

# **EFFECTUATING THE CONSTITUTION: CONSTITUTIONAL LAW IN VIEW OF ECONOMIC AND SOCIAL PROGRESS**

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## **ECONOMIC AND SOCIAL ORDER AND THE CONSTITUTION**

### **I. The Modern Social and Welfare State**

The modern social and welfare state is no longer influenced by the laissez-faire philosophy of the nineteenth century. Undoubtedly, economic growth and improving social policy added to the stability of democracies during the last decades. A certain economic standard is an important prerequisite for the existence of a state governed by the rule of law. Consequently, a modern state, to protect its economic and social basis, has to participate in the economic process and is responsible for the basic elements of social security. However, the manner and extent of state activities in these fields are dependent on the economic and social order and contribute considerably to it. This will be demonstrated in six steps. The social market economy of the Federal Republic of Germany and the Basic Law of 23 May 1949, as her constitution, may serve as an example for consideration.

### **II. The Social Market Economy**

The social market economy is a competitive and market economy that relies or is based on private initiative and combines market accomplishment with assured social progress for everybody. It is not an administered and planned economy. The social market economy is based on private autonomy and enterprise, private property and freedom of association. Contiguously, it holds the state responsible for protecting it, providing the legal framework for free competition, and carrying out a systematic economic policy that enables and strengthens private enterprise. The state is particularly responsible for social policy. Social policy aims are to:

- Compensate for the deficiencies of a liberal economy, to regulate competition and protect it from trusts;
  
- Provide public goods that cannot be produced at reasonable prices by the market and, nevertheless, have to be accessible to everybody;

- Provide a social security system, which takes care of people who do not yet, or no longer, participate in the economic process, such as students, the unemployed, aged and sick citizens; and, finally;

- Assist in a just distribution of wealth, starting out from the well-established principle that people's social situation improves if and as far as everybody shares the results of what has been produced by society.<sup>1</sup>

### III. Economic and Social Provisions of the Basic Law

The constitution of the Federal Republic of Germany, the Basic Law of 23 May 1949, as amended 19 December 2000, organises the country in a free democratic order (Art. 18, 21 (2) BL) that is based on democracy, the rule of law, the social state principle and a federal organization.<sup>2</sup> Of course the basic organisation of the state – a federal and rule of law democracy – has a deep impact on the economic and social order of the country. In addition, it is the civil rights and liberties section of the constitution that bears upon the subject of economic and social progress. Finally, European Law has an increasing influence on the economic process and the constitutional order: as in anti-trust law, regulation of branches of the market and tax law. More than 40 per cent of the legislation and 80 per cent of legislation for the economic sector stems from Brussels and Strasbourg rather than from Berlin.

The civil rights and liberties section of the Basic Law (Arts 1-19) draws the line between society and government. Individual intangible rights are an essential prerequisite for liberal freedom. However, this is not all. Civil rights are to protect the individual's freedom against unlegitimised measures of state regulation and control. Moreover, the rights and liberties of individuals, associations and groups of society are the constitutional basis of private entitlement to exercise economic competition and to freely participate in the economic process. It is primarily the basic rights section that shelters competition and market order from governmental intrusion.

To describe the economic and social order of the Federal Republic of Germany, in the civil rights and liberties section, one has to mention primarily the right to choose a trade, occupation or profession (Art. 12), the right to hold property (Art. 14), the right of contract (Art. 2) and freedom of association (Art. 9), which is the legal basis of business corporations, trade unions and employers associations. It is the freedom and parity of the social partners (unions and employers associations) that, via tariff-autonomy, strike and lock out, form the basic conditions for the economy. Thus, in economic terms, the Basic Law guarantees labour, capital, associations and coalitions, as keystones of the economic order of the country.

Besides that, there are a couple of other basic rights that are linked with and contribute to the economic order. This is true in particular for the equality clause (Art. 3) as an element of the social state clause (Art. 20, 28) and receiving some of its value-content from that clause. The freedom of speech, press and broadcasting clause (Art. 5) is the basis, for example, of advertising as an element of the economic process. Art. 11 guarantees freedom of movement and – chiefly in combination with the freedom of occupation – enables mobility of labour and capital. The right to hold property (Art. 14) may be limited by social-State regulations, tax law and labourers' participation in enterprise-governance. According to Art. 15, land, natural resources and the means of production may, for purposes of socialisation, be transferred to public ownership, of course, only in exchange for compensation.

Arts. 20 and 28 BL explicitly bind the state to the goal of a 'Social State'. It must be a social government based on the rule of law. The social state aims at social justice, at a solution to the tensions between the individual and the common weal, alongside the line of equality of opportunity. The social state orients its policy towards coping with basic situations of neediness, sickness, unemployment and age. It offers a minimum means to live one's life, e.g., stipends for pupils and students. The social state satisfies the basic needs of all people, such as water and electricity. The new public task of protecting the environment is part of the social state's responsibility (Art. 20a BL). Solidarity is one aspect of the social state, subsidiarity another (Art. 23 (1) BL). Efficiency is a third element of the social state.

