Special Section
The *Hartz IV Case* and the German *Sozialstaat*

The Political and the Basic Law's *Sozialstaat* Principle—Perspectives from Constitutional Law and Theory

By Hans Michael Heinig[*]

A. The *Sozialstaat* in the German Constitutional Order

The welfare state aspect is among the central characteristics of German statehood as established by the constitution. For the Basic Law's drafters, it was so indispensable that they included the mandate of a welfare state in the catalogue of constitutional principles which are to have eternal validity within the constitution and which could only be dispensed with at the cost of breaching the constitution, the cost of revolution (Article 79(3) of the Basic Law (*Grundgesetz* in German; hereinafter "GG")). Article 79(3) GG codifies the distinction between constitution and constitutional provision made prominent by Carl Schmitt, whose constitutional doctrine of 1928 asserted that, while the constitutional legislature can amend an individual provision in the constitution, the constitution as a whole is not to be changed short of political action transcending the law, that is, a revolution.[1] Article 79(3) GG takes up this idea, insulating certain features of the constitution from amendment. These features—outside all democratic reach and thus quasi depoliticized—include the inviolability of human dignity (Article 1(1) GG) and the nature of the state as a democracy, a republic, a federal state based on the rule of law, and a "social" state (Article 20(1) GG). On closer scrutiny, the principles underlying the state's structure reveal a significant difference between, on the one hand, the principles of democracy, federalism, the rule of law, and republicanism and, on the other, the principle of the welfare state. The four former features stem from long traditions in constitutional law; modern political philosophy has detailed them precisely and the Basic Law concretizes them in thorough regulations. In contrast, the political history of ideas has failed to produce a "flag-bearing" thinker for the welfare state.[2] The establishment of the welfare state

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[1] CARL SCHMITT, VERFASSUNGSLEHRE 11 (8th ed. 1993).

[2] The most likely candidate would be Lorenz von Stein, although he may well be unknown to a larger—and international—audience. On von Stein's significance for the development of the idea of the social state, see Ernst-Wolfgang Böckenförde, *Lorenz von Stein als Theoretiker der Bewegung von Staat und Gesellschaft zum Sozialstaat*, *in* RECHT, STAAT, FREIHEIT 170 (1991). *See also* Hans Michael Heinig, *Antagonisten im*

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has played no significant role in constitutional history. And, on first glance, even the Basic Law seems to provide hardly any specifics as to what exactly makes up its "social" state or, in particular, what normative consequences follow from this constitutional principle. This raises the question: What actually justifies the principle of the welfare state's illustrious position among those constitutional entities endowed with highest relevance? The following discussion develops the answer: Regardless of its limited historical and theoretical traditions, the principle of the *Sozialstaat* finds its meaning beyond its doctrinal content in its own distinct, symbolic substance.

B. On the Constitutional Doctrine of the Welfare State

At the outset, several remarks can be made about the fact that the principle of the welfare state in the wording of the Basic Law receives peculiarly little attention. The text contains three points of reference for a "principle of the welfare state" in terms of constitutional doctrine: article 20(1) GG ("The Federal Republic of Germany is a . . . *social* federal state"), article 28(1) GG ("The constitutional order in the Länder must conform to the principles of a . . . *social* state governed by the rule of law, within the meaning of this Basic Law"), and article 23(1) GG ("With a view to establishing a united Europe, the Federal Republic of Germany shall participate in the development of the European Union that is committed to . . . *social* . . . principles.") (emphases added) Unlike, for instance, the drafters of the Weimar Constitution, certain constitutions of the *Länder* (states in the Federal state), or the European Charter of Fundamental Rights, the Basic Law's framers intentionally omitted social fundamental rights. Provisions explicitly directed toward welfare state activities are few and far between. Article 87(2) GG mentions social insurance institutions (and regulates whether they are federal or *Land* corporations), and Article 78(1) GG lists legislative powers for areas classically within the welfare state: the public welfare, disabled veterans benefits, and social security and unemployment insurance, for example (Article 74(1) No. 7, 10, and 12 GG).

From this starting point within the text of the constitution, German legal scholarship has developed a canon on the principle of the welfare state, emphasizing in particular the limits of the constitutional principle.

Kontext der politischen Philosophie des Sozialstaates, Lorenz von Stein und Robert Nozick, *in* DIE IDEE DES SOZIALSTAATES 45 (Diethelm Kleczewski, Steffi Müller & Frank Neuhaus eds., 2006).

