,<sup>9</sup> such as judicial errors, the disruption of social programmes, and regressive findings arising from the litigation of social policy questions. It fails to head the broader lesson of FRANKLIN DELANO ROOSEVELT's New Deal programme for giving effect to Freedom from Want. If one told Roosevelt that his appointees to the SC (like FELIX FRANKFURTER) should not defer too much on social policy, because otherwise nothing would happen, he would have been astounded. His administration was trying to do something, and it was the judges (and a conservative American Bar Association)<sup>10</sup> that slowed him down. And that is of course the lesson of the *Lochner* era, one noticed rather early in Europe.<sup>11</sup> So the critique therefore gives too little weight to the potential of damage, too few doctrinal structures to tame the power that a bill of social rights gives to the judiciary.

The German Basic Law contains no set of social rights as such, however the social state principle has invigorated readings of the basic rights provisions under Part I of the Basic Law in a manner that invites comparison with, and raises the same competence questions as, the adjudication of social rights. Yet it is at the same time a development that has largely remained within the incrementalist prescriptions advocated in *Judging Social Rights*. More importantly, the principle focuses on a general state duty to take responsibility for the 'social question,' and take an active role in the society. It is an experience that is worth exploring.

### III. Background And Antecedents To The *Sozialstaatsprinzip*

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8. See JOSE ANTONIO PEREIRINHA, MANUELA ARCANTO, AND FRANCISCO NUNES, "The Portuguese Welfare System: From a Corporative Regime to a European Welfare State", in *The Handbook of European Welfare Systems*, Oxford, 2009, pp. 398-414, at p. 399; MAURIZIO FERRERA, "The 'Southern' Model of Welfare State in Social Europe", *Journal of European Social Policy*, 6(1), 1996, pp. 17-37.

9. NEIL K KOMESAR, *Law's Limits: The Rule of Law and the Supply and Demand of Rights*, New York, 2001.

10. REUEL E SCHILLER, *The Era*, pp. 421-425.

11. ÉDOUARD LAMBERT, *Le Gouvernement des Juges*, Paris, 1921. See the review of the new edition by LUC HEUSCHLING in *Revue internationale de droit compare*, 4, 2007, p. 958 (where he observes "it is only today that this stigmatization of constitutional justice is losing its vigour") [my translation]. See further, HAROLD J LASKI, "Note by Professor Laski on the Judicial Interpretation of Statutes", Annex V to the Report of the Committee on Ministers' Powers (Donoughmore Committee), Cmd 4060/1932 (1932) pp. 135-6.

Remarkably, the meaning of the expression ‘social state’ in article 20° was not even considered, let alone debated, during the drafting of the German Basic Law of 1949.<sup>12</sup> This curious fact invites consideration of important German historical antecedents of both an historical and legally significant character.

#### A. The Weimar Republic

“Weimar” says DAVID DYZENHAUS in his book on constitutional thinking in that period, “was a failed experiment in democracy.”<sup>13</sup> But it was also an interesting if also ultimately unsuccessful experiment in economic and social constitutionalism. Founded after the armistice of Nov 1918, Weimar was shaped quite decisively by the Social Democratic Party of Germany (SPD) and its leader Friedrich Ebert, who was handed power after the war’s conclusion. In the drafting of the constitution, the SPD had the largest faction, and Christian conservatives were not far behind. The constitution that emerged embraced a sweep of civil and political rights, as well as a range of economic and social rights in Section 5 of the document. Yet the constitution did not only simply spell out rights in abstract form – it also gave concrete institutional specification to particular social policies. For instance, article 155° states that “[t]he owner of [land] is obliged to the community to cultivate and exploit the soil. Any increase in the value of the real estate which does not result from the investment of labour or capital has to be made utilizable to the community.” Article 165° proclaims that “[w]orkers and employees are called upon to participate, on an equal footing and in cooperation with the employers, in the regulation of wages and working conditions as well as in the economic development of productive forces.” Indeed, article 165° as a whole is essentially the model not only of co-determination (*Mitbestimmung*) in the workplace, but of the formal incorporation of labour representation into parliamentary social policy making.<sup>14</sup>

The various coalition governments in the Weimar Republic, which were the first to include the SPD in government, introduced the most radical advances in social provision in Germany history to that date. They comprised the reform of welfare provision and provision of a system that supplemented the fractured system of private social insurance societies, extending coverage quite widely; the expansion and consolidation of a ‘youth social law’ to deal with socio-economic challenges specific to youth; as well as a totally new and ambitious housing policy that, in implementation of article 155°’s obligation to secure “to all Germans... housing and an economic homestead in accordance with their needs,” saw the

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12. See HANS M HEINIG, *Der Sozialstaat*, pp. 38-39 (showing that it was not discussed in the Parlamentarische Rat and that a Communist proposal to declare the state was committed to the socialisation of the means of production was rejected without debate). See also HANS F ZACHER (trans. THOMAS DUNLOP), *Social Policy in the Federal Republic of Germany: The Constitution of the Social*, Baden-Baden, 2013, pp. 158-159.

13. DAVID DYZENHAUS, *Legality and Legitimacy: Carl Schmitt, Hans Kelsen and Hermann Heller in Weimar*, Oxford, 1997, p. 17. For an discussion of Weimar’s ongoing legal relevance, see CHRISTOPH GUSY (ed), *Weimars Lange Schatten – ‘Weimar’ als Argument nach 1945*, Baden Baden, 1994.

14. See GERHARD A RITTER, *Der Sozialstaat: Entstehung und Entwicklung im Internationalen Vergleich*, 3<sup>rd</sup> Edn, Munich, 2010, pp. 116, 121ff.

introduction of nation-wide rent control and legal protection of tenant interests (together with Rent Tribunals), as well as subsidies and regulation sponsoring the building of housing to make up the considerable post-war shortfall.<sup>15</sup> At the same time, all of these constitutional and even nearly all legislative social rights were not enforceable in the courts. A court found quite clearly in 1931 that the proper construction of the poor law measures pre-dating the Weimar Republic as well as the central consolidating provisions introduced during the Republic<sup>16</sup> showed “that the person in need of assistance never has a legally actionable claim against those obligated.”<sup>17</sup> This situation persisted until the new Federal Republic of Germany abolished it after the war. The weak position of the courts was not entirely uncharacteristic of constitutional law at the time, as CHRISTOPH MÖLLERS makes clear. Caselaw was virtually irrelevant to the rich discourse of law and the state in both Imperial and Weimar Germany.<sup>18</sup> The introduction of the role of the Federal Constitutional Court in the 1949 Basic Law as the protector of the constitution “narrowed...the influence of a conceptual constructive scholarly discipline of constitutional law (*Staatsrechtswissenschaft*).”<sup>19</sup>

