

Sixty years of a social market economy in Germany – Legal sociological observations¹

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Introduction

For an observer in Africa, particularly one of German origin, it is interesting to note how a social market economy was a point of reference in the campaigns for the federal elections in Germany, which were held on 27 September 2009. Measures to cope with the current global

¹ The following essay is a slightly amended version of a presentation made by the author to the Stakeholders' Conference on Economic Rights as Human Rights, organised by the Konrad Adenauer Foundation's Rule of Law Programme, and held in Cape Town from 23 to 26 September 2009. The author's observations attracted particular interest in view of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights (A/HRC/8L.2/Rev.1/Corr.1) adopted by the United Nations Human Rights Council and now open for ratification and accession (see www.un.org/News/Press/docs/2009/Lt4418.doc.htm; last accessed 11 October 2009). The new Optional Protocol opens the door for the development of a new field of international jurisprudence – jurisprudence on economic, social and cultural rights – as provided for by the International Covenant on Economic, Social and Cultural Rights of 1966 (GA Res. 2200 A XXI) and in force since 1976. Accessing to the Optional Protocol will mean that “communications on behalf of individuals or groups of individuals who claim to be victims of a violation of the economic, social and cultural rights” set forth in the said Covenant (cf. Article 2 of the Optional Protocol) will have the opportunity to submit communication to the Committee, which will have the mandate to examine the communication and assess the complaint forwarded therein (Articles 7–12). In assessments of complaints in terms of the Optional Protocol, questions will arise which have occupied the constitutional jurisprudence since the enactment of social rights in national constitutions; questions on the nature of economic and social rights; their dependence on the economic power of the State providing such rights; and their enforceability. International answers will unavoidably lead to national challenges. A comparative approach, which takes note of what national constitutions have done with economic and social rights, why they have done what they have done, and what reality corresponds to the constitutional vision, will certainly help in drafting international answers and responses to the international challenge. The following observations can only provide some preliminary suggestions.

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economic crisis, measures to limit the consequences of the crisis for the average German citizen, were on the agenda of basically all pre-election debates: in the newspapers, in public speeches, on the radio, and on TV.

The proponents of the two major political parties, the previous and now re-elected Chancellor of Germany, Angela Merkel, who is also the leader of the Christian Democratic Union (CDU), and Frank-Walter Steinmeier, the Vice Chancellor-cum-Minister of Foreign Affairs in the German coalition government for the past four years,² and the eventually unsuccessful candidate of the Social Democratic Party (SPD) for the Chancellorship appeared on TV on 13 September 2009 to make their cases to the nation and convince voters, particularly the undecided, that they were worthy of office. The social market economy as a concept and the platform for State interventions featured high on the agenda of the encounter, which was broadcast across the nation, was referred to in TV-speak as a *duel*. Some commentators, having watched the 90-minute interrogation of the two top politicians, called it a *duet* instead: they had hoped to see some political blood drawn, but the encounter was extremely civil.

The debate certainly revealed differences, but it also revealed a broad common basis, a common point of departure – the social market economy. The shared orientation towards this type of economy had assisted the CDU–CSU–SPD coalition over the past few years, particularly since the members of the international community had begun to suffer the consequences of the economic crisis, with jointly accepted tools to embark on national measures to combat it. In the TV duel/duet, one of the two top politicians called on the social market economy to renew itself, while the other was satisfied with the concept and mechanism as it stood, as well as with its capacity for political action.

An academic spectator would certainly have been surprised if the proponents of the historically differently rooted political parties had shown full agreement on the catalogue of appropriate measures to employ in combating the economic crisis. Notwithstanding this, the emphasis and focus on the social market economy as the underlying politico-philosophical principle appeared to be firmly entrenched in both of the political approaches.³

² In which the Christian Social Union (CSU), the CDU's Bavarian sister party, also participated.