The social and welfare state as the modern economic order of developed countries is characterised by industry, technology, communication and rationality. The social state is called upon, not only to preserve and protect (in a liberal rule of law state sense) legal order and the present situation, but also to shape social life and, to a certain extent, plan for society. Consequently, bureaucracy and planning add to a proper description of the social state. It is neither a liberal laissez-faire nor a welfare state, but a state, which aims at harmony between liberal ideas and free economy on the one hand and equality of chance and distribution of wealth on the other.

The Federal Republic of Germany is organised according to the (rule of law) separation of powers principle. It is the (Federal and States') legislatures that are primarily called upon to set the framework for a free economy and to initiate economic and social reforms. Major and more important legislative responsibilities rest with the Federation, the major part of the executive function with the states (Länder). According to the subject catalogues of Arts. 71-75 BL, a whole set of laws have been enacted concerning the economy, labour and social security. Every federation has to balance to tendencies of decentralisation and unitarianism. The attempt to balance the latter is illustrated by Art. 72 (2) BL, which entitles the Federal Parliament to legislate on a subject "if and to the extent that the establishment of equal living conditions throughout the federal territory or the maintenance of legal or economic unity render federal regulation necessary in the national interest." Along the same lines, according to Arts. 91 a and b BL, costly state tasks, like the improvement of regional economic

structures or building of universities, are “joint tasks” of the Federation and the states, jointly planned and financed. In every modern social state, in fact the budget, in terms of quantity and sectoral appropriation, is an important factor of the economy. Consequently, under certain circumstances the state may influence the economic process. Art. 109(4) BL, entitles the Federal Parliament, in order to avert disturbances of the overall economic equilibrium, to enact legislation providing for maximum amounts, terms and timing of loans to be raised by public administrative entities. It also obliges the Federation and the Länder to maintain interest-free deposits in the German Federal Bank (anti-cyclical reserves) for counterbalancing economic trends.

#### IV. ‘Economic and Social Constitution’ as Part of the State Constitution?

One may easily understand that, in view of the manifold provisions of the Basic Law concerning the economic and social spheres of society, the question was discussed as to whether the constitution contains a provision for a particular economic and social order, for example, a decision on the type or model of the social market economy, as explained before (sub II). To answer this question, one should keep in mind, that the Basic Law undoubtedly decided certain issues of high importance for the economy and social order. Basic Rights and the rule of law are themselves a decision in favour of the liberal principle. The economy is primarily a matter of society as distinct from state and government. The constitution stressed the dichotomy of the market and the welfare responsibility of the state. The state and all its organs are bound to social activity.<sup>3</sup>

However, they enjoy wide discretion to decide what is ‘social’ in any particular case. Thus, the social state principle is not a directly applicable law, but rather an appeal to all state organs, which in the end, may choose to follow this line through legislation, executive action or budget appropriation. Finally the Basic Law contains the principle of subsidiarity (Arts. 23, 28, 30 BL) according to which the state may assume responsibility only as far and as long as private and social activities and the strength of local government no longer suffice.

From these fundamental provisions of constitutional law, one may well draw some conclusions. Neither the model of a centrally administered (planned) economy nor a laissez-faire market economy is consistent with the Constitution. Given the Constitution, as far as the economy is concerned, one may say, ‘As little state as possible, as much state as necessary.’ In the social sphere, the view of the Constitution is oriented toward situations of fundamental social need rather than a roundabout-supply of individuals. It is more the mature and responsible individual who is the master of his or her fortune rather than the client of the welfare state, on whom the model of society focuses.

Finally, the search for an economic and social ‘constitution’ in the Basic Law may raise some points:

- The ‘social market economy’ is not an explicit part of the constitution;
  
- The Basic Law provides guidance on some important matters of economic and social order, but does not do so on other equally important matters (like strikes and lock-outs);
  
- Thus, the constitution does not contain a complete economic or social ‘constitution’, but only elements of it. The major part of economic and social law is law enacted by parliament within the framework of the constitution;
  
- Within this open playground, the political forces (government, parties) are expected and entitled, to shape the economic and social order as they feel it appropriate to the demands of the common weal of the time.<sup>4</sup>

## ECONOMIC AND SOCIAL PROGRESS AS A CHALLENGE FOR THE CONSTITUTIONAL STATE

### I. Accelerated Progress as a Sign of Modern Times

Globalisation, competition, effectiveness and efficiency characterise societies. The constitution of a liberal democratic, rule-of-law state, to a certain extent, reflects the bourgeois society of the nineteenth century. Its concept was that of limited state responsibility. Economy and social activity were mostly private domains. As economic and social progress are significant for our times and are, in fact, necessary to ensure growing wealth for everybody, the state assumes more and more responsibility for the economic and social sectors. This leads to increased expectations of the steering capacities of constitution and law. Some raise the question: is the liberal democratic constitution capable of adapting to these new demands?

### II. Some Characteristic of Economic and Social Progress

Economic and social progress demonstrate clearly that market mechanisms do not suffice to bring about a just balance of interests under all circumstances or a fair distribution of goods.<sup>5</sup> Progress increases problems of social justice. The modern state has to explicitly accept responsibility for the well being of all its citizens, for the economic and social prerequisites for everybody's enjoyment of freedom and for the political shaping of typical life situations, like education, (un)employment and old age. To meet these expectations, the state of economic and social progress must increasingly become a rational and planning state.

The state of economic and social progress faces new tasks. Foremost among them there are increasing responsibilities which now cover the whole population, no longer only segments. As social structures become increasingly differentiated, the capacity for society's achievement increases in the same manner as its vulnerability to disturbances. New tasks of state and government arise, in particular, from the point of view of security concerning new technologies (nuclear energy, information, genetic and chemical technology). The growing perception of the need to protect a minimum standard in ecology leads – not least under the social state principle – to complex and comprehensive legislation in that field.

The state of economic and social progress is confronted with new political goals: ensuring a permanent economic boom and growing wealth, taking care of basic social insurance (sickness), providing social support for needy groups (children, students) and promoting the level of equality.

To cope with these new demands the modern state has to use new means and instruments. It has to raise taxes. The financial requirements of state and local budgets increase. The modern state is a fiscal state. One can observe a change of public activity toward prevention. Command and repression are no longer effective administrative instruments, but rather funding, using public utilities and solely influential measures.

Finally, the modern state knows new actors, different organisations and procedures. Besides governmental agencies there are political parties and associations that now have an impact on policymaking. Bureaucracy is increasingly dependent on scientific and technological advice and forced to set legal standards in the field of technology which are barely accessible to legal actions.

### III. Consequences and Dangers of Economic and Social Progress

Rationality, efficiency, technology, planning and so on, which grow alongside each other as the state progresses, are to a certain extent 'the opiate of intellectuals'. The danger of authoritarian government and élitism, in particular, within the bureaucracy has to be restrained by strengthening individualism and democracy. The modern state, in fact, evokes a more extensive demand for regulation. This in turn calls for legitimation and consensus. State regulation is expected to ensure certainty, binding force, regularity and reliability. There are growing expectations of regulation, not only on political parties, as was seen in previous decades, but on economic and societal associations.

Of course, state agencies and all citizens suffer from the dark side of this development: the inflation of legal rules.<sup>6</sup> This is dangerous: not knowing the laws hurts acceptance of state and government. Certainly one observes constant expansion of public legislation into areas that were formerly the preserve of private or social self-regulation and an excessive refinement of law due to the creation of increasingly detailed rules. Proliferation of legislation and instability of law adds to the decreasing comprehensibility of law. Reasons for these phenomena are the expansion of state activities and the necessity of high flexibility in the face of rapidly changing economic and social factors. One important political factor is the alternation of political leadership following general elections insofar as it produces new laws or a change in legislation for political motives. Not only is the quantity of laws increasing; the quality of norms is decreasing. Obviously, an important contributor to inflation is the frequently insufficient method and skill of law making which calls for the subsequent improvement or modification of laws.

#### IV. Economic and Social Progress as a Challenge for Constitutional Law

The constitution, as the basic norm of the country, the master plan for preserving the good results of development and inducing change, should ban these dangers to progress. However, there is a threat, that constitutional law, instead of channelling these developments, may be subject to alterations by them, which may reduce its stability. The question is, whether the liberal basic-rights-democracy (as a static order to organise the state and shelter the individual versus the state) is going to be swept away by a constitution expounded as a dynamic instrument of value-loaded norms. This is a very basic problem of constitutional theory and philosophy (under C.). In fact, economic and social progress has an impact on the application of constitutional norms, for example, the social state principle, the basic-rights section and the basic organisation of the state (under D.). Altogether, economic and social progress is good reason to rethink the efficiency of the constitution again (under E.), in particular the effectiveness of Fundamental Rights (under F.).

#### CONSEQUENCES OF ECONOMIC AND SOCIAL PROGRESS

#### FOR CONSTITUTIONAL THEORY

## I. Models of Constitutional Interpretation

The rapid change of social life has an impact on understanding the functions of the modern constitution:

- What is the main purpose of the constitution: does it primarily regulate organisation and procedure of political life or is it a catalogue of goals and means of policy?
  
- Is it more a static or a dynamic order?
  
- Does the constitution limit itself to a law for the state and its organs or does it aim at regulating society as well?

## II. The Constitution as Law for Government or as Regulating Society?

The latter is the most important question for modern constitutional interpretation. The realms of discussion indicate a constitutional regulation deficit:

- Does the constitution take notice of the increasing scope of state responsibility in modern societies?
  
- Does constitutional law, for example, its democracy and publicity principles, apply to political parties and associations that participate in the policymaking process?
  
- Are civil rights still defensive rights or also sharing and participatory rights?

Drawing a line between these issues, it is obvious, that the dogma of differentiation between state and society as a prerequisite of rule-of-law-liberty<sup>7</sup> is at state. It is true, that the liberal limitation of public tasks and the confinement of society's influence on politics through elections only are no longer valid. To a certain extent, state and society are merging. The



modern state's expansion of its functions leads to a deficit of constitutional regulation. The liberal constitutional state is oriented toward limiting individual freedom in favour of the common interest in a strict rule-of-law manner. The modern state, in addition, requires constitutional means for regulating state activities in supporting the individual, distributing wealth and influencing people's behaviour by spending power and moral persuasion. On the other hand, management of public authority is increasingly influenced by society. In a sort of new corporatism, parties and associations are diffusing into the state decision-making process.

In both perspectives, the borderline between state and society is no longer quite clear. Constitutional theory and administrative law have to work on a new definition and delimitation of the spheres of government and society.

### III. Constitutional Law as Static or Dynamic Law?

The constitution is the framework for political life and action. It is the basic decision of the people about how they want to live. The traditional business of the constitution is to stabilise political life. In doing so, the constitution has to be carefully adapted to changes in society.<sup>8</sup> The constitution can do what is expected of it only if and insofar as it contains sufficient static elements that preserve the consensus of the people about the manner and form of political existence. The bill-of-rights section and the basic organisation of the state allow it to fulfil this function.

Economic and social progress is a challenge for this function of the constitution. It encourages the trend of looking at the constitution as a dynamic motor for changes in society. In this landscape, constitutional law is evoked as a value system to steer changes in state and society. The constitution in this perspective is a mandate rather than a frame for changes.

### IV. The Constitution as Organisation and Procedure or Value System?

This is the most drastic shift in perceiving the function of constitution law. Constitution law no longer presents an organisation of government to regulate on the contest of pluralistic values in the political process, but rather a value system in itself. Applying and expounding constitutional law no longer means primarily to define the rights and duties of individuals and state organs, but to find values and goals in the constitution and to transform them into reality. The constitution is no longer a boundary around political action, but a guiding principle to provide for policy goals and means.

The perception of the constitution as a myth is deeply rooted in human needs and desires. Everybody deserves orientation, and while and because religions and consent to ethics are losing strength, modern societies look at constitutional law as a basis of consensus and a value system. This is, to a certain extent, legitimate and useful, but embraces the danger of a tyranny of values that might jeopardise tolerance and pluralism.

In fact, one may well pose the question, whether the entitlement of the individual to enjoy justice and security under law is better protected by constitutional law as organic law for the political process, with attainable basic rights and a strictly bound executive, or by a constitution as a set of values, proclamations, and promises for a directed policy.

## ECONOMIC AND SOCIAL PROGRESS AND ITS IMPACT

### ON THE BASIC ELEMENTS OF THE CONSTITUTION

#### I. Progress and Constitutional Law

Economic and social progress, as a far-reaching process in changing societies, undoubtedly has an impact on the traditional constitution and all of its elements. In particular, it is the social rule-of-law state that undergoes alterations. The social state is increasingly transformed into a tax-raising state, which is subject to the ever-increasing demands of its citizens. By this, the rule of law state is affected both as a human-rights state and a system of separation of powers. The former are no longer barriers against illegal inroads into individual freedom but sharing rights of the citizen to finance their pursuit of happiness. In view of the role of parliament in the balance of power system, it is subject to day to day politics and incapable either to decide on long term plans for the country or to control the inclination of the executive to spend, because the representatives induce spending bills rather than enhance them. Parliament is very much dependent of the voters' expectations.

#### II. The Social State Principle

The constitutional state, as a heritage of the nineteenth century's liberal era, starts from a minimal state concept. Nowadays, social state's action is required for regulating economic, cultural and social life, distributing wealth and facilitating opportunities for enjoying basic rights. The social state concept – although inserted into the constitution only by adding the attribute 'social' to the rule-of-law principle – is dominating the politics of the country.

New tasks, goals and means of fulfilling them are detracted from the word 'social' by interpretation. The social state aims at gaining peace, a healthy environment, full employment and social justice. The extent of state responsibility is finally limited only by the taxpayers' unwillingness to pay, because the social state is a state of taxation. Enormous sums are channelled, distributed and redistributed after deduction of a bureaucracy-quota. Of course, the social state is a mechanism to create job opportunities. However, the social state's development has come to a point of reconsidering what the citizen wants to be: free or dependent persons. Does the individual prefer to be master his life or to be looked after by government?

### III. Economic and Social Provisions of Basic Law

Economic and social progress in all countries induces a changing role of civil rights. One can observe, as a whole, a growing expansion of civil rights. They are looked at not only as being individual safeguards, but also as expressing the basic value standards of the people. Civil rights with more or less explicit, jurisprudential interests, are interpreted and applied not only as defensive, sharing and participatory rights, but also as objective value norms, institutional guarantees and organisational and procedural safeguards. In looking at the constitutional approach to human rights, the legalistic approach reflects the *liberté-principle*, the collective dimension *égalité* and the solidarity aspect *fraternité*.

The traditional defensive rights notion is still valid: man versus the state. The traditional defensive rights catalogue, however, shrinks to contain rights 'merely' of the first generation, which with the 'progress' of constitutional rights and freedoms have to be complemented by rights of the second generation<sup>9</sup> (for example, right to labour, housing, etc.) and a third generation (for example, right to a peaceful life in a healthy environment and a right to share a just distribution on natural resources and the GNP).

Enlarging human rights underestimates the reach and strength of the defensive rights notion: the right to life and inviolability of the person (Art. 2 (2) BL), which may well protect the individual against acts destroying her or his environment and can even go so far as to guarantee a legal right to security.<sup>10</sup> In the embracing bureaucratic welfare state there is, in fact, no good reason to reduce the first notion of civil rights as defensive rights: man versus the state is a key element of rule of law.

