

CONSTITUTIONAL REVIEW OF SOCIAL LAW-REFORMS IN GERMANY AND ITS IMPACT ON LEGISLATION

Dr. Markus Sichert
Max Planck Institute for Foreign
and International Social Law
München, Germany

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Nadzor ustavnosti reformi socijalnih propisa u Njemačkoj i njegov utjecaj na zakonodavstvo

Značaj nadzora ustavnosti u odnosu na socijalno zakonodavstvo u Njemačkoj postaje očit kada se sagleda brojnost ustavnosudskih predmeta koji obuhvaćaju različite socijalne kategorije te utjecaj takvih odluka na socijalnu politiku i zakonodavstvo. Jednakost pred zakonom i načelo socijalne države blagostanja samo su dvije primjenjive ustavne odredbe, no one sadrže temeljne standarde za odlučivanje. Primjena načela jednakosti pred zakonom prilikom ocjene ustavnosti zahtijeva stavljanje u odnos konkretnih kategorija. Ustavni sud utvrđuje moguća neustavna razlikovanja na zahtjev ovlaštene stranke. U slučaju utvrđenja povrjede jednakosti pred zakonom, Ustavni sud može naložiti zakonodavcu redefiniranje određene kategorije. Zakonodavac tako ima zadaću stvoriti i preurediti društveni poredak u okvirima koje postavlja Ustav koristeći pri tome široke diskrecijske ovlasti. Posebno se razmatraju najnovije reforme modernih usluga na tržištu rada radi odgovarajuće ilustracije izazova koji su vezani uz smanjenje izdataka iz državnog proračuna.

Ključne riječi: *nadzor ustavnosti, načelo socijalne države blagostanja, jednakost pred zakonom, smanjenje izdataka, reforma zakonodavstva u području modernih usluga na tržištu rada.*

Introduction

In the Federal Republic of Germany¹ constitutional litigation plays an outstanding role² that has been developed and strengthened throughout more than 50 years. Constitutional jurisdiction at the federal level is assigned to the Federal Constitutional Court (FCC)³, a specialized tribunal empowered to decide constitutional issues that arise within manifold jurisdictional categories. Attention is not only paid to politically determined cases like "disputes between supreme constitutional organs"⁴, "federal-state conflicts"⁵ or the prohibition of political parties seeking to undermine or to abolish the free democratic basic order⁶. Any constitutional action may gain significance if the subject matter is of particular public interest⁷ or many people are affected by the acts or laws to be assessed. The latter is especially true with respect to review of welfare reforms. The impact of testing the constitutionality of social laws is not restricted to a single pending lawsuit. Cassation but also mere declaration of incompatibility of the relevant laws takes an overall effect.⁸ By testing the constitutionality of laws the authority of both the constitution and the FCC becomes effective; hence this issue is

¹ The text of the Constitution is available sub www.bunderegierung.de/en (Federal Government/Function and constitutional basis). Each internet-citation within this article has lastly been checked on March 15th 2006 if not explicitly indicated otherwise. Decisions of the Federal Constitutional Court not (yet) published in print media are referred to by date and file number and accordingly available sub www.bverfg.de/entscheidungen.

² Constitutional review is part of the constitution's intangible core (Sommermann, in: von Mangoldt/Klein/Starck (eds.), GG, 5th ed., Vol. 2, 2005, Art. 20 Abs. 3 no. 326.); following a concept of constitutional identity Bryde, *Verfassungsentwicklung*, 1982, pp. 237, (pp. 232, 235 et seq.); with respect to the principle of separation of power and Art. 79 (3) even in favour of intangibility of the Constitutional Court Herzog (1980) in: Maunz/Dürig, GG, V. Art. 20 no. 73. For a comparative perspective Häberle, *Funktion und Bedeutung der Verfassungsgerichte in vergleichender Perspektive*, EuGRZ 2005, pp. 685 et seq. In view of the European Court of Justice as a constitutional court and EC-primary law as a constitution Sichert, *Grenzen der Revision des Primärrechts in der Europäischen Union*, 2005, pp. 819 et seq. respectively pp. 383 et seq.

³ "Bundesverfassungsgericht". See Art. 92, 93 and 100 of the Constitution (Const.) of May 23rd 1949 (BGBl. p. 1, lastly revised 26. 7. 1992, BGBl. I 2863) and the Act on the Federal Constitutional Court (FCCA, proclaimed anew 11. 8. 1993, BGB. I 1473, lastly revised 15. 12. 2004, BGBl. I 3396), esp. § 13. Moreover see Art. 18, 21 (2), 41 (2), 84 (2) 98 (2), (5), 99, 126 Const.

⁴ Art. 93 (1) no. 1 Const., § 13 no. 5, §§ 63 et seq. FCCA.

⁵ Art. 93 (1) no. 4 Const., § 13 no. 8, §§ 71, 72 FCCA.

⁶ Or to endanger the existence of the Republic, Art. 21 (2) Const., § 13 no. 2, §§ 43 et seq. FCCA; see, for instance (procedural) dismissal of 18. 3. 2003, BVerfGE 107, 339. See also Sichert, *Das Parteiverbot in der wehrhaften Demokratie*, DÖV 2001, pp. 671 et seqq.

⁷ On February 2nd the FCC declared a provision of the aviation security act (BGB. I 2005, p. 78) void according to which military forces were empowered to shoot down by force of arms an aircraft used to attack human lives as far as non-involved people are on board, BVerfG of 15. 2. 2006, NJW 2006, pp. 751 et seqq.; see also Schenke, *Die Verfassungswidrigkeit des § 14 III LuftSiG*, NJW 2006, pp. 736 et seqq. Such a shot violates the right to life in conjunction with the guarantee of human dignity.

⁸ Judgements on review of norms even take a statutory effect, § 31 (2) FCCA.

considerably dealt with in the process of law-making and remains vivid while the law has come into force and is frequently applied. Constitutional limits often form part of the socio-political debate into which not only experts enter.⁹ The frequency to take constitutional action in view of a particular reform may indicate the degree of its social acceptance. Also with respect to the number of cases social law issues take a major position within the court's activity.¹⁰ Accordingly, social security faces outstanding challenges¹¹ in view of demography¹², globalization¹³, economic conditions and financing, but although retrenchment occurs more frequently these days it is nonetheless limited by constitutional law.¹⁴

Understandably, retrenchment causes resistance and even or just in times of low budgets it appears as if the affected citizen's main concern is to be treated equally: "Germans are »equality-diseased«", as federal judge of the Constitutional Court *Steiner* stated,¹⁵ not only with regard to the latest law reforms for modern services on the labour market. The critique, however, gives rise to the question whether it is nonetheless true that calling upon "equality before the law" served as a vehicle for this fundamental right to evolve as a (creative) principle that not only limits but also determines further development of social security law. We may see that the principle of equality obtains a particular position – not only with respect to material standards (sub. III), but especially in view of the FCC's judgements, its authority and relation to the legislator (IV); against this background it is possible to enlighten if the Constitutional Court is looking beyond judicial competences by means of exceptionally following a "quasi-legislative approach". As an overall foundation we shall initially look at the legal system of constitutional litigation and in how welfare laws and reforms, on which some preliminary remarks are made (I), are subject to control by the FCC (II).

⁹ E.g. there is much discussion about the constitutionality of the fourth law for modern services on the labour market (see below I) on several internet platforms.

¹⁰ *Umbach/Dollinger*, in: *Umbach/Clemens/Dollinger, Bundesverfassungsgerichtsgesetz*, 2nd ed. 2005, pp. 30 et seq., nos. 6 et seq. with further references.

¹¹ *Von Maydell*, Social Insurance – An Instrument of Social Security in the Future?, in: *Engels/Weiss* (eds.), *Labour Law and Industrial Relations of the Century*, Liber Amicorum Blanpain 1998, pp. 125 (132 et seq.).

¹² *Becker*, Die alternde Gesellschaft – Recht im Wandel, *JZ* 2004, p. 929.

¹³ *Idem*, The Challenge of Migration to the Welfare State, in: *Benvenuti/Nolte* (eds.), *The Welfare State, Globalization and International Law* 2003, pp. 1 et seq.

¹⁴ *Steiner*, Reform des Sozialstaats – Spiel ohne (Verfassungs-)Grenzen?, *DVP* 2003, pp. 385 et seq.; *Neumann*, Der Grundrechtsschutz von Sozialleistungen in Zeiten der Finanznot, *NZS* 1998, pp. 401 et seq.

¹⁵ *Steiner*, *Frankfurter Allgemeine Zeitung* of 14. 3. 2005, p. 1.

I. The subject matter of constitutional litigation: Social laws and "welfare reform" with special regard to "Hartz IV"

Whereas in former time welfare reform predominantly aimed at consolidating and further developing standards of social (security) law, current reforms are often arranged for retrenchment due to the challenges described above. One of the most famous and a real fundamental reform, particularly referred to here, had recently been enacted by the already mentioned "forth law for modern services on the labour market", also called "Hartz-IV" with respect to the head of commission for modern services appointed in 2002.¹⁶ The commission made several proposals that served as the basis for the finally enacted corresponding laws numbered one to four.¹⁷ Concern about keeping constitutional standards that assign legislative power to the "Bundestag" (Art. 38 Const.) is legitimate;¹⁸ nonetheless there was accurate procedure and the corresponding rules do not govern pre-legislative initial steps.¹⁹

As already reported in the middle of March 2005, 40 cases concerning "Hartz-IV"-reforms were pending before the constitutional court.²⁰ The Hartz-laws are ambitious and far-reaching. Its main issues may be described as follows:

- Shortening the duration of paying unemployment benefits;²¹
- Merging the former follow-up benefit called "unemployment relief"²² with welfare assistance into a new form of basic assistance²³ as

¹⁶ *Bayreuther*, Die Vorschläge der Hartz-Kommission, Sonderbeilage NZA 1/2004, pp. 3 et seqq.

¹⁷ *Grahn/Schmidt*, Änderungen im Sozialrecht durch die "Hartz-Gesetze", SGB 2003, pp. 207 et seqq. For the first and second law *Neumann*, Das Erste und das Zweite Gesetz für moderne Dienstleistungen am Arbeitsmarkt im Überblick, NZS 2003, pp. 113 et seqq.; *Bayreuther*, op cit.; from a retrospective point of view *Spellbrink*, Die Vorschläge der Hartz-Kommission – 3 Jahre danach, info also 2005, pp. 195 e seqq.

¹⁸ *Ruffert*, Entformalisierung und Entparlamentarisierung politischer Entscheidungen als Gefährdungen der Verfassung, DVBl. 2002, pp. 1145 et seqq.; *Papier*, Reform an Haupt und Gliedern – Eine Rede gegen die Selbstentmachtung, ZFSH/SGB 2003, pp. 67 et seqq.

¹⁹ See *Masing*, in: von Mangoldt/Klein/Starck (eds.), GG, 5th ed., Vol. 2, 2005, Art. 76 Abs. 1 no. 25.

²⁰ *Steiner*, supra note 15, p. 1.

²¹ § 127 (2) SGB III, limited up to 12 months and up to 18 months for unemployed people aged 55, in any case additionally dependent on the duration of a recent compulsory insurance relation; benefits were formerly much more specifically graduated as depending on the age of the beneficiary and duration of recent compulsory insurance relations; § 434/ SGB III provides for transitional regulation: ancient law had to be applied in favour of beneficiaries whose claim for unemployment benefits ("Arbeitslosengeld") had come into existence before January 1st 2006.

²² Also called unemployment assistance ("Arbeitslosenhilfe") as formerly granted after entitlement to receive unemployment benefits ("Arbeitslosengeld") had expired.

²³ The so called "Arbeitslosengeld II" (§ 19 SGB II) is composed of regular allowance to the amount of 345 € (for beneficiaries residing in the old and 331€ [legislative intent for equal pay dated 29.11.2005, BT-Drucks. 16/99] for those living in the new *Länder*), § 20 II SGB, and benefits for accommodation and heating, § 22 SGB II. Under certain conditions, a temporally limited supplement is granted (§ 19 no. 2, § 24 SGB II). Payments for further specific needs are provided by § 21 SGB II. The term "Arbeitslosengeld II" is in so far misleading as the benefits granted may

regulated in a newly introduced second book of the social code (SGB II),²⁴

- Ensuring basic assistance within a divided authority-scheme by assigning responsibility for further support (especially benefits on accommodation and heating) to counties and towns that are not county-seated and binding the federal agency for labour to pay regular allowance and to provide for social security contributions and services for integration, §§ 6, 44b, 46 SGB II;
- Arranging services and imposing duties to seek for integration in the labour market, e.g. assigning the case to a "case-manager" and demanding to conclude an integration agreement from the person in need for assistance, §§ 14 et seq. SGB II;
- Sharpening of the duty to take up and accept work which basically is any reasonable work²⁵ and allowing sanctions like cutting the regular allowance if the beneficiary fails to make own efforts to find a job, ignores integration actions or refuses to conclude integration agreements, §§ 2, 10, 31, 32 SGB II.

