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Legitimation by Constitution and Socioeconomic Rights from a German Perspective*

Zusammenfassung

Die Erwiderung auf *Frank Michelmans* Essay in diesem Band enthält eine knappe Darstellung der verfassungsrechtlichen Ausgestaltung des Prinzips sozialer Gerechtigkeit in *Deutschland* sowie eine Diskussion der Justiziabilität der Sozialstaatsklausel des Grundgesetzes. Deutschland gehört ohne Zweifel zu denjenigen Staaten der Welt, die einen besonders hohen Standard sozialer Sicherheit entwickelt haben. Dieser Standard ist jedoch nicht das Resultat der Verbürgung sozialer Grundrechte – sie fehlen im Grundgesetz – oder der gerichtlichen Durchsetzung des Sozialstaatsprinzips in Art. 20 und 28 GG. Er hat seinen Grund vielmehr in erster Linie in politischen Entscheidungen auf der Basis einer insgesamt positiv verlaufenen wirtschaftlichen Entwicklung, welche die ausgreifende Sozialpolitik erst ermöglichte. Damit soll freilich nicht gesagt werden, dass das Verfassungsrecht für die Verwirklichung des Sozialstaats bedeutungslos gewesen wäre. Das *Bundesverfassungsgericht* hat sich vielmehr in zahlreichen Fällen auf den Sozialstaatsgrundsatz berufen, um in Verbindung mit der Menschenwürdegarantie und dem allgemeinen Gleichheitssatz ungerechtfertigte Differenzierungen auf dem Gebiet des Sozialrechts zu beanstanden und Gesetzeslücken zu füllen. Es hat ferner diejenigen Mindeststandards definiert, welche die Sozialgesetzgebung nicht unterschreiten darf, wenn sie den verfassungsrechtlichen Anforderungen genügen will. Dagegen können aus der Sozialstaatsklausel wegen ihrer hochgradigen Unbestimmtheit keine weitergehenden Ansprüche abgeleitet werden. Ebenso versagt die verfassungsrechtliche Sozialstaatsklausel dort, wo Großdefizite im Bereich der sozialen Sicherheit bestehen. In einem solchen Fall muss sich das Verfassungsgericht vielmehr auf eine verfassungsrechtliche Verpflichtung des Gesetzgebers beschränken, die Problemlösung in Angriff zu nehmen. Werden diese Grenzen der gerichtlichen Durchsetzung des Sozialstaatsprinzips eingehalten, bleibt die Verfassungsgerichtsbarkeit im verfassungsrechtlich geregelten Bereich und greift nicht in die Zuständigkeit der Politik über.

Résumé

Cette réponse à l'essai de *Michelman* dans le présent volume offre un exposé succinct de la perspective constitutionnelle allemande classique relative aux droits socio-économiques. *L'Allemagne* se qualifie de toute évidence comme un Etat qui répond aux standards les plus élevés en matière de Sécurité sociale dans le contexte mondial actuel. A cet égard, ce statut n'est pas le résultat de la justiciabilité des droits socio-économiques

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ou de l'application judiciaire du principe de l'État social enchâssé dans l'article 28 de la Loi Fondamentale allemande (Grundgesetz). Il est plutôt le résultat de certaines décisions politiques et d'une économie d'après-guerre globalement robuste qui a rendu possible la mise en œuvre de celles-ci. Ceci dit, il n'en démure pas moins que l'article 28 joue un rôle dans la mise en œuvre des droits socio-économiques en Allemagne. La *Cour Constitutionnelle* l'applique fréquemment, souvent en se référant à la garantie de la dignité humaine, afin de préserver l'égalité de traitement dans le domaine de la sécurité sociale et de remplir les lacunes des dispositions législatives. Elle détermine aussi le niveau minimum de garantie d'aide sociale. Toutefois, l'absence de signification précise de la clause relative à l'état social ne permet pas maximaliser la sécurité sociale. De même, la Cour s'abstiendrait d'intervenir dans le déficit de sécurité sociale qui concerne largement la vie sociale. Dans ces cas, la Cour se contentera de demander au législateur de corriger les insuffisances et d'élaborer un projet visant à résoudre le problème.

Like *Frank Michelman* I am convinced that liberalism alone will not satisfy the requirements of justice and legitimacy as he describes them. I start with some remarks concerning socioeconomic rights as necessary elements of constitutionalism (*Michelman's* concern in section II B 3 of his essay in this volume) and then pass over to the problems of a judicialization of socioeconomic rights (the concern in section II B 4 of his essay).

I.

What *Frank Michelman* describes as "the social liberal branch of political-liberal thought" would probably appear in German translation as "Sozialstaat" (social state), understood as a constitutional principle, not as philosophical theory. The social state is not a socialist state. The term is usually used in connection with the term *Rechtsstaat* (rule of law) as the reference to the *Sozialer Rechtsstaat* in article 28 of the Basic Law shows. This indicates that the concept shares liberal commitments to individualism and individual freedom as foundations of the social and political order. But it differs from traditional liberalism insofar as it breaks with a purely formal understanding of liberty by including concerns with the substantive conditions that must prevail if individual freedom is to become a meaningful concept and not to remain an empty notion. Among these conditions are the material means necessary for leading a dignified live – *Frank Michelman's* and *John Rawls'* "social minimum." To guarantee and, if necessary, provide this minimum is a constitutional mandate that burdens the state with a positive duty to act (*Staatsaufgabe*). In a social state, the "social minimum" cannot be considered a voluntary grant of the state. The social state principle therefore prohibits a return to the 19th century type of liberalism under the reign of which no such positive duties were contemplated.

Does this notion of *Sozialstaat* imply or require the constitutional recognition of socioeconomic rights? This would not seem to be the case. The German Basic Law does not contain such rights. And, although the origins of the social state lie in *Germany*, namely in Bismarck's social security system of the 1870 s, the social security provided under Bismarck's system was not yet accompanied by socioeconomic rights. In fact, it

was not at all accompanied by a bill of rights. The Constitution of the German Empire of 1871 was nothing more than an organizational statute. This changed with the Weimar Constitution of 1919. The Weimar Constitution contained a bill of rights that was not limited to the classical liberties, but also guaranteed a considerable number of socioeconomic rights along with principles aimed at ordering the economy. However, legal science disputed the legal validity of these rights at the time. In spite of their inclusion into the constitution, the majority of constitutional law scholars held that they were not law. They drew this conclusion from the fact that socioeconomic rights were not directly applicable to concrete cases, but depended on legislation that specified the conditions and the extent of social benefits. Only concrete laws were deemed to be legally relevant, whereas socioeconomic rights formed but a proclamation of political intent without obligatory force. In the absence of judicial review, the courts enforced the laws, not the constitution. Nonetheless, social security, workers protection and material social benefits were considerably enlarged compared to the benefits granted during the Empire. The Weimar Republic was a social state without being characterized as such in the Weimar Constitution and without the socioeconomic rights in the constitution playing a legal role.

The Basic Law of 1949 did not repeat the experiment with socioeconomic rights, mainly for fear that, in the economic situation of post-war Germany, the expectation they would create might not be met. The Bill of Rights of the Basic Law was confined to the classical liberties. Yet, it recognized the social obligation of the state and guaranteed human dignity. Although no specific obligation can be derived from the constitutional principle of the *Sozialstaat*, the *Federal Republic* is beyond doubt a social state, even more so than the *Weimar Republic*. This is primarily the result of political decisions. Social welfare was part of the program of all major political parties because they realized that the legitimacy of the political system and their success in elections depended on guaranteeing social security. The realization was facilitated by an unexpected economic growth, whereas the Weimar Republic had been in a constant economic crisis. Neither the Basic Law nor the *Constitutional Court* was the driving force. The German *Sozialstaat* would not have been fundamentally different in the absence of the social state principle of the Basic Law.

With regard to social policy, the constitution only came into the play when the legislature accorded social benefits unequally or failed in isolated cases to provide the social minimum. In these cases the social state principle in combination with the guarantee of human dignity (Art. 1 BL) and the equality clause of the constitution (Art. 3 BL) was used to close the gap. Furthermore, the Court developed an interpretation of fundamental rights that differed sharply from the formalistic interpretation that prevailed in the *Weimar Republic*. Although the Constitution of the *Federal Republic* contains only classical liberties, the *Constitutional Court* has consistently refused to understand them as purely negative rights that limit state action and entitle individuals to defend themselves against intrusive acts of government. In addition to that, the Court viewed the rights as objective principles that permeate the whole legal order, including private law, and obligate the state to actively promote liberty also in the societal sphere.

This includes a duty to legislate in order to protect individuals against menaces to their freedom that emanate not from the state, but from private actors, and to organize spheres or systems of social live where individual liberties are exercised in a way that

the freedom of the various actors is maintained, and to provide the means necessary to make use of a constitutionally guaranteed freedom. This does not mean that liberties are transformed into social and economic rights. Rather the constitutional court developed the positive dimension of classical liberties and made them a vehicle of social justice.

One may conclude from this brief account of German constitutional history that there is no necessary connection between a country's constitution and the level of its social welfare. A state may be a social state without a corresponding constitutional obligation and in particular without socioeconomic rights. But the opposite is also true, as is evident in many countries. Constitutions may contain socioeconomic rights without the state qualifying as a social state because the majority of the population lives in poverty and is unprotected against exploitation.

This is not a repudiation of *Frank Michelman's* assertion that social rights are a *necessary* part of constitutional law. *Frank Michelman* develops a philosophical theory of a well ordered, just and legitimate political entity, whereas I speak about a legal situation, a connection between the constitutional law of a state and the social conditions of society. And it is from this perspective that I am prompted to conclude that German constitutional law, in theory and in practice, comes quite close to *Frank Michelman's* social liberal concept, but does so without recourse to socioeconomic rights. It relies instead on a functional equivalent of socioeconomic rights, namely the duty of the state to protect individual rights against threats emanating from private actors and a special enforcement mechanism, namely, constitutional adjudication.

What, then, are socioeconomic rights good for? They don't leave it to political discretion to determine whether the state should ensure social justice. If socioeconomic rights or functional equivalents exist and are recognized as rights or principles, they impose a legal duty on the state. A state that does not discharge its social obligations, does not choose a legal option, but behaves illegally.

II.

Constitutional adjudication, be it by a special constitutional court or a general supreme court, plays an important role in the arguments that *Michelman* forwards in this volume. In order to fulfil the requirements of social liberalism, constitutions must contain a commitment to social justice and must provide for judicial enforcement of a social minimum, albeit only if this can be done in a legal way. If a court would take leave of the legal system when enforcing socioeconomic rights, it would necessarily enter the political realm. *Michelman* would regard the possibility of such a development as a good argument against socioeconomic rights. This is why he devotes the second half of his contribution to the exigencies of constitutional adjudication.

I will do the same. The argument that legal discourse ends and political discourse begins when courts apply socioeconomic rights is often used to deny courts an active role in the adjudication of socioeconomic rights or against constitutional entrenchment of such rights altogether. As early as 1848 this was an object of discourse in the *German National Assembly* that drafted the *Paulskirche Constitution*. The majority of the deputies who took part in the *Paulskirche* assembly were not hostile to social policy, but they were opposed to the constitutional recognition of social rights. They argued that these

rights were not directly applicable but in need of legislative specification for their application. Many of them concluded from this that the problem which socioeconomic rights meant to solve could not be solved on the constitutional level but only at the level of ordinary law. As mentioned before, the constitutional doctrine in Weimar went even further in this regard. Although mentioned in the constitution, socioeconomic rights were not regarded as law.