A second trend of adapting basic rights to what is seen as the needs of the social state is interpretation of sharing rights. One holds the individual as legally entitled to enjoy an equal share of state offerings, at least in areas such as education<sup>11</sup> or social welfare. One step further, some authors advocate the insertion of claimable performance rights to ensure labour, a healthy environment and health for all by state action. The notion is to dismantle social

barriers, especially in light of the fact that in the rule-of-law state legal barriers have effectively been demolished for 100 years.

The first approach – equal opportunity and chance under the law – is well accepted, the latter less so. In fact, the state is obliged to supply existential wants of the individual under the dignity of man (Art 1 BL) and life and freedom (Art 2 BL) clauses,<sup>12</sup> which covers, for example, education. However, in view of guaranteeing labour and health, the constitution must restrain itself to an instruction directed to the state to promote social justice. It is the responsibility of the state organs to decide how to accomplish this. The notion of claimable social rights leads to various problems in applying the constitution. First, they cannot be executed themselves, but in fact, need legislation and administration. Second, parliament is no longer free to set priorities. Furthermore, social rights of this kind lack precision, and so are unsuited to court decisions. Altogether, social rights open a gap between form and content

A third way of interpreting basic rights in a democratic state is to construe them as participatory rights.<sup>13</sup> Of course, there are rights to vote, to petition, to decide on one's own matters in self-governing bodies like municipalities, institutions of higher education and autonomous social security bodies. But there are problems of double participation, if and as far as parliamentary or city council decisions on building plans, location of power plants or environmental measures are preceded by participatory votes of neighbours, environmentalists and the industry. Representative democracy is one form of government, direct participation another. The two may not easily be combined. And there are doubts as to whether it is wise to enlarge the political arena, which is marked by the democratic majority vote principle.

Following the trends of interpretation in the human rights section, one may run into a contradiction between the basic constitutional principle of freedom and the factual situation of increasing regulation in the participatory social state. In order to meet its obligation of protecting the individual, assuring and distributing social goods, the state often takes over where it should not be entitled to do so, in particular via its spending power. This calls for 'more' freedom after all rationalisation and planning and distribution.

#### IV. Organisation and Procedure of Government

Economic and social progress in the modern social state are a challenge for the federal rule of law as a separation of power state insofar as it leads toward centralisation, growing legislative and governmental regulation, and impact of court decisions, which make life and society more and more a matter of administration, and impede flexibility, mobility, creativity and competition.

Federalism adds to cultural, economic, and social diversity as well as pluralism. Small is beautiful. However, growing inter-communication in the modern state fosters the trend toward homogeneous living conditions. People obviously tolerate diversity of life style – in particular, in economic terms – only to a certain extent. Thus, unitarian mechanisms may be detected in many federal or decentralised systems, like operating with central funds, co-operation of decentralised units and financial aid from the top. The entrance for unitarian trends in Germany is Art. 72 (2) CI3 BL, which entitles the Federation to legislate on matters in the concurrent legislation sector, if and to the extent that the maintenance of legal or economic unity, especially the maintenance of equal living conditions throughout the federal territory, renders federal regulation necessary. In the separation of power system, economic and social progress leads to a strengthening of the executive.<sup>14</sup> Parliament as the ‘motorised legislator’ hardly can pursue executive action. State regulation, of legislative and executive origin, becomes denser.<sup>15</sup>

Planning as an instrument of final rather than conditional steering by law becomes increasingly important. The decision-making process is influenced by bargaining and compromise rather than by parliamentary majority vote.

Finally, it is the growing importance of court decisions, which affects the development of the social and welfare state. It is true, that the rights to education, minimum financial support and equal opportunity are such broad constitutional clauses that they need to be detailed through litigation. One can clearly observe a shift in the balance of power in favour of the third power. The modern constitution is no longer merely the basic organisation of the state, but is a value oriented law that determines the goals and means of politics. The constitution is deciding instead of the organs of government. It removes important political issues from the daily political decision-making process. Thus the constitution incapacitates, to a certain extent, parliament and the executive branch, and, in fact, entitles the courts to decide on directions of economic and social reform.

## ECONOMIC AND SOCIAL PROGRESS AND ITS IMPACT ON THE CONSTITUTION

### I. Challenges to the Effectiveness of the Constitution

Applying the constitution properly requires that every state action must be in accord with the constitution. An effective constitution has binding strength and can be enforced. Modern constitutionalism in Germany hitherto led from programmatic constitutional principles (as parts of the Weimar Constitution of 1919) to directly binding law. “The following basic rights shall bind the legislature, the executive and the judiciary as directly enforceable law” (Art 1 (3) BL). “Legislation shall be subject to the constitutional order; the executive and the judiciary shall be bound by law and justice” (Art. 20 (3) BL). The constitution may be

enforced by state organs (Art. 93 (1) Cl. 1-4 BL) and every citizen: Art. 93 (1) CL 4a BL and Art. 19 (4) BL: “Should any person’s right be violated by public authority, recourse to the court shall be open to him”. The Basic Law of the Federal Republic is a meagre constitution. It refrains from noble and lofty political goals in favour of being an effective tool for government and citizens.