These issues particularly conform to the motto "demanding and supporting" (see title chap. one, §§ 2 and 14 SGB II). The corresponding change of paradigm from "active" to "activating" employment promotion has already been followed by preceding laws for modern services on the labour market, especially the third one.²⁶ "*Hartz-III*" contains regulations to reform the organisation and administration of the federal agency and former institution of labour, to redefine its tasks and to simplify instruments on labour employment policy.²⁷ New sanctions affecting the unemployed are introduced like suspension of unemployment assistance because of insufficient own efforts of the unemployed and failure to attend the job-centre (§ 144 SGB III)²⁸; sanctions already existing

– unlike "unemployment benefits" formerly known – not be qualified as benefits on contributions but rather correspond to those formerly covered by social assistance ("Sozialhilfe"). Ascertaining the need for basic assistance by additionally counting on income and property of partners and relatives living together with the person in need (§§ 7 and 9 SGB II) has been ruled similarly within the former system of general welfare assistance. Under special conditions, additional earnings are permissive and "additional jobs" may also serve as activation measures in favour of public utility and interest for which some reimbursement is paid (§ 16 [3] SGB II); see – taking activities promoting sports as an example – *Becker/Sichert*, *Hartz IV in Diensten des Sports – Privilegierung gemeinnütziger und im öffentlichen Interesse liegender Tätigkeiten im SGB II*, *SpuRt* 2005, pp. 187 et seqq.

²⁴ BGBl. I 2003, p. 2954, lastly revised December 2005, BGBl. I 3676.

²⁵ For a critical point of view with respect to freedom of occupation, compulsory work and labour enforcement *Rixen*, in: *Eicher/Spellbrink*, *SGB II*, 2005, § 10 nos. 20 et seqq. For further details see *infra* III. 1. c) aa).

²⁶ See legislative intent, *BT-Drucks.* 15/1515, p. 74.

²⁷ Legislative intent, pp. 6 et seqq.

²⁸ *Serving employment promotion*, of 24. 3. 1997, BGBl. I 594, lastly revised December 2005, BGBl. I 3676.

are increased.²⁹ Whereas the provisions of either "Hartz III" or "II" had not been tested, three constitutional complaints directed against the first of these laws have not been accepted to be ruled upon;³⁰ there was no reasonable prospect of success. The tested provisions that granted equal salary for both loan workers and regular employees did neither unjustifiably violate collective bargaining autonomy nor contractual liberty of the temporary employment agencies.

Retrenchment also occurs in other fields of social law. A subtle form, for instance, is the increase of contributions that slightly affects the equivalent-relation to benefits, especially in conjunction with raising the contributory basis.³¹ Within the setting of another recent reform modernising public health insurance,³² non-prescription pharmaceuticals had been excluded from the catalogue of medicals provided as benefits.³³ Patients were at the same time obliged to pay an additional fee to health insurance funds for visiting a doctor who is responsible for collection.³⁴ In 1996 the legislator expedited full implementation of increasing legal retirement age for women and unemployed people as adopted in 1992. The former possibility for women to retire at the age of 60 without financial loss was financially restricted in 1992, again limited by a deduction of pension in 1996 and then principally abolished in 1999 such as early

²⁹ § 147 SGB III (BT-Drucks. 15/1515, p. 87); henceforth not only suspensions that arose after but also those coming into existence together with the claim of unemployment relief are taken into account for an exclusion of benefits.

³⁰ BVerfG, 29.12.2004, BVerfGK 4, 356; for further comments see *Bayreuther*, Tarifpolitik im Spiegel der verfassungsgerichtlichen Rechtsprechung, NZA 341, pp. 341 et seqq., and – from an economical perspective – *Milacher*, Equal-Pay – Das Ende der Zeitarbeit, SF 2005, pp. 97 et seqq.

³¹ See Art. 2 no. 4 (§ 275 c SGB VI) and Art. 8 § 1 of the law to ensure stability in health and pension insurance law of 23.12.2002, BGBl. I, 2002, pp. 4637, 4639, 4641. Constitutional complaints were not accepted, BVerfG, 4. 2. 2004, BVerfGK 2, 283; BVerfG, 1 BvR 2151/03 of 18. 2. 2004.

³² GKV-Modernisierungsgesetz of 14. 11. 2003, BGBl. I, 2003, p. 2189. On new (respectively adapted) forms of supply tending to result in competition see *Sichert*, Kooperative Versorgungsformen in einer solidarischen Wettbewerbsordnung – Integrierte Versorgung (IV) und Medizinische Versorgungszentren (MVZ), in: Bodirola-Vukobrat (ed.), Soziale Sicherung und Wettbewerb – Europäische Vorgaben und nationale Regelungen, Rijeka 2007 (forthcoming); *idem*, Abkehr vom Kollektivvertragssystem in der Integrierten Versorgung: Verbot und Folgen der Beteiligung Kassenärztlicher Vereinigungen, VSSR 2006, Vol. 4.

³³ Acceptance of a constitutional complaint filed by 6570 complainants was rejected; due recourse to the courts had not been exhausted (§§ 90 (2), 93a (2) FCCA): BVerfG, 1 BvR 1076/04 of 4. 8. 2004; see also BVerfG, 1 BvR 1078/04 of 4. 8. 2004. On health (insurance) and the FCC see *Steiner*, Das Bundesverfassungsgericht und die Volksgesundheit, MedR 2003, pp. 1 et seqq.

³⁴ The fee was held constitutional by the *Landessozialgericht Brandenburg*, 24 KR 47/04 of 25. 1. 2005 [www.Brandenburg.lsgbb (Entscheidungen)]; see also *Linke*, Praxisgebühr auf dem Prüfstand, NZS 2004, pp. 186 et seqq. A claim of an association of panel doctors (competent via encashment) for the fee and the costs incurred in making request for payment has been substantially rejected with respect to the latter position by the social court *Düsseldorf*, S 34 KR 269/04 of 22. 3. 2005 (www.sozialgerichtsbarkeit.de, Entscheidungen); especially civil law was not held applicable (see § 69 SGB V).

retirement for unemployed in 1996.³⁵ Transitional provisions do still apply (see §§ 237, 237a SGB VI). All these exemplary provisions on retrenchment have been tested by (constitutional) complaints, but all of these were rejected.³⁶

II. Constitutional jurisdiction: "Judging welfare reforms"

1. Separation of constitutional areas and jurisdiction within a federal system

Constitutional litigation is not exclusively assigned to the federal level. The federal states (*Länder*) are states as well, and notwithstanding major restrictions of external sovereignty and the boundaries within a federal system the constitutional areas are separated.³⁷ Each *Land* has its own constitution and 15 of them established a constitutional court (CC)³⁸, except *Schleswig-Holstein* that conferred limited constitutional jurisdiction upon the FCC as a lent organ in accordance with the Basic Law.³⁹ Complex interrelations cannot be dealt with here.⁴⁰

Compared to procedures at the federal level, constitutional jurisdiction in the *Länder* is – more or less – conceptualized similarly, especially with respect to incidental review of norms.⁴¹ Nonetheless, some features are particularly striking like principle review of laws by popular action as provided by the *Bavarian* constitution that does not require alleging to be personally affected by an act of the legislator.⁴² Out of 81 decisions of the constitutional courts of the *Länder*

³⁵ BVerfG, 3. 2. 2004, BVerfGK 2, 266.

³⁶ *Supra* notes 31, 33, 35.

³⁷ BVerfGE 1, 14 (34); 99 (11 et seq.).

³⁸ Called "Staatsgerichtshof" or "Verfassungsgerichtshof".

³⁹ Art. 99 Const. See also Art. 44 of the constitution of *Schleswig-Holstein*. In this respect, the Federal Constitutional Court applies constitutional law of the *Land* and acts as a Court of the *Land*, whereas the procedure itself is governed by federal constitutional law.

⁴⁰ Within the category of popular action, for example, fundamental rights of the federal constitution do not serve as standard of control, but other provisions may do in so far as a severe violation of law of higher rank may – at the same time – violate the (principle of the rule of law of the) *Bavarian* constitution (see *Pestalozza*, *Verfassungsprozessrecht*, 3rd ed. 1991, § 23 II, no. 103, p. 449 et seqq. with further references). – Concrete judicial review of norms as provided by *Land* law may lead to the corresponding procedure at the federal level if a post-constitutional provision of the Constitution of the land itself is held unconstitutional because of a violation of the federal Basic Law. On further controversies, e.g. whether or not the CC of the *Länder* may principally decide about constitutionality by applying the standards of federal constitutional law, see *Hillgruber/Goos*, *Verfassungsprozessrecht*, 2004, pp. 309 et seq. no. 883. Even a CC of the *Land* may exceptionally be obliged to suspend a case and submit it to the FCC, but this depends on the scope of control as well as on the qualification of the presumed validity of the norm to be reviewed as the main or just an incidental issue, see *Pestalozza*, *op cit.*, § 13 II, nos. 3 and 24, pp. 203 and 212.

⁴¹ *Pestalozza*, *op cit.*, § 21 I, no. 1, p. 372. Here, Art. 100 (1) Const. already provides a minimum standard.

⁴² Art. 98, 4th sent. Const., Art. 2 no. 7, Art. 55 of the law of the *Bavarian* CC.

reported in the field of social law⁴³ in between 1952 and 2005 about half were ruled by the *Bavarian CC*, in turn approximately half of these were popular actions, and by far most of the last mentioned referred to equality before the law as a standard of control, even though not (necessarily) exclusively.

Compared to the federal level, however, the judgements are of minor significance in so far as social security law is predominantly federal law, and federal law is not subject to constitutional litigation as provided by the *Länder*, because it may not violate constitutional law of the *Länder* since federal law prevails (Art. 31 Const).⁴⁴ Almost all main issues of social security law are matters of concurrent legislation⁴⁵ within which the federal legislator has extensively exercised the powers conferred on the Federation.⁴⁶ Still a matter of *Land* law, by contrast, is regulating old age provision for professional classes. Regulations governing the lawyers' pension⁴⁷ and the notary fund⁴⁸ have been reviewed by the *Bavarian CC* as well as bye-laws of decentralized public corporations like statutes or legally enacted keys for allocation of fees⁴⁹ passed by the association of panel doctors/dentists.⁵⁰ The Court also decided upon regulations on educational allowance additionally provided by *Bavarian Land* law as a follow-up benefit⁵¹ and various regulations on financial assistance, e.g. to cover costs for the way to school.⁵²

⁴³ Outcome of a search in the data-base "juris" dated 27. 2. 2006 ("VerfGH" and "StGH" [not taking into account the constitutional court of *Vienna/Austria*], each combined with "Sozialrecht" as field of law).

⁴⁴ See *Hillgruber/Goos*, supra note 40, no. 880 et seq., p. 309.

⁴⁵ See Art. 74 (1) nos. 7, 9, 10, 12, 13, 19a Const. Details, however, are debatable. In medical law, for instance, various interplays may be observed, and it is held that some federal laws specifically affecting medical practitioners are not fully covered by federal competence, see *Riedel/Derpa*, *Kompetenzen des Bundes und der Länder im Gesundheitswesen*, 2002.

⁴⁶ Modifying the general allocation of competences to the *Länder* (Art. 70), Art. 72 (1) Const. provides that "on matters within the concurrent legislative power of the federation the *Länder* shall have power to legislate so long as and to the extent that the Federation has not exercised its legislative power by enacting a law." The legal order of competences will be revised in the near future.

⁴⁷ BayVerfGH, 13. 6. 1986, ZfSH/SGB 1986, p. 558; BayVerfGH, 4. 8. 1999, BayVBl. 2000, p. 239.

⁴⁸ BayVerfGH, 13. 4. 2005, BayVBl. 2006, p. 43.

⁴⁹ BayVerfGH, 15. 12. 1989, BayVBl. 1990, p. 749; BayVerfGH, 27. 5. 1998, BayVBl. 1999, p. 461; BayVerfGH, 4. 7. 2001, BayVBl. 2002, p. 79; BayVerfGH, 14. 11. 2003, NZS 2004, p. 264. These regulations are (by-)laws in a material sense.

⁵⁰ On register of the public health insurance system (*Honorarverteilungsmaßstäbe der Kassen(zahn)ärztlichen Vereinigungen*).

⁵¹ BayVerfGH, 27. 1. 1993, BayVBl. 1993, p. 302; BayVerfGH, 28. 7. 1995, BayVBl. 1996, p. 141.

⁵² BayVerfGH, 25. 1. 1990, BayVBl. 1991, p. 268.

2. The federal level: Procedures to review welfare reforms

a) Abstract or principal review of norms, Art. 93 (1) nos. 2, 2a Const.

At the federal level, abstract or principle review of norms is an option to test the constitutionality of a social law that has already been promulgated⁵³ "on application of the Federal Government, of a Land government, or of one third of the Members of the *Bundestag*." Disregarding the prevailing classification as an objective procedure, principal review is mainly filed by oppositional fractions, and the Government usually appears to be the natural counterpart of action.⁵⁴ However, considering its overall relevance within society and the need of approval by the *Bundesrat* in view of significant administrative implications⁵⁵ there has often been a consensus between the parties on major reforms of health and pension insurance. The same is, all in all, true with respect to "Hartz-IV".⁵⁶ The so called "Party of Democratic Socialism" alone was helplessly tempted to take constitutional action.⁵⁷ Considering that only two representatives of this party were members of the former Parliament (*Bundestag*)⁵⁸ surmounting the quota of one third of the members of parliament was just impossible.⁵⁹

It was already in 1967 that the FCC filed a famous decision on welfare assistance and youth welfare service.⁶⁰ In 1995 a regulation on short time allowance for unemployment caused by a regionally limited industrial strike in another tariff-area but within the same industrial sector was held constitutional.⁶¹ Moreover, the main part of the *law on old people's welfare* was held constitutional in 2002 because the federal legislator predominantly exercised legislative competences in accordance with the constitution except in the area of education of simple helpers.⁶² Another two very important cases filed in 2001 and 2003 that have been decided just recently concern the laws providing financial adjustment

⁵³ BVerfGE 1, 396 (400 et seqq.).