³ It is not the task of this essay to interpret the results of the elections in view of this statement. The German electorate voted against the continuation of the coalition of the last years by giving substantial support to the Liberal Party (FDP). The new government will therefore be a government of the CDU/CSU on the one side and the FDP on the other. According to many political analysts, the

The current degree of consensus of the parties as regards the concept of the social market economy is the result of a very specific socio-political development. The broad acceptance of the social market economy as the guiding principle of Germany's economic order is the result of a political process that goes back to the beginning of post-Nazi Germany, to 1949, when the *Grundgesetz*⁴ was adopted as the country's Constitution.

Therefore, it is the intention of the first part of this essay to take the reader back to the legal debate at the time when the *Grundgesetz* was being enacted and implemented. The second part will shed some light on the realities behind what German history termed *die Sozialfrage*,⁵ and on the current challenge to the concept of *social market economy*. The conclusion will link the said discussion to the state of affairs in southern Africa, and offer some comparative remarks.

The social market economy from a constitutional perspective

Social State *and* social market economy

One of the questions that occupied lawyers and legal-minded members of the public at large after the adoption of the *Grundgesetz* was what type of economy it envisaged. It was obvious from the political environment that had led to the drafting of the *Grundgesetz* that it would not tolerate a socialist economy in the strict, i.e. communist, sense. The rest was not so obvious. For example, how *social* or *liberal* was the economy allowed to be?

In developing a constitutional framework, where do we find assistance that would allow us to place emphasis either on liberality or on sociality? There is not much assistance offered by the *Grundgesetz*. However, there are the fundamental rights and freedoms that basically follow the international standards in place at the time the *Grundgesetz* was drafted. Thus, apart from the guarantee of the right to property, there is the guarantee to be allowed to do

scope for liberalizing the State of the social market economy is very limited. Some political commentators added to this by terming the old and new German Chancellor Merkel to be the *social democrat* that will remain in government after the voting out of the SPD.

⁴ "Basic Law".

⁵ "The social question".

whatever you would like to – provided you do not infringe on the rights of others and do not offend the constitutional order or the moral code.⁶

Does this general guarantee of liberty encompass the right to engage in economic activities, in entrepreneurial activities? Whatever some may have said against the integration of activities of this nature into the scheme of constitutional protection, there will eventually be no argument to exclude one of the most important dimensions of human beings, namely to be *homines oeconomici* from the protection of liberty. What remained as a constitutional ground to argue?

The chapter in the *Grundgesetz* that follows the one on human rights and freedoms deals with the relationship between the federal State and the respective individual States. Although one would have expected the *Grundgesetz* to deal with the social dimension of Germany's new legal order at a different place, there are in fact two Articles of relevance to the social question. Article 20, Sub-article 1, states the following:⁷

The Federal Republic is a democratic and *social* federal state. [Emphasis added]

Article 28 sets certain legal conditions for the constitutions of the States and says the following in its Sub-Article 1(1):

The constitutional order of the States must conform to the principles of republican, democratic and *social government based on the rule of law*, within the meaning of the Basic Law. [Emphasis added]

The phrase “social government based on the rule of law” is an attempt to translate what the *Grundgesetz* terms a *sozialer Rechtsstaat*. *Rechtsstaat*, the rule of law, is by now understood internationally, while the adjective *sozial* denotes its social dimension.

What is the legal meaning of this constitutional provision? Is there any meaning in it at all? The post-1949 debate shows two legal schools of thought on this issue. The first followed a

⁶ Article 2(1). Article 7 read with Articles 21 and 22 of the Constitution of the Republic of Namibia of 1990 can be referred to as the rights equivalent to the quoted rights in the *Grundgesetz*.

⁷ It is noteworthy that a draft version of Article 2(2) contained an amendment which aimed at guaranteeing minimum standards with respect to clothing, food and housing. This amendment was later deleted and did not become law.

conservative interpretation, according to which the reference to *social* did not lead to any substantial change in the provision of rights:⁸ such provision remained the principal objective of liberal constitutionalism. In this sense, the reference to *social* was interpreted as the expression of a mere programme and, thus, was relegated to administrative activities to be embarked upon by the State as the need arose. The second school of thought referred to the achievements of social movements since the era of industrialisation and their right to the right to sociality.⁹ *Social*, in terms of the *Grundgesetz*, was interpreted as meaning the recognition of social rights against the State and, by recognising social rights, the recognition of the obligation to limit liberal rights.¹⁰