There were many reasons why the Weimar Republic failed when the Nazis rose to power in 1933. But among the most important was the constant economic instability and crisis caused both by unsustainable reparations payments, and the global economic crisis in 1929-30. This raises an historical question of some importance for students of constitutionalism: were the economic and social provisions of the Weimar constitution part of the reason for its downfall? The question concerning the inherent instability of the Weimar constitutional arrangements was debated by a range of legal theorists and lawyers in and after the Weimar period (a number of which were left-liberal or socialist),<sup>20</sup> many of whom broadly thought the constitution embodied an inherent compromise between social forces such as capitalism and socialism. A more conventional explanation focuses on the role of macroeconomic instability during the Weimar period (especially the hyperinflation of 1921-1924 and the response to the global economic crisis of 1929), and the use of emergency powers to deal with it. The crushing impact of the terms of the Versailles treaty was something predicted by John MAYNARD KEYNES in his widely admired essay *The Economic Consequences of the Peace*.<sup>21</sup> FRIEDRICH EBERT used emergency powers almost

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15 See MICHAEL STOLLEIS (trans. THOMAS DUNLOP), *Origins of the German Welfare State: Social Policy in Germany to 1945*, Berlin, 2013, pp.98-114.

16 Esp. the Reich Law on the Responsibility to Provide Social Welfare Assistance of 24 February 1924, discussed in MICHAEL STOLLEIS, *Origins*, pp. 103-106.

17 MICHAEL STOLLEIS, *Origins*, p. 106.

18 CHRISTOPH MÖLLERS, *Der vermisste Leviathan: Staatstheorie in der Bundesrepublik*, Frankfurt am Main, 2008, p. 38. (“Administrative law cases were notably infrequent, and constitutional law problems virtually never came before the courts.”) [my translation].

19 CHRISTOPH MÖLLERS, *Der vermisste*, p. 39 [my translation].

20 See CHRIS THORNHILL, *Political Theory in Modern Germany: An Introduction*, Cambridge, 2000, chs. 3 and 4 for an introduction to these debates and the key positions situated in their political context.

21 London, 1921. For the detailed account of KEYNES’ participation at the Paris Peace Conference and drafting of the book, see ROBERT SKIDELSKY, *John Maynard Keynes: Volume One: Hopes Betrayed 1883-1920*, London, 1983, chs. 15 and 16.



constantly between 1919 and 1925 to deal with the effects of these conditions,<sup>22</sup> also the period during which Germany experienced hyperinflation.<sup>23</sup> Regarding the global financial crisis in 1929, far reaching emergency powers were used to implement an austerity budget under Chancellor HEINRICH BRÜNING in 1930, a budget that caused a sharp rise in public discontent and surge in support for both the National Socialist (Nazi) Party and the Communists, and reducing even further the influence of more moderate parties in the Reichstag.

An open question in this study is whether the ambitious social programme under the Weimar constitution contributed substantially to the economic instability that prompted the introduction of Brüning's austerity budget through emergency powers. This extremely important question of the history of constitutionalism is one that must be answered elsewhere.

### B. State (Land) Constitutions

There were a series of *Bundesland* (federal state) constitutions passed in 1946 and 1947 in the French and American zones (the British were not so fond of written constitutions).<sup>24</sup> Many of these constitutions remain in force until this day, though their precise legal significance is unclear, and their impact on policy seems slight. At any rate, two prominent economic features of this wave of constitution making were that there was a widespread recognition of a right to economic freedom – of a form of freedom of trade and occupation; and, on the other hand, a right of worker co-determination through work Councils. HANS ZACHER describes this trend thus: “A common feature was that the state constitutions spoke of a right of participation by workers and their union organization on the level of both the individual enterprise and above. But while the promise of co-determination above the enterprise level was nowhere realized, the path for influence by workers over their workplace was blazed at that time.”<sup>25</sup> This was done through the right of co-determination by the works councils – this usually meant that a supervisory board was established, it would have worker participation alongside of shareholder participation, and such work councils would have the right to representation in management decisions and rights to appoint management boards to actually run the company. The legal basis of worker co-determination in Germany both before and after the war is complex – beforehand, it was largely institutionalized in Weimar Germany. Afterwards, it was recognized in Land constitutions, promoted federally in an Allied Control Council Law (no.22), and later by the Federal Republic in laws enacted in the early and mid fifties and especially in 1976.<sup>26</sup> This model is said

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22 WILLIAM SCHEUERMANN, “The Economic State of Emergency”, *Cardozo Law Review*, 21, 2000, p. 1869 (a superb historical and theoretical overview); CLINTON ROSSITER, *Constitutional Dictatorship: Crisis Government in the Modern Democracies*, Princeton, 1948. The classic history of the period is HANS MOMMSEN, *From Weimar to Auschwitz*, Princeton, 1992.

23. For an interesting account of the use of emergency provisions, and of the Weimar model of semi-presidentialism, see CINDY SKACH, *Borrowing Constitutional Designs: Constitutional Law in Weimar Germany and the French Fifth Republic*, Princeton, 2005, chs. 2 & 3.

24. See HANS F ZACHER, *The Constitution*, pp. 132-146.

25. HANS F ZACHER, *The Constitution*, pp. 133-134.

26. HANS F ZACHER, *The Constitution*, pp. 133ff., 173-178, 232.

to have produced a very high degree of industrial peace in the German economy. Even so, it is still an arrangement subject to a strong degree of criticism on the far left as well as moderate right.<sup>27</sup>

There were also extensive catalogues of economic and social rights provisions in the *Länder* constitutions, though ANKE BRENNE found in a study of the phenomenon that they made little overall difference, and that courts have repeatedly refused to infuse the provisions with significant legal force.<sup>28</sup> In a comparative piece, PETER QUINT explores how after the process of German reunification, there was debate about whether the new *Länder* constitutions of the territories in the former German Democratic Republic should embrace fully justiciable social rights.<sup>29</sup> The result of the debate, which took place both prior to the decision of the former German Democratic Republic to join the West German Federal Republic as well as after in negotiating constitutional amendments for the new union, was a rather firm rejection of the revision of the German Basic Law to include even reference to social rights as state goals.<sup>30</sup> QUINT confirms also that the jurisprudence of the state constitutional courts, in the new *Bundeländer* he examines, has been almost exclusively one of deference to legislative determinations.<sup>31</sup>

Yet not all the social provisions of these constitutions are stated as abstract principles. They also include a range of firm rules. For example, of the Constitution of the Land of Hessen makes the 8 hour work day the legislative rule (article 31°), as well as minimum paid holiday of 12 days a year (article 38°); the self-government of the social insurance regime through the free election of associations (article 35°). More generally, we see many declarations or statements of what the role of the state is in relation to the economy: its role is to “oversee”, supervise, protect, promote, guide and guarantee. On the whole, we have a picture of the state as an active director of social policy in the economy. Perhaps most importantly, to describe the social functions of the state, most of these state constitutions used the expression social state “*Sozialstaat*”<sup>32</sup>

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27. See CHRIS THORNHILL, *Political*, ch. 3, esp FRANZ NEUMANN, on his critique of pluralism and corporatism.