⁵⁴ *Vofßkuhle*, in: von Mangoldt/Klein/Starck (eds.), GG, 5th ed., Vol. 3, 2005, Art. 93 Abs. 1 Nr. 2 no. 119. On procedural law see also § 13 nos. 6, 6a, §§ 76 et seqq. FCCA.

⁵⁵ See Art. 84 (1) Const. Due to extensive interpretation and the view according to which approval is needed not only with respect to the norm on administrative procedure but the law as a whole (BVerfGE 8, 274 [294 et seq.]; 55, 274 [319, 326 et seq.]) revising this principle is one of the major tasks of reforming the federal constitutional order, see www.bundesrat.de (Bundesstaatskommission).

⁵⁶ On the process see *Münder*, in: idem (ed.), SGB II, 2005, introduction no. 1.

⁵⁷ For the party's aims and policy as well as a the opinion titled "Hartz IV und das Grundgesetz" by *Wende* (2004) see www.sozialisten.de (Politik/Themen, and *Medienspiegel*, 7. Juli 2004).

⁵⁸ *Pau and Löttsch*; see also Art. 1 and 6 (1), (6) of the federal electoral law.

⁵⁹ Under certain conditions a political party may file a constitutional complaint as a legal person that it is directly affected by an infringement of its basic rights but not its constitutional status.

⁶⁰ BVerfGE 22, 180 et seqq.

⁶¹ BVerfGE 92, 365.

⁶² Until now this was the first and only procedure ruled by Art. 93 (1) no. 2a Const. as implemented in 1994, which is a particular form of principal review to control federal competences formally covered by ordinary abstract review.

between health insurance funds (*Risikostrukturausgleich*)⁶³ respectively aim at achieving stability of contribution-rates for health insurance (*Beitragsatzsicherungsgesetz*);⁶⁴ both were held constitutional.

In case a norm is held unconstitutional the FCC declares the norm void (§ 78 FCCA) and in case it is considered constitutional, the Court will expressly declare this although such a *dictum* is not explicitly provided by the FCCA. Even though discussed controversially the predominant view is that unconstitutional norms are both void *ab initio* and *ipso iure*.⁶⁵ The formal declaration, however, is exclusively assigned to the FCC. By legal practice the court further developed the *dictum* of only declaring a norm incompatible with the constitution. This is accepted by express provisions in the meantime⁶⁶, but neither the conditions nor the consequences of such a *dictum* are specifically regulated.

b) Concrete or incidental review of norms, Art. 100 (1) Const.

Decisions and consequences are equally drawn within the category of concrete or incidental review of norms. "If a court concludes that a law on whose validity its decision depends is unconstitutional" due to a violation of the Basic Law a decision shall be obtained from the FCC.⁶⁷ In this respect, incidental review especially determines the relation between ordinary jurisdiction or jurisdiction within special fields of law and constitutional jurisdiction. Judicial control including the application of constitutional law is a task for any court; the competence to decide about constitutionality and to draw further consequences, however, is exclusively assigned to the constitutional court. Unlike principle review⁶⁸, bye-laws and subordinate legislation (decree- and executive order law) may not be tested by incidental review,⁶⁹ the extend of control is generally restricted to the norm upon which the decision of the court presenting the question depends⁷⁰ and the constitutional court may only decide this question but not the ordinary lawsuit. With respect to the number of cases, incidental review is the second most important procedure.⁷¹ 26 actions were filed in 2005.⁷²

⁶³ 18. 7. 2005, SoZR 4-2500, § 266 SGB V, decision no. 8. See also *Becker*, *Rechtliche Fragen im Zusammenhang mit dem Risikostrukturausgleich – unter Berücksichtigung der integrierten Versorgung*, VSSR 2001, pp. 277 et seqq.

⁶⁴ BVerfG, 13. 9. 2005, concerning the law of 23. 12. 2003, BGBl. I, 2002, pp. 4637, MedR 2006, pp. 45 et seqq.

⁶⁵ *Voßkuhle*, supra note 54, Art. 93 no. 47.

⁶⁶ §§ 31 (2), 79 (1) FCCA.

⁶⁷ § 13 no. 11, §§ 80 et seqq. FCCA.

⁶⁸ BVerfGE 2, 307 (312 et seq.); 10, 20 (54).

⁶⁹ For bye-laws see BVerfGE 2, 341 (346); 79, 245 (249 et seq.), statute on doctor's pension.

⁷⁰ For this precept and its exceptions see *Siekmann*, in: von Mangoldt/Klein/Starck (eds.), supra note 54, Art. 100 Abs. 1 no. 65, and *Clemens*, in: Umbach/Clemens, GG, Vol. 2, 2002, Art. 100 nos. 44 et seqq.

⁷¹ www.bverfg.de (Organisation/Jahresstatistik 2005 A I.1., V.1.).

⁷² www.bverfg.de (Organisation/Jahresstatistik 2005 A I.4.).

Incidental review has frequently occurred with respect to single norms of social welfare law. Almost half of all cases pending before the first senate contained issues of social law.⁷³ Referrals were filed by the social courts⁷⁴, by social courts of appeal⁷⁵ and the federal social court. In 2005, one case was submitted by a lower social court, five referrals have been made by the federal social court.⁷⁶ Social courts decide various issues of social security as enumerated and generally provided by the *law concerning social courts and their procedure* (SGG)⁷⁷ and as particularly assigned to the social courts by other laws.⁷⁸ They are now competent to decide on cases of basic assistance [§ 51 (1) no. 4a SGG], unless exceptionally conferred upon a special penal of administrative courts like in *Bremen*⁷⁹, and on cases of welfare assistance and those governed by the law of benefits for persons seeking for asylum [§ 51 (1) no. 6a SGG] also.⁸⁰

In summer 2004, the FCC declared a provision unconstitutional according to which foreigners were not entitled to receive child benefits in 1994 and 1995 while their residence was only authorized but not strengthened by a right to reside or a residence permit.⁸¹ Another referral by a social court concerned the constitutionality of provisions on the transition of pensions of additional and special pension systems of the former German Democratic Republic to the system of the reunified Federal Republic.⁸² In 2006 the court will have to decide upon a referral of the federal social court in order to review a law that shortens the amount of individually acquired points to determine foreigners' or refugees' pension payment.⁸³

⁷³ According to *Umbach/Dollinger*, supra note 10, p. 31, no. 9.

⁷⁴ See for instance BVerfGE 102, 107; BVerfGE 111, 115.

⁷⁵ BVerfGE 16, 305, referring to the social court of appeal as a tribunal; E 54, 159 (164), 111, 160.

⁷⁶ www.bverfg.de (Organisation/Jahresstatistik 2005 B/C II.1).

⁷⁷ Proclaimed anew 23rd September 1975, BGBI. I 2535, lastly revised August 2005, BGBI. I 2354.

⁷⁸ E.g. like in § 13 of the federal law of educational allowances.

⁷⁹ See – in accordance with § 50a no. 2 SGG – Art. 1 § 1a of the Act establishing special penals of the administrative and upper administrative court to exercise jurisdiction in social law matters, Brem.GBl. 2004, p. 583. The provisions of the SGG are applied accordingly, § 50a SGG, unless otherwise regulated by Chap. 5 of Part 1 SGG.

⁸⁰ Administrative courts formerly ruled upon cases on welfare assistance and they are still competent, for instance, to decide cases on youth welfare service, promotion of education and care for war victims; see also *Waibel*, *Zuständigkeiten des Sozialgerichte für Angelegenheiten nach dem Sozialgesetzbuch – Versuch einer Systematisierung des Rechtswegs nach Einfügung der Bücher II und XII in das SGB*, SGB 2005, pp. 215 (226 et seq.).

⁸¹ BVerfGE, 111, 160. The case was submitted by the social court of appeal of *Northern-Westfalia*. See also BVerfGE 111, 176. By now, the law concerning aliens has been revised, last thoroughly by the migration law which has been in force since 2005, BGBI. I 2004, p. 1950, after the former version (BGBI. 2002, p. 1946) had been annulled, BVerfGE 106, 310.

⁸² BVerfGE 111, 115.

⁸³ 1 BvL 9/00 et al.; www.bverfg.de (Organisation, Zu erledigende Verfahren 2005).

It is frequently discussed whether and if so under which circumstances a court is obliged to file a referral in preliminary summary proceedings as well. The FCC stresses that in order to respect the principle of effective legal protection the courts are not obliged, unless proceedings in the main action would be anticipated.⁸⁴ Not to apply the norm in question, however, is only one possible consequence⁸⁵ as drawn by the *social court Düsseldorf*, again with respect to "Hartz IV": The court presumed a violation of the basic law⁸⁶ because determining the "need" for basic assistance currently operates by additionally committing not only a person's husband or wife or *registered* homosexual partner but also heterosexual partners in extra-marital cohabitation, whereas homosexual partners outside registered partnership are not taken into account. Presuming a violation of the principle of equality by discrimination, the court did not apply the relevant section and granted benefits at the level of 80 % to avoid anticipation of the proceedings in the main action. However, the court was overruled by the social court of appeal of *Northern-Westfalia*, which held that the initial perspective for constitutional qualification is only matrimony but not comparability of forms of living together; the legislator is free to decide and not forced to treat these groups equally⁸⁷ especially where typing in view of mass phenomena is necessary.⁸⁸

c) Constitutional complaints by individuals, Art. 93 (1) no. 4a Const.

96% out of more than 154.000 settled cases in between September 1951 and the end of 2005 were constitutional complaints of which only 2.5 % succeeded.⁸⁹ By far most complaints were filed by individuals (those filed by municipalities are not counted separately). Additional procedural requirements⁹⁰ were already provided by ordinary federal law since 1951; pre-litigation proceedings were introduced five years later and replaced by a preliminary acceptance procedure 1963 which was modified again in 1983.⁹¹ Last year, the chamber competent to

⁸⁴ BVerfGE 86, 382 (389); referral, however, is generally permissible in view of final decisions about counterstatements determined by press and broadcast law, see BVerfGE 63, 131 (140 et. seqq.), *Hillgruber/Goos*, supra note 40, p. 223, no. 606. Hence, that the courts do not submit can be justified by current predominance of the need of effective legal protection as principally granted by the constitution (*Siekmann*, in: von Mangoldt/Klein/Starck (eds.), supra note 54, Art. 100 Abs. 1 no. 9) but not, as often maintained, by reference to summary control alone that concerns determining facts, see *Hillgruber/Goos*, op cit., no. 607.

⁸⁵ *Redeker/von Oertzen*, *Verwaltungsgerichtsordnung*, 14th ed. 2004, § 1 no. 7b.

⁸⁶ *SG Düsseldorf*, 16. 2. 2005, DB 2005, p. 617 (with annotations by *Wank/Maties*, ibidem, p. 619), basically agreed by *O'Sullivan*, *Verfassungsrechtliche Fragen des Leistungsrechts der Grundsicherung für Arbeitsuchende*, SGB 2005, pp. 369 (375 et seqq.).

⁸⁷ L 9 B 405 SO of 21. 4. 2005 (www.sozialgerichtsbarkeit.de)

⁸⁸ As put forward by the Upper Social Court of *Saxony*, 14. 4. 2004, NZS 2006, p. 107 (109), that was facing the same issue. See likewise the resolution of the Upper Social Court of *Hessen*, L 7 AS 29/05 ER of July 21st 2005 (www.sozialgerichtsbarkeit.de).

⁸⁹ www.bverfg.de (Organisation/Jahresstatistik 2005 A I.1.).

⁹⁰ See also § 13 no. 8a, §§ 90 et seqq. FCCA.

⁹¹ See *Pestalozza*, supra note 40, pp. 160 et seqq.

do so has refused acceptance of 4.666 out of 4.967 complaints.⁹² Constitutional complaints "may be filed by any person alleging that one of his basic rights" or of his rights equally granted "has been infringed by public authority". The judiciary is included, and by far most of the complaints refer to an infringement by the judiciary. In 2005, 930 complaints were directed against federal judgements out of which 171 were filed by the federal social court.⁹³ All in all, 281 judgements of social courts were tested.⁹⁴ The FCC may refer to any constitutional issue⁹⁵ not only to those addressed to by the complainant.⁹⁶ Decisions that violate basic law are set aside and the cases are remitted. Unconstitutional laws are dealt with in the same way as under review although § 95 (3) FCCA rules that they have to be declared void.