A number of cases brought before the *Bundesverfassungsgericht*¹¹ provided an opportunity for the court to pronounce itself on the debate. A very early decision by the court laid the foundation for subsequent decisions. In the so-called *Hinterbliebenenversorgung* case,¹² the court was confronted with the following problem: the widow of an attorney who had lost his life as a soldier in World War II (WWII), who was the mother of their three children between the ages of 6 and 16, complained about the amount of money she had received in accordance with the relevant law providing for the dependants of, in this case, war victims. The widow received a monthly amount of 183 German Marks per month. The widow submitted that this amount was not sufficient to provide for her children's essentials. In particular, the widow noted that she was disabled, meaning that she was unable to earn additional money through work.

⁸ Cf. here Forsthoff, E. 1964. *Rechtsstaat im Wandel: Verfassungsrechtliche Abhandlungen 1956–1964*. Stuttgart: Kohlhammer Verlag, pp 27ff.

⁹ Cf. Abendroth, W. 1995. "Zum Begriff des demokratischen und sozialen Rechtsstaates im Grundgesetz der Bundesrepublik Deutschland". In Sultan, H & W Abendroth (Eds). *Bürokratischer Verwaltungsstaat und soziale Demokratie: Beiträge zu Staatslehre und Staatsrecht der Bundesrepublik*. Hannover & Frankfurt/M: O Goedel, pp 81ff.

¹⁰ The author of this essay discussed the arguments submitted by the two schools of thought in his study on the legal foundation of the statutory power of the parties to industrial agreements (trade unions and employer associations) in setting labour standards; see Hinz, MO. 1971. *Tarifhoheit und Verfassungsrecht: Eine Untersuchung über die tarifvertragliche Vereinbarungsgewalt*. Berlin: Duncker & Humblot. For a more recent approach to the debate, see Badura, P. 2009. "Wirtschafts- und Sozialpolitik im sozialen Rechtsstaat". In Herdegen, M, HH Klein, H-J Papier & R Scholz (Eds). *Staatsrecht und Politik. Festschrift für Roman Herzog zum 75. Geburtstag*. München: CH Beck, pp 7ff.

¹¹ "Federal Constitutional Court".

¹² "Provision for survivors". Cf. BVerfGE 1, 97 (Decision of the Federal Constitutional Court, Vol. 1).

In arguing the case before it, the court recognised the changed nature of constitutional rights. While the original dimension of the fundamental rights was to protect the individual against the State, this dimension, according to the court, had changed with time, namely to the effect that the dimension of State assistance to the individual had been added to the original understanding of *fundamental rights*. This new call on the State to provide assistance to its subjects, the court submitted, was, at least politically, increasingly being accepted as essential, particularly after WWII and the destruction it had caused. Despite the political acceptance of this new dimension, the court found itself bound by the law, including the *Grundgesetz*, which accommodated the new dimension in a limited manner only. In analysing Article 1 on dignity and the cited Article 2(1) of the *Grundgesetz*, the court concluded that both Articles would not provide for the right to claim specific benefits from the State. Nevertheless, the constitutional clauses that contain the above-quoted references to the social State accord a right in principle to social benefits.

But is this so-called right really a right, and what is its content? For the court in the *Hinterbliebenenversorgung* case, the content was that the State was obliged to provide for the necessary legislative instruments to fulfil these obligations to its subjects. Only if the State deliberately neglected its legislative duty, i.e. if the State refrained from acting without good reason, did an individual have the right to take the State to court.

Noting this court's decision and other subsequent decisions,¹³ one could summarise the position of the constitutional views established thus far with regard to the 'social State' clause as follows:¹⁴

- The clause is not simply an expression of a programme, but a proper legal provision with legally traceable consequences.
- As part of the binding body of law, the clause creates the legal obligations of the State.
- However, the clause is not the basis for immediately enforceable rights.
- Therefore, the clause is primarily directed towards the State, i.e. the legislator, to concretise its application and, thus, provide for legal instruments the citizens can use in pursuing their social rights.
- The clause has to be taken into account when laws are being interpreted, i.e. the clause assists in the interpretation of the law in the sense that, in a situation where

¹³ Cf. BVerfGE 9, 124; or 27, 253.