It seems that economic and social progress, as involving state and constitution, is a challenge for this notion of the effective constitution. It is more or less a philosophical issue, what the extent of state’s responsibility in the arena of social and economic development is and should be. The Basic Law as a human rights constitution undoubtedly calls for limited state control; the state must refrain from abundant regulation. If there are too many laws, they lose effectiveness. There should definitely be a limit to limits on economic and social freedom. Moreover, to load the constitution with issues of steering economic and social progress may have the effect of reducing its clarity and increase difficulties in understanding the text. All this serves to decrease security under the law and consequently to damage the effectiveness and enforceability of the Constitution.

## II. Effectiveness as Binding Force

The Basic Law according to Art. 1 (3) is binding on state organs. This applies to federal agencies and (according to Art. 28 (1) BL) state governments as well as all organs of municipalities (Art. 28 (2) BL) that enjoy autonomy. Furthermore, the constitution is binding on political parties (Art. 21 BL), which, though not state organs, have a semi-governmental status, more in the sphere of society than government. There are discussions of whether the Basic Law should be made binding upon associations of economic and social life. The present constitutional situation is that they enjoy freedom (Art. 9 BL) within the limits of the very basic principles of the constitutional order. Although it is true that associations play an ever increasing role in political life, steer social and economic progress and have a quasi-governmental importance for every individual, there are sound arguments to keep them as flexible pluralistic brick stones of society rather than integrating them into government. There are even more divergent disputes about the question, whether the constitution, in particular its basic rights section, is binding not only on state organs but upon individuals as well. The latter could well be a good argument, since the Constitution is looked at as a basic value system. As a starting point there is more or less agreement,<sup>16</sup> that there is no direct third party effect, because the constitution and its fundamental rights are directed at man versus the state. On the other hand, the Constitution enters the private sector and relations between individuals under the law in a threefold manner. First, every person enjoys his or her fundamental rights and freedom only as far as he or she does not violate the equal rights of others (Art. 2 (1) BL). Second, the Constitution as a basic value system affects every single law and consequently has an impact on, for example, contracts or agreements between individuals. Third, the state has to guarantee and protect the individual’s fundamental rights. This responsibility has no direct legal effects except in as far as the individual is granted a right to sue the state. It is at the discretion of parliament how to fulfil the state’s obligation. Nevertheless, the constitutional status of the individual is a vehicle for bringing private law into the spotlights of the constitution.

### III. Enforcement of the Constitution

If a state (Land) fails to comply with its obligations of a federal character imposed by the Basic Law or another federal law, the federal government may take the necessary measures to enforce that Land's compliance (Art. 37 (1) BL). The Länder enforce the law via the municipalities. By virtue of the Federal Constitutional Court, state organs may enforce their rights under the Constitution (Art. 93 (1) Cl. 1 BL). The same is true for the rights and duties of the Federation and the Länder (Art. 93 (1) Cl. 3,4 BL). Municipalities may defend their constitutional rights (Art. 93 (1) Cl. 4b BL) as may individuals (Art. 93 (1) Cl. 4a BL) and, according to recent decisions of the Federal Administrative Court, associations, like those of environmentalists.

The Basic law contains a set of provisions for protecting the Constitution, and enforces it under irregular circumstances. According to Art. 91 BL, to avert any imminent danger to the existence or the free democratic order of the Federation or a Land, a Land may request the services of the police forces of other Länder or of the forces and facilities of other administrative authorities and of the Federal Border Guard. Arts. 115a et seq. and Art. 53a BL, regulates intensively on states of emergency and defence. By an amendment of 1968, paragraph 4 was added to Art 20 BL: "All Germans shall have the right to resist any person seeking to abolish the constitutional order, should no other remedy be possible." This basic right may be applied in case of a coup d'état from the top as well as an insurrection or revolt from the bottom or if measures for coping with a state of emergency are insufficient.<sup>17</sup> To protect the very core of the Basic Law, Art. 79 (3) says that amendments affecting the division of the Federation into Länder, (That's what the constitution says. The Länder must participate in the Federal legislation, but only on principle, so that details and scope may vary) the participation on principle of the Länder in legislation or the basic principles of the free democratic rule-of-law state are inadmissible.<sup>18</sup>

Of course, history may pass over this provision of the 'intangible', 'iron', 'everlasting' constitution, but this would be an act clearly ending the constitution's effectiveness.

### IV. Effective Constitution or Soft Law?

It is legitimate to ask the question whether constitutional elements of the dynamic state, which fosters economic and social progress, add to the strength and effectiveness of the fundamental order or not. One may well come to the conclusion, that state goal directives (like the social state clause or a similar provision, which obliges the state to provide for a healthy environment) and social and economic fundamental rights (like a right to education, labour and housing) do not strengthen but rather weaken the individual's position. However, it is polemic and too far-reaching to talk of 'constitution-lyrics'. However, the constitution

definitely can foster a special 'reform drive'. State goal provisions may be used as guide ropes for politics, for the legislator as well as for government and administration. They may be guidelines for the courts to advocate laws in the light of the state goal provision. On the other hand, in view of a strong and effective constitution they carry some deficiencies with them. First, they are very abstract and lack the precision of most constitutional provisions. Second, state goal directives are integrated into the constitution to join a special reform drive that may change rapidly. To make these directives effective, government – under a budget squeeze – may come into conflict with the need to fulfil other state tasks. And state goal directives can never be implemented properly.