A complaint may only be successful on grounds of infringing specific constitutional law; the FCC may not act as another supreme or "super-"instance of appeal.⁹⁷ Nonetheless, many complaints directed against social laws, administrative acts and judgements of social courts have been successful. However, none of the individual complaints alleging an infringement by "Hartz IV" has been accepted to be decided by judgement so far: Complaints are only admissible if the complainant himself is directly affected at present. Hence a complainant's groundless fear for belonging to a group of people bound to support the person in need lead to rejection of the complaint.⁹⁸ The same was true for a claimant who did not substantiate in how far the law would apply in his case,⁹⁹ e.g. whether or not he was certainly obliged to conclude a reintegration-agreement and which sanctions would have been imposed on him in case he refuses to do so.¹⁰⁰ Complaints directed against the law¹⁰¹ hardly ever meet the criterion of being directly affected because laws usually have to be executed by

⁹² www.bverfg.de (Organisation/Jahresstatistik 2005 A IV.1.); in 2004 5.205 out of 5434 complaints were not accepted.

⁹³ www.bverfg.de (Organisation/Jahresstatistik 2005 A IV.5.).

⁹⁴ www.bverfg.de (Organisation/Jahresstatistik 2005 A IV.3.).

⁹⁵ BVerfGE 42, 312 (325 f.); 76, 1 (74).

⁹⁶ Complaints are regarded as a specific legal action provided by objective constitutional law, BVerfGE 33, 247 (258 f.); E 51, 130 (139).

⁹⁷ That constitutional litigation is basically free of costs, § 34 (1) FCCA, also has the effect that many complaints just refer to a violation of the right to a hearing in accordance with the law just because appeal within "ordinary" jurisdiction has come to an end; this is probably the main reason why so many constitutional complaints are not successful. Academics have frequently discussed to abolish constitutional complaints (*Vofßkuhle*, supra note 54 Art. 93 no. 166), at least those against decisions of the courts. This is possible even with regard to the principle of effective legal protection and the material limits provided by Art. 79 (3) Const.; see also supra note 2.

⁹⁸ BVerfG, 1 BvR 1962/04 of 2. 9. 2004.

⁹⁹ BVerfG, 1 BvR 199/05 of 14. 2. 2005; see also BVerfG, 1 BvQ 39/04 of 27. 9. 2004.

¹⁰⁰ BVerfG, 1 BvR 199/05 of 14. 2. 2005, op cit.

¹⁰¹ Complaints directed against orders and bye-laws are permissible, for references *Vofßkuhle*, supra note 54, no. 175, footnote 350.

further acts to take an effect.¹⁰² Regardless of several exceptions¹⁰³ – like retrenchment of pension benefits¹⁰⁴ – individuals shall take legal action to control administrative acts within non-constitutional jurisdiction first whereby the law may be constitutionally reviewed by incidental referrals. In accordance with the principle of subsidiarity of constitutional complaints, a complaint may be filed only if due recourse to the courts has been exhausted [§ 90 (II) FCCA]. Then the complainant may choose to review the final decision only or additionally (one of) those of the (lower) courts and/or the underlying act as well.¹⁰⁵ Hence retrenchment of benefits as provided by the *Hartz-reforms* has to be faced and the underlying notifications must be dealt with by the social courts first.¹⁰⁶ Even in these cases the constitutional court refused to exceptionally accept a complaint before all remedies have been exhausted, which is permissible only "if a complaint is of principal importance or if recourse to other courts would entail a serious and unavoidable disadvantage to the complainant" [§ 90 (II) FCCA]. The court argued that it is not obliged to decide but to weigh up all circumstances against and in favour of an early decision which may not be filed if far reaching ordinary legal and factual clarification is needed which is the task of jurisdiction of the social courts.¹⁰⁷ The same reasons were given when an action commonly filed by 6570 complainants against excluding non-prescription pharmaceuticals from the catalogue of medicals provided as free treatment had been rejected.¹⁰⁸

d) Constitutional complaints filed by municipalities or associations of municipalities, Art. 93 (1) no. 4 b Const.

Exceptionally, welfare reforms may also be tested by a so called "municipal constitutional complaint".¹⁰⁹ Academics sometimes deny its character as a "complaint" but see it as a special procedure of review of norms by emphasizing restrictions as to the object and scope of control and the entitlement to put it in motion.¹¹⁰ By the end of 2004, eleven administration counties (*Landkreise*) put in such a complaint to be "filed by municipalities or associations of municipalities". These counties – associations of municipalities under constitutional law¹¹¹ – aim

¹⁰² With respect to "Hartz IV" BVerfG, 1 BvR 143/05 et al. of 18. 3. 2005 (no.15).

¹⁰³ For many examples see *Schlaich/Korioth*, 6th ed. 2004, p. 162 et seqq., no. 240.

¹⁰⁴ BVerfG, 2. 3. 2004, BVerfGK 2, 266.

¹⁰⁵ BVerfGE 19, 377 (389); 54, 53 (64 et seq.).

¹⁰⁶ BVerfG, 1 BvR 2323/04 of 29. 10. 2004; 1 BvR 199/05 of 14. 2. 2005; 1 BvR 143/05 et al. of 18. 3. 2005, no. 17.

¹⁰⁷ BVerfG, 1 BvR 2323/04 (op cit.); 1 BvR 199/05 (op cit.); 1 BvR 143/05 et al. of 18. 3. 2005, nos. 21 et seqq.

¹⁰⁸ BVerfG, 1 BvR 1076/04 of 14. 11. 2004.

¹⁰⁹ For procedural implications see also § 13 no. 8a, §§ 90 et seqq. FCCA.

¹¹⁰ *Stern*, Staatsrecht II, 1980, p. 1023 et seq., *Schlaich/Korioth*, supra note 103, p. 143, no. 191 et seqq.; *Voßkuhle*, supra note 54, no. 196.

¹¹¹ BVerfGE 83, 363 (383); on terms and categories see *Tettinger*, in: von Mangoldt/Klein/Starck (eds.), supra note 2, Art. 28 Abs. 2 nos. 240 et seqq.

at testing certain provisions of the SGB II as implemented by "Hartz IV"-laws. This is permissible only "on the ground that their right to self-government under Article 28 has been infringed by a law." The counties argue that additional tasks have been conferred upon the municipalities without compelling reasons for federal regulation and they correspondingly refer to the portage for benefits and services for reintegration as well as certain supporting benefits to ensure the unemployed's living.¹¹² The duties to establish institutionalized working cooperation between federal and municipality institutions and to confer administrative tasks upon them are criticized as well as imposing financial burdens on the municipalities and counties by federal law.¹¹³ Until now, the FCC has not yet ruled a decision.

III. Constitutional standards

1. Provisions demanding a fair and social order and constraints limiting welfare reforms

Constitutional law does not only limit infringements of constitutional rights but also contains legal provisions that determine a social order.¹¹⁴ Providing for a social order and welfare reforms are, of course, interrelated; laws enacted to establish or to reform the social legal order may justify interferences with individual positions. It is within this conflict between upholding individual positions and guaranteeing common welfare that we shall look to important constitutional rights and principles.

a) The principle of social welfare state (in conjunction with human dignity)

The principle of social welfare state (*Sozialstaatsprinzip*) is of fundamental and outstanding importance for welfare legislation. The FCC stressed that because of this principle the state is obliged to counterbalance social imbalances and to provide for a fair and social order, particularly by legislation.¹¹⁵ According to *Zacher* the most important objectives of the social welfare state are "aid against need and poverty",¹¹⁶ "to guarantee everyone an existence with decent living conditions, to diminish differences of well-being, and to abolish or control

¹¹² § 6 (1) no. 2, § 16 (2) nos. 2-4, §§ 22, 23 (3) SGB II

¹¹³ For details of constitutional questions arising *Henneke*, *Aufgabenwahrnehmung und Finanzlastverteilung im SGB II als Verfassungsproblem*, DÖV 2005, pp. 177 et seqq.; *Ruge/Vorholz*, *Verfassungs- und verwaltungsrechtliche Fragestellungen bei der Arbeitsgemeinschaft nach § 44 b SGB II*, DVBl. 2005, pp. 403 et seqq.

¹¹⁴ See below a).

¹¹⁵ BVerfGE 22, 180 (204).

¹¹⁶ *Zacher*, in: *Isensee/Kirchhof* (eds.), *Handbuch des Staatsrechts*, Vol. II, 3rd ed. 2004, p. 678 no. 25.

relations of dependence"¹¹⁷ and "more security in view of the vicissitudes of life, and finally raising and spreading of prosperity."¹¹⁸ The principle of social welfare state is anchored in Art. 20 (1) Const. The constitutional order in the *Länder* must be conform to this principle within the meaning of the basic law (Art. 28 [1] Const.)¹¹⁹. An amendment to the basic law affecting the fundamental core principle of social welfare state is impermissible.¹²⁰ Hence the principle is either of higher rank or at least subject to particular constitutional protection.¹²¹

Disregarding the social markedness of particular fundamental rights [Art. 6, 7, 9 (3), 14 (2) and (3), 15]¹²² the principle of social welfare state serves, in the first place, as an objective and constitutional task of the state. It becomes operational, for instance, as a directive for the interpretation of laws and as a standard for authorities to exercise their discretion¹²³. For further consequences it takes an effect especially in conjunction with the right of equality before the law. Equality is in line with the aim of providing a fair and social order as to prevent unequal exclusion of groups or people. A law that provided additional retirement benefits, for instance, was declared incompatible with the basic law to the extent that employees working less than half time were excluded.¹²⁴ Similarly the principle operates to grant subjective legal positions only in conjunction with other fundamental rights. Together with the principle of human dignity [Art. 1 (1)] the principle of social state commands to secure a stranded person's social minimum by social benefits if necessary.¹²⁵ Correspondingly, the social minimum of a person liable for taxation and his family entitled to maintenance has to be spared.¹²⁶ It is, however, hardly possible to fix an exact moneyed legal position

¹¹⁷ *Idem*, in: *Abhandlungen zum Sozialrecht*, ed. by von Maydell/Eichenhofer, pp. 73 (93).

¹¹⁸ *Idem*, supra note 116. As to security against the "vicissitudes of life" compare with Art. 171 of the *Bavarian Const.* and Art. 53 (3) of the *Const. of Rheinland-Pfalz*.

¹¹⁹ The principle of the social welfare state as such is also rooted in the following constitutional provisions of the *Länder*: Art. 23 (1) [*Baden-Württemberg*]; Art. 3 (1) [*Bavaria*]; Art. 2 (1), Art. 45 (1) [*Brandenburg*]; Art. 65 (1) [*Bremen*]; Art. 3 (1) [*Hamburg*]; Art. 27 [*Hessen*]; Art. 2 [*Mecklenburg-Vorpommern*]; Art. 1 (2) [*Lower Saxony*]; Art. 74 (1) [*Rheinland-Pfalz*]; Art. 60 (1) [*Saarland*]; Art. 1 [*Saxony*]; Art. 2 (1) [*Sachsen-Anhalt*]; Art. 44 (1) [*Thüringen*].

¹²⁰ Art. 79 (3) Const. On material limits for constitutional amendments in EU-member state countries *Sichert*, supra note 2, pp. 706, 745, 750, all et seqq.

¹²¹ *Sichert*, *ibid.*, pp. 546 et seqq.

¹²² *Sommermann*, supra note 2, Art. 20 Abs. 1 no. 102.

¹²³ *Idem*, op. cit., nos. 125, 126.

¹²⁴ BVerfGE 97, 35, 44 et seqq.; see also BVerfG 82, 126 (146).

¹²⁵ BVerfGE 40, 121 (133); 82, 60 (80); see also *Sartorius*, *Das Existenzminimum im Recht*, 2000, pp. 54 et seqq.; *Könemann*, *Der verfassungsunmittelbare Anspruch auf das Existenzminimum*, 2005. Human dignity is also referred to by § 1 SGB XII (BGBl. I 2003, p. 3022, lastly revised September 2005 [BGBl. I 2809]) in view of social assistance as provided by formal law for people in need who are not entitled within the scheme of basic assistance (SGB II). Basic assistance is granted for people in need (below 65) who are capable of work.

¹²⁶ See – summarizing its constant adjudication – BVerfGE 99, 246 (259 ff.).

by constitutional law alone.¹²⁷ Correspondingly, when refusing to accept a complaint directly striking the "Hartz-laws" because there was no due recourse to specified courts, the FCC also argued that in this context an actual ascertainment of financial needs to secure a social minimum is required.¹²⁸ Recently lower Social courts¹²⁹ decided that there is no indication of unconstitutionality of the legally granted level of basic assistance;¹³⁰ complex details – e.g. as to a pre-constitutional guarantee of security, the impact of financial sanctions etc. – cannot be dealt with here.¹³¹

Further individual positions may be derived from the "Sozialstaatsprinzip" in conjunction with equality before the law and other fundamental rights, e.g. occupational freedom; on this legal basis the FCC granted a right to participate in professional university education, however subject to existing vacancies.¹³² In a recent decision the FCC held that it is both a violation of the principle of social state in conjunction with the right to personal freedom (Art. 2 [1] Const.) and a contempt of the duty to protect one's life (as assigned to the state by and derived from Art. 2 [2] Const.) to exclude a person from free treatment following a so called (brand-)new method not yet generally asserted if there is no principally accepted way to accomplish but at least some prospect of success with respect to the new method.¹³³ Here, this treatment belongs to a necessary "minimum" supply for a person insured within the public scheme raising income-related contributions.

Even though the court emphasized that the basic law does not lay down a particular economic system, the principle of social welfare state may form part

¹²⁷ For a far-reaching approach, however, see *infra* note 223.

¹²⁸ BVerfG, 1 BvR 199/05 of 14. 2. 2005, sec. no. 10. Therefore exceptional ruling [§ 90 (II) FCCA] was also refused.

¹²⁹ It is important to mention that explicitly declaring a norm unconstitutional or compatible with the constitution is not a task of specialized or ordinary courts; if the Basic law is held to be violated by a law on whose validity the courts decision depends, a decision shall be obtained by the FCC upon referral, see II. 2. b. Nonetheless fundamental rights also establish an objective order of values for all areas of law [see also Art. 1(3)] and hence courts are bound to regard constitutional rights when applying and interpreting law, BVerfGE 7, 198.

¹³⁰ SG *Chemnitz*, S 21 AS 491/05 of 12. 2. 2006 (www.sozialgerichtsbarkeit.de), stating that the law takes socio-cultural needs into account [§ 20 (1) SGB II], provides for benefits beyond regular allowance, § 23 SGB II, and that the legislator is not precluded from typifying and generalizing; likewise SG *Aachen*, S 11 AS 15/05 of 15. 6. 2005; see also SG *Schleswig*, S 6 AS 70/05 ER, and SG *Berlin*, S 63 AS 1311/05 of 2. 8. 2005, all sub www.sozialgerichtsbarkeit.de (Entscheidungen), furthermore *Lang*, in: Eicher/Spellbrink, SGB II, 2005, § 20 nos. 112 et seqq.

¹³¹ For critical assessment see *Däubler*, Das Verbot der Ausgrenzung einzelner Bevölkerungsgruppen – Existenzminimum und Arbeitslosengeld II, NZS 2005, pp. 225 et seqq.; *Bieback*, Probleme des SGB II, NZS 2005, pp. 337 et seqq. See also *Martínez Soria*, Das Recht auf Sicherung des Existenzminimums, JZ 2005, pp. 644 et seqq.

¹³² Unless very exceptional conditions would qualify a non-performance of creating new career-opportunities as an evident violation of the constitution, BVerfGE 33, 303, 331 et seqq. (*numerus clausus*).

¹³³ BVerfG, 1 BvR 347/98 of 6. 12. 2005.

of the framework of the concept of "social market economy" to which the principle's affinity is predominant. However, the court has been "reluctant ... to lay down guidelines for the realization of socio-economic rights" and likewise "for the achievement of other social goals".¹³⁴ "With respect to the requirements of the social order and the legal protection of the individual's freedom", the court argued, "the legislator enjoys wide-ranging discretion for legal formation, within which he may determine the way and the extent of necessary or at least maintainable interference with the economic self-determination of the individual."¹³⁵

b) Social rights and affirmative constitutional tasks

"The Basic law is largely silent with regard to the nature of social rights."¹³⁶ Constitutional law at the federal level does not contain any of the classical social rights e.g. to work, lodging or education. Art. 6 (4) alone says that "every mother shall be entitled to the protection and care of the community." According to the FCC this is a fundamental right¹³⁷ as well as an affirmative constitutional task.¹³⁸ Moreover, both a general task of protection and equal treatment but also corresponding basic rights are provided by Art. 6 (1) and (5): "Marriage and the family", as sec. one reads, "shall enjoy the special protection of the state." According to Art. 6 (5) "Children born outside of marriage shall be provided by legislation with the same opportunities for physical and mental development and for their position in society as are enjoyed by those born within marriage". The constitutional court dealt with Art. 6 (5) in 1958 and 1963 before a bill was introduced;¹³⁹ in view of material problems of legislation the court decided anew in 1969 and successfully set forth a deadline for the implementation of the law in order to fulfil the constitutional task of Art. 6.¹⁴⁰

In the last decade and against the background of reunification it was largely discussed to implement social, cultural and ecologic basic rights.¹⁴¹ Such rights are granted by many constitutions of the "old" *Länder*,¹⁴² but they are restricted

¹³⁴ *Kommers*, *The Constitutional Jurisprudence of the Federal Republic of Germany*, 1997, p. 242. For the court's position BVerfGE 4, 7 (17); 7, 337 (400); 14, 19 (23); 30, 259, 315. By contrast, Art. 38 of the Const. of *Thüringen* provides that the order of economic life has to comply with the principles governing a social and ecologic market order.

¹³⁵ BVerfGE 10, 354 (371); E 18, 257 (273).

¹³⁶ *Kommers*, supra note 134, p. 241.

¹³⁷ BVerwE 47, 23 (27).

¹³⁸ BVerfGE 60, 68 (74).

¹³⁹ For details see *Kleuker*, *Gesetzgebungsaufträge des Bundesverfassungsgerichts*, 1993, pp. 112 et seqq.

¹⁴⁰ To prevent direct enforcement by the courts, BVerfGE 25, 167 (188).

¹⁴¹ *Sterzel*, *Staatsziele und soziale Grundrechte*, ZRP 1993, pp. 13 (16 et seq.).

¹⁴² See for instance the Constitutions of *Baden-Württemberg*: Art. 11 (1) [right to education]; *Bavaria*: Art. 106 (1) [right to accommodation], Art. 125 (3) [care for families with many children], Art. 128 (1) [right to education], Art. 166 (2) [right to ensure one's one subsistence by work], Art.

in operation.¹⁴³ Similarly "social rights" can substantially be found (only) as constitutional tasks or foundations of the state – separated from fundamental freedoms – in constitutions of the new federal countries.¹⁴⁴ Social rights existing within the *Bavarian* constitution are similarly designed as constitutional tasks with limited justiciability.¹⁴⁵ At the federal level, however, implementing classical social rights was rejected. Nevertheless it is important to mention that as a specific approach of constitutional interpretation the so called social theory¹⁴⁶ "highlights the importance of social justice, cultural rights, and economic security."¹⁴⁷ Social rights contribute to being conscious of social justice and preserve public interests that are constitutionally demanded, they also function as to justify interferences in order to achieve social objectives and they finally operate as to preserve some legal setting established to build up a social order.¹⁴⁸

c) *Fundamental freedoms – economic liberties*

It is not possible to deal with all relevant basic rights and fundamental freedoms binding and also determining welfare legislation comprehensively here. The right to physical integrity, for instance, is – first of all – a fundamental right but also serves as an affirmative task to protection. Hence the legislator is obliged to provide for protection against negative health affecting consequences of night work.¹⁴⁹ Moreover, freedom of associations might be affected by a provision to pay equal salary for both loan workers and regular employees. In

168 (3) [care], Art. 171 [social security], Art. 174 (1) [vacation]; *Berlin*: Art. 18 [right to work], Art. 20 (1) [right to education], Art. 28 (1) [right to accommodation]; *Bremen*: Art. 8 (1) [work], Art. 14 (1) [accommodation], 27 (1) [education]; *Hessen*: Art. 28 (1) [work]; *Lower Saxony*: Art. 4 (1) [education]; *Northern Westfalia*: Art. 8 (1) [education], 24 (1) [work]; *Saarland*: Art. 45 [work], Art. 48 [vacation]; *Thüringen*: Art. 20 [education]. The former Art. 53 (2) [work] of the constitution of *Rheinland-Pfalz* has been revised in 2000. The Constitutions are commonly collected in: *Verfassungen der deutschen Bundesländer*, 8th ed. 2005.

¹⁴³ For *Bavaria* see *Meder*, *Die Verfassung des Freistaates Bayern*, 4th ed. 1993, Art. 106 no. 1; Art. 166 no. 1. Moreover *Brenne*, *soziale Grundrechte in den Landesverfassungen*, pp. 7 et seqq. et passim.

¹⁴⁴ Art. 11 (13 et seqq.) of the Const. of *Mecklenburg-Vorpommern*; Art. 34 et seqq. of the Const. of *Sachsen-Anhalt*; moreover very clearly Art. 7 (1) and 9 (1) Const. of *Saxony*; See also Art. 6a of the Const. of *Lower Saxony*. For general constitutional tasks on social security see furthermore Art. 22 (*Berlin*), Art. 45 (*Brandenburg*), Art. 35 (*Hessen*), Art. 53 (3), (4) [*Rheinland-Pfalz*], Art. 46 (*Saarland*). See also *Riepe*, *Soziale Grundrecht in den Verfassungen der Länder Brandenburg, Mecklenburg-Vorpommern, Sachsen, Sachsen-Anhalt und Thüringen*, 1995, pp. 171 et seqq.

¹⁴⁵ See supra note 143.

¹⁴⁶ *Böckenförde*, *Grundrechtstheorie und Grundrechtsinterpretation*, NJW 1974, pp. 1529 (1530, 1535 et seq.); *Alexy*, *A Theory of Constitutional Rights*, 1982, translation 2004, pp. 11, 378 et seq.

¹⁴⁷ See *Kommers*, supra note 134, p. 49, with reference to the Court's jurisdiction.

¹⁴⁸ *Lübbe-Wolf*, *Soziale Grundrechte und Verfassungsaufträge*, JöR n.F. 53 (2005), pp. 1 et seqq.

¹⁴⁹ BVerfGE 87. 363 (386); 85, 191 (323 f.).

this case already addressed to,¹⁵⁰ however, the question was left open and the court affirmed that such interference by the second law of modern services of the labour market was at least justified.

aa) Occupational freedom, Art. 12 Const.

With respect to welfare reforms occupational freedom plays an important role for those who perform within the public insurance system. Main problems arise with respect to the law of registered medicals¹⁵¹ including difficulties to fix the limits of constitutional categories. In general the court accurately distinguishes regulations on exercising one's occupation from provisions restricting individual access or access in general;¹⁵² thereby it draws a distinction which is important to meet the progressively fixed conditions of justification. With respect to the law of registered medicals, however, who provides services for 90% of the population insured by the public scheme, the court often left open a proper delimitation and turned to the more severe conditions of justification. These were applied to a provision according to which access to registration was denied for doctors already aged 55 and to another one providing that registration automatically expires for medicals aged 68. In the first case the court argued that there was a proportionate relation between the purpose of the law and the intensity of interference because monetary stability and proper function of public health insurance are legitimate public interest issues of particular and even outstanding importance.¹⁵³ Similarly health protection and ensuring quality of services were defined as particularly important common values that may uphold justification of even severe and typified interferences with the access to occupation, as held in the second case.¹⁵⁴ By contrast, simply regulations on exercising the medical profession within the public scheme are federal agreements on units of medical treatment in order to measure performances by scores that in turn determine a doctor's salary.¹⁵⁵ Extending the personal scope of compulsory insurance may under certain circumstance affect the occupational freedom of private insurance companies although such interference can rather be justified.¹⁵⁶ The FCC held

¹⁵⁰ See supra note 30.

¹⁵¹ Schnapp, in: idem/Wigge (eds.), *Handbuch des Vertragsarztrechts*, 2002, pp. 65 et seqq.

¹⁵² See BVerfG 7, 377 (405 et seqq.); E 46, 120 (138 et seqq.).

¹⁵³ BVerfGE 103, 172 (184), leaving aside a delimitation between interfering with exercising one's occupation or – stressing the economic effect – with individual access.

¹⁵⁴ BVerfG, 16. 4. 1998, NZS 1998, p. 285 (286), leaving open a qualification alike (supra note 153). See also Becker, *Zur verfassungsrechtlichen Stellung der Vertragsärzte am Beispiel der zulassungsbezogenen Altersgrenzen*, NZS 1999, pp. 521 et seqq.

¹⁵⁵ BSG, 9. 12. 2004, SozR-4 2500, § 72 decision no. 2; § 87 decision no. 8. See also Engelhard (2006), in Hauck/Noftz, *SGBV*, § 69 no. 204. With respect to the latest "Bewertungsmaßstab [EBM] 2000 plus" Ehlers/Sichert, *Juristische Möglichkeiten der Verbandspolitik*, Allergo Journal 2005, pp. 138 et seqq. As regards content of these authoritative collective agreements, however, freedom of occupation and equality before the law commonly call for justice of fee-allocation.

¹⁵⁶ BVerfG, 4. 2. 2004, BVerfGK 2, 283. If applicable with respect to their character, fundamental freedoms also protect legal persons or associations, Art. 19 (3) Const.

that establishing a legal framework to unfold freedom of occupation is a common value for appropriate justification of reforming social labour laws.¹⁵⁷

To lower standards of employment expected to be taken by the work-seeking beneficiary and sanctioning contempt by the "Hartz"-laws (e.g. by cutting payments), §§ 10, 31 SGB II, should not be qualified as forced labour of a particular kind banned by Art. 12 (2) Const.¹⁵⁸ A basically dissenting view¹⁵⁹ nonetheless leads to justification by colliding constitutional law (Art. 12 and 14) of solidly community.¹⁶⁰ The distinct defensive structure of Art. 12 (2), (3)¹⁶¹ may be evoked for extended protection also covering indirect pressure on guarantee level as known with respect to Art. 12 (1); emphasizing the dimension to positively claim benefits, however, leads to restrictive interpretation. Likewise the duty to conclude a (re-)integration agreement and thereby accept an additional job-bargain (§ 16 [3] SGB II) does presumably not unconstitutionally¹⁶² interfere with Art. 12 (2) or (3)¹⁶³ even though it might be imposed by administrative act in case of the beneficiary's failure (§ 15 [1] SGB II). Ultimately, it is a crucial question in how far pushing below the subsistence level may not violate – unjustifiable¹⁶⁴ – human dignity in its specification of guaranteeing a social minimum. Basically it is important to mention that (restrictively) interpreting and applying the SGB II in accordance with the constitution gains outstanding importance in order to "avoid" the verdict of unconstitutionality. Cutting basic assistance conform to the constitution therefore likely presupposes that a

¹⁵⁷ BVerfG, 29. 12. 2004, BVerfGK 4, 356 (361).

