



Social Rights in German Basic Law *(Overview Paper)*

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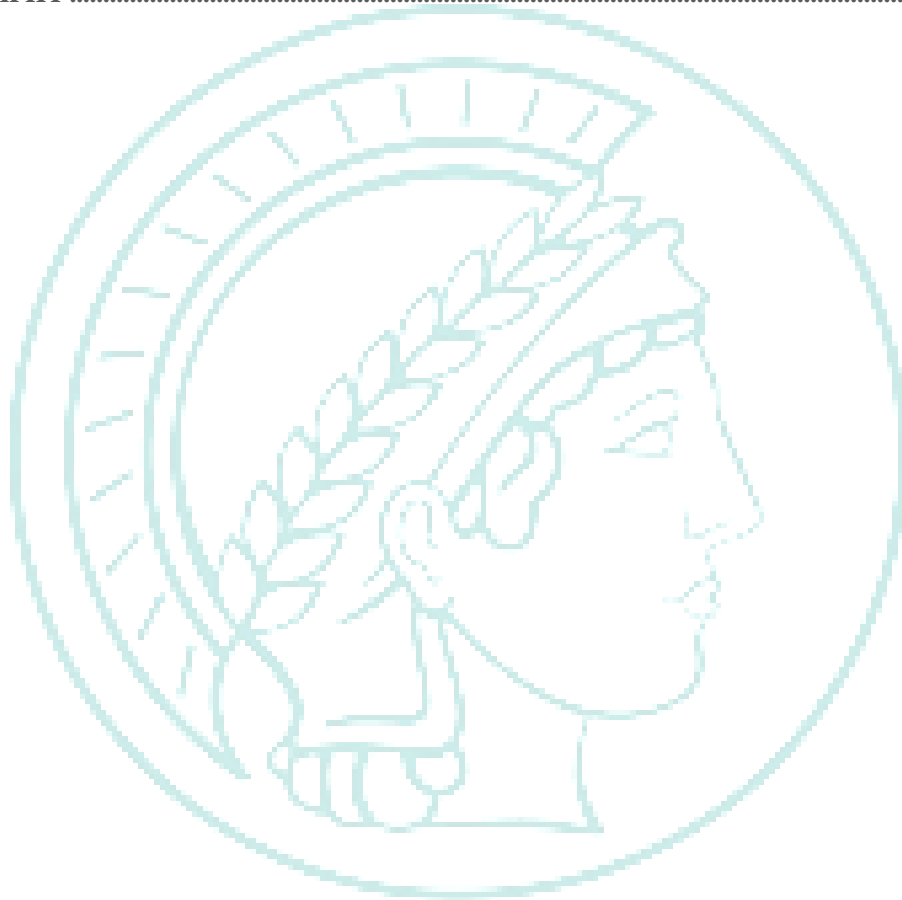
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EXECUTIVE SUMMARY

This paper describes and analyses the status of social and economic rights in the German legal system. It will establish that social and economic rights are mostly not explicitly contained in the German Basic Law (German Constitution) but have been guaranteed and implemented at the ordinary legal level and through the jurisprudence of the Federal Constitutional Court as well as other Supreme Courts. These courts, in interpreting and progressively developing the German legal system mainly invoked Article 1 (concerning the dignity of the human being) or Article 2 of the Basic Law, while also relying on Article 20 of the Basic Law declaring Germany to constitute a 'social State'. The latter is one of the leading principles of the German Constitution, which guides both the legislature as well as the executive, and serves as guidance for the interpretation of German norms. Briefly, international commitments in this field will be mentioned.



1. INTRODUCTION

Considering the International Bill of Human Rights – composed of the 1948 *Universal Declaration of Human Rights* (UDHR), the 1966 *International Covenant on Civil and Political Rights* (ICCPR) and the 1966 *International Covenant on Economic, Social and Cultural Rights* (ICESC) – human rights are generally divided roughly into two groups¹: those that guarantee freedom from state interference (most of the civil and political rights, such as the freedom of expression²) and those that ensure a certain standard of living (most of the economic, social and cultural rights, such as the right to health³). Social rights fall under the latter group and include, *inter alia*, the right to education, the right to work the right to health and the right to housing. Recently, in one form or another the right to a healthy environment has been added.