28. ANKE BRENNE, *Soziale Grundrechte in den Landesverfassungen*, Frankfurt am Main, 2002. Her conclusion at 183 is rather gloomy: “Fundamental social rights cannot have effect on comprehensive demands for redistribution and provision in a state with a liberal overall order and market fundamentals, especially when they always are stated under the condition of ‘possible’, ie without the decision of the budgetary legislator on the financial resources available and are therefore at most ‘reserved rights’, though not as directly traceable subjective legal claims in court. It is not clear that they can be legal claims.” [my translation].

29. PETER QUINT, “The Constitutional Guarantees of Social Welfare in the Process of German Unification”, *American Journal of Comparative Law*, 47, 1999, p. 303.

30. PETER QUINT, “The Constitutional”, pp. 313-317.

31. PETER QUINT, “The Constitutional”, pp. 316-321.

32. HANS F ZACHER, *The Constitution*, p. 145 (ZACHER refers to this expression as the “common denominator” in the *Land* constitutions).

#### IV. The Social Constitutional State In The Federal Basic Law Of 1949

##### A. The Text of the Basic Law of 1949

Although the Constitutional Court has found that the Basic Law is neutral as regards economic policy,<sup>33</sup> the commitment to the social state and social law found in the constitution does not appear neutral or apolitical under the Anglo-American lense. It distinctly reflects a corporatist welfare system as described by GØSTA ESPING-ANDERSEN,<sup>34</sup> as well as a state skewed heavily away from classical liberalism or libertarianism.

Article 20(1)<sup>o</sup> statement that Germany is a “social federal republic” is repeated in article 23(1)<sup>o</sup> in respect of Germany’s involvement with the European Union, and in article 28(1)<sup>o</sup> in respect of the obligations of the *Bundesländer*. It is of great importance that article 20<sup>o</sup> is protected by the so-called ‘eternity clause’ (*Ewigkeitsklausel*) (article 79(3)<sup>o</sup>). That means it may not be amended by constitutional procedure; only revolution can change it. This has buttressed claims that the social state principle embedded in article 20<sup>o</sup> must be regarded as a “foundational constitutional decision for the social state, in the sense of an obligation to shape the social order more deeply and more widely.”<sup>35</sup>

There are at least three other ways, however, in which the text of the Basic Law reflects aspects of a social state. The first is the clear allocation of welfare competencies in the allocation of powers between the federal government and *Länder*. There is concurrent legislative jurisdiction in labour law, occupational health and safety, and employment agencies (article 74(12)<sup>o</sup>); public welfare (social assistance) (article 74(7)<sup>o</sup>); social security (article 74(12)<sup>o</sup>), civil service pensions and much else. Article 86<sup>o</sup> allows for federal corporations to be formed under public law, whereas article 87<sup>o</sup> provides for the creation of federal social insurance corporations (in my view a constitutional reflection of the corporatist system evident in German social policy). This articulation of competencies prevents conflict over jurisdictional competence. The second notable aspect is that the Basic Law provides for the jurisdiction of a Federal Social Court and a Federal Labour Court. In so doing, it institutionalized at the constitutional level the importance of social and labour law in the constitutional landscape. By contrast, Britain had a slow evolution and patchwork of administrative tribunals whose output was for the most part unpublished and in which there was no precedent or body of doctrinal law to apply.<sup>36</sup> It was not until the Tribunal, Courts and

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33. BVerfGE 50, 338.

34. GØSTA ESPING-ANDERSEN, *Welfare State Capitalism*, Princeton, 1990.

35. HANS PETER IPSEN, as quoted in JOHN P THURN, *Welcher*, p. 38 [my translation of “...die grundgesetzliche Entscheidung für den Sozialstaat im Sinne der Gestaltung der Sozialordnung zu vertiefen und zu verbreiten.”]

36. See TREVOR BUCK, “Precedent in Tribunals and the Development of Principles”, *Civil Justice Quarterly*, 25(4), 2006, p. 458, and UK Department for Constitutional Affairs, *Transforming Public Services: Complaints, Redress and Tribunals*, Cm 6243 (2004); see more generally

Enforcement Act 2007 that the tribunal judiciary were formally recognized as part of the judiciary and formally clothed with (the distinctly British conception of) constitutional judicial independence. The same is largely true in America, where it is Administrative Law Judges who apply the social security regime as well as other aspects of welfare law and regulation, are Article 1 rather than Article III judges and are appointed under the Administrative Procedure Act 1946.<sup>37</sup> In both these latter cases, there are appeals from these tribunals to generalist courts, which are removed from the minutiae of the complex statutory regimes,<sup>38</sup> and in which on some views there has been a tendency to insist on a more classical liberal posture of austerity and unwillingness to question employer or executive decisions.<sup>39</sup>

The third and most important reflection of a social constitutional state may be found in the basic rights provisions, found in Part I of the constitution. The very first article, on human dignity, declares it to be inviolable and that “to respect and protect it shall be the duty of every state authority.” Article 2° declares that “[e]very person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law.”, which on its own terms does not reflect a purely negative conception of liberty. Article 3° states that “[a]ll persons are equal before the law.” Article 6°, concerned with marriage, family and children, announces that “[e]very mother shall be entitled to the protection and care of the community,” and that “[c]hildren born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage.” Article 9(3)° guarantees the rights to form and join unions, and it restricts the capacity to use emergency powers to deal with industrial disputes. The provisions dealing with property are particularly interesting as well. The “inviolability of the home” (article 13°) is conceived of separately from the right to property (article 14°), which is also subject to a number of qualifications. The right to expropriate is assured, but also, in the property clause, there is also a provision that declares “Property entails obligations. Its use shall also serve the public good.” Interestingly, this right to property has in some cases been interpreted in a manner that has made it itself a source of rights in the welfare state, not dissimilar to the theory of ‘new property’ advocated by CHARLES REICH in the US context.<sup>40</sup> For instance,

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the superb overview and comparative analysis of the tribunal systems in various countries in PETER CANE, *Administrative Tribunals and Adjudication*, Oxford, 2009.

37. 5 US Code § 3105 (‘Appointment of Administrative Law Judges’).

38. *Cooke v. Secretary of State for Social Security* [2002] 2 All ER 279 (English Court of Appeal) advocated more deference to social security tribunal findings, a somewhat novel development.

39. One example is the ‘range of reasonable responses’ line of jurisprudence in UK employment law, which accords more deference to the employer’s decision than the specialised tribunals below initially sought to give. See *British Leyland (UK) Ltd. v Swift* [1981] Industrial Relations Law Reports 91, 1.1.1981 (Court of Appeal).

40. CHARLES; IALSTAATPRINZIP SOCIAL RIGHTS, ERCURSO REICH, “The New Property”, *Yale Law Journal*, 73, 1964, p. 732; see also CHARLES; IALSTAATPRINZIP SOCIAL RIGHTS, ERCURSO REICH, “Individual Rights and Social Welfare: The Emerging Legal Issues”, *Yale Law Journal*, 74, 1965, p. 1245.

the Court has held repeatedly that certain social insurance and other social benefits are to be regarded as ‘property’ under Article 14° and are entitled to constitutional protection as such.<sup>41</sup> In another case, the Court found that a tenant’s rental contract for an apartment generated a constitutionally protected property interest. Given that most Germans were effectively ‘forced’ (*gezwungen*) to live in rental accommodation (given the paucity of owner-occupied living arrangements in Germany), and the centrality of accommodation to personal integrity, the development of one’s personality, and securing material conditions for existence, the Court found the rationale for the protection of property justified the recognition of the tenant’s interest as property as well.<sup>42</sup> Article 15°, furthermore, also concerns the role of property and certainly recognizes the role of the state in regulation thereof. It is what is commonly called the ‘socialisation clause’, which states that “[l]and, natural resources and means of production may for the purpose of socialisation be transferred to public ownership or other forms of public enterprise by a law that determines the nature and extent of compensation.” Essentially, this provision assures that nationalization of private industry remains a distinct possibility that the constitution should not obstruct.

Collectively, these provisions suggest that there is a limited yet nonetheless clear notion of a constitutional social state reflected in the Basic Law of Germany. The outlines are vague at points, and the Weimar model was not followed. But that it is concerned with far more than the ‘freedom to be left alone’ is also patent.

### *B. The Influence of the Social State Principle on German Law*

There have been well over one hundred articles and books written in Germany on the *Sozialstaatsprinzip*, even if many German lawyers are not too familiar with the idea.<sup>43</sup> It has been broadly debated within mainstream German public law scholarship, where it has received a mixed reception particularly in the years when conservative thinking was dominant in the core of the profession.<sup>44</sup> I want here to focus on two distinct ways in which the social state principle appears to have had an important and interesting impact.

#### *1. Constitutional Law and Politics*

Most German constitutional scholars know the *Sozialstaatsprinzip* as a legal

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41. 53 BVerfGE 257 (1980); 72 BVerfGE 9 (1986). The protection is predominantly procedural and does not lock in benefit rates or prevent reform.

42. BVerfGE 1 (1993).

43. The introductions mentioned in note 4 above are guides to the extensive literature, and especially KLAUS STERN’s work is a fairly comprehensive guide to the pre 1984 literature.

44. A superb account of many of these debates can be found in JOHN P THURN, *Welcher*. THURN’s ultimate conclusion is that the idea had a largely hostile reception in the meetings of the *Vereinigung der Deutscher Staatsrechtler* (Association of German State Law Scholars), an organization that was both central in the profession, but almost dominated by former Nazis in the early post-war period when the debate was at a critical stage. At pp. 35-85, THURN analyses the ABENDROTH/FORSTHOFF debate on the nature of the social state principle, situated in the broader context of state law thinking in the quite conservative Association at the time. See further, in ERNST FORSTHOFF, *Rechtsstaatlichkeit und Sozialstaatlichkeit*, Darnstadt, 1968 (containing contributions from FORSTHOFF, ABENDROTH, BACHOFF, IPSEN and a number of others).

concept that is recognized by the Constitutional Court. Many believe it to be fairly marginal in German constitutional law. Whether by German standards it is or not, it has been referred in over 120 reported decisions of the Constitutional Court since the founding of the Federal Republic in 1949.<sup>45</sup> In its first decade, the court found that the commitment to the social state is a basis for interpreting the constitution,<sup>46</sup> that it is superior to and not limited by any alleged ‘free market economy’ principle,<sup>47</sup> that it is a ‘guiding principle of the state’ (*leitendes Prinzip, Staatsziel*),<sup>48</sup> and, especially, that it is ‘directly applicable law’.<sup>49</sup> In 1958, the Court struck down the first law by reference to the principle. In measures that limited the remuneration of civil servants, the court found that the social state principle demands adequate remuneration for civil servants ‘to ensure their legal and economic independence so that they may carry out their primary function of a stable and apolitical administration of the state.’<sup>50</sup> This decision was based on the interpretation of article 33(5), which states that ‘(5) The law governing the public service shall be regulated and developed with due regard to the traditional principles of the professional civil service,’ read in conjunction with the social state principle.

Following on from such foundational decisions, one can see the content of the social state principle develop in the jurisprudence of the court and gradually take on the following features:

1. It is a genuine principle of law, not a hortatory or empty declaration, and it commits the state to positive social activity;
2. It obligates the state to provide for, and to shape, a just social order, compensating for inequalities (shaping principle);<sup>51</sup>
3. The constitutional duty is chiefly to be concretised and realised by the lawmaker, and in this activity the Federal Constitutional Court will give it a wide margin of discretion with respect both the evaluation of social

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45. In a composite index, my research assistant Mr. STEFAN THEIL and I have identified 134 decisions mostly reported in the official reports of the Federal Constitutional Court, namely, the *Entscheidungen des Bundesverfassungsgerichts* (‘BVerfGE’), and a number of others not included in the official law report but available on the Court’s website. The quotations that follow are translations of the German original carried out by STEFAN THEIL.

46. BVerfGE 1, 97 (105) (1951). All references are to the official reports of the Federal Constitutional Court, as outlined in the previous footnote.

47. BVerfGE 4, 7 (17f) (1954).

48. BVerfGE 5, 85 (206) (decision concerning the banning of the Communist Party of Germany (KPD)).

49. BVerfGE 6, 32 (41) (1957). This statement, though verbatim translation, requires significant qualification that will be elaborated below.