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(1) The principle of the welfare state is a genuine principle of law, not merely a political agenda.[3]

(2) It empowers and obliges the state to certain social activities that must provide for a just social order.[4] Thus, the state must safeguard a certain minimum of social welfare activities.

(3) The substance of these activities is historically prefigured by the social difficulties of the late nineteenth century, to which the evolution of the German welfare state sought to adapt (social question as question of workmen).[5] At the same time, it is open to new conditions and stimuli (welfare state as a continuing process).[6] The principle of the *Sozialstaat* therefore does not require the state to maintain a given social status quo. The principle does not elevate concrete services or institutional forms to the level of constitutional law.

(4) As a general rule, individual rights are not derived from the principle of the welfare state, not even in conjunction with fundamental rights. Narrow exceptions include human dignity (Article 1(1) GG), from which the individual right to the state's provision of a minimum living standard is derived,[7] as well as the right to health and bodily

[3] For a different approach to its status in constitutional law, see Ernst Forsthoff, *Begriff und Wesen des sozialen Rechtsstaates*, *in* RECHTSSTAATLICHKEIT UND SOZIALSTAATLICHKEIT 165 (1968).

[4] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 13 Jan. 1982, 59 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 231 (262) (Ger.).

[5] In contrast, the social issue is addressed in France as more of a family issue and in Great Britain as more of a poverty issue. Even today, this still causes significant differences in the structures of social security. *See* Franz-Xaver Kaufmann, *Christentum und Wohlfahrtsstaat*, 34 ZEITSCHRIFT FÜR SOZIALREFORM 65 (1988).

[6] Hans F. Zacher, *Was können wir über das Sozialstaatsprinzip wissen?*, *in* HAMBURG, DEUTSCHLAND, EUROPA, FESTSCHRIFT FÜR HANS PETER IPSEN 207, 240 (Rolf Stödter & Werner Thieme eds., 1977).

[7] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 9 Feb. 2010 (*Hartz IV*), 125 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 175 (__), 1 BVL 1/09 of 9 Feb. 2010, para. 134,

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> integrity, which at least arguably requires the state to safeguard a minimum standard of health.[8]
>
> (5) To the extent possible, it should be the legislature that strikes the actual balance between individual responsibility for personal welfare and social solidarity.[9] Constitutionally, the legislative branch, above all others, is called to determine concrete social rights and their financing. For reasons of both democratic theory and pragmatism, the legislature is to have a high level of discretion (evaluative prerogative and design discretion) with constitutional judicial review reduced to a minimum.[10]

Thus, as a whole, the principle of the welfare state's constitutional relevance is not overwhelming. It is beyond the scope of this article whether and, if so, to what degree the generally meager German scholarship on the constitutional doctrine of this principle indeed deserves greater attention.[11] If one assumes, however, that the principle's content is limited to the aforementioned statements, then it can be reduced to two assertions: The state may and should shape itself into a welfare state, and further details are to be worked out by the legislature.

2010 (Ger.), *available at* http://www.bverfg.de/entscheidungen/ls20100209_1bvl000109.html (last visited 5 Nov. 2011). For further references on case law, see Hans Michael Heinig, *Menschenwürde und Sozialstaat*, *in* MENSCHENWÜRDE IN DER SÄKULAREN VERFASSUNGSORDNUNG 251 (Petra Bahr & Hans Michael Heinig eds., 2006).

[8] Most recently, see Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 28 Feb. 2008, 115 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 25 (Ger.). *See also* Hans Michael Heinig, *Der Hüter der Wohltaten?*, 25 NEUE ZEITSCHRIFT FUR VERWALTUNGSRECHT 771 (2006).

[9] This was already the holding in Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 3 Mar. 2004, 1 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 97 (105) (Ger.). *See also* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 3 Apr. 2001, 50 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 57 (108) (Ger.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 13 Jan. 1982, 59 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 231 (262) (Ger.). *See generally* Christoph Enders, *Sozialstaatlichkeit im Spannungsfeld von Eigenverantwortung und Fürsorge*, 64 VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 7 (2005).