¹⁵⁸ Nor as (general) compulsion to (specified) work, basically prohibited by Art. 12 (3) Const. Moreover, several exemptions prevent unconstitutionality in view of other fundamental rights (e.g. human dignity, family protection). Art. 12 (1) – freedom of occupation – is touched in case a juvenile is sanctioned for not taking up "reasonable" education, which, however, may be justified if aid had been provided.

¹⁵⁹ *Berlit*, in: SGB II, Lehr- und Praxiskommentar, 2005, § 31 no. 13; see also *Manssen*, in: von Mangoldt/Klein/Starck (eds.), GG, Vol. 1, 5th ed. 2005, Art. 12 Abs. 2 no. 302; *Däubler*, Absenkung und Entzug des ALG II – ein Lehrstück zur Verfassungsferne des Gesetzgeber, info also 2005, p. 51 (at p. 55).

¹⁶⁰ *Manssen*, op cit., Art. 12 Abs. 2 nos. 302 and 309.

¹⁶¹ See *Tettinger*, in: Sachs (ed.), GG, Commentary, 3rd ed. 2003, Art. 12 nos. 148, 157.

¹⁶² In favour of unconstitutionality because of a violation of the principle of freedom of contract as contained in Art. 2 (1) Const. *Berlit*, supra note 159, § 31 no. 14; dissenting *Rixen*, supra note 25, § 15 Nos. 15 et seq.

¹⁶³ See SG *Schleswig*, S 6 AS 70/ER of 8. 3. 2005 (sub www.sozialgerichtsbarkeit.de). According to the FCC (general) compulsion to (specified) work is touched only if the commitment may lead to (potential) interference with human dignity; BVerfGE 74, 102 (116, 121 et seq.); 83, 119 (126). By contrast *Manssen*, supra note 159 no. 304; *Berlit*, supra note 159, § 31 no. 13, emphasizing that such a job is neither placed by the market nor may it reasonably provide for one's own livings.

¹⁶⁴ *Starck*, in: von Mangoldt/Klein/Starck (eds.), supra note 159, Art. 1 Abs. 1 no. 34, also with respect to Art. 79 (3) Const. exposing Art. 1 Const. as a limit of constitutional amendment.

minimum is provided for otherwise and furthermore such a measure may not go beyond reducing the socio-cultural interest of subsistence.¹⁶⁵

bb) Right to property, Art. 14 (1) Const.

Next to substantial property Art. 14 covers all valuable legal positions and goods of private law, contractual rights included. Today, legal positions as guaranteed by public law are also protected in case they are equivalently based on one's own¹⁶⁶ and not only inessential efforts; these rights as to property value have to be assigned to the possessor like exclusive rights are. Neither condition, for instance, is met in view of abolishing formerly granted unemployment assistance ("Arbeitslosenhilfe") following unemployment benefits by the "Hartz-IV"-laws because unemployment assistance was exclusively financed by federal funds and also depending on the beneficiary *currently being* in need.¹⁶⁷ Financial property as such is not protected and neither are obligations to pay as provided by public law classified as undue interference. It took quite some time until the court outlined its position to rights granted by public law clearly. In 1985 legal protection of social security rights was definitely affirmed in a leading case concerning pension related contributions and allowances of retired people's health insurance.¹⁶⁸ Henceforth, rights and claims within social security law were frequently protected in accordance with the conditions already mentioned. The equivalent core of valuable legal positions is particularly protected. However, the court ruled that such legal positions must serve to ensure basic assistance, which has often been criticized.¹⁶⁹ The court acknowledged¹⁷⁰ protection of pension and unemployment payment, both including entitled expectancies,¹⁷¹ pensions for war victims¹⁷² and expectancies of occupational disability pensions,¹⁷³ maintenance

¹⁶⁵ With respect to the former "Bundessozialhilfegesetz" *Krahmer*, in: Lehr- und Praxiskommentar, 6. Aufl. 2003, § 25 no. 9; *Berlit*, supra note 159, § 31 no. 12; *Däubler*, supra note 159, p. 55. According to all authors a cut of 30% (or more) is constitutionally unacceptable.

¹⁶⁶ Therefore social welfare, promotion of vocational training, family allowances, housing benefits, child-rearing allowance and social reimbursement are not protected, *Umbach/Dollinger*, supra note 10, p. 48 no. 71 with further references.

¹⁶⁷ Albeit it is nonserious if the position is additionally or predominantly based on governmental grant (BVerfGE 69, 272 [301]); see *Boecken*, Zusammenführung von Sozialhilfe und Arbeitslosenhilfe: insbesondere zur verfassungsrechtlichen Zulässigkeit einer Abschaffung des Anspruchs auf Arbeitslosenhilfe und einer Beteiligung des Bundes an den Sozialhilfeaufwendungen, SGB 2002, pp. 357 (360 et seqq.); moreover see also BSGE 59, 157 (161); *Umbach/Dollinger* (supra note 10) Chap. A II. 2., p. 49. Nonetheless it is not without controversy that "Arbeitslosenhilfe" is not covered by Art. 14 (1) Const., *Boecken*, op cit.

¹⁶⁸ BVerfGE 69, 272; following BVerfGE 53, 257.

¹⁶⁹ See *Deppenheuer*, in: von Mangoldt/Klein/Starck (eds.), supra note 159, Art. 14 nos. 71 et seqq., 185.

¹⁷⁰ For an overview *Jarass*, in: idem/Pieroth, GG, 7th ed. 2004, Art. 14 no. 12.

¹⁷¹ E 64, 87 (97).

¹⁷² BSGE 73, 41 (42).

¹⁷³ BVerfGE 75, 78 (96 f.).

allowance and temporary allowance.¹⁷⁴ Again it is nonetheless impossible to fix an exact moneyed legal position by constitutional law (alone). This is especially true with respect to prospective and systematic changes of welfare reforms on retrenchment. Content and limits of property are defined by (social) laws, albeit these restricting laws must meet the requirements of the principle of proportionality. In this respect, shortening the duration of unemployment benefits by the "Hartz"-laws in order to rearrange security effectively, thereby determining rights in content and enacting transitional regulations can be properly justified.¹⁷⁵ By contrast, expectations of fees, profit and income are not protected. Hence increasing the income level for compulsory insurance without affecting already existing insurance relations did not even touch the area of guaranteed property as alleged by a private insurance company. In this case the court left open if the establishment of regular costumers is protected because it was not affected.¹⁷⁶ Similarly reforming federal agreements on score-units of medical performance for fee allocation (see c] aa]) does not violate Art. 14 Const.¹⁷⁷

d) Protection of legitimate expectations and against retroactivity, Art. 20 (3) Const.

Rather complex constitutional standards to outline are protection against retroactivity and protection of legitimate expectations. Real retroactivity interferes with a closed set of facts and provides legal consequences for a time before publication of the law. According to the rule of law this is principally unconstitutional unless there are obligatory reasons and exceptional circumstances.¹⁷⁸ Permissible, by contrast, are norms that retrospectively (by "pretentious retroaction") take effect by referring to current cases and facts that are still in motion and not yet closed.¹⁷⁹ With respect to the rule of law and also fundamental freedoms they may only be held unconstitutional if it was unreasonable for the individual to take such interference into account and if the individual's interest is in greater need of protection than common interest.¹⁸⁰ Both, for instance, is not the case as far as the "Hartz"-laws retrospectively shortened the period of unemployment

¹⁷⁴ BVerfGE 76, 220 (235)

¹⁷⁵ See also SG *Schleswig*, S 6 AS 70/05 ER of 8. 3. 2005 (www.Sozialgerichtsbarkeit.de); see also supra note 167, and, for transitional law, supra note 21.

¹⁷⁶ BVerfG, 4.2.2004, BVerfGK 2, 283 (287, 289).

¹⁷⁷ *Link/de Wall*, *Verfassungsanforderungen an die Honorarverteilung im Vertragsarztrecht – insbesondere im Hinblick auf ärztliche Minderheitengruppen VSSR 2001*, pp. 69 (96 et seq.).

¹⁷⁸ BVerfGE 30, 367 (385); 95, 64 (86 et seq.); 109, 133 (181). The Second Senate of the BVerfG calls this "back-reaching" or "operating aback" of legal consequences. Only here the principle of legal state shall serve as a limiting standard, BVerfGE 72, 200 (242 et seq.); 92, 277 (325).

¹⁷⁹ BVerfGE 30, 392 (402 et seq.); 95, 64 (86); 101, 239 (263). Again, the Second Senate uses a different terminology (tying up legal consequences to a set of facts behind), BVerfGE 72, 200 (242 et seq.); 92, 277 (325); here, fundamental freedoms shall impose restrictions on the law-maker.

¹⁸⁰ BVerfGE 97, 378 (389); 101, 239 (263 et seq.).

benefit entitlement¹⁸¹ – also because of transitional provisions¹⁸² – and with respect to transforming the former follow-up benefit of unemployment assistance into basic assistance,¹⁸³ especially when limited supplementary benefits (§ 24 SGB II) are taken into account.

Concrete legitimate *expectations* are protected under exceptional circumstances. This is predominantly derived from Art. 20 (3) Const. [also in conjunction with Art. 2 (1) Const.] **and with respect to pension expectancies** it may also be derived from the freedom of property.¹⁸⁴ Protection may be granted if the individual actually trusted in the continuing existence of the law, if the person affected made arrangements against this expectation and if a comprehensive balancing of expectation and interests with the purpose of the new provision to promote common interest lead to acknowledging a legitimate need for protection.¹⁸⁵ The legislator may pass transitional provisions to avoid unconstitutional interference. He may alter these provisions only with respect to a change of the underlying circumstances and the need of common interest. Against this standard it was held constitutional that in 1996 the legislator expedited full implementation of increasing legal retirement age for women and unemployed people as already adopted in 1992.¹⁸⁶ Provisions on a factual limitation of the former possibility for women to retire at the age of 60 without financial loss by deduction of pension were also sustained as well as abolishing this opportunity in 1999 like early retirement for unemployed in 1996.

e) Equality before the law, Art. 3 Const.

It has already been mentioned that testing the constitutionality of law reforms is of particular significance with respect to equality before the law.¹⁸⁷ A large number of cases arises with respect to presumably comparable situations that are (potentially) governed by the principle of equality – a standard that is rather relational in its operation. Given a multiplicity of constellations, alleging a violation of Art. 3 Const. seems to be more promising than litigation based on rather absolute standards like fundamental freedoms. Accordingly main issues of constitutional review are being unequally excluded from benefits or facing retrenchment or burdening measures that do not affect other people who are supposed to be in a similar situation. For instance, it is held unconstitutionally unequal that young people who do not comply with the duties set forth by the SGB II are only paid

¹⁸¹ See I.

¹⁸² Supra note 21.

¹⁸³ *Boecken*, supra note 167, pp. 361 et seq.; *O'Sullivan*, supra note 86, pp. 369 (375 et seq.).

¹⁸⁴ BVerfGE 67, 1 (14); BVerfG, 3.2.2004 BVerfGK 2, 266 (273).

¹⁸⁵ BVerfG 67, 1 (15).

¹⁸⁶ BVerfG, 2. 3. 2004, BVerfGK 2, 266.

¹⁸⁷ On state-run benefits and payments by social (security) law as secondarily ("derivatively") determined entitlements *Starck*, in: von Mangoldt/Klein/Starck, Grundgesetz (eds.), supra note 159, Art. 3 nos. 141 et seq.

costs for accommodation and heating but no regular allowance.¹⁸⁸ Moreover, *additionally* cutting a limited supplement granted subsequent to "Arbeitslosengeld" but not for long-term unemployed is hardly justifiable.¹⁸⁹

The FCC frequently emphasized that with respect to Article 3 Const. and especially within the area of social security law the legislator has wide-ranging discretion¹⁹⁰ that includes typifying constellations, particularly if the subject matter is rather complex.¹⁹¹ Thereby legislative interference may be allowed as to material grounds of differentiation¹⁹² but has to meet the conditions of proportionality. Against this background the laws providing financial adjustment between health insurance funds (*Risikostrukturausgleich*)¹⁹³ were held constitutional. With respect to the legislator's legitimate aim to provide for health insurance based on social balance, including redistribution, there was a constitutionally acceptable and proportional differentiation between some groups of insured members and also public health insurance funds (which do not hold constitutional freedoms).¹⁹⁴

By contrast, successful litigation shall be illustrated by two decisions ruled in 2000 and 2001. Although it was not questioned that the legislator annexed compulsory long-term care insurance to existing individual protection of public or private health insurance it was held unconstitutional to thereby exclude the small group of people without health insurance but in equal need of care.¹⁹⁵ Before, the FCC rendered it unconstitutional to raise contributions for social security funds on the basis of non-recurrent wages without taking this payment into account for unemployment and sickness benefits.¹⁹⁶ The FCC decided that the norms were incompatible with the constitution without declaring them void. In both cases the court also imposed an obligation upon the legislator to pass a new law and set forth a deadline. In the first case the Parliament's task was defined as to allow people without health insurance to join the long-term care insurance scheme. According to the second judgement the legislator had to ensure that non-recurrent wages had to be taken into account for benefits. In both cases the court gave hints to the Parliament with regard to possible formation of the provisions to be enacted, including particular issues of transitional law and inter-temporal cases. These hints can be identified by statements such as "it is up to the legislator whether or not" or "the law-maker is quite free to".