Although social rights, on the one hand, and civil and political rights, on the other, are binding,⁴ each entail different implications. While civil and political rights predominantly prohibit government encroachment and thus are often qualified as negative rights, social rights mostly impose a duty on the State and thus are often referred to as positive rights.⁵ Therefore, social rights oblige the State to act instead of just refraining from acting, which makes the fulfilment of social rights more difficult than the fulfilment of civil and political rights in practice. However, the distinction is not as clear-cut as it may seem. There are cases where civil and political rights require for their full implementation a positive action from the side of the State. On the other side, social and economic rights may require the State not to interfere, for example not to interfere into the freedom of association according to Article 9 of the Basic Law. The latter constitutes an important element of the right to work.

Among the main obstacles of bringing social rights to life are financial constraints as education, health, social security, and housing for everybody might be very costly.⁶ On the other hand, social rights are depicted as necessary additions to civil and political rights since the latter cannot be exercised without social rights ensuring a certain standard of living and internal peace.⁷

¹ A third group would address collective rights, such as the right to self-determination.

² See Art. 19 UDHR and 19(2) ICCPR.

³ See Art. 25 UDHR and Art. 12 ICESCR.

⁴ N.B.: The establishment of human rights in two different treaties (ICCPR and ICESCR) was due to historic and political reasons since they were supported and eventually signed by different groups of States when they were negotiated.

⁵ Another distinction refers to the status of the individual, saying civil and political rights protect the *status negativus*, while social rights enable the *status positivus* (Georg Jellinek, *System der subjektiven öffentlichen Rechte*, 1892).

⁶ Insofar, a reservation of the possible applies (Bernd Grzeszick, in: Theodor Maunz and Günter Dürig, *Grundgesetz – Kommentar*, Stand: 2014, Art. 20, VIII, marginal no. 34).

⁷ Mark Eric Butt, Julia Kübert and Christiane Anne Schultz, *Soziale Grundrechte in Europa*, 1999, p. 5.

In German history, the constitutions of the 19th century⁸ did not include any social rights. By contrast, the *1919 Weimarer Reichsverfassung* (WRV) contained social rights, which were, however, non-justiciable.⁹ The *1949 German Basic Law* does not explicitly provide for any social rights, except the entitlement of every mother to the protection and care of the community.¹⁰ The reasons for omitting the inclusion of social rights at constitutional level were twofold: first, the Constitution should not make promises that are hard to keep, which eventually could lead to a loss of trust in the legitimacy of the document; secondly, it was expected that living conditions are subject to change and thus social and economic rights should be better addressed at the level of national laws below the Constitution, making them easier to amend and more flexible in order to meet the current needs of the people.¹¹

Section 2 of the present memo analyses the situation of social rights in Germany at the constitutional level, referring broadly to the rights of a minimum subsistence level, the right to work, the right to education, and the right to housing. Section 3 describes the situation of social rights at the level of national laws. Section 4 concludes.

2. SOCIAL RIGHTS AT CONSTITUTIONAL LEVEL

As mentioned, the German Basic Law does not contain social rights. Social rights have been developed though from the ‘social state principle’ promulgated in Art. 20(1) German Basic Law. It should be noted that Article 20 Basic Law cannot be abolished. From a systematic perspective, however, Art. 20(1) German Basic Law is not part of the catalogue of fundamental rights and, as such, it is not a right as those laid down in Art. 1 to 19, but a determination of the goals of the State (*Staatszielbestimmung*).¹² *Staatszielbestimmungen* do have a programmatic character and address the State, not the individual.¹³ In contrast to other *Staatszielbestimmungen*, especially the rule of law, the democracy principle and federalism, the social state principle is not duly appropriated in the German Basic Law.¹⁴ However, the Federal Constitutional Court has referred to the social state principle several times when deciding on matters touching essentially upon human dignity. As a result, social rights in Germany are not contained in the Constitution, but have been developed by case law, referring most commonly to human dignity, the general freedom of action, the right to life and physical integrity and the social state principle.¹⁵

⁸ The 1849 Paulskirchenverfassung and 1871 Bismarcksche Reichsverfassung.

⁹ Bernd Grzeszick, in: Theodor Maunz and Günter Dürig, *Grundgesetz – Kommentar*, Stand: 2014, