Studia z zakresu prawa pracy i polityki społecznej 2016
ISSN 1429–9585

Eberhard Eichenhofer
University of Jena

THE RIGHT TO SOCIAL SECURITY IN THE EUROPEAN CONSTITUTIONS*

1. The constitutional guarantees of social rights

In the Basic Law ("Grundgesetz") – the German Constitution – a special and coherent catalogue of social human rights is not foreseen. Only a few social rights' guarantees primarily as to women, mothers, children and handicapped persons are explicitly stipulated. Therefore, in the current German legal thought social human rights are regarded as neither fundamental, nor integral parts of human rights. As the full spectrum of human rights acknowledged in international law, among them above all the basic social human rights to work, education, health, accommodation, social security or social assistance (Articles 22–26 UDHR), does not correspond to the far more restricted catalogue of human rights explicitly figured out in the Basic Law as fundamental rights ("Grundrechte"), the doctrine argues even more that due to their very legal nature social human rights could not and never exist.

In this understanding human rights are supposed as negative freedoms[1] – a *status negativus*[2] – which should open to each individual a sphere for choice and action free from any state intervention. Social rights, however, intend to create the positive freedom of the individual – a *status positivus.* Such a freedom is based on entitlements against public institutions like employment services, schools, city councils, social insurance administrations or health services. As social rights imposes to them commitments to bring about and make practically feasible specific social rights, public institutions are obliged to become active, both on the legislative and the administrative field. Big government is the outcome of social rights. Can, however, human rights concur with the idea of big government?

All the rights of delivery, which are addressed to public institutions, depend on preliminarily given public institutions, taken actions, political choices made and financial capabilities sufficiently available those rights are supposed to be inappropriate as human rights guarantees, as the individual entitlements stemming from them are not directly

---

* This article has been previously published in *The Right to Social Security in the Constitutions of the World. Broadening the Moral and Legal Space for Social Justice* (ed. M. Wujczyk), Geneva 2016.

[1] Isaiah Berlin, Four Essays on Liberty, Oxford University Press, 1969.

[2] This doctrine stems from Georg Jellinek, Allgemeine Staatslehre, 1960 (3. Aufl.), 419 ff.; ibid., System der subjektiven öffentlichen Rechte, Tübingen 1905 (2. Aufl.), reprinted 2011, 94 ff., 114 ff., 136 ff.

given by the Constitution, but are to be identified and verified and, finally, made effective by acts of state legislation themselves. Those rights are therefore conceived as being enshrined in law, but not to be found in the guarantees of the Constitution.[3]

Hence, in the current German legal thinking the fundamental rights, explicitly enacted in the Constitution, are taken as a *pars pro toto* for the human rights in general. Among the main scholars in German law there is a wide-spread consensus, that social human rights are a legal category of minor importance. Therefore, those rights do not matter or materialize in the conceptual framework within the German Constitution.[4]

2. The scope of the martial and personal social security rights guaranteed by the Constitution

a) The lack of social rights in the Constitution

The Basic Law lacks a fully elaborated catalogue of social human rights.[5] Only a *few* of the *provisions* can be interpreted as giving rights due to social need or with social intentions. These are above all the equal treatment clauses for men and women or with respect to handicapped persons (article 3 para. 2, 3 of the Basic Law). They do not only provide for equal rights, but also for equal living conditions to all addressed persons. So, they matter in the context of fundamental freedoms. Further examples are the commitment to assist families, to protect mothers and their children, to guarantee equal treatment between marital and non-marital children and to respect the rights of collective bargaining and action for both employees and employers (article 6 para.1, 2, 5; article 9 para.3 of the Basic Law).

This constitutional arrangement can be explained by the history. The framers of the Constitution *intentionally abstained* from providing a comprehensive catalogue of social human rights. This decision was taken against the constitutional traditions of the Weimar Republic and the international developments in human rights legislation in the formative era of the German Constitution. It was taken, because the Basic Law intended originally to establish an interim regime for the western part of Germany. In the period of the constitution's formation the assumption prevailed, that after a very short period of time the German unification – the east-west unity – will come true. The framers of the Constitutions were convinced to assume that this incident could be brought about in the very next

---

[3] Isensee, Der Staat 1980, 367; Scholz, RdA 1993, 249; Murswiek, in Isensee/Kirchhof, Handbuch des Staatsrechts, Band 9 (2011), § 192.

[4] Isensee, Verfassung ohne soziale Grundrechte, in Der Staat 1980, 367; Murswiek, Grundrechte als Teilhaberechte, soziale Grundrechte, in: Josef Isensee/Paul Kirchhof, Handbuch des Staatsrechts, Band 9, 2011, 3. Aufl., § 192; Brunner, Die Problematik der sozialen Grundrechte, 1971; an opposite position can be found in Eberhard Eichenhofer, Soziale Menschenrechte im Völker-, europäischen und deutschen Recht, Tübingen 2012.

[5] Klee, Die progressive Verwirklichung wirtschaftlicher, sozialer und kultureller Menschenrechte, 2000; Lohmann, Soziale Menschenrechte und die Grenzen des Sozialstaats, in Kersting (Hg.), Politische Philosophie des Sozialstaats, 2000, 351; Eichenhofer, Soziale Menschenrechte im Völker-, europäischen und deutschen Recht, Tübingen 2012.

years after the constitutional formation of West Germany and, hence, within the foreseeable future. So, the Constitution was explicitly sketched as a preliminary and transitional legislation, to be replaced in the very next future.

This reluctance can also be explained by the constitutional history of Germany. In the Constitution of the *Weimar* Republic of 1919 the social human rights played a pivotal role as an integral part of a broad and comprehensive catalogue of human rights, which had a similar profile than the one, enacted on the international level after World War II. As to the Weimar Republic Constitution of August 11th, 1919, the *economic life* should coincide with the principles of *social justice* and follow the aim to guarantee a life in *human dignity* to each human being (article 151). Human labour has to be protected by a unified labour law (article 157). The freedom of association and collective bargaining is guaranteed to both employees and employers (article 159). The right to social insurance (article 161) was guaranteed. In general, it was stated, that irrespective of the individual freedom each citizen is exposed to the moral commitment, to utilize her/his physical or intellectual capability for the common good. Under there auspices each citizen should have a right to work in order to acquire his or her personal maintenance (article 163). Employees are entitled to take part in the gestion of enterprises. For this purpose works councils shall be established on the level of a factory, the enterprise, or on regional or national level (article 165).

The Weimar Constitution served even more as a *model* for the international enactment of social human rights, as it was – apart from the Mexico Constitution of 1917 and the Constitution of Finland of 1919 – one of the first constitutions of the World which did provide for fundamental social human rights. But in the Weimar Republic the courts interpreted these human rights as provisions of a mere programmatic character, which did *not* have any *binding effect* – neither to the courts, nor the administration, nor finally the legislator.[6]

The framers of the Basic Law intended to avoid this arguing for the future definitely. It was the overall intention of them to make the Constitution a strictly and unconditionally mandatory piece of legislation, which as the supreme law of the land, should be acknowledged and regarded as being paramount to all other legal provisions and to abide without any reservation. As to the strictness of constitution, there was the assumption made, that this imperative could not cope with a social rights' guarantee, which leaves not only a wide room for interpretation, but depends also on legislative implementation.

Furthermore, the Basic Law as the Constitution of the Federal Republic of Germany did not intend to create a comprehensive Constitution, but to give shape to a provisional and interim status for the former West Germany to regain its sovereignty and at the same time to leave open the door for a re-unification of the then divided Germany. As to *Carlo Schmid*, a leading intellectual and Member of the Parliamentarian Assembly, the Basic Law shall *not constitute*, *but organise* the *state*.[7] So, the reluctance to implement social rights into the framework of the fundamental rights can also be explained by the concern not to anticipate a social order for a unified Germany, which should be established later on the basis of a new constitution.

---

[6] RGZ 113, 33, 37; 116, 268, 273.

[7] Speech of October 20th, 1948.

When 1990 the east-west divide of Germany had been overcome, the Constitution of West Germany was kept and not revised despite of its fragmentarian character, as it was regarded at that time as the best Constitution Germany ever had before, and, therefore the opinion prevailed, that the unification did not give any ground for its revision. So, under the constitutional law of Germany after the unification the previous incompleteness of the Constitution as to the social sphere was kept.

b) The "social state" – clause (articles 20, 28 of the Basic Law)

The Basic Law established a substitute for its lacking social human rights; this is the principle of the "social state" (Sozialstaat). In articles 20, 28 of the Basic Law Germany defines itself as a democratic, federal, republican and social state, which is based on the rule of Law. These five characteristics of the German state cannot be altered, nor abolished even not by a change of the Constitution itself (article 79 para.3 of the Basic Law). These five characteristics assume with other words the character of "eternal", i.e. unchangeable principles of the Constitution.

As to the social state clause the state has to control, on whether from the freedoms guaranteed under the constitution follow detrimental social effects, above all inacceptable disequalities, unjustifiable differences as to incomes, pensions or social status. Whenever those impacts are about to happen, the state is obliged to react and light against poverty and exclusion, reduce inequalities in income and fortune and to overcome social dependencies. Under the social state clause the state is supposed to make a social order becoming to exist, which is based on "social justice"[8] and shrives to overcome "social contracts".[9]

From this characteristic of Germany as a "*social state*"[10] does not stem any individual rights' guarantee, but it obliges the state to create a whole range of social legislation, which has to create individual social rights. So, under the social state clause the state becomes mandatory to create social rights, which have to assume a legal, but not a constitutional rank.

c) Protection of social rights under other constitutional principles and rules

The lack of genuine social human rights in the German Constitution brought about a debate under the legal perspective on whether those social rights could find any constitutional attention at all. In the course of the developing case law of the German *Constitutional Court* (Bundesverfassungsgericht) various contexts became relevant as to the question on whether those rights could be get any protection under another angle of con-

[8] BVerfGE 22, 180, 204; 59, 231, 263; 69, 272, 314; 94, 241, 263; 110, 412, 445.

[9] BVerfGE 1, 97, 105; 43, 213, 226.

[10] Forsthoff, Begriff und Wesen des sozialen Rechtsstaates, in: ders. (Hg.), Rechtsstaatlichkeit und Sozialstaatlichkeit, 1968, 165, 180: „A Constitution can never be a social law." „Eine Verfassung kann nicht Sozialgesetz sein"; Hartwich, Sozialstaatspostulat und gesellschaftlicher status quo, 1978 (3. Aufl.); Zacher, Das soziale Staatsziel, in Isensee/Kirchhof (Hg.), Handbuch Staatsrecht, Bd. 2, 2004 (3. Aufl.), § 28, 428; Spieker (Hg.), Der Sozialstaat, 2012; Heinig, Der Sozialstaat im Dienst der Freiheit, 2008; Wallrabenstein, Versicherung im Sozialstaat, 2009.

stitutional law. As the German Constitution strives to give a full-fledged protection of the individual as to all circumstances, which stem from acts of the state, the freedom of action (article 2 para. 1 of the Basic Law), the equality (article 3 para. 1 of the Basic Law) and the property clauses (article 14 of the Basic Law) had been addressed as instruments to protect social rights.

As to the universal guarantee of the freedom of action the Constitutional Court did examine on whether a legal provision on a mandatory inclusion in a special scheme of old age protection for self-employed medical doctors can cope with the freedom of action.[11] The Court held that this is possible, as the obligatory inclusion into social security schemes is to be assessed as an appropriate means to a legitimate end, necessary and proportionate to achieve its end. As to the social legislation a series of very distinct questions had been examined by the Constitutional Court, on whether they comply with the principle of equality of each person before the law. As to the case law of the Constitutional Court social legislation has to be enacted in accordance with the principle of equal treatment of each person.[12]

This provision does not require that differences are not allowed, nor does it hinder the legislator to make distinctions if there is a good cause for doing this, nor does it embarrass that social legislation is built upon typical cases,[13] which does not appropriately fit to atypical situations. The equality of treatment is, however, not granted, if distinctions are made which lack a convincing ground. So, the equal treatment clause is hurt, if a social legislation is based upon irrational and unjustifiable distinctions.

Since the first years of the Constitutional Court case law there was a broad debate about whether under the German Constitution a social right can be conceived as a *property right*.[14] Whereas the Federal Social Security Court[15] already very early qualified social insurance rights as property under the Basic Law, the Constitutional Court held in the formative era till 1980, that social insurance does not correspond with the requirements to property, which are peculiar to an entitlement under private law. Social insurance rights are, however, rights under public law; so they could fall into the substantial scope of the property clause of the Basic Law. But in 1980 the Constitutional Court[16] changed its posi-

---

[11] BVerfGE 10, 354; 12, 319; 75, 108; further BVerwGE 87, 324.

[12] BVerfGE 54, 11; 59, 287; 66, 234; 72, 141; 89, 365; 92, 53; 97, 103; 99, 165; 100, 195; 102, 68; 103, 242; 105, 73; 111, 176; 125, 75.

[13] BVerfGE 63, 119; 66, 66; 67, 231.

[14] BVerfGE 32, 111; vgl. zur Problematik: Adam, Eigentumsschutz in der gesetzlichen Rentenversicherung, 2009; Axer, in Epping/Hillgruber, BeckOK GG, 2012, Art. 14 Rn. 56 ff.; Boecken, Der verfassungsrechtliche Schutz von Altersrentenansprüchen und -anwartschaften in Italien und in der Bundesrepublik Deutschland sowie deren Schutz im Rahmen der Europäischen Menschenrechtskonvention, 1987; Jährling-Rahnefeld, Verfassungsmäßigkeit der Grundrente, 2002; Krause, Eigentum an subjektiven öffentlichen Rechten, 1982; Lenze, Staatsbürgerversicherung und Verfassung, 2005; Papier, in von Maydel/Ruland/Becker (Hg.) Sozialrechtshandbuch, 2012 (5. Aufl.), § 3 Rn. 41 ff.; Pohl, Rechtsprechungsänderung und Rückanknüpfung, 2005; Preis/Kellermann, SGb 1999, 329; Reiter, SGb 1996, 246 ff.; Stober (Hg.), Eigentumsschutz sozialrechtlicher Positionen, 1986.

[15] BSGE 9, 127.

[16] BVerfGE 53, 257.

tion and accepted, hat also social insurance rights are to be conceived as property under the Basic Law.

This case law coincides with the one of the *ECHR*. But the meaning and the substantial scope of application of the property clause differs as to the case law of both courts. Under the latter all social benefits based on a legal entitlement can be taken as property in the meaning of the 1 st Additional Protocol to ECHR.[17] Under the German constitutional law, however, only those social rights can be regarded as property, which are based and stem from own contributions made by payments to the social security administration or own work.[18]

Under the property clause the legislator is not only committed, but acts also in a legitimate manner, if it both defines the social insurance rights and at the same time or reduces social insurance rights, because both acts are accepted or provided for under the property clause.[19] As to article 14 para. 1 of the Basic Law, the legislator has to give shape to the content of property and it has to establish the limits of property. The Basic Law establishes property only with within social limits; the use of property shall also serve to the public benefit ("Eigentum verpflichtet, sein Gebrauch soll zugleich dem Wohle der Allgemeinheit dienen", article 14 para.2 of the Basic Law). From this follows clearly, that also restrictions of social insurance rights are permitted under the Constitution, unless they are appropriate to make the social insurance burden bearable to the active population and proportionate and, finally, the amount of benefits keeps on to be substantial and adequate to the beneficiary.

In the context of the right to social assistance quite early in the legal history of postwar West Germany the question emerged on whether such a right has a sound constitutional fundament. The Federal Administrative Court[20] held already 1951 in one of its first judgments, that under the Constitution a social assistance beneficiary has not only a legal entitlement to *social help*, but that this right is embedded in and stem from the constitutional guarantee of *human dignity* and that it will find in this principle its conceptual fundament. In its sequent case law the Constitutional Court[21] joined this perspective and held, that human dignity in combination with the social state clause bring about a fundamental right to protection of a minimum level existence. This should be in the absence of other preliminary sources be guaranteed by the public administration, which should become active as a lender of the last resort. On this basis the Constitutional Court hold, that the individual's right to a minimum level of existence encompasses the socio- cultural minimum. This means, with other words, that not only the physical existence has to be guaranteed, but that, additionally to this, by means of social assistance the social and cultural participation of the beneficiary is to be made feasible. The Court also held that the level of social assistance benefits is to be determined in a transparent manner and on

---

17 ECHMR 16.9.1996 (Gaygusuz / Austria) 17371/90; 7.5.2002 (Burdov / Russia) 59498/00; 25.10.2005 (Romanov / Russia); 30.9.2003 (Koua Poirrez / France) 40892/98; 12.4.2006 (Stec / United Kingdom) 65731/01; 65900/01.

18 BVerfGE 69, 272, 301; 100, 1; 59, 104.

19 BVerfGE 97, 271; 122, 151.

20 BVerwGE 1, 159.

21 BVerfGE 132, 134; 125, 175.

the basis of a rational method to identify and assess the specific needs to be covered by means of social assistance.

d) Impact of the international protection of social rights

In the German legal system the international social rights, enacted in many provisions of international law – among them above all the UN, ILO, Council of Europe and EU legislation is relevant in the sense, that the leading provisions on social rights are *transformed* into the German legislation. By this act of transformation of international into national law the international law rules assume the characteristic of a provision under German law. Therefore it has the same rank as provisions under the legislation of Germany. If the international provision has the same content as the corresponding provision under German law, the latter will prevail to the first. So, under these circumstances the provision under German law is regarded as paramount to the international one. If there is a provision under international law, whereas a corresponding provision in German law is lacking, the international law demands for a complementary provision to be enacted in German law.

But there is a huge reluctance within the German judiciary to give an international law rule such an important impact that it will make a revision of internal law a legal imperative.[22] There is a widespread reservation to international law, which is challenged predominantly as an act of intrusion and violation of national sovereignty. For those, who are not familiar with international law, but practise on the basis of the domestic law cultivate a widely diffused resentment against international law, which is not regarded as a fundament of or a frame of reference for domestic law, but which is seen as alien and so non-genuine component of domestic law and, hence, of law at all. So, there is up to now a widely shared tendency to *minimize* or even *annihilate* the *impact* of *international law* on *national legislation*. This tendency is also driven by the case law of the Constitutional Court, which is keen, with varying degrees of intensity and rigor to minimise the influence of international law on German law. The main argument in this context is that the national Constitution is the supreme law of the land and that therefore also the international law, when incorporated into national legislation ,has to comply with national Constitutional law and because of this assume a lower rank as to the Constitution. This reasoning, however, does not So, the role of international social rights to the German social legislation is still rather incremental and rarely to be fully observed.

But this argument cannot uphold under the Basic Law itself. As to article 1 para 2 of the Basic Law the German people confesses to respect the unalienable human rights as fundaments of each human society and imperative as indispensable basis of peace in the world. This provision makes the international human rights in their entirety an integral part of the German human rights legislation and, hence, it imposes to it to regard them completely.

[22] BVerfGE 111, 307.

3. The constitutional regulations' impact on the content of social security rights

a) Social rights in ordinary legislation

Within the social legislation of Germany the Social Code plays an important role, as it contains all the relevant provisions on social legislation in Germany. In integral part of this legislation is to be found in the *basic social rights*.[23] They are enacted in the introductory and most general part of the *Social Code*. It plays a key role to outline the purpose, function, structure and content of the German system of social security.

Despite of this, a strong civilicism is to be noticed as to the binding effect of social rights. In the legal literature they are assessed as lacking any "normative substance",[24] they are conceived as irrelevant.[25] But this characteristic is not justified. As to the official justification[26] the social rights in the context of the Social Code shall describe the targets of social benefits; it shall keep pace with the international development, where a rights-based approach to social legislation becomes more and more common and gained ground. Social rights shall emphasize, that the individual in a modern welfare state is supposed to be not an object for social policy but that social policy intends to establish the beneficiary as a subject of rights.

Seen from a systematic point of view, social rights in the Social Code help to translate the goal of social justice into the *structure* of the various *social branches of protection*. They are not made in order to create specific social rights, but to outline the normative basis on which social entitlements are built upon.

b) Justiciability of social rights

As to the low awareness for social rights their justiciability is not a key issue. On the contrary under the arguments put forward against social right their alleged injusticiability, plays a leading role. So, due to the meagre role social rights play in the current legal debate in Germany, the problem of the *justiciability* of social rights did *not* attract a *broader interest* among the legal scholars in Germany so far.

c) Growing awareness of social rights

Despite of the profound reservations as to social rights as such and to the constitutional guarantee of these rights especially, the constitutional dimensions of the legislation on social protection substantially gained ground and got a growing attention. In the context of the constitutional provisions on human dignity, equality of rights, protection of

---

[23] Eichenhofer, in Eichenhofer/Wenner (Hg.), Wannagat SGB I, IV, X, 2012, § 2 SGB I Rn. 2 ff.

[24] Von Maydell, Die „sozialen Rechte" im Allgemeinen Teil des SGB, DVBl 1976, 1, 6.

[25] Karlheinz Rode, Zum Wesen der sogenannten „sozialen Rechte" im Sozialgesetzbuch – Allgemeiner Teil, SGb 1977, 268, 272; Hauck/Noftz, SGB I, § 2 I 2; Schnapp/Meyer, Zur Entwicklung von sozialen Rechten in der Sozialgesetzgebung, DRV 1973, 66 ff.; Manfred W. Wienand, Bedeutungsgehalt und Funktionen der sozialen Rechte im Allgemeinen Teil des Sozialgesetzbuches, 1980.

[26] Bundestags-Drucksache VI/3746, S. 16.

freedom, property rights, protection against all sorts of discrimination and respect of the rule of law a series of social policy measures attracted a broad attention in Constitutional law, in the case law of the Constitutional Court and, finally, in the doctrine.

4. Threats to social security rights in times of economic crisis

In the context of social rights as human rights the idea of rights coincides with the idea of social obligations. Under the Constitution the parental right to care for and educate the children coincides the assumption, that the parents are obliged to make use of their rights, otherwise the parental rights are to be withdrawn (article 6 para 2 of the Basic Law).

This principle that social rights and social commitments concur is a general feature of all social rights. As to article 14 para 2 of the Basic Law the property rights are also limited by social aims. If the constitutional property clause also applies to social rights, also the social limitation clause matters for social rights. As to these two restrictions – the committing strand of social rights and the social limitation of property rights – a theoretical justification can be found for adjusting social rights in times of economic crisis. So, social rights are not to be regarded as absolute rights in the sense, that their content is to be protected irrespective of the conditions under which the contributions live and work. If there are recession and unemployment, wage cutbacks or a shrinking number of contributing insured persons the legislator is not embarrassed to reduce benefits in order to keep the balance between the beneficiaries' rights and the contributor's commitments. As the latter depend directly on the first, the Constitution provides for compromising the conflicting portions in a proportionate manner.[27] If such compromise is to be found out, the most vulnerable beneficiaries should be protected and the less vulnerable beneficiaries should bear the higher share.[28]

5. Assessment of the future of social security rights in the light of the Constitution

There is an indication on the increasing awareness of international social rights as to their impact on the domestic legislation. This tendency is not to be restricted to a single part of legislation but it represents an overall and all-embracing trend. In this context of an increasing international impact on national constitutional law the human rights' guarantees for social rights become more and more important. So, there is some reason to assume a growing influence of international law to the further development of domestic law. As social human rights play a key role in international law they will also become more important for domestic law in the years to come.

---

[27] BVerfGE 36, 73; 54, 11; 58, 81; 64, 87; 100, 59.

[28] BVerfGE 87, 1.

Summary

In the Basic Law ("Grundgesetz") – the German Constitution – a special and coherent catalogue of social human rights is not foreseen. Only a few social rights' guarantees primarily as to women, mothers, children and handicapped persons are explicitly stipulated. Therefore, in the current German legal thought social human rights are regarded as neither fundamental, nor integral parts of human rights. As the full spectrum of human rights acknowledged in international law, among them above all the basic social human rights to work, education, health, accommodation, social security or social assistance (Articles 22–26 UDHR), does not correspond to the far more restricted catalogue of human rights explicitly figured out in the Basic Law as fundamental rights ("Grundrechte"), the doctrine argues even more that due to their very legal nature social human rights could not and never exist.

Keywords: Germany, social security rights, constitution