When one endorses the reasoning of the *Paulskirche* deputies and Weimar constitutional doctrine and assumes that socioeconomic rights do not constitute law, one evidently also accepts that they do not found individual legal entitlements. Yet, the assumption that these rights cannot (or only in exceptional cases) create individual entitlements, would not entail their legal irrelevance. Even if they were not to found individual entitlements, they would still remain obligations that bind government. What kind of obligations? At stake would be the obligation to turn constitutional principles into ordinary law. Socioeconomic rights – or their functional equivalents – would thus impose on *Government* a constitutional duty to create individual entitlements and to provide the means necessary to honor these entitlements, either in kind or in money. The legislature is no longer free to act or not. But it remains free to determine, according to the political program of the elected majority and to available means, who shall be entitled to what benefits and to what extent.

Were this constitutional dispensation to hold true in a country, that country's constitutional court would have the capacity to declare the legislature to be in violation of its duty and could even oblige it to take action. Yet, a constitutional court could never prescribe to the legislator how to fulfil its duty, because this is not, and practically cannot be, predetermined in socioeconomic rights. This seems different from what constitutional courts can do with regard to classical liberties. When a state action violates a fundamental freedom, the constitutional court is not confined to declaring the act unconstitutional. It can also pronounce it null and void and reverse the act. In case of legislative non-action, however, there is nothing to reverse or declare null and void. The court can only order the legislature to act. But the order as such is unable to reach the aim, namely to create enforceable norms.

This is a difference in remedy. It puts courts in a different situation. If the legislature wants to resist an annulment of an act it has to re-enact it, which will be rather unlikely in a well-functioning constitutional democracy. If the legislature wants to resist an order to act it may simply remain passive. The court can only wait for the next case to come and re-affirm the order, but it cannot get an unwilling legislature going. In other words: the remedy for violations of a liberty remains within the legal sphere, the court can itself implement the constitutional norm. The remedy for the violation of a socioeconomic right concerns the real world. Only the political branches of government can implement the court order.

Yet, the difference is not as fundamental as it may seem. Sometimes, the harm created by a violation of a liberty can be redressed if the act is reversed. Often this will not be the case. The factual effects of the violation continue even after the act is abolished. The person is in jail. The property is destroyed. The private conversation is disclosed. The newspaper is confiscated. Therefore, the enforcement of a liberty is often accompanied by an obligation of government to restitute the previous situation or to pay damages. In

this case, the court is in the same situation as it is vis-à-vis socioeconomic rights. It can give an order to act, but not implement the order itself.

Constitutional courts are aware of this weakness. They have developed means to reduce the deficit. One of the ways in which they have done so is to distinguish between big and small deficits in the fulfilment of socioeconomic rights. Big deficits would typically concern the situation when large parts of the population are deprived of the benefits that socioeconomic rights promise. They have no housing, no job, no medical care, etc. And the government does not have sufficient resources to change the situation immediately. Under circumstances such as these, the court's only option is to oblige government to concern itself with the problem, perhaps also requiring it to report back and explain its endeavours to do so – that is, to address the problem – within a set period of time. A small deficit would concern those situations in which a program or system of social benefits has been installed, but nevertheless neglected or failed to include certain individuals or groups of individuals. In this case the constitutional court can order the government to include these groups into the system.

There are even possibilities to order how the obligation shall be fulfilled. Thus the *German Constitutional Court* (in the Hartz IV judgment of 2010)[1] enlarged the definition of the social minimum to include some elementary cultural needs. It also added some elements of the proportionality test to the positive dimension of fundamental rights. The legislator has to do something suitable to address a problem and should not do too little to solve it. The court may even require that the legislature uses some rational method to determine the social minimum.

However, this cannot close the gap between liberties and social and economic rights. But if the court respects the boundaries that stem from the difference between them, it does not leave the realm of the law. It does not act as a political institution. It remains within the boundaries of a legal discourse, which seems to be essential for the legitimacy of the judiciary.

1 BVerfGE 125, 175.