[10] *See, e.g.*, THORSTEN KINGREEN, DAS SOZIALSTAATSPRINZIP IM EUROPÄISCHEN VERFASSUNGSVERBUND 120 (2003); Rainer Pitschas, *Soziale Sicherungssysteme im "europäisierten" Sozialstaat*, *in* 2 FESTSCHRIFT 50 JAHRE BUNDESVERFASSUNGSGERICHT 827 (Peter Badura & Horst Dreier eds., 2001).

[11] For an attempt at such an endeavor see HANS MICHAEL HEINIG, DER SOZIALSTAAT IM DIENST DER FREIHEIT (2008).

Against the backdrop of this limited content, the question arises: Why is such a constitutional provision needed at all, especially one thus honored as constitutional nobility by Article 79(3) GG? The mere empowerment to act toward the achievement of a welfare state does not seem a particularly urgent regulation of constitutional law. Even the Prussian state, under its legal code, the *Allgemeines Landrecht*, was to some degree a "social" state.[12] At the end of the nineteenth century, the welfare state took on its fundamental dynamics without assistance from constitutional law.[13] Numerous European states survive without constitutionally mandating that the community take on the *gestalt* of a welfare state, which of course has not hindered the establishment and construction of their social welfare systems.[14] What then is the point of a principle of the welfare state with such limited regulatory content? Moreover, what, if anything, does it add to the exalted principles of democracy, the rule of law, republicanism, and federalism?

C. The Principle of the Social State and Cultural Theory

At this point, a shift in perspective—from doctrine to theory—may be helpful. If the principle of the welfare state—particularly as distinguished in Article 79(3) GG—lacks a high profile in legal doctrine, then it seems logical to seek its "actual" significance outside the rigid confines of legal doctrine. Inquiry into a legal norm's significance above and beyond its doctrinal function implies that the law cannot be reduced to the technical instructions of legal practice. Rather, law inherently tends to extend and transcend. In terms of cultural theory, one might restate this by saying that the law is part of our cultural self-concept. "Law . . . is part of the fabric of meaning and symbol, in which the human being is woven."[15] With reference to Ernst Cassirer, one could say that the law constitutes a symbolic form[16] in which to store certain experiences and narratives in a specific way. The law becomes a sort of memory for meaning, so to speak. The law contains and displays discursive and contentious processes of attempts to answer the question of how we are to live, how we want to organize our community, how we understand this community, and which set of values are to guide us. As a cultural form, law is thus a component of the complex, dynamic/static interweaving of the human's construction of sense. But, at the same time, the specifics of the law give it a societal independence, usually described as autonomy,

[12] *See* MICHAEL STOLLEIS, GESCHICHTE DES SOZIALRECHTS IN DEUTSCHLAND 23–24 (2003).

[13] *See id.* at 36–110.

[14] *See* TONY JUDT, POSTWAR 73 (2005); EBERHARD EICHENHOFER, GESCHICHTE DES SOZIALSTAATS IN EUROPA (2007).

[15] ULRICH HALTERN, EUROPARECHT UND DAS POLITISCHE 18 (2005).

[16] *See* ERNST CASSIRER, VERSUCHÜBER DEN MENSCHEN (1944). Admittedly, Cassirer did not himself view the law as symbolic form, but he did not intend his list of symbolic forms, including analyses of religion and myth, language, art, history, and science, to be exhaustive.

meaning that the law cannot simply be reconstructed from other means of ascribing sense.

If cultural theory is to reconstruct constitutional law, then, it seems advisable to make recourse to the delicate category of "the political," using it as a marker for the dimension of law that transcends the merely technical. That is to say, the tension that exists between constitutional law and political vision manifests itself as a formative force. And cultural-theoretical analyses seem very well suited to reveal this force with its dynamic points of political and legal reference. This formative power is not only indebted to the positivization of law and thereby to the fact that law can be politicized; it is also a result of the peculiar function of the constitution in modern societies (namely, the structural coupling of the legal and the political system).[17]

In this sense, law can (also) be understood as the "imagination of the political," as the symbolic actualization of a specifically political vision for the social sphere, a representation of political, collective identity—of *our* identity.[18] Pushed to an extreme, this can, though it need not, lead to a preoccupation with inclusion and exclusion manifested in existential differentiation between friend and enemy.[19]

The equipment of cultural theory introduces two factors that a purely doctrinal viewpoint must ignore: history and the field of political ideas, both of which influence the imagination in complex input relationships.[20]

Against the backdrop of competing political ideas, if one seeks the object and purpose of the principle of the welfare state, the categories of inclusion and exclusion perform formative functions for the political sphere. The principle sets the boundaries of the political. Outside these borders, the mode of political antagonism dominates; within the borders, republican friendship reigns, unbroken by the political competition. The

[17] NIKLAS LUHMANN, DAS RECHT DER GESELLSCHAFT 470 (1997); Niklas Luhmann, *Verfassung als evolutionäre Errungenschaft*, 9 RECHTSHISTORISCHES JOURNAL 176 (1990).

