Lecture – Germany's *Sozialstaat* Principle and the Founding Period

By Christian Bommarius[*]

I cannot avoid beginning on an embarrassing note – speaking to you as possibly the next German Foreign Minister. That is a position I will have earned because it is a good old (bad) tradition in Germany that its Foreign Ministers speak English either not at all or so badly that it is better if they do not speak it. Some say that not being able to speak English is even a requirement for becoming Foreign Minister. Well, in that case my prospects are excellent. I hope you will forgive my poor English.

But I have not yet been asked to join Chancellor Merkel's cabinet. At the moment, I am still a German journalist and book author, who is a bit surprised, but also delighted, that Professor Miller and his students want me to talk about the German Basic Law, about its origin, its historical roots, about the work of the Parliamentary Council, and, above all, about the Basic Law's *Sozialstaat* principle. Professor Miller, thank you for the invitation and the wonderful reception here in Washington.

I will focus on the *Sozialstaat* principle in the Basic Law, its origin, and how it relates to other fundamental constitutional principles. But first, allow me to give you a short overview of the times and the conditions in which the Basic Law was drafted and ratified. The professional literature ordinarily points to only two factors when characterizing the conditions under which the sixty-five members of the Parliamentary Council (only four of whom were women) came together in Bonn on 1 September 1948 – instructed by the victorious Western powers to provide Germans in the western occupation zones with a provisional constitution. The first factor is the newly ignited Cold War. The second factor is that the Parliamentary Council's work was being carried out at the beginning of the reconstruction of the bombed-out and devastated country. Naturally, both factors are relevant. In particular, the members of the Parliamentary Council were constantly aware of the escalating Cold War. As you know, at the time the Parliamentary Council began its work, Berlin had been blockaded by the Soviet Army for two months. The blockade was

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Moscow's military answer to the currency reform that had been implemented in the western occupation zones in the summer 1948. It was a milestone, by no means the first, but an obvious one, on the path to Germany's partition, which would end a half-century later in 1990. The whole western world, in the summer and fall 1948, lived in the expectation that the Cold War could turn "hot" at any time, which, of course, actually happened two years later in June, 1950 – and not in Europe, but in Korea. "I can see Russia from my house" is not only a memorable statement of a prominent present day American politician. Every German in the Soviet occupied area could see Russian tanks and soldiers just by stepping out of the front door, and every German in the western occupation zones was plagued by the fear that, maybe tomorrow, this could be his or her fate. Every German knew that the Western allies' command to found a West German state – with the Basic Law as the founding document – would not only further escalate the conflict. The Germans were painfully aware that it would be the beginning of the Germany's partition.

For a long time, this partition was considered by Germans to be a misfortune – at least officially. But partition was not only a consequence of the Second World War, which had been unleashed by the Germans, and the post-war rift that had opened up between Germany's conquering enemies. For the Germans, and more than a few perceived it this way, partition was an undeserved chance to be rehabilitated even before Germany had faced its comeuppance for the war it started and atrocities it had perpetrated. Only three years after the end of the Second World War, the Cold War had transformed the shattered stronghold of Nazi rule, into an important component of European reconstruction. Yesterday's villain was welcomed as tomorrow's partner. The magnanimity of this offer – even though it was not exclusively based on the victorious powers' free will but also was driven by their respective interests in the Cold War – was so breathtaking that it could not be rejected. It says a lot about the West German politicians who were active in the summer of 1948 that some felt that they should not accept the Western allies' offer of rehabilitation – at the price of partition – at least not without some reservation. Yet, West Germans were in no position to reject this offer, which, to be more precise, was actually an order. And, in any case, over the preceding two years, they already had accepted the course towards partition in incremental steps without having to address the matter explicitly. The Basic Law, which was created within nine months, did not fall into their laps. In many parts, it is an extract from the constitutions which the German states already had given themselves, in particular on the initiative of the US occupying forces. This is a point I want to say more about later.

The Cold War overshadowed the negotiations of the Parliamentary Council, but fear of that conflict did not dictate the words on which the Council would settle for the Basic Law. Fear of Stalinist totalitarianism may have weighed on West Germans' minds. But, above all, the fathers and mothers of the Basic Law were preoccupied with the National Socialist totalitarianism and, along with it, the irrefutable moral bankruptcy of the German people. What was not considered at the time, and what today is almost forgotten, is that in 1948/49 a revolution took place in Bonn. It is to the credit of the revolutionaries, the

members of the Parliamentary Council, that Germans even to this day are not aware of this. They did not erect barricades, instead they discussed peacefully in the former lecture hall of a teachers' academy. They did not plan a *coup*, instead they planned a provisional reconstruction. They would have strongly rejected the label "revolutionary." Nevertheless, within 265 days they not only laid the foundations for the Federal Republic of Germany, but also churned up the existing state of affairs.

Largely unnoticed by the German public at the time, the Parliamentary Council banished the authoritarian state with the Basic Law; they even forced the state, wherever it obstructed the canon of values established by the Basic Law, to withdraw. They wiped away the "authoritarian state" from the nation's curriculum and sent both the state and society to the college of democracy. At the same time, they bound the legitimization of the state to an ethical idea.

Before the proceedings in Bonn had begun, experts had come together at a constitutional convention to prepare a draft constitution that would serve as the Parliamentary Council's framework. The constitutional convention of Herrenchiemsee had placed, at the beginning of its draft constitution, the sentence written by the Social Democrat Carlo Schmid: "The state is there for the human being, not the human being for the state." The fathers and mothers of the Basic Law rephrased this concept during the Parliamentary Council. The dignity of the Federal Republic, its identity, rests in the sentence: "Human dignity shall be inviolable." This was the unprecedented message from Bonn, the watchword of the most peaceful and successful revolution that Germany has ever seen.

When comparing the Basic Law of Bonn of 1949 with the Constitution of Weimar of 1919, it becomes clear that this revolution was not at all confined to the protection of human dignity. Though the Weimar Constitution included basic rights – and basic obligations, too – none of them were judicially enforceable. In the Basic Law, however, they are formulated as specific entitlements. Respect for these rights can be demanded in every court up to the Federal Constitutional Court in Karlsruhe, which was established by the Basic Law. In accordance with their importance, the Basic Law starts off with the basic rights. They are binding for the judicial, the executive, and the legislative branches. The essence of their content may not be changed.

If basic rights are so important for the Basic Law, it is of course interesting to note what, exactly, was included in the catalogue of basic rights in 1948/49 – and what was excluded. Apart from the classic liberal protections – freedom of the press, freedom of expression, freedom of assembly and religion, freedom of movement, and the principle of habeas corpus – there were some novel creations, which the Parliamentary Council developed. For example, Article 3 (2) of the Basic Law provides that "Men and women shall have equal rights." And Article 16a (2) [2], which, in the meantime has been strongly curtailed, granted to "Persons persecuted on political grounds shall have the right of asylum."

For those who know about the constitutional discussions in the western occupation zones, it is surprising that, of all things, some of the Weimar Constitution's basic rights were not included in the Basic Law. This is surprising because, in the post war years, some of the neglected rights were of the highest importance for a large portion of the citizenry and for the leadership of some of the political parties. I am referring here to basic social rights, for example, the right to employment and housing. In order to realize how important these rights were for the West Germans of that time it is enough to look at the millions of unemployed in the bombed-out cities and at the impoverishment of the millions of eastern refugees who were desperately looking for work and a place to live. Bertolt Brecht wrote: "First food, then morals." Indeed, Germans at that time might have done completely without the morals, if only they guaranteed some food, a meaningful job, and a roof over their heads. So why did the framers of the Basic Law fail to incorporate basic social rights?

This question forces me to digress a little and talk about the political platforms of the parties represented in the Parliamentary Council and the majority political situation of the time. Until the Social Democratic Party (SPD) passed the Godesberg Program of 1959, they considered themselves to be a socialist workers party. Their platform was based, in particular, on the concept developed during the Weimar period called "economic democracy." This concept had three central planks: a planned, command economy; workers' participation in management; and nationalization of important economic interests. Their leader in the post-war years, Kurt Schumacher, was a determined opponent of both the Nazis *and* Stalinism. Schumacher was convinced that the economic devastation faced by Germans in the immediate post-war period would make socialists out of West Germans and, thereby, make the SPD the leading political party. Schumacher said: "Because in prosperity the Germans did not want to become socialists, they will now have to become socialists in poverty." This quickly turned out to be an error. Already, in the first state elections in 1946/47, the SPD was far behind the Christian Democratic Party (CDU) in some cases. The CDU was a newly established party. What held it together, initially, was not much more than the realization that the Center Party of the Weimar period had led political Catholicism in Germany into a Ghetto and that it needed to be replaced by a large, Christian (meaning interdenominational) "big-tent" party. The different currents were dominated, in the first post-war years, by the idea of Christian Socialism informed by Catholic social teaching. In particular, the economic policy concepts in the platforms of the CDU associations of Berlin and the Rhineland were almost indistinguishable from those of the SPD. This current did not become dominant in the long term. The main reason for this was the first leader of the CDU, Konrad Adenauer, who, as a traditional Catholic and a convinced conservative, abhorred every variant of socialism, including the Christian one. Earlier than any other German politician, Adenauer, who became West Germany's first Chancellor in 1949, supported the founding of a Western state and the integration of this state into the Western world. Moreover, Adenauer was coldly calculating: A Christian party on socialist foundations would hardly be able to win over middle class voters and to establish itself as a big-tent party alternative to the SPD.

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Those were, broadly speaking, the initial positions, when the Parliamentary Council – under Adenauer's chairmanship – began its work on 1 September 1948. What was the majority situation? Altogether, the federal state parliaments had elected sixty five members of the Council. Twenty seven belonged to the CDU and its Bavarian sister party, the CSU. Another twenty seven belonged to the SPD. Two seats each belonged to the extremely conservative Deutsche Partei (DP), the Catholic Zentrum, which was close to the SPD in economic and social policy, while in its Christian orientation it stood close to the CDU and CSU, and the German Communist party, whose representatives were fanatical opponents of the founding of a West German state and which can definitely be called a representative of the Communist regime in East Berlin. The key position with five seats was held by the Free Democratic Party (FDP), the classical liberals, who liked neither the economic and social policy ideas of the SPD, nor the closeness of the CDU to the Christian churches. That meant that, from the beginning, neither the SPD nor the CDU would have a secure majority. So the two parties came to an agreement: The Basic Law was to contain only legally binding, classic basic rights, "lifestyles" of any kind were to be left out. Though the CDU did not keep to this agreement in one crucial point, the SPD upheld its part of the bargain and did not put the debate about introducing basic social rights on the agenda of the Parliamentary Council. This was not too difficult for them because, like their leader Schumacher, they expected that the voters, maybe even the voters of a soon reunified Germany, would give them the parliamentary majority that they did not enjoy in the Parliamentary Council.

Nevertheless, there was broad unanimity in the deliberations about an article which, if applied systematically in Germany today, would certainly lead to huge disruptions. Article 15 of the Basic Law states: "Land, natural resources and means of production may for the purpose of socialization be transferred to public ownership or other forms of public enterprise by a law that determines the nature and extent of compensation." You might think of this is socialism. But at the time the German parties were, by and large, in agreement that socialization had to be the foundation of a necessary democratization of the economy. For the SPD this was self-evident in any case, but even in the CDU at the time it was the prevailing opinion. Karl Arnold, who had been elected Minister President of the state North Rhine-Westphalia in 1947, explained that "a basis for a reasonable reconstruction of economic and social life can never be found if, in politics, there is formal democracy and in the economy there is absolutism." Hardly any German at the time would have disagreed. Of course there were reasons why an overwhelming majority of Germans shared Arnold's view. First, the general expectation in the post war years was that, for many years, the only goal of businesses would be to meet the needs of the people. A second reason was rather more ego-centric. Most large businesses were in the hands of the occupying forces, so socializing them would mean nothing other than reclaiming them for Germany.

All West German state constitutions, which were, as I have mentioned, passed prior to the enactment of the Basic Law, provided for a socialization of key industries. The Hessian rule

was the most far reaching, not only with regard to the extent of socialization, but also to the extent of the compensation given to the affected owners. They were to receive compensation only "according to social considerations." This regulation encountered bitter resistance from the commanding officer of the US occupying forces, General Lucius D. Clay. He was not only a staunch federalist, but he also was convinced that free enterprise was superior to every other economic system. He was certain that, if the citizens of Hesse were given the choice, they would side with capitalism. Clay decreed that they were to have a referendum on the new state constitution, but also, on the same day, vote in a separate ballot on the socialization article in the constitution. The result was as surprising for Clay as it was staggering: 76.8 percent of Hessian citizens voted for the draft constitution, but also 71.9 percent for the socialization article. What followed was one of the few direct interventions of the US occupying forces into the West German constitutional debate. General Clay stopped the socializations planned by the Hessian state government. Clay justified his maneuver with the explanation that, before the formation of a government for the whole of Germany or of a superordinated West German government, the United States would not accept any socialization. The matter was settled fairly quickly for the West Germans. As soon as the first harbingers of what West Germans would later call the "economic miracle" appeared in the spring of 1949, they became what General Clay had always been: staunch opponents of socialization.

So when there is talk about the German social state – and the *Sozialstaat* principle – it is not because of basic social rights in the Basic Law. The Basic Law does contains nearly no social rights, and those it contains are very rudimentary. Talk of the *Sozialstaat* principle also cannot be attributed to the possibility of workers' participation in management, which, although secured by the Basic Law is nonetheless irrelevant in practical terms. When there is talk about the social state – and in Germany it has been talked about permanently in the past 60 years, though with varying connotations – then the talk about it is misguided in a certain sense because the term does not really exist in the Basic Law at all. In its original version, there are only two references to the social state in the Basic Law. Article 20 (1) guarantees a *social* federal republic. And Article 28 ensures that the state governments conform to the principles of a democratic, republican, and social state. Nevertheless, many Germans today still believe that the welfare state is an invention of the Basic Law. That is not quite right. The Weimar constitution, after all, did much more. In Article 151 (1) [1]) it provided that "The economic system must conform with the principle of justice with the goal of ensuring a humane existence for all." Hermann Heller, one of the SPD's leading figures, had written as early as the 1920s that "The idea of social justice is the logical extension of political and economic democracy." So, in the post war years, the concepts "social state" and "social constitutional state" and "social democracy" already had a long history. And after the war they left their mark in the constitutions of the individual West German states even before the debates about the Basic Law had begun. Article 3 of the Bavarian constitution, for example, referred to the state as a "constitutional, cultural and social state." Rhineland-Palatinate's constitution, at Article 74, called for a "democratic and social member state of Germany." The constitution of the

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state called Württemberg-Baden, at Article 43, referred to a "democratic and social people's state."

So the social state existed before the Basic Law, in the constitutions of the individual states. The debate about it in the Parliamentary Council was not controversial. What is more interesting is the result. In the end, there was not only the formulation of the goal of a social state. At the same time, in Article 79 (3), the so-called "eternity clause," the requirement of a social state was protected from changes to the constitution. It is worth mentioning the context in which the Parliamentary Council placed the requirement of a social state: "The Federal Republic of Germany is a democratic and social federal state." The Basic Law also provided that "he constitutional order in the states must conform to the principles of a republican, democratic and social state governed by the rule of law, within the meaning of this Basic Law." It thereby combines the principle of democracy with the idea of rule of law and the requirement of a social state in "a historic compromise to an inextricable triad," as former Federal Constitutional Court Justice Helmut Simon wrote. According to this view, the original postulate of constitutional freedom from the state needs to be complemented by a requirement to participate in the supply of social services by the state and to provide subsistence in the collective body of the insured. The Parliamentary Council left it up to the legislature to determine how this is to be fleshed out in practice, because social justice cannot be defined authoritatively once and for all. The dynamics of a society, therefore, forces the law makers to re-regulate the social conditions time and again. Nevertheless, some articles of the Basic Law demand that the state takes social action. Of course, this applies above all to Article 1 of the Basic Law. From the obligation that state power respect and protect human dignity it follows that the state must ensure a material subsistence level. Similarly, from the equality of men and women and the prohibition of discrimination secured by Article 3, there follows an obligation to remove social inequalities and to provide for equal treatment – for example at the workplace. From this perspective, child benefits and family tax breaks are not government charity. Instead, they are a consequence of the protection of marriage and family secured by Article 6 of the Basic Law.

The Basic Law has stabilized the foundation of social justice in Germany. Insofar as the wealth of Germany grew, the welfare state was no longer concerned only with the sheer survival of its citizens, but with their quality of life. More than the police and judicial institutions, more than criminal law and the anti-terrorism laws of recent years, this social "participation" has guaranteed the inner peace in Germany. The social state is not concerned with providing everyone with an apartment of equal size, a car with the same price, and a bank account with the same balance. But no-one is to walk around bent so low that he or she cannot rise up under the burden of fate and go through life as an upright citizen. A democracy without upright citizens is no democracy; therefore a democracy needs the social state. For a few years now in Germany, even the lawmakers keep forgetting this again and again. The parents of the Basic Law meant the social state to be not a suggestion or a demand, but a mandate for all time.