50. BVerfGE 8, 1 (16f).

51. ANDREAS VOSSKUHL, “Der Sozialstaat in der Rechtsprechung des BVerfG”, *Die Sozialgerichtsbarkeit*, 4, 2011, pp. 181-186. See esp. 183: (The state is “verfassungsrechtlich zu sozialer Aktivität ... verpflichtet”) and elsewhere “bekenntnis zum Sozialstaat”. BVerfGE 1, 97 (105). VOSSKUHL speaks of an “Auftrag an den Gesetzgeber zur Sozialgestaltung entscheidungstragende Bedeutung.” (183).

conditions and design of remedies (margin of appreciation principle);<sup>52</sup>

4. The substance of welfare state delivery in Germany is quite conditioned by its historical development, and the SSP does not ossify these precise structures by elevating them to the constitutional level;<sup>53</sup>

5. The SSP is a principle that limits the exercise of other rights, both non-constitutional market freedoms, and constitutional/basic rights outlined in Part I of the Basic Law;<sup>54</sup> (limitation principle)

6. The SSP mandates special treatment for economically weak persons, primarily as a shield against constitutional challenges to such privileges;<sup>55</sup>

7. Generally, individual or ‘subjective’ rights are not directly derived from the SSP.<sup>56</sup> The social state principle is, however, occasionally used ‘in conjunction with’ (*in Verbindung mit*) other basic rights provisions to provide affirmative entitlements – this is especially the case with the right to human dignity and a dignified subsistence minimum (*menschenwürdiges Existenzminimum*) (article 1<sup>o</sup>); the right to equal treatment and equal opportunity (*Chancengleichheit*, article 3<sup>o</sup>); the right to liberty or factual freedom (*faktische Freiheit*) (article 2<sup>o</sup>).<sup>57</sup>

Although the significance of the social state principle is multi-layered, I will focus here on only three key aspects of this jurisprudence. The first is the obligation to shape the social order (the shaping principle) so as to protect the economically disadvantaged. It may at first appear to be an empty rhetorical statement, and it is often coupled with the claim that it is for the legislator rather than court to determine the shape of the social benefits system. Yet there is also evidence that this constitutional obligation has been the subject of some political consideration, especially in the 1960s. The Federal Chancellor WILLY BRANDT, and his ‘social liberal’ coalition government of the SPD governing in coalition with the Free Democrat Party (FDP) (1969-1982), made ample use of the concept and frequent reference to the constitution when outlining and justifying their programme.<sup>58</sup>

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52. BVerfGE 36, 383 (393) (1974); BVerfGE 51, 115 (125) (1979); BVerfGE 78, 104 (117f.) (1988).

53. This is most evident as a recurring theme in the scholarship of the highly influential HANS F ZACHER, “Das Soziale”.

54. As outlined further below.

55. BVerfGE 13, 331 (347) (1962) (in tax law); BVerfGE 13, 248 (259) (1961) and BVerfGE 14, 30 (33) (1962) (in receipt of benefits).

56. HANS M HEINIG, adds to this claim, “even when read in conjunction with other basic rights”, in his “The political and the Basic Law’s Sozialstaat Principle – Perspectives from Constitutional Law and Theory”, *German Law Journal*, 12, 2011, p. 1887. However there are several cases showing otherwise and this claim may be regarded as misleading if read strongly. A different formulation can be found in BVerfGE 84, 90 (125) (The social state principle typically does not grant claims to benefits, these require legislation).

57. See the discussion in ANDREAS VOSSKUHL, “Der Sozialstaat”. VOSSKUHL is the President of the Federal Constitutional Court at the time this article was written.

58. WILLY BRANDT (ARNOLD HARTTUNG (ed)), *Zum Sozialen Rechtsstaat: Reden und Dokumente*,

The second area of interest is in the role of the social state principle in justifying the limitation or balancing of rights. Such can be seen in the challenge by employers to the Worker Co-Determination Law of 1976, a federal law which guaranteed worker representation and worker managerial rights in private enterprises with more than 2000 employees.<sup>59</sup> It was challenged by firms and employers' associations as a violation of the right to property.<sup>60</sup> The Federal Constitutional Court rejected the challenge, relying in part on the social state principle, and chiefly on the need to show restraint in adjudicating economic policy. DONALD KOMMERS, an important translator and conveyor of German Jurisprudence to the Anglophone world, notes that the social state principle has been used this way a number of times.<sup>61</sup> My own research also confirms this conclusion, for the use of the principle as 'limiting principle' (*Beschränkungsprinzip*) has been in evidenced many times over several decades.<sup>62</sup>

The third area is using the principle in conjunction with other rights. Essentially, there are a range of cases maintaining that the right to personal liberty must be read to include factual freedom (*faktische Freiheit*);<sup>63</sup> that the right to equal

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Berlin, 1983, esp. pp. 20, 31-35, and also 114, 116-117 among others. The very title of this work (loosely "Toward the Social Constitutional State: Speeches and Documents"), which BRANDT approved of, gives some indication of the purchase of this concept in political discourse. It is not evident that the *Sozialstaatsprinzip* itself played any strong partisan role in national politics, as the basic (and vague) principles affirmed by the Constitutional Court were not fundamentally opposed to the party policy of any of the leading political parties in Germany during the post-war period. The Christian Democratic Party (CDU) has generally supported the elaboration of Germany's social state, whereas the liberal oriented party (FDP) was the junior partner in the 'Social-liberal coalition' (*Sozialliberale Koalition*) with the Social Democratic Party (SPD) from 1969-1982, during which the key reforms were introduced by Brandt and others. Certain conservative legal scholars also defended a robust reading of the social state principle in the early debates at the *Vereinigung der Deutschen Staatsrechtler*: JOHN P THURN, *Welcher*, at pp. 38ff on HANS PETER IBSEN, whose conservative defence of the principle he contrasts with the socialist position of WOLFGANG ABENDROTH at p. 46.

59. 50 BVerfGE 290 (1979).

60. The provisions of the 1976 law that were challenged included: (§ 1 (Scope of application to stock corporation, joint stock company, company with limited liability, etc. and who have more than 2000 employees); § 7 (Board of Directors required to have equal representatives from owners and employees, which may be limited under certain conditions); § 27 (Chairman of the Board of Directors requires two thirds majority for election in first round, then simple majority); § 29 (Votes; require simple majority, unless something else is prescribed; privilege for chairman in case of deadlock); § 31 (Appointment of members); § 33 (Working director).

61. DONALD KOMMERS, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 2<sup>nd</sup> edn, Duke, 1997, pp. 241-242.

62. See, for some of many, BVerfGE 21, 117 (130) (1967) (SSP justifies privileged access to housing for those in need); BVerfGE 21, 245 (251) (1967) (monopoly of state employment agency to facilitate jobs for unemployed justified by SSP which can restrict other fundamental rights); BVerfGE 27, 111 (131) (1969) (the SSP mandates a social tax policy and thus justifies taxing capital gains from the sale of shares in corporation); BVerfGE 29, 221 (235) (1970) (mandatory membership for some persons in pension scheme allowable, as SSP may justify limits to other fundamental rights); BVerfGE 32, 333 (339); BVerfGE 89, 365 (377) (1994) (The social state principle does not require a single, unitary statutory health insurance); BVerfGE 103, 197 (221 ff.) (2001) (mandate requiring privately health insured citizens to buy and maintain private nursing care insurance is a justified limitation of the right to equality under art. 2(1) having regard to the SSP).

63. BVerfGE 115, 25 (41 ff.) (2005) (Denying a terminally ill or high risk patient (in the



treatment must be read to include equality of opportunity (*Chancengleichheit*).<sup>64</sup> In a recent case, to take one example, the Court found that a state higher education law that required tuition fees from students not residing in the state was unconstitutional as a violation of this principle.<sup>65</sup> The most noteworthy development under this rubric is, nevertheless, the recognition of a right to a dignified existential minimum.<sup>66</sup> Although this is often stated by the Court as a core obligation (*Kerngehalt*), and without qualification that the German state must secure an existential minimum to all persons in Germany, in reality the jurisprudence is a bit more subtle. The President of the Federal Constitutional Court at the time of writing, Justice ANDREAS VOSSKUHLE, for instance, subdivides the cases on the Federal Constitutional Court between the “procedural core obligation” (*prozeduraler Kerngehalte*) and the “material core obligation” (*materieller Kerngehalt*).<sup>67</sup>

As to the procedural core obligation, the Court’s jurisprudence on the *Existenzminimum* doctrine is seen in the well known *Hartz IV* case,<sup>68</sup> where it found the 2004/2005 law giving effect to the Hartz Commission’s welfare reform proposals to be unconstitutional. The reform merged long-term unemployment assistance benefits with social assistance benefits, by replacing both with a single, means-tested basic provision for employable persons and those living with them. The scheme is relatively straightforward. When a person becomes unemployed, she becomes eligible for Unemployment Benefit I (*Arbeitslosengeld I* (ALG I)) – which is a set percentage of one’s former income (usually two thirds), topped up by social assistance if it sinks below the existential minimum. This lasts for one year. Then she goes onto Unemployment Benefit II (*Arbeitslosengeld II* (ALG II)), and this is now the low benefit under consideration – it is colloquially known as *Hartz IV* in Germany. The reform established a standard monthly ALG II benefit level of 345 (the “Standard Benefit”), together with some social allowance for family dependents such as children.

There were three important holdings in the case, but for simplicity’s sake I will

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statutory health insurance) access to generally accepted medical treatment when there is a sufficient chance at recovery or positive development in the illness is unconstitutional as it breaches the right to liberty in conjunction with the SSP); see further, ANDREAS VOSSKUHLE, “Der Sozialstaat”, pp. 184-185.

64. See ANDREAS VOSSKUHLE, “Der Sozialstaat”, p. 185. In my own research, STEFAN THEIL and I have identified 23 cases of some importance that interpret art.3 in conjunction with the SSP.

65. 1 BvL 1/08, NJW 2013, 2498 (Federal Constitutional Court, 8.05.2013).

66. BVerfGE 40, 121 (133) (1975) (The social state principle mandate to support those in need requires that the support achieve the minimum requirements for a dignified existence (“*Mindestvoraussetzungen für ein menschenwürdiges Dasein*”); BVerfGE 78, 104 (117f.) (1990) (law allocation legal costs to a party receiving legal aid endangers their existential minimum and is thus unconstitutional); BVerfGE 82, 60 (80) (1990) (in connection with the adjustment of family allowance for children and related to income for the family the existential minimum must not be taxed); see likewise BVerfGE 87, 153 (1992).

67. ANDREAS VOSSKUHLE, “Der Sozialstaat”.

68. BVerfGE 125, 175 (2010) [*Hartz IV*]. An official English translation with identical paragraph references to the German original is available on the website of the Constitutional Court.

focus on two of them – both had to do with the court finding the methods for calculating the benefits unsound. First, the Court declared the Standard ALG II Benefit to be unconstitutional. The key problem was that the formula used to up-rate the benefits between 1998 and 2005 were based on pension values, which track wages, salaries and other data that is logically unrelated the subsistence minimum, rather than on factors such as net income, cost of living and consumer behaviour.<sup>69</sup> Second, the social allowance for children was determined to be forty percent of the Standard Benefit. This meant it fell with the unsound Standard Benefit, but the Court also found that the figure was determined entirely without any empirical or methodological foundation, which should have taken into account children's costs of schooling and living. A schooling supplement of 100 per year was likewise held to be determined without any empirical basis.<sup>70</sup> Each of these findings in my view fits the approach of judicial incrementalism outlined in my book – it shows the merit of a careful forensic investigation of the process by which this key benefit was determined.

So, the main upshot of the case was that there was a duty to recalculate the benefits. The political outcome of the decision was that the benefit rate was recalculated and a new level was adopted in the Bundestag, pursuant to a debate that generated more heat than light.<sup>71</sup> After taking account for the increases to the benefit level already made (in view of inflation) between the amount of the benefit in the Hartz IV case at the legislative debate of 2010, the actual increase to the benefit level was about 5 euros per month, what the government had allegedly been prepared to offer anyway in line with regular uprating of benefits to reflect higher costs of living. This new rate was challenged again and upheld by the Federal Constitutional Court.<sup>72</sup> Despite the mismatch between the notoriety of the Hartz IV judgment and its impact on the basic Unemployment Benefit II rate, there were other political responses to the judgment such as the increase in funding for an educational allowance (the '*Bildungspaket*') whose repercussions may be important.<sup>73</sup>

Under the concept of the 'material core obligation', there were at the time VOSSKUHLE wrote as outlined by there are no cases enforcing a positive entitlement to a sum determined by the court, though there is a line of jurisprudence which has held that the lowest taxation threshold may not fall below the *Existenzminimum* of a family – i.e. that one may not tax the *Existenzminimum*.<sup>74</sup> However, it seems

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69. *Hartz IV*, [173]ff.

70. *Hartz IV*, [190]ff, [198].

71. The debate is reported in the Federal Parliament (Bundestag), Stenographic Report, 79, Sitting of 3.12.2010, Plenary Protocol 17/79, pp.8739-8776 (available at <http://dipbt.bundestag.de/doc/btp/17/17079.pdf>).

72. 1 BvL 10/12, 1 BvL 12/12, 1 BvR 1691/13 (Federal Constitutional Court decision of 23.07.2014) (The social state principle mandates an existential minimum in conjunction with Article 1 paragraph 1 Basic Law, but allows for generalisations unless there are systematic deficits in the calculation of the amounts or serious concerns as to their adequacy to cover living expenses).

73. The *Bildungspaket* is discussed in the Bundestag debate, above, introduced at p. 8740, and at pp. 8748ff.

74. BVerfGE 87, 153. It is by far from clear that by raising the tax threshold the state's

clear that the court takes for granted that the German state's existing commitment to providing social assistance in general is in conformity with the obligation to secure the subsistence minimum.

Yet in another case which is likely to have a more profound impact, the Court found that a law failing to uprate social assistance payments for asylum seekers since 1993 failed to secure the *Existenzminimum* to such persons and was therefore unconstitutional.<sup>75</sup> With immediate effect, such asylumseekers were entitled to the payments determined according to the *Existenzminimum* (namely, *Arbeitslosengeld II*). In further debate in the Bundestag two years later, further enhancements to the provision for such asylum speakers was also determined and planned (though the legislation is under discussion at the moment this article was written).<sup>76</sup> The impact of the decision has thus been substantial.

## 2. Codification and Doctrinal Elaboration of Social Law

There is a clear link between the *Sozialstaatsprinzip* and what may be seen as the crowning achievement of the legal protection of social human rights in Germany: the Social Code (*Sozialgesetzbuch*). The SPD Chancellor WILLY BRANDT established a Commission to begin working on the codification of social benefits law, which developed the concept of a social code. Book One – General Part (*Allgemeiner Teil*) appeared in 1975. There have been at least eight other books codified between 1980 and 1997.<sup>77</sup> Article one of Book One sets out the general purpose of social law: to secure a dignified existence; create equal opportunities, protect the family; 'make it a possibility to earn a living through freely chosen work'; compensate for special burdens of life. These are helpful normative guidelines. But what follows in sections 3-10 of the book is more interesting for present purposes. They set out the basic suite of legislative social rights as the core entitlements the Social Code is meant to protect. One example is the right to social security (s.4), which reads as follows: (1) Within the framework of this code,<sup>78</sup> everyone has the right to social security. (2) Anyone who is insured in social security has a right...to (1.) the necessary measures to

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obligation to secure the subsistence minimum will be strengthened.

75. BVerfGE 132, 134 (2012).

76. Bundestag-Plenarprotokoll 18/57, 9.10.2014, p. 5303 (A) et seq. The law being discussed in the debate will formally raise the amounts (which the BVerfG had already imposed) and ensure that they are adapted in accordance with the needs of asylum seekers. Additionally several smaller reforms are integrated: in terms of waiting time for asylum benefits to reach the level equivalent to regular social benefits has been cut from 4 years to 15 months; children are immediately eligible for the "Bildungspaket" known from ALG II and are no longer penalized for the failings of their parents in asylum proceedings. I am indebted to STEFAN THEIL for this summary.

77. HANS F ZACHER, *The Constitution*, p. 246.

78. This language, also found in section 2 SGB, meant that these 'rights' were effectively declaratory of the content of the Code rather than be meant to be a binding normative standard against which the sufficiency of the rest of the code could be judged. This led HANS F ZACHER to note, *The Constitution*, p. 247, that "the 'social rights' could hardly live up to their name..." But he still considers them important: "it did substantially improve the overall effectiveness of the social benefits system. And it did not stand in the way of reforms that essentially followed the lines of demarcation of the traditional institutions."

protect, preserve, improve and restore health and the ability to produce, and (2.) economic security in case of sickness, maternity, reduction of earnings capacity and old age. The surviving dependents of the insured person also have a right to economic security.’ This is just one of seven such provisions. HANS ZACHER says that these seven provisions ‘must be described as a *triumph of the institutionalism of German social policy*.’ Well he would say that – he largely wrote them. So much is shown by the legal historian MICHAEL STOLLEIS in his study of the history of social law in Germany, where he also tells the story of how the study of social law developed into an academic discipline.<sup>79</sup>

There is a link between the constitutional *Sozialstaatsprinzip* and this code of legislative social rights. In 1960, the President of the Federal Social Court joined together with HANS ZACHER in 1960 and formed a socio-legal study group called “the effect of constitutional norms on the right of social security.”<sup>80</sup> This served as the locus for intellectual discussions, where the concept of social rights at the very idea of social law as a somewhat unified discipline was conceived and worked out. ZACHER ultimately came to play a decisive role in the drafting of the Social Code, especially the ‘General Part’, which as STOLLEIS explains, required a certain degree of theoretical sophistication. ZACHER regarded section 1 of the Book One to be the ‘independent concretization of the principle of the social state’ with respect to social benefits law.<sup>81</sup> As the author of both that section and the leading scholar on the social state principle, this is an opinion worthy of some weight.<sup>82</sup> Furthermore, and more importantly, in Federal Chancellor WILLY BRANDT’s important address to the Bundestag of 28 October 1969, he clarified that the social state principle obliges Germany to give effect to a social constitutional state (*soziale Rechtsstaat*) and that codification of social (and labour) law is one of the responsibilities under that heading.<sup>83</sup>

It must be acknowledged, however, that the principle’s influence per se on the jurisprudence of the Federal Social Court is rather slight, even when considering the overall influence of the constitution on social law.<sup>84</sup> This is not entirely

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79. MICHAEL STOLLEIS, *Geschichte des Sozialrechts in Deutschland: Ein Grundriss*, Stuttgart, 2003, ch.VIII (“Sozialrecht als wissenschaftliche Disziplin”), pp. 307-313.

80. “Die Einwirkung verfassungsrechtlicher Normen auf das Recht der Sozialen Sicherheit”.

81. HANS F ZACHER, *The Constitution*, p. 246.

82. In 1980, ZACHER’s project on German and international social law led to the founding of the Max Planck Institute for Social Law and Social Policy in Munich, which is still busy hosting active research on this topic to this day. Germany, moreover, is generally regarded as the place where the doctrinal elaboration of social law (separate from labour law) is at its most sophisticated.

83. BRANDT, *Zum Sozialen*, pp. 31-35.

84. See the fifty five page essay by HANS-JÜRGEN PAPIER, “Der Einfluss des Verfassungsrechts auf das Sozialrecht”, in BERND VON MAYDELL, FRANZ RULAND and ULRICH BECKER (eds), *Sozialrechtshandbuch*, 5 edn, Baden Baden, 2012 (outlining the impact of the FCC’s jurisprudence on the development of social law). The Social state principle occupies only a few pages of the chapter, whereas the basic rights provisions take up the bulk of the discussion. In analysis of 40 references to the principle in the period of 2010 to mid 2014, STEFAN THEIL and I determined that no reference was decisive the decision of the court and none succeeded in supporting a claim to relief.

surprising, for the shape of social law itself is arguably an extended articulation of the state's duty to give effect to the social state.

## V. Concluding Observations And Further Questions

The social state principle is but one piece of a complex, interwoven socio-economic and legal puzzle. It is, indeed, the expression of a deeper set of political arrangements and commitments forged over time and recognized in a variety of legal institutions and doctrines. Some of the pieces include: a new post-war economic policy of the Social Market Economy (*Sozialmarktwirtschaft*); consensus and co-optation procedures in economic and social life, both in bureaucratic as well as adjudicative spheres (e.g. the Bismarckian, corporatist welfare state generally, as well as the policy of *Konzertierte Aktion* (1967-76)); a legal tradition of juridical rigour and doctrinal elaboration; a post-war loss of faith in the executive branch of government, and of moral authoritativeness of positive law, and a corresponding increase in the authority of both legislature and especially the courts; a high degree of juridification and codification of basic social rights in the fabric of ordinary law – as enforceable individual or 'subjective' legal rights; and a high degree of constitutional juridification of questions such as finance and tax, and potentially a corresponding need for an invigorated constitutional affirmation of the social state in this midst.

These pieces of the puzzle may tell us more about the German experience than the words 'social state' can in isolation, and of course they help explain why the expression 'social state' has received far greater doctrinal and theoretical exposition in Germany than it has in France, Spain or Italy despite the latter three having the same words in their constitutions. In connection with Portugal, moreover, one might see (at least until recently) a certain irony in that the 1976 Portuguese constitution's ambitious economic programme, including the recognition of many social rights, has received a relatively weak degree of legal enforcement.<sup>85</sup> By contrast, the German constitution's vague, contested, and at first quite controversial reference to the social state principle has received a significant degree of attention in both constitutional and other areas of law.<sup>86</sup>

At the same time, the German experience is not merely an object of curiosity for foreign eyes. It demonstrates one way in which the constitutional commitment to

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85. I have in mind those aspects of the constitution which remained after the subsequent amendments that had the effect of curtailing the economic programme in the 1976 constitution. My claims about the role of judicial enforcement are based on MIGUEL NOGUEIRA DE BRITO, "Putting Social".

86. JUTTA LIMBACH, "The Role of the Federal Constitutional Court", *Southern Methodist University Law Review*, 53, 2000, pp. 429, 432 (the "[s]ocial State has also become one of the main pillars of civil law."). See also STERN, *Staatsrecht*, pp. 900-902; and esp. JÖRG NEUNER, *Sozialstaat und Privatrecht*, Munich, 1999, esp Part III (pp. 219ff). NEUNER discusses the doctrine(s) of direct and indirect 'horizontal effect' (*unmittelbare Drittwirkung* and *mittelbare Drittwirkung*) at pp. 171-173. The doctrine, under which the Basic Rights provisions are considered also to regulate the scope and content of private law, is (perhaps surprisingly) ascribed no large role in NEUNER's treatise. It is also not mentioned as among the important characteristics of the social state 'impregnation' of private law in Stern's discussion either.

the social state has been elaborated and woven into the legal fabric of a nation that takes both the welfare state and the rule of law quite seriously. In some respects, it represents an exemplar of the ‘social constitutional state’ working well, as well as a counter-narrative to the liberal egalitarian and Marxist discourse that views the rule of law and the welfare state as antagonistic entities.<sup>87</sup> It repays closer examination. Such closer examination would raise some of the following interesting questions. First, to what extent has the social state principle been decisive in the jurisprudence of the Federal Constitutional Court? Second, how far can it be said to have influenced political practice, in particular legislative activity? Third, has the defensive role (limiting principle) of the principle been necessitated by the court’s preparedness to adjudicate questions that many foreign courts might decline on justiciability grounds? Fourth, is the German experience wholly a product of its unique socio-political history, or are their lessons ready for export? The answers to these questions will cast light on how one particularly sophisticated form of social constitutionalism speaks to ROOSEVELT’s dream of real Freedom from Want.

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87. When the Marxist historian EDWARD PALMER THOMPSON claimed that the rule of law was “an unqualified human good” in his magisterial *Whigs and Hunters: The Origin of the Black Act* (New York, 1976, pp. 262-3) his left-wing contemporaries accused him of ‘apostasy’, as DANIEL H COLE puts it in “An Unqualified Human Good: E.P. Thompson and the Rule of Law”, *Journal of Law and Society*, 28, 2000, pp. 177, esp. at 189ff. The antagonism between the welfare state and the rule of law within liberal egalitarianism is more subtle. Although liberal egalitarians are committed to both institutional practices individually, the tradition sees the elaboration of social policy as almost exclusively within the legislative domain. With one if not both eyes on the Lochner era experience in the US, the tradition has tended to affirm judicial and constitutional (textual) restraint in respect of economic questions. See e.g. JOHN RAWLS, *A Theory of Justice*, Cambridge, 1971, pp. 198-99: “the question whether legislation is just or unjust, especially in connection with economic and social policies, is commonly subject to reasonable differences of opinion.”; RONALD DWORKIN, *A Matter of Principle*, Cambridge, 1985, esp. ch. 3, (matters of principle are suitable for adjudication but questions of policy are for legislatures). LON FULLER addressed the epistemic limitations of the adjudicative process. He claimed that polycentric disputes affecting many interests in interlocking ways are unsuitable for a legal process in which the decision-maker hears chiefly from two rather than the multiplicity of affected parties: LON FULLER, “The Forms and Limits of Adjudication”, *Harvard Law Review*, 92, 1978-1979, p. 353. All told, there is much in this tradition to condemn both the inclusion of the *Socialstaatsprinzip* in the Basic Law and the some of the jurisprudence that evolved under it in the German legal order. There are exceptions to this liberal egalitarian trend, as seen in the work of CHARLES REICH (above) and in writing about constitutional social rights that began to pick up steam in the 1990s.