[18] This is, of course, only a perspective on law and on constitutional law in particular. Law as a cultural phenomenon, however, is not merely an imagination of the political; as civil law and trade law, for example, it also shapes our views of the ideational, institutional complex (commonly referred to as economy), and is then, in turn, shaped by this complex.

[19] There are good empirical reasons not to negate and ignore the potential of the political sphere through such an extreme formulation; rather, it should be analyzed for its origin and effect. On the other hand, normative boundaries should be set for this potential—for instance, by justifying a certain ensemble of democratic procedures. But, without a realistic approach to the political sphere, it may be that systematic misestimation prevents normative postulates from reaching their goals of neutralizing the political sphere's destructive power.

[20] On the relationship of political theory to imagination, see CHARLES TAYLOR, MODERN SOCIAL IMAGINARIES 23 (2004).

state's duty to carry out social welfare activities means that some forms of what is politically imaginable are included, while competing forms are excluded. In this sense, the principle of the welfare state deals with the great ideological struggles of the nineteenth and twentieth centuries within a triangle of influences on the politically imaginable: First, *liberalism* centered on the market and the individual; second, culturally critical, restorative *conservatism*; and, third, revolutionary *socialism*. The constitution's reference to the welfare state rejects the social model of purely market-driven self-organization in the form of Manchester liberalism. It is a rejection of the ideal of justice as the product of unrestricted competing forces, fitting together in some sort of harmonious order guided by an "invisible hand." But the reference to the welfare state in the constitution also contains a refusal of Marxist ideas of a radically new social order for the primary distribution of property. Furthermore, it rejects the conservative, Romantic ideal of a return to corporative, patriarchal forms of an agrarian society.

Precisely because of its vague contours, the principle of the welfare state marks not only exclusions, but inclusions as well. After all, various normative justificatory models compete in political philosophy. Four ideal types of the social state can be distinguished: (1) subsistence models, ultimately traceable to Hobbes; (2) democratic and egalitarian models, informed largely by Rousseau; (3) neo-Aristotelian community models; and (4) Kantian liberty models.[21]

Within these lines of *ethical* conflict, there are good reasons to prefer a liberal model of the welfare state. The subsistence model fails to encompass significant features of the modern welfare state, and its minimalist provision fails to meet the predominant, fundamental, intuitive answers to questions about social justice. Rousseauian egalitarian models generally lead to a postulate of an unconditional basic civic income, independent of financial need, for every citizen.[22] These models, however, suffer from a faulty evaluation of the significance of the individual's responsibility for the self, which underlies the postulate of individual economic and political autonomy—even in the form of freedom from collectivization. Neo-Aristotelian justifications of the social state frequently lose sight of pluralistic concerns. They underestimate the cultural dynamism of modern societies[23] or overextend the demand for state social welfare activities, forgetting about the conditions for repeatability.[24] Finally, egalitarian

[21] *Cf.* Hans Michael Heinig, *Zur Normativität des Sozialstaates*, *in* NORMATIVITÄT UND RECHTSKRITIK 138 (Jochen Bund, Brian Valerius & Sascha Ziemann eds., 2007).

[22] *See* HEINIG, *supra* note 11, at 151–70.

[23] This is the danger of communitarian justifications of the social state.

[24] *See, e.g.*, Martha C. Nussbaum, *Der aristotelische Sozialdemokratismus*, *in* GERECHTIGKEIT ODER DAS GUTE LEBEN 24 (1998).

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conceptions of the social state fail to appreciate the preponderance of liberty (rooted in the very concept of equal liberty) over radical claims that the social hierarchy should be leveled out. Not "equality" but the capability to actualize liberty, not distributive justice but justice in terms of capability should be the focus of a liberal, social-philosophical justification of the social state—developed using Kant against Kant.[25]

Granted, the Basic Law's principle of the welfare state avoids taking a clear position on such justificatory discourse, as is evident from the above-diagnosed textual and legal vagueness. Thus, it suspends the great ideological struggles over a community's economic and social order between dual strategies. It excludes certain assertions of what is "sociopolitically imaginable," while it employs vagueness to integrate other contrary and multifaceted imaginations.

However, the Basic Law is not—or, to be precise, its interpreters are not—completely ambivalent toward this tension between competing social models. Rather, the established interpretation of the Basic Law not only strikes out individual liberty as the very basis of the constitution as a whole but also drastically modifies the classic, liberal, nineteenth century theory of fundamental rights. The concept of liberty, including its fundamental rights doctrine, therefore becomes center stage for the dramatic struggle for identity—for an appropriate, political and theoretical self-image, for the adequate German "imagination of the political." And this drama plays out, inter alia, under the direction of the principle of the welfare state. Thereby, in the German fundamental rights doctrine, additional dimensions of fundamental rights enter alongside the classical understanding of fundamental rights as negative rights held by liberty-bearing citizens against the liberty-limiting state: fundamental rights as an objective order of values; fundamental rights as the state's duties to protect its citizens; and fundamental rights as participatory rights in a society widely shaped by the state. This approach increasingly challenges the theoretical notion of division between state and society, which is constitutive for liberal constitutional thought.[26] Fundamental rights, to some degree, undergo a sort of thrust-reversal; from the protection against state intervention emerges the right, even the duty, to state activities, which are to be carried out even against the opposition of the beneficiary, if necessary.

[25] For an overview, see HEINIG, *supra* note 11, at 110.

[26] Konrad Hesse, *Der Rechtsstaat im Verfassungssystem des Grundgesetzes*, *in* RECHTSSTAATLICHKEIT UND SOZIALSTAATLICHKEIT 556, 567, 575 (Ernst Forsthoff ed., 1968); Dieter Grimm, *Der Wandel der Staatsaufgaben und die Krise der Rechtsstaats*, *in* DIE ZUKUNFT DER VERFASSUNG 159, 170 (2d ed. 1994). On the complex of issues as a whole, see Christoph Möllers, STAAT ALS ARGUMENT 233, 297 (2000).

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The basis for this development consists of: (a) a specific anthropology, which begins with the notion of human dignity as, inter alia, a corrective for the idea of liberty[27] and which is written into (the interpretation of) the constitution; and (b) a post-libertarian self-concept, that is, one grounded in the idea of the welfare state. Thus, two notions fall into alignment. First, the Basic Law has a simultaneously anti-libertarian and anti-socialist understanding of the human being—"While the Basic Law does construe the human being as free, it nonetheless presumes the human's social bond to society."[28] Second, it conceives of the state as an active welfare state—"The state is a planning, distributing, shaping state that makes both individual and social life possible."[29] The interplay of the general doctrine of fundamental rights, the notion of human dignity, and the principle of the *Sozialstaat*, therefore, produces a specific conceptualization of the human being, and this concept, in turn, decisively shapes the legal, political, and other social spheres. In other words, this interplay produces the German imagination of the political.

D. On the Political Theology of the Welfare State

As with any interpretation and depiction of the political, this political imagination of the welfare state can be analyzed for its theological-political content, for its varying forms, religious emphases, and archetypes stemming from religiously conceptualized worlds or the righteous speculation of theologumina. While a detailed analysis is beyond the scope of this article, attention should at least be drawn to the fact that this form of "political theology" is highly promising, especially for the welfare state and the "powerful images" associated with it. After all, humanistic and socialist meta-narratives converge with Christian ones in the ideational, institutional complex of the welfare state. Presumably, the *Sozialstaat* provides an excellent case study of the degree to which secular state phenomena are genealogically and architecturally embedded in religiously formed thought patterns and *raisons d'être*.[30] For instance, significant roles are likely played by the salvific paradigm of mercy, the Christian

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[27] *Cf., e.g.*, the case law on peepshows or the so-called "dwarf tossing": Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] 15 Dec. 1981, 64 ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS 274 (Ger.); Administrative Court Neustadt, NVwZ 1993, 98. On the overall issue, see generally H. DREIER, *in* 1 GRUNDGESETZ 151 (2d ed. 2004). Art. 1, margin nos. 151 et seq.

[28] *See* Pitschas, *supra,* note 10 at 827; *see also* Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] 3 Dec. 1969, 57 ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS 253, 283 (Ger.) (holding that the constitution places the free human being in the center of the state's order for the development of her or his personality in society).

[29] Hesse, *supra* note 26, at 566.

[30] For an overview, see Hans Wolfgang Stätz & Hermann Zabel, *Säkularisation/Säkularisierung*, *in* 5 GESCHICHTLICHE GRUNDBEGRIFFE 789 (Otto Brunner, Werner Conze & Reinhart Koselleck eds., 1984); Hans Michael Heinig, *Säkularisierung/Säkularisation*, *in* Ev. Soziallexikon column 1363 (2003).

mission of de-fatalization, the mythical-theological potency of "human dignity" and the "sanctity of life," as well as the reference to the fatherhood of God evident in the metaphorical figure of the welfare state's fatherly care and provision.[31]

E. The Principle of the Welfare State as an Imagination of the Political: An Exceptional Case?

Building on Paul W. Kahn's critique of liberalism and reconstruction of the imagination of the political in the United States,[32] it seems advisable to view the German—one might even say European—welfare state model as a sort of anti-belligerent alternative to the US-American blueprint as described by Kahn. Drawn into the welfare state model are both of the central elements of the political that Kahn employs against political liberalism: sacrifice and love.[33] This German model, too, generates its own form of ultimate meaning, as can be seen in the history of West Germany's mentality between 1950 and 1989. The reconciliation of capital and labor in Rhenish capitalism and the promise of a leveled middle-class society[34] became the identifying characteristics of an entire country. The "social market economy" promised justice and progress ("Prosperity for all!")[35] and replaced the national chauvinism that had been discredited by National Socialism in the interrelated processes of collective identity-building. The domestic social policy of pacifism mirrored the foreign policy approach of self-binding and cooperation (integration into the West via NATO and EEC/EC). Here, sacrifice was no longer brought by war and civil war; rather, sacrifice took the form of a heavy tax burden used to finance an (extensive) redistribution system and a social system oriented toward equalizing living conditions. Instead of blood flowing on the battlefield or in urban warfare, it flowed in the operating rooms of public hospitals, to which all had access irrespective of income. Nonetheless, such a manifestation of the imagination was likely to evoke strong connections and identifications with a certain political formation. It was precisely this imagination that went beyond a rational calculus of atomized interests and drew from the pool of traditional European images of love, charity, and a communal solidarity in which the individual disappears.

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[31] Joachim von Soosten, *Neubau der Sittlichkeit*, *in* MENSCHENWÜRDE IN DER SÄKULAREN VERFASSUNGSORDNUNG 297 (Petra Bahr & Hans Michael Heinig eds., 2006).

[32] PAUL W. KAHN, PUTTING LIBERALISM IN ITS PLACE (2005).

[33] *See id.* at 143.

[34] HELMUT SCHELSKY, AUF DER SUCHE NACH DER WIRKLICHKEIT 311 (1965).

[35] LUDWIG ERHARD, WOHLSTAND FÜR ALLE! (1957).

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Yet one should be careful not to overstate the contrasting positions of a German imagination set on peaceful solidarity and a belligerent, US-American imagination of the political. This would let the welfare state off too easily. The Leviathan as welfare state does not quietly morph into a lapdog; it maintains its genetic potential to mutate into a beast. Accordingly, the list of welfare state critics is long. Jürgen Habermas, for instance, views it as part of the larger development of the "colonization of the lifeworld."[36] He has thus repeatedly called for the overcoming of the structures of the paternalistic and bureaucratic *Daseinsvorsorge* (provision for existence), which only serves to pacify class struggle.[37] Recently he repeated his critique of the welfare state in his philosophy of law, in which he developed a procedural conception of law,[38] which has been met with much skepticism.[39]

Therefore, it may be more useful in our context to make brief reference to Michel Foucault's analytics of the welfare state's exercise of power. According to Foucault's analysis, the welfare state is embedded in a long tradition of population policy and bio-policy, a tradition that cannot simply be dismissed with a quick neo-Marxist or liberal response.[40]

Prominent commentary on the principle of the welfare state emphasizes the liberal social state's radical break with the traditional police and welfare state of the seventeenth and eighteenth centuries.[41] Foucault's genealogy of the welfare state, in contrast, shows that the modern "social" state rests structurally, though not programmatically, on the developments in the sixteenth to nineteenth centuries.[42] So the postulate of a right to health—often considered the central sociopolitical demand of the twentieth century, in light of the associated politicization and socialization of health, sickness, and body—has deep roots, reaching all the way to the epistemic

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[36] In German, "*lebenswelt*," meaning the world "as lived." *See* JÜRGEN HABERMAS, 2 THEORIE DES KOMMUNIKATIVEN HANDELNS 510 (1988).

[37] JÜRGEN HABERMAS, DIE NEUE UNÜBERSICHTLICHKEIT 141 (1985).

[38] JÜRGEN HABERMAS, FAKTIZITÄT UND GELTUNG 470 (1992).

[39] *See* Niklas Luhmann, *Quod omnes tangit*, 12 RECHTSHISTORISCHES JOURNAL 36 (1993); *see also* Jürgen Habermas, *Replik auf Beiträge zu einem Symposion der Cardozo Law School*, *in* DIE EINBEZIEHUNG DES ANDEREN 309 (1999).

[40] MICHEL FOUCAULT, 3 DITS ET ECRITS: SCHRIFTEN 19, 54, 272, 644, 769 (2003).

[41] Rolfe Gröschner, *in* GRUNDGESETZ Art. 20 ("Sozialstaat"), margin no. 4 (Horst Dreier ed., 1st ed. 1998). *But see* STOLLEIS, *supra* note 12; Christoph Enders, *Sozialstaatlichkeit im Spannungsfeld von Eigenverantwortung und Fürsorge*, 64 VEROFFENTLICHUNGEN DER VEREINIGUNG DER DEUTSCHEN STAATSRECHTSLEHRER 7, 17 (2005) (referring to subcutaneous continuity).

[42] FOUCAULT, *supra* note 40, at 19.

changes at the end of the sixteenth century. In Foucault's opinion, only with the medicalization of society did the "body" as a category become a target of state intervention. From the outset—as the hospital evolved from a place of death to a place of healing and with the establishment of socialized medicine—the medical practice established itself as a highly influential industry.[43] In this context, Foucault speaks, with reference to Fichte's closed trade state, of an "open medical state."[44] Foucault sees the increase in the body's value as indebted to technical (military) developments. And, in light of the political economy of medicine, he shows how this increased value motivates medicalization and how disciplining the individual gives this movement teeth.[45] He retraces medicine's overreaching of the bounds of its actual field: sickness. Thus, in Germany, a medical police is established, and health administration becomes state medicine; in France, an urbane medical field focuses on environmental intervention and infrastructure policy; and, in England, medicine becomes a laborers' field, and aggressive policies emerge for medical aid to the needy, general health surveillance, and private medicine.[46] These brief citations should suffice to show that the notion of the welfare state is no guarantee against the risks of excesses inherent in the political sphere. The political imagination, as inspired by the welfare state, is not in and of itself the full solution.

Even a brief glance at three turning points in German welfare state history shows that the imagination of the political, proceeding from the *Sozialstaat* project, cannot gracefully and easily depart from the classical imagination of the nation-state. First, the welfare state emerged in Germany as a highly politicized project in the *gestalt* of a social security state, in order to neutralize the approaching workers' movement. It also acted as a response to the particular need for legitimization of the German Empire founded in 1871. Founded top down, this "delayed nation"[47] had the failed civil revolution of 1848–49 on its back and largely dispensed with democratic legitimization. Second, the German welfare state underwent a not insignificant extension during the First World War;[48] National Socialism, then, was to continue this process—regardless of its orientation toward discriminatory racial policy. Historian Götz Aly accurately speaks in his well-known work, *Hitlers Volksstaat* ("Hitler's People's State"), of a social welfare dictatorship of accommodation, in which the population's consent was bought—especially in the first years of war—with

[43] *Id.* at 644.

[44] *Id.* at 54.

[45] *Id.* at 650.

[46] *Id.* at 272.

[47] HELMUTH PLESSNER, DIE VERSPÄTETE NATION (3d ed. 1988).

[48] STOLLEIS, *supra* note 12, at 110–23.

sociopolitical benefits, among other things.[49] Third, the post-national status of West Germany's imagination of the political was based on the welfare state. The precariousness of this basis became evident in 1989–90 when the promise of prosperity and security, tied in with the welfare state, was exploited to obtain consent to an accelerated reunification of the two parts of Germany; West Germany's collective identity, shaped by the welfare state, was transferred seamlessly into the eastern part of the country, becoming the starting point for efforts toward forming a single, common German identity.

F. The Outlook

This formation of a post-post-national imagination of the political took place in the reunified Germany under the signum of the welfare state. Its success can perhaps be measured against the persistence of this imagination in Germany; the widespread discussion in the 1990s of a major crisis had little influence on the content and form of the imagination. As the Iron Curtain fell and global trade lines intensified and accelerated, the general framework of the classical welfare state changed dramatically. Pressure was put onto the economic prerequisites of the traditional, domestic social policies. The German response to these challenges was a broad rejection of necessary reforms to the social welfare system—an attitude that may seem less bizarre considering the emphasis placed, inter alia, by the Basic Law on the traditional conceptualization of the welfare state and its importance for the self-definition and self-interpretation of German society.

At the same time, the Europeanization and internationalization of statehood seem to be breaking the unity of welfare state and nation-state. The project of European integration had, for a long time, remained indecisive as to whether it would take over the national imaginations of the sociopolitical, prescribing a common political and legal "welfare model." From the beginning, the project's strong market orientation worked against such a tendency. Suddenly, the social welfare systems were exposed to the internal market's dynamics of economic freedoms and a competition regime.[50] Recourse to the right to free movement of goods and services forced a partial opening

[49] GÖTZ ALY, HITLERS VOLKSSTAAT, 2005. Aly speaks—misleadingly—of a "secularized" National Socialism that has become established in Germany because the early Federal Republic of Germany adhered to political integration through social redistribution. However, the social state's techniques of governance antedate National Socialism and are by no means exclusive to Germany. Thus, the relationship between the social state's extensions and the production and promotion of wartime preparedness should also be studied from a comparative legal perspective (with attention paid to the British Beveridge Plan of 1943 and the American continuation of the New Deal after 1939). For a remarkable, insightful comparative study of the New Deal, Italian fascism, and National Socialism in the 1930s, see WOLFGANG SCHIVELBUSCH, ENTFERNTEVERWANDTSCHAFT (2005).

[50] *Cf.* KINGREEN, *supra* note 10, at 283.

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of health markets, which were properly within national competence.[51] For a long time, it was even an open question whether social insurance institutions would have to abide by European antitrust law and state aid restrictions. The European Court of Justice has, however, taken a position that leaves the national competence over social policy largely untouched.[52] Nonetheless, the European level has appropriated certain specific elements of the social state and has "embellished" the EU's Charter of Fundamental Rights with social rights. Whether or not this provides a sufficient basis for a European imagination of the sociopolitical would require a more thoroughgoing analysis. Yet one has reason to be skeptical. The forces of integration, resulting from processes of functional differentiation and associated with the welfare state project, have clearly begun to fade from the society's political execution.[53] Perhaps the welfare state's dynamics, by removing its own boundaries, have called the conditions for its own existence into question.[54] Whether in the short or long term, pressure from such dynamics cannot help but influence a society's self-interpretation and, in turn, its representation in the law. Thus, despite the peculiarities of transnational political and legal integration, the imagination of the sociopolitical is hardly challenged.

[51] *See* Case C-385/99, Müller-Fauré v. Onderlinge Waarborgmaatschappij OZ Zorgverzekeringen UA and E.E.M. van Riet v. Onderlinge Waarborgmaatschappij ZAO Zorgverzekeringen, 2003 E.C.R. I-04509; Case C-158/96, Kohll v. Raymond and Kohll v. Union des caisses de maladie, 1998 E.C.R. I-1931; Case C-157/99, B.S.M. Geraets-Smits v. Stichting Ziekenfonds VGZ and H.T.M. Peerbooms v. Stichting CZ Groep Zorgverzekeringen, 2001 E.C.R. I-5473.

[52] Joined cases C-264/01, C-306/01, C-354/01, and C-355/01, AOK Bundesverband v. Ichthyol-Gesellschaft Cordes, Hermani & Co., 2004 E.C.R. I-2493.

[53] NIKLAS LUHMANN, POLITISCHE THEORIE IM WOHLFAHRTSSTAAT (1981).

[54] NIKLAS LUHMANN, DIE POLITIK DER GESELLSCHAFT 422 (2000).

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