The social state is like a warm bath that heats up so imperceptibly that you do not know when to scream.<sup>19</sup> It is a screw without end. Finally, it is the courts that are blamed for bad laws and the weakness of parliaments to decide. Indeed, in view of furthering the welfare state, health and the environment, time for great rhetoric is over. What is needed nowadays is practical fantasy, enforcement of laws and – of course – sufficient financial means.

To implement social and economic fundamental rights into the constitution is even more questionable. Not only does a right to labour hurt the budget autonomy of parliament, it also hands the state responsibility for the whole economic sector, which means control. A right to labour leads to concealed unemployment at taxpayers' expense.

If one wants to avoid these consequences, the real content of social rights is thin. The effectiveness of social rights depends on legislation and economic and social development. The legal solution of social rights may not be found in the clouds of the constitution but rather on the ground of legislation.<sup>20</sup>

If one dares a cost-effectiveness analysis of new constitutional provisions and interpretations of the social and economic progressive state, one would find that they may have an appellative, evocative, and educational function on the one hand. On the other hand, they are a breach of the system of the effective and enforceable constitution. They raise expectations that cannot be fulfilled. In the end, the latter argument is overwhelming.

## ECONOMIC AND SOCIAL HUMAN RIGHTS

### IN INTERNATIONAL AND EUROPEAN LAW

#### I. Impact of the Universal Bill of Rights of 10 December 1948



Following the German constitutional law philosophy of protecting relatively few and mostly defensive fundamental rights, albeit in a very effective manner, the impact of international and European human rights, in particular social and economic rights, is limited. They strengthen and enhance national human rights by convergence and complementarity.<sup>21</sup>

One finds, indeed, that there is an astonishing degree of convergence between most of the civil and political rights embodied in the Universal Declaration of Human Rights (UDHR) in the United Nations Covenants of 1966, and from this perspective, their counterparts in the Basic Law. The civil and political rights guarantees of the Universal Bill of Rights are directly applicable, constitutionally guaranteed and implemented basic rights.

## II. Impact of the United Nations Covenant on Economic, Social and Cultural Rights of 19 December 1966

The economic, social, and cultural rights of the UDHR and the UN Covenant on Economic, Social and Cultural Rights, on the other hand, have not been transformed into national obligations in the same manner. They have been accepted as obligations, binding the state internationally only, and as standards of programmatic intent needing national legislative transformation before becoming effective. Moreover, these social human rights catalogues, when ratified, are regarded as non self-executing obligations, and thus, exclude direct applicability for citizens concerned unless follow-up legislation produces such effects.

## III. Affect / Impact of the European Convention for Human Rights (ECHR) of 4 November 1950

While at the universal level human rights standards from the perspective of effective application and implementation machinery have not flourished, a radical difference of approach at the regional European level can be observed. The ECHR regime, in particular, with its subtly differentiated system of review mechanisms of Commission, Committee of Ministers, and Court of Human Rights, has greatly enhanced the international realisation of human rights standards. This regional success is partially responsible for less effective review mechanisms at the global level. During the first years of the existence of the ECHR, due to the full strength of the Basic Law fundamental rights, one paid little attention, to its substantive guarantees. In addition, the fact that the ECHR in Germany was not accorded constitutional law status but was enacted by legislation and consequently was excluded from review by the Federal Constitutional Court unless a violation of Basic Law provisions could be claimed concurrently, helped to belittle the importance of the convention at the national level.<sup>22</sup> This changed drastically with a series of cases since 1978. They give evidence of the increasing importance attached to the European Convention. National legislation in the 'human rights'

sphere is bound by the national constitution, not directly by the ECHR, but certainly has to acknowledge and to take into account the ECHR standards.

#### IV. Impact of the European Social Charter (ESCh) of

18 October 1961

All 19 economic and social rights, set out in 72 provisions of the Charter, were laid down as objective norms, binding only the states that were parties to that convention. In comparison with the equivalent human rights standards of the Universal Bill of Rights, the European social rights standards are more elaborate and the system of optional obligatory acceptance laid down in that convention is geared more towards direct implementation at the regional level than their global counterparts. Although there had been doctrinal controversy,<sup>23</sup> the overwhelming majority of opinions reject the view of self-executing effect of the social and economic rights. Thus, the norms of the ESCh have to be viewed instead in the light of their programmatic, standard-setting function. In this respect, they share the fate of all social rights at the global and at the national level of Western constitutional systems.