¹⁴ As to this, see Richter, I & GF Schuppert. 1996. *Casebook Verfassungsrecht* (Third Edition). München: CH Beck, p 412f.

different interpretations are possible, the interpretation that gives the sociality preference is to prevail, and

- Wherever there is discretion for the administration in deciding on benefits, such discretion has to be exercised to give the clause prominence.

With respect to the more prominent question of whether the *Grundgesetz* did not, at least, inherently decide in favour of a specific economic order, it became increasingly apparent that it was in fact order-neutral, meaning that whatever was not in conflict with the *Grundgesetz* was permitted.¹⁵ In other words, the basically accepted interpretation of the *Grundgesetz* opened up the potential for a variety of political programmes addressed to social problems that were caused by otherwise liberal-minded economic developments.

The challenge of social realities

Addressing the social question has a long history in Germany.¹⁶ It goes back to the beginning of industrialisation, the demands of the labour movement, and Government responses such as the famous social laws promoted by Chancellor Otto von Bismarck.¹⁷ Bismarck's social laws were a ground-breaking attempt to react to developments prompted

¹⁵ Within the framework of that permission, political alternatives were debated. See here e.g. Gromoll, B. 1976. "Klassische und soziale Grundrechte". In Mayer, U & G Stuby (Eds). *Die Entstehung des Grundgesetzes: Beiträge und Dokumente*. Köln: Pahl-Rugenstein, pp 112ff, 138ff.

¹⁶ The history of responses to the social question has far-reaching theoretical implications, which this essay will not pursue. The answers of the Marxist philosophy, social-democratic answers, but also answers of the social theory of the Catholic Church, would need to be looked at here. The reorientation of these answers to meet the demands of Germany's post-WWII formative years and those that followed would also be of interest in determining the conceptual framing of the social market economy. The collection of articles in Hasse, H, H Schneider & K Weigelt (Eds). 2005. *Social market economy: History, principles and implementation* (Second Edition). Johannesburg: Konrad-Adenauer-Stiftung, provides helpful short summaries not only on key issues, but also on key persons, such as Ludwig Ehrhard (Germany's Federal Minister of Economic Affairs from 1949 to 1963 and CDU Chancellor from 1963 to 1966), one of the chief promoters of the social market economy after WWII, and Oswald von Nell-Breuning (a member of the Order of Societas Jesu and Professor of Moral Theology and Social Sciences; he also served as advisor to the German Federal Ministry of Economics for 17 years).

¹⁷ To the latter, see Borchardt, K. 1985. "Die industrielle Revolution in Deutschland 1750–1914". In Cipolla, CM & K Borchardt (Eds). *Europäische Wirtschaftsgeschichte, Vol. 4: Die Entwicklung der industriellen Gesellschaften*. Stuttgart/New York: Gustav Fischer Verlag, pp 196ff.

by growing industrialisation. The well-known German scholar and politician Lorenz von Stein developed his concept of *social kingship* to show that the king had to do more than rule: he also had to promote some kind of social balance between the haves and the have-nots.¹⁸

What the *Grundgesetz* was meant to sustain was the very understanding of the social question as it emerged in response to the problems of industrialisation and what was further shaped in the Weimar constitutional period.¹⁹ However, the post-WWII constitution-making could not ignore the fact that the socio-political context had changed since the Weimar Republic. Social demands had increasingly evolved into the domain of rights and law,²⁰ resulting in the debate mentioned in the first section of this article.

There is no doubt that the 'social market' interpretation of the 'social State' clause in Germany's post-1949 development was politically of enormous importance.²¹ It made it possible to establish a legal framework that responded adequately to social demands in terms of support to families, health care, cases of sickness during employment, unemployment, pension funds, etc. This led to a very efficient and effective social welfare system being established over the years.