¹⁸⁸ *Berlit*, supra note 159, § 31 nos. 17, 106.

¹⁸⁹ *Berlit*, op cit., § 31 no. 18. For further problems in view of "Hartz IV" compared with social assistance see *Luthe*, Gleichheitsprobleme mit Hartz IV, SGB 2004, pp. 729 et seq.; *Däubler*, supra note 159, at p. 53.

¹⁹⁰ BVerfGE 77, 84 (106 et seq.); BVerfG, 29. 12. 2004, BVerfGK 4, 356 (362 et seq.).

¹⁹¹ BVerfGE 77, 84 (106 et seq.).

¹⁹² See *Starck*, supra note 159, no. 28.

¹⁹³ BVerfG, 18. 7. 2005, supra note 63.

¹⁹⁴ Op cit., nos. 92, 113, 210, al et seqq.

¹⁹⁵ BVerfGE 103, 225.

¹⁹⁶ BVerfE 102, 127.

2. Some principal remarks on justification of retrenchment and interference

Monetary stability, proper function of public health insurance and quality standards of services are central issues to justify interferences with fundamental freedoms.¹⁹⁷ These issues serve as requirements that in turn limit justification of interferences as constitutionally allowed by laws or so called colliding constitutional law. To the extent that they are connected with the principle of social welfare state they may directly operate to justify interferences. All these issues are valued within the progressively fixed system of justification in view of occupational freedom¹⁹⁸ and similarly they operate within the staged principle of proportionality. This is derived from the principle of "rule of law" and provides that justification is only valid if restrictions are appropriate in view of legitimate aims, if more lenient but equally effective measures cannot be taken and if interference is adequate and reasonable. While regulations interfering with exercising a profession may be justified by "reasonable issues of public interest", the FCC recently hold that affordability is an issue of paramount public interest and therefore upheld regulations of the "Beitragssatzsicherungsgesetz" that impose duties on pharmacists, drugmakers and wholesale merchants to grant discount and reduction of fixed percentages to public sickness funds.¹⁹⁹

With respect to the first of the "Hartz"-laws the FCC repeated that the legitimate aim to fight mass unemployment enjoys constitutional rank in view of the principle of the social welfare state and that it allows people formerly unemployed to realize freedom of occupation. "Within the area of labour-, social and economic order", the court added, "the law-maker has an especially wide-ranging prognostic leeway and margin of evaluation. It is particularly up to legislator to decide about measures for common interest in accordance with his social, economic and labour-market related policy."²⁰⁰ The wide-ranging discretion, however, may be reduced in view of an interference with the core of the protected position like the equivalent core of valuable legal positions formed by one's own efforts.²⁰¹ It is held that the principle of proportionality is violated with respect to sanctions imposed on young people who do not comply with the duties set forth by the SGB II:²⁰² they are only paid costs for accommodation and heating but no regular allowance.

¹⁹⁷ BVerfGE 70, 1 (30); 82, 209 (230); 103, 172 (184 f.); BVerfGK 2, 283 (286).

¹⁹⁸ In our context *Schnapp*, in: Schnapp/Wigge (eds.), supra note 151, pp. 67 et seqq. with further references.

¹⁹⁹ BVerfG, 2 BvF 2/03 of 13.9.2005, MedR 2006, p. 45 (at pp. 52 et seqq.); central issues, however, were matters of competence distribution.

²⁰⁰ And also aims that respect the regime of factual issues of the subject matter, BVerfGE 77, 84 (106); 87, 363 (383); 103, 293 (307); BVerfG, 29. 12. 2004, BVerfGK 4, 356 (362 et seq.).

²⁰¹ 5th ed. 2001, See *Gitter*, Sozialrecht, 5th ed. 2001, § 3 no. 25, p. 34

²⁰² *Berlit*, supra note 159, § 31 nos. 17, 106.

IV. The Court's "quasi-legislative approach": On looking beyond judicial competences

1. Declaration of incompatibility and obliging the legislator to clear up the state of unconstitutionality

As said the court may declare a norm only incompatible with the constitution but not void – this is often the case when equality before the law serves as decisive standard of control. If there is unjustifiable unequal treatment the fundamental right of equality does not provide a definite solution: the legislator may either abolish discrimination of a group of people or set aside the privileges; he may also abolish the whole regulation or form a new one.²⁰³ As a consequence of a declaration of incompatibility the courts and administrative agencies may not apply the norms tested and procedures must be stayed; under exceptional circumstances application within a transitional period is permissible. However the FCC holds and declares that the legislator is obliged to find a new regulation and often fixes a deadline.²⁰⁴ In 2001, for instance, the FCC declared some provisions of the law on long-term care insurance incompatible with Art. 3 (1) in conjunction with Art. 6 (1) Const. because members educating children and thereby extraordinarily contributing to the function of a public system financed by allocation and – on the other side – members without children were equally in charge of contributions.²⁰⁵ The court exceptionally allowed to apply the challenged provision until the legislator would pass a new regulation as obliged to until the end of 2004. The law-maker fulfilled his task by increasing the contributory rate for people without children older than 23 up to 1.1 % of income since 2005, § 55 (3) SGB XI.

The court's approach may be criticized. There is no appropriate legal basis for how and under which circumstances a norm may be declared just incompatible with the constitution, even though since 1970 the possibility to declare a provision incompatible has been acknowledged implicitly.²⁰⁶ However, the legislator's obligation to resolve the unconstitutional state may be derived from the principle of legal state or rule of law, Art. 20 Const.²⁰⁷ But this is true only if the FCC in turn may legally reject to declare a norm rendered unconstitutional void. The conflict cannot be solved by deciding the dispute between the theory according to which a norm is void *ipso iure* and the theory claiming that a norm

²⁰³ *Schlaich/Korioth*, supra note 103 nos. 401 et seqq.; *Vofkuhle*, supra note 54, Art. 93 no. 48.

²⁰⁴ *Vofkuhle*, op cit., Art. 93 no. 49.

²⁰⁵ BVerfGE 103, 242.

²⁰⁶ *Schlaich/Korioth*, supra note 103 nos. 394 et seqq.

²⁰⁷ *Kleuker*, supra note 139, pp. 36 et seqq. With respect to protection liability imposed on the state as derived from basic rights *Badura*, Die verfassungsrechtliche Pflicht des gesetzgebenden Parlaments zur "Nachbesserung" von Gesetzen, in: Müller et al. (eds.), Staatsorganisation und Staatsfunktionen im Wandel, Festschrift for Eichenberger, 1982, pp. 481 et seqq.

has to be destructed.²⁰⁸ With regard to Art. 3 Const. both theories are functionally equivalent and an unconstitutional *relation* cannot be split and isolated and therefore even the *ipso iure*-theory exceptionally allows declaring a norm only unconstitutional but not void.²⁰⁹

2. Refraining form declaring a norm incompatible and rendering an appeal to the legislator

Sometimes the court declares that a norm is *just* in accordance with the constitution and makes an appeal to the legislator to provide for future legislation. This is also significant from the perspective that social laws, too, are adopted within the current socio-economic context that may undergo a change by time.²¹⁰ In the "Widower's Social Security Benefits case" of 1975 the court ruled upon a provision that had already been tested more than ten years ago: In 1963 the court sustained a provision that conferred "benefits on a widower only if his wife had been primarily responsible for the family's support".²¹¹ The same condition, however, did not apply for benefits for the widow. In the second decision, within which the provision was challenged anew, the court reasoned that in the light of changing social conditions and in view of special shaping of equality further existence of the provisions in future may not be allowed.²¹² The court did neither declare the provision void or incompatible but instructed the legislator to change the statute in the light of the changes according to which "married women constituted a significant portion of the labour force, just as they had obtained greater equality under law within marital relationship."²¹³ The court dedicated two pages alone to reasoning about options how new provisions might be formed. It did not fix a sharp deadline, but "expected that the new regulation should be implemented until the end of the next period of legislation but one."²¹⁴ Accordingly the legislator fulfilled his task in 1985.²¹⁵

In these cases it is even more difficult to derive an obligation of the legislator to change the law directly from the constitution. The law-maker might be obliged

²⁰⁸ Kleuker, op cit. p 3.

²⁰⁹ Kleuker, op cit., p. 33 with further references.

²¹⁰ The meaning of existing regulations is subject to changes and supplements as a true picture of changes within society; there may be changes in the field of application and evaluation; see *Bryde*, supra note 2, p. 283. For the notion of "changing constitution" see *Jellinek*, *Verfassungsänderung und Verfassungswandlung* [1906 (reprint 1996)]; *Hsü Dau-Lin*, *Die Verfassungswandlung* (1932), pp. 17 et seqq.; *Smend*, *Staatsrechtliche Abhandlungen und andere Aufsätze*, 2nd ed. 1968, pp. 187 et seqq.; *Bryde*, op cit., pp. 254 et seqq., *Sichert*, supra note 2, pp. 122, 198 and 524, all et seqq., including "changing primary EU/EC-law".

²¹¹ BVerfGE 17, 1 (3, 12 et seqq.).

²¹² BVerfGE 39, 169.

²¹³ *Kommers*, supra note 134, p. 144.

²¹⁴ BVerfGE 39, 169 (194 et seqq.).

²¹⁵ BGBl. 1985 I, p. 1450; *Kleuker*, supra note 139, p. 123.

to clear up unconstitutionality, but there is no clear obligation to positively prevent unconstitutionality. At the time the FCC decides unconstitutionality is only *presumed* according to future changes; hence there is a prognosis as to these changes and their impact for legislation which is principally assigned to the legislator.²¹⁶ The court may control whether such a prognosis already filed is wrong but it may not replace the law-makers discretion.

3. Practice of "implementation"

It has been observed that most of the tasks imposed on the legislator have been successfully fulfilled; problems on implementation have been relatively rare and they often concerned the time limits.²¹⁷ 52 tasks were registered at the beginning of April 1989 and 12 more in 1991.²¹⁸ Many more followed (*supra*). Laws that were finally implemented mainly also took into account the proposals made by court.²¹⁹ It has been argued that the shift of legislative power to preparatory work at the governmental ministry level has absorbed much conflict potential between the law-maker and the constitutional court.²²⁰

V. Due control or undue interference with the democratic process?

1. The court's "authority to determine politics"

It has often been considered dangerous that public authorities are broadly or permanently subject to constitutional jurisdiction.²²¹ Critique arises both with respect to far reaching legal and factual consequences of the court's dicta. Tasks imposed on the legislator by the constitutional court may lead to further financial consequences. This was obviously the case with respect to the famous decision according to which the legislator may not interfere with the social minimum of children by tax law as this is true for other people.²²² The court also argued that the law-maker must positively provide for ensuring such a minimum for all children even if parents may be unable to do so. Similarly the court obliged the legislator to pass a law according to which costs of education for children are to be acknowledged as a decrease of income and therefore reduce tax burden not

²¹⁶ See also *Tz-hui Yang*, *Die Appellentscheidungen des Bundesverfassungsgerichts*, 2003, pp. 113 et seq.

²¹⁷ *Kleuker*, *supra* note 139, pp. 128 et seqq., 144 et seqq.

²¹⁸ According to *Kleuker*, *op cit.*, pp. 122 and 164, note 334.

²¹⁹ *Kleuker*, *op cit.*, pp. 144 et seqq., 190.

²²⁰ *Kleuker*, *op cit.*, p. 190.

²²¹ For an illustration of critical interferences see the contributions in *Piazolo* (ed.), *Das Bundesverfassungsgericht – Ein Gericht im Schnittpunkt von Recht und Politik*, 1995; and in *Guggenberger/Würtenberger* (eds.), *Hüter oder Lenker der Politik? Das Bundesverfassungsgericht im Widerstreit*, 1998; furthermore *Blasberg*, *Verfassungsgerichte als Ersatzgesetzgeber*, 2003.

²²² BVerfGE 82, 60 (89 et seqq.).

only for a person educating children alone but also for parents living in extra-marital cohabitation.²²³ The court even exactly defined financial limits related to tax law. In 1992 the court ruled that the legislator was obliged to adjust deficits within pension insurance resulting from disadvantages of old age pension due to education of children.²²⁴ From a material perspective it was argued that the FCC had been the "only instance" which acknowledged the outstanding value of family and children protection.²²⁵ But nonetheless critique arose with respect to the principle of separation of powers and the court's socially determined authoritative reasoning.²²⁶ It has no competence, as argued, to judge upon or even to set forth future orientated persisting standards.²²⁷ Within a society of interplays of process an authoritative directing style and competence could not be reasonable any longer; the court may be the guardian of the constitution but not the guarding of common social nature of society that does not exist any longer.²²⁸

2. The courts position according to constitutional law

Facing these observations the court's position "under" the Constitution is of increasing interest. According to the Basic Law, the FCC court is a supreme constitutional organ.²²⁹ It is often said to be the "guardian of the constitution"²³⁰. At the very beginning of constitutional jurisdiction the court identified that there is binding extra- and supra-positive law but at the same time held itself competent to further interpret and apply this law.²³¹ However, the court does not stand outside the constitution. It is also bound by the constitutional provisions and by law.²³² Nevertheless there is a wide-ranged concept of constitutional jurisdiction in *Germany*. It is also obvious that much of the court's intervention is due to the nature of equality before the law as a frequently applied standard; it is constitutionally requested to redefine an unconstitutional unequal relation whereas cassation becomes inapplicable.²³³ This has to be taken into account

²²³ BVerfGE 99, 216. Costs for care and education of children, the court argued, are also to be taken into account to define the substantial basic need of a family and the corresponding valuable positions are to be protected from interference by tax laws.