#### V. Impact of the European Charter of Fundamental Rights (ECFR) of 6 December 2000

The constitutionalisation process of the European Union is under way. The recent and most visible step is the proclamation of the ECFR. It covers social and economic rights. However, in contrast to the fundamental freedoms in the EC-Treaty, which are binding law, the Charter is, strictly speaking, not legally binding. It is a political instrument. It has not been submitted to parliamentary vote or popular referendum, and it is difficult to adopt a part of a constitution of the EU without the people. The charter is a solemn political declaration of the EU organs. By the Charter, Europe has reached the formulation of an integral model through right, which takes a meaning that goes beyond the EU's specific requirements. Basically, it meets a general need to identify a system of values, it makes the powers of citizen effective and reconstructs the ground conditions of democratic legitimacy. One may talk of integration through rights. The Charter exceeds the common traditions of member states by far. It is an essential element for the interpretation of binding European as well as national fundamental rights.<sup>24</sup>

1 Ulrich Karpen, *Soziale Marktwirtschaft und Grundgesetz. Eine Einführung in die rechtlichen Grundlagen der sozialen Marktwirtschaft*, Baden-Baden, 1990, p. 14ff.

- 2 Ulrich Karpen (ed.), *The Constitution of the Federal Republic of Germany: Essays on the Basic Rights and Principles of the Basic Law* (with a translation of the Basic Law), Baden-Baden, 1998.
- 3 Federal Constitutional Court, Official collection of decision, vol 1, pp 104 etseq, at p 114 [BverfGE 1, 104 (114)] 1, p. 104ff.
- 4 BVerfGE 7, 377 (400); E 50, 290 (338).
- 5 Dieter Grimm, *Die Zukunft der Verfassung*, in: *Staatswissenschaften und Staatspraxis*, 1990, p. 5ff. (12); Wilfried Fiedler, 'The Strengthening of the Executive in the Contemporary Constitutional System', in: Christian Starck (ed.), *Rights, Institutions and Impact of International Law According to the German Basic Law: The Contributions of the Federal Republic of Germany to the Second World Congress of the International Association of Constitutional Law*, Baden-Baden, 1987, p. 95ff. (102).
- 6 Ulrich Karpen, 'Legislative Theory and the German Society of Legislation', in Ulrich Karpen, *The Constitution of the Federal Republic of Germany and its Economic Order: Some Observations after 40 years, four essays*, Hamburg, 1989, pp. 26-88; Meinhard Schröder, 'Inflation of Legal Rules', in Christian Starck (ed.), *op. cit.*, p. 115ff.
- 7 Ulrich Karpen, *Die Unterscheidung von Staat und Gesellschaft als Bedingung der rechtsstaatlichen Freiheit*, in *Juristische Arbeitshlätter*, 1986, p. 417ff.
- 8 Ulrich Karpen, 'Application of the Basic Law', in Christian Starck (ed.), *Main Principles of the German Basic Law: The Contributions of the Federal Republic of Germany to the First World Congress of the International Association of Constitutional Law*, Baden-Baden, 1983, p. 55ff.
- 9 Eckart Klein, 'Human Rights of the Third Generation', in Christian Starck (ed.), *op. cit.* (fn. 5), p. 63ff.
- 10 Ulrich Karpen, 'Zu einem Grundrecht auf Umweltschutz', in Werner Thieme (ed.), *Umweltschutz im Recht*, Berlin, 1988, pp. 9-24.
- 11 BverfGE 33, 303 (333).
- 12 BVerfGE 39, 1 (36) (protection of the foetus); E 46, 160 (164) (security of nuclear energy installations), E 56, 54 (73) (noise of aircraft).
- 13 Wolfgang Graf Vitzthum, 'Citizens' Participation in State Functioning', in Christian Starck (ed.), *op. cit.* (fn. 5), p. 159ff.
- 14 Wilfried Fiedler, 'The Strengthening of the Executive in the Contemporary Constitutional System', in Christian Starck (ed.), *op. cit.* (fn. 5), p. 115ff.
- 15 Meinhard Schröder, 'Inflation of Legal Rules', in Christian Starck (ed.), *op. cit.* (fn. 5), p. 115ff; Ulrich Karpen, 'Zum gegenwärtigen Stand der Gesetzgebungslehre in der Bundesrepublik Deutschland', in *Zeitschrift für Gesetzgebung*, 1986, p. 5ff.

- 16 Christian Starck, 'Constitutional Definition and Protection of Rights and Freedoms', in Christian Starck (ed.), op. cit. (fn. 5), p. 47ff.
- 17 Ulrich Karpen, (fn. 8), p 86.
- 18 Gunnar Folke Schuppert, 'The Constituent Power', in Christian Starck (ed.), op. cit. (fn. 8), p. 37ff.
- 19 Analogous to Bertrand Russell; Ulrich Karpen, op. cit. (fn. 8) p. 64, fn. 37.
- 20 Georg Brunner, *Die Problematik sozialer Grundrechte*, Tübingen, 1971, p. 36.
- 21 Eibe Riedel, 'Assertion and Protection of Human Rights in International Treaties and Their Impact in the Basic Law', in Christian Starck (ed.), op. cit. (fn. 5), p. 198ff.
- 22 Eibe Riedel, 'Bundesverfassungsgericht und Europäischer Gerichtshof für Menschenrechte', in *Europäische Grundrechte Zeitschrift* (?), 1978, p. 264ff.
- 23 Eibe Riedel, op. cit. (fn. 21), p. 218.
- 24 Stefano Rodotà, 'The Charter of Fundamental Rights', in *Reports of the First European Jurists Forum, Nuremberg 2001, Baden-Baden, 2001*, p. 20.