Looking at the more recent of the 60 years of a social market economy, however, we see challenges not experienced before. The first challenge to the system occurred with the changing age structure, according to which increasingly older citizens relied on welfare provisions. Serious restructuring was therefore undertaken, basically leading to increased own contributions of the recipients of welfare towards the welfare coffers.

The second challenge came as a bit of a surprise, being due to the current economic crisis. Major production units in Germany were affected by the crisis and faced with the threat of

¹⁸ Cf Fortshoff, supra:32 and E R Huber, *Nationalstaat und Verfassungsstaat. Studien zur Geschichte der modernen Staatsidee*. Stuttgart 1965:127ff.

¹⁹ Hermann Heller's contribution to the concept of the *social State* during Weimar Germany's post-imperial constitution deserves special mention here. Cf. Schluchter, W. 1968. *Entscheidung für den sozialen Rechtsstaat. Hermann Heller und die staatsrechtliche Diskussion in der Weimarer Republik*. Köln/Berlin: Kiepenheuer & Witsch.

²⁰ See here Forsthoﬀ, E. 1961. *Lehrbuch des Verwaltungsrechts, Vol. 1: Allgemeiner Teil* (Eighth Edition). München/Berlin: CH Beck'sche Verlagsbuchhandlung, pp 56ff.

²¹ Cf. Schlecht, CO. 2005. "Social market economy: Political implementation". In Hasse et al. (ibid.:401ff).

closure, leaving hundreds of thousands unemployed. The collapse of several banking institutions threatened the economy with severe consequences. How would the social State react? Would it allow for so far unheard of State interventions?

It did. What nobody could have imagined a few years ago became reality, namely that the expropriation of certain enterprises was debated in order to prevent an economic freefall. It was debated without references which one would have encountered some year ago, according to which the proposal to expropriate was a clear indication that its proponent could only be a 'communist'.

Huge financial savings programmes were devised to help the economy survive the crisis. The case of the car producer, Opel, owned by the United States-based General Motor Company, is a significant example of how one could interpret the 'social State' clause in a social market economy and make meaningful political contributions to stabilising the economy from a social perspective.²² The Opel project and other interventions have turned out to be widely accepted as viable for the social market economy. Whether the Opel project will stand the European test²³ remains to be seen, however.

Conclusion

Can an African country such as Namibia or South Africa learn from the German experience?

Namibia and South Africa have taken different paths when it comes to social and economic rights in their respective Constitutions. According to Article 98 of the Constitution of the Republic of Namibia, for example, the country's economic order is based on the "principles of a mixed economy". Social rights and so-called third-generation rights feature in a limited sense only. Apart from the right to education,²⁴ second- and third-generation rights appear under "Principles of State Policy" in Chapter 11 of the Constitution. Article 101 of the Constitution determines the legal status of such principles, as follows:

The principles of state policy contained in this Chapter shall not of and by themselves be legally enforceable by any Court, but shall nevertheless guide the Government in making and

²² "Opel-Krise", *Der Spiegel*, 11 September 2009; available at www.spiegel.de/politik/deutschland/0,1518,648294,00.html; last accessed 23 September 2009.

²³ It could be argued that the €1.5 billion bridging loan violates the European competition law.

²⁴ See Article 20, Namibian Constitution.

applying laws to give effect to the fundamental objectives of the said principles. The Courts are entitled to have regard to the said principles in interpreting any laws based on them.

The South African Constitution²⁵ has taken a more radical approach: it provides for economic *rights*. Section 24 of the South African Constitution provides for the right to a healthy environment; section 26 for the right to housing; section 27 for the right to health care, food, water and social security; and section 29 for the right to education. All these rights are enforceable in terms of section 38.

What is the meaning of these differences between Namibia and South Africa in reality? What do/can economic rights achieve? If one considers what the Constitutional Court of South Africa said in the *Grootboom* case when it defined the right to housing to be the right to reasonable “planning of housing”, where are the citizen’s economic rights?²⁶ Where are economic rights in view of the limited resources available to the State? What can the law actually and meaningfully offer when economic rights are at stake?

Looking at the three quoted jurisdictions – those of Germany, Namibia and South Africa – one sees a very specific development in the attempts to respond to social problems. In Germany, the response to the social question was basically left to the German Federal Constitutional Court, assisted by scholarly work. What the German court achieved is more or less what the drafters of Namibia’s Constitution wrote into its Article 101 – although one may debate whether an individual would have the opportunity to make a case against the Government based on what Article 101 determines as the latter’s obligation.

South Africa went an important step further than Germany and Namibia by granting social rights the status of constitutional rights. However, what we see in the approach of the South African Constitutional Court, for example, as documented in the *Grootboom* case,

²⁵ The Constitution of the Republic of South Africa, 1996.

²⁶ *Government of the Republic of South Africa & Others v Grootboom & Others* 2000 (11) BCLR 1169 (CC). In its final order, the Constitutional Court of South Africa declared as follows:

- “(a) Section 26(2) of the Constitution requires the state to devise and implement within its available resources a comprehensive and coordinated programme progressively to realise the right of access to adequate housing.
- (b) The programme must include reasonable measures such as, but not necessarily limited to[,] those contemplated in the Accelerated Managed Land Settlement Programme to provide relief for people who have not access to land, no roof over their heads, and who are living in intolerable conditions or crisis situations.

constitutional rights were transformed into the right to adequate procedure. The right to housing is reduced to a right to developing policies for the implementation of the right, which are governed by the obligation to be reasonable – albeit subject to the availability of funds.

In terms of comparative constitutional law, the developments in the three jurisdictions falls within the generally noted picture that the more recent constitutions tend to reach out to and into areas of regulation, which earlier constitutions avoided doing. This most probably owes itself to a phenomenon being observed worldwide, according to which the social philosophies underlying given legal orders have, in their increasing focus on communication as a means of achieving justice, become concomitantly less complex.²⁷ The reduction of philosophical complexity is compensated by an increasing degree of complexity in legal texts. Having said this, one could, on the one hand, be tempted to conclude that the South African way of dealing with the social question is the way forward; on the other, one also has to accept that the procedural reduction of the social rights to the right to reasonable planning, as determined by that country's Constitutional Court, overrides the notion of a right being an asset of the individual right-holder who would like to see that s/he receives in substance what the right promises.

A concluding word on these two ways of interpreting this very progressive constitutional implementation of social rights in a democratic constitution is hardly possible. Further developments in securing social rights will certainly add to the debate about the legal status of social rights and, with this, eventually support one of the two approaches.

In view of this open conclusion, I would like to return back to the debate I referred to in the introductory remarks to this essay.

Whatever lawyers maintain when they compare the different approaches to the social question, social rights, and their place in a given legal order, one important lesson can be learnt from the political debate between the parties that campaigned in the recent German elections. Up to the very end of the campaign, most of the debates and contributions by the former governing parties (CDU/CSU and the SPD) and the opposition (the FDP, the Greens²⁸ and the Left Party) showed a high degree of commitment to a debate of standard in arguing economic details, e.g. when arguing about the proposal to reduce certain taxes,

²⁷ Cf. Häberle, P. 1992. *Rechtvergleichung im Kraftfeld des Verfassungsstaates: Methoden und Inhalte, Kleinstaaten und Entwicklungsländer*. Berlin: Duncker & Humblot, p 257f.

²⁸ *Bündnis 90/Die Grünen*.

as strongly advised by one of the then opposition parties. The German public has obviously accepted this high standard of the economic discourse. The majority were even able to follow the debates on tax reform, as promoted in particular by the Liberal Party (the FDP), whose popularity increased at the polls as a result.

What does this mean? Sixty years of a social market economy have created a widely accepted political foundation: a foundation, which, on the one hand, appreciates the dynamics of the market, but, on the other, is firm in its stance that markets need social regulation. What kind of regulation has to be put in place is a societal issue that will eventually be determined by societal forces – at least in countries such as Germany, where civil society works! Only a functioning civil society will be able to make political use of the *Grootboom* case formula, which made the availability of funds a criterion to limit the authority to plan. Whether or not funds are available will not depend on whether the budget in fact provides for them, but on whether or not the State's generation of income follows the principles of justice (tax justice), and whether the budget distributes the generally available income in a justifiable manner.