²²⁴ BVerfGE 87, 1 (40 et seq.).

²²⁵ *Lübbe-Wolff*, supra note 148, p. 1 (15) with further references.

²²⁶ *Lübbe-Wolff*, op cit., pp. 15 et seqq.

²²⁷ *Lietzmann*, in: Guggenberger/Würtenberger (eds.), *Hüter der Verfassung oder Lenker der Politik?* (1998), pp. 233 (251, 253 et eqq.).

²²⁸ *Lietzmann*, op. cit., pp. 233 (251, 253, 259 et seqq.).

²²⁹ See *Denkschrift (I) des Bundesverfassungsgerichts*, JöR n.F. 6 (1957), p. 144; *Chryssogonos*, *Verfassungsgerichtsbarkeit und Gesetzgebung* (1987), pp. 24 et seqq.

²³⁰ See *Denkschrift*, op cit.; *Chryssogonos*, supra note 229, pp. 29 et seqq. with further references; *Guggenberger*, in: idem (ed.), supra note 227, p. 202 (218).

²³¹ BVerfGE 1, 14; see also *Lietzmann*, supra note 227, p. 251 et seqq.

²³² *Schlaich/Koriath*, supra note 103, nos. 33 et seqq.; *Vofßkuhle*, supra note 54, Art. 93 no. 18.

²³³ *Vofßkuhle*, supra note 54, Art. 93 no. 48.

when criticising that there is no clear legal basis for imposing tasks or fixing dates; the legislator himself never reorganised the regime of procedural consequences of the courts decisions.

3. Judicial restraint and the democratic process

Against this background judicial self-restraint might be an appropriate solution. However, the impact of judicial self-restraint transferred from American constitutional doctrine is not totally clear and understood differently.²³⁴ The court itself addressed to this doctrine and acknowledged restraint to make politics in the sense of interfering with the constitutional guaranteed area of political action, but it refrained from setting forth criteria to comply with.²³⁵ And since both the material standards and the principle of effective legal protection demand that the court exercises its power, it is not up to the FCC to decide whether or not to substantially or restrictively adjudicate.²³⁶ A tendency to identify a cross over or pretended overlapping of exercising powers is inherent in a system of checks and balances. A solution rooted in material law faces the difficulty that the FCC itself authoritatively interprets constitutional law²³⁷ and various legal consequences cannot be explained solely on material grounds. It is therefore suggested that material directives must be added by a functional approach according to which a task is assigned to the constitutional organ in accordance with its power to perform and the process to decide.²³⁸ In how far different organs may be bound differently, however, and how the components may be brought into line is not self-evident.

Keeping welfare legislation free of constitutional control solely with respect to the (intangible) democratic principle might be critical as well: To ensure a "proper" material social standard that faces future challenges might often become a problem with respect to discontinuity of Parliament due to periodicity of elections. Moreover the majority rule may lead to the effect that representatives of a majority of people who are not affected may retrench benefits of predominantly other people who belong to the minority that is affected.²³⁹ To call on external experts (commissions) alone, however, is also inappropriate in a way.²⁴⁰

²³⁴ *Voßkuhle*, supra note 54, Art. 93 no. 36. As *Lechner/Zuck*, BVerfGG, 5th ed., 2005, Einl. no. 31, point out, the question is not substantially discussed any longer.

²³⁵ See *Burchardt*, Grenzen verfassungsgerichtlicher Erkenntnis, 2004, pp. 63 et seq.; *Lechner/Zuck*, op cit.

²³⁶ *Schlaich/Korioth*, supra note 103, no. 505.

²³⁷ *Voßkuhle*, supra note 54, Art. 93 no. 39.

²³⁸ *Schlaich/Korioth*, supra note 103, nos. 505 et seq. with further references.

²³⁹ *Zacher*, supra note 117, pp. 3 (56 et seqq.).

²⁴⁰ See sub I.

Concluding remarks

Against this background and with particular respect to retrenchment one may wonder what happens if the legislator fails to ensure a social minimum although obliged to do so. In this respect it is important to mention that both the core principles of democracy and the social state are not subject to amending the constitution, Art. 79 (3) Const. A conflict may under exceptional circumstances be solved by the court as an outstanding organ of the principle of legal state. The latter principle is in turn not subject to a change of the constitution²⁴¹ even if one may argue that constitutional litigation *before a special tribunal* is not involved and neither a demand of the fundamental principle of Art. 1 Const. nor of implicit limitation.²⁴² As long as special constitutional jurisdiction exists, however, it is up to the constitutional court to decide and it will take into account that the leading idea underlying the fundamental principle is human dignity. It may bring the principle of social state and demands of democracy in line. Thereby it may go back to common roots of both principles in view of solidarity as a pre-constitutional value that forms a community which is homogeneous to an extent not yet found within European citizenship.²⁴³

Abbreviations

Abs.	Absatz
Art.	Artikel, article
BayVBl.	Bayerische Verwaltungsblätter
BayVerfGH	Bayerischer Verfassungsgerichtshof
BGBI.	Bundesgesetzblatt
Brem.GBl.	Gesetzblatt der Freien Hansestadt Bremen
BSG	Bundessozialgericht
BSGE	Entscheidungen des BSG (amtliche Sammlung)
BT-Drucks.	Bundestags-Drucksache
BVerfG	Bundesverfassungsgericht
BVerfGE	Entscheidungen des BVerfG (amtliche Sammlung)
BVerfGK	Kammerentscheidungen des BVerfG
BVerwG	Bundesverwaltungsgericht
BVerwGE	Entscheidungen des Bundesverwaltungsgerichts (amtliche Sammlung)
CC	Constitutional Court
Const.	constitution

²⁴¹ For a comparative perspective see *Sichert*, supra note 2, pp. 748 et seqq.

²⁴² Constitutional review as such, however, belongs to the intangible core of German Basic law, supra note 2.

²⁴³ Comp. with *Sichert*, supra note 2, pp. 369, 624, 651, all et seqq.; *Gussone*, *Das Solidaritätsprinzip in der Europäischen Union und seine Grenzen*, 2006, p. 167 et seq., 175. See also *Zacher*, *Wird es einen europäischen Sozialstaat geben?*, EuR 2002, pp. 147 et seq.

DÖV	Die Öffentliche Verwaltung
DVBbl.	Deutsches Verwaltungsblatt
DVP	Deutsche Verwaltungspraxis
E	Entscheidung
Einl.	Einleitung
EuGRZ	Europäische Grundrechts-Zeitschrift
EuR	Europarecht
FCCA	Act on the Federal Constitutional Court
FCC	Federal Constitutional Court
GG	Grundgesetz
GKV	Gesetzliche Krankenversicherung
info also	Informationen zum Arbeitslosenrecht und Sozialhilferecht
JöR n.F.	Jahrbuch des öffentlichen Rechts (neue Folge)
JZ	Juristenzeitung
LSG	Landessozialgericht
MedR	Medizinrecht
NJW	Neue Juristische Wochenschrift
no.	note, number
NZA	Neue Zeitschrift für Arbeitsrecht
NZS	Neue Zeitschrift für Sozialrecht
SF	Sozialer Fortschritt
SG	Sozialgericht
SGB	Sozialgesetzbuch
SGb	Die Sozialgerichtsbarkeit
SGG	Sozialgerichtsgesetz
SozR-4	Sozialrecht, 4. Folge
SpuRt	Zeitschrift für Sport und Recht
VSSR	Vierteljahresschrift für Sozialrecht
ZfSH/SGB	Zeitschrift für Sozialhilfe und Sozialgesetzbuch
ZFSH/SGB	Sozialrecht in Deutschland und Europa
ZRP	Zeitschrift für Rechtspolitik

Summary

CONSTITUTIONAL REVIEW OF SOCIAL LAW-REFORMS IN GERMANY AND ITS IMPACT ON LEGISLATION

The importance of constitutional review of social laws in Germany becomes obvious with respect to a significant number of cases in various categories and by virtue of the judgements' impact on social policy and law-making. Among the constitutional provisions to be applied, equality before the law and the principle of social welfare state are prominent standards. According to equality before the law constitutionality is determined rather relationally. Within this setting the Constitutional Court detects unconstitutional interferences upon permissible request. With respect to a violation of equality before the law it may impose a task on the legislator to redefine a relation or accordingly renders an appeal. Against the legal background of a wide-ranging discretionary power it is the law-maker's task to build up and also to rearrange a social order as basically requested by constitutional law. Particular reference is given to the latest law reforms for modern services on the labour market where appropriate in order to illustrate specific challenges of retrenchment in times of low budgets.

Key words: constitutional review, principle of social welfare state, equality before the law, retrenchment, law reforms for modern services on the labour market.

Zusammenfassung

KONTROLLE DER VERFASSUNGSMÄSSIGKEIT VON REFORMEN SOZIALER VORSCHRIFTEN IN DEUTSCHLAND UND IHR EINFLUSS AUF DIE GESETZGEBUNG

In der Bundesrepublik Deutschland kommt der verfassungsgerichtlichen Kontrolle sozialrechtlicher Gesetze große Bedeutung zu. Die hohe Zahl der in diversen Verfahrensarten entschiedenen Fälle untermauert dies ebenso wie der erkennbare Einfluß der Entscheidungen des Bundesverfassungsgerichts (BVerfG) auf Politik und Gesetzgebung. Unter den verfassungsrechtlichen Kontrollmaßstäben nehmen der Gleichheitssatz und das Sozialstaatsprinzip eine besondere Rolle ein. Beim Gleichheitssatz sticht hervor, daß die Verfassungsmäßigkeit strukturell relational zu bestimmen ist. Ist das verfassungsgerichtliche Verfahren zulässig, entscheidet das BVerfG, ob ein Verfassungsverstöß vorliegt bzw. ob differenzierende Eingriffe verfassungsrechtlich gerechtfertigt sind. Verstößt ein Gesetz gegen den Gleichheitssatz, ohne daß die Norm aufgehoben wird, erklärt das BVerfG

die Unvereinbarkeit mit der Verfassung und fordert den Gesetzgeber zumeist auf, diesen Zustand zu beseitigen. Zuweilen stuft das BVerfG die Norm auch als "noch" verfassungsgemäß ein, verbunden mit einem Appell an den Gesetzgeber, tätig zu werden. Im Zeichen des weiten Einschätzungsspielraums des Sozialgesetzgebers ist dann eine Neujustierung der in den Sozialgesetzen verankerten Verhältnisse angezeigt, ebenso, wie es grundsätzlich Aufgabe des Gesetzgebers ist, für eine faire und soziale Ordnung des Gemeinwesens zu sorgen. Die der Verfassungskontrolle von Sozialgesetzen immanenten Fragen werden anhand der jüngsten Reformgesetze über Moderne Dienstleistungen am Arbeitsmarkt illustriert, die den besonderen Herausforderungen des "Umbaus" des Sozialstaates in Zeiten knapper Kassen gerecht werden sollen.

Schlüsselwörter: *Verfassungsgerichtliche Kontrolle, Sozialstaatsprinzip, Gleichheitssatz, Einschränkung des Leistungsumfangs, Verschärfung der Bezugsvoraussetzungen, Gesetze für moderne Dienstleistungen am Arbeitsmarkt.*

Sommario

CONTROLLO COSTITUZIONALE DELLA RIFORMA DELLE DISPOSIZIONI SOCIALI IN GERMANIA E IL SUO IMPATTO SULLA LEGISLAZIONE

L'importanza del controllo costituzionale delle disposizioni sociali in Germania risulta evidente dal significativo numero di casi in diversi settori sociali e per la virtù dell'impatto giurisprudenziale sulla politica e la legislazione sociale. Tra le previsioni costituzionali da applicare, l'eguaglianza davanti alla legge e il principio del benessere nello stato sociale sono i criteri prevalenti. L'eguaglianza davanti alla legge è determinata costituzionalmente piuttosto che relazionalmente. Nell'ambito di questo inquadramento il Tribunale costituzionale individua le interferenze incostituzionali sull'istanza ammissibile. Rispetto alla violazione dell'eguaglianza davanti alla legge può essere imposto al legislatore il compito di ridefinire un rapporto. Contro la base giuridica di un diffuso potere discrezionale è compito del legislatore di costruire e anche di riconfigurare un ordine sociale come fundamentalmente richiesto dal diritto costituzionale. Particolare riferimento è fatto all'ultima riforma giuridica dei moderni servizi al mercato del lavoro per illustrare le specifiche sfide delle riduzioni di spesa da fondi pubblici.

Parole chiave: *controllo costituzionale, principio del benessere nello stato sociale, eguaglianza davanti alla legge, riduzioni di spesa, riforma della legislazione nell'ambito di moderni servizi al mercato del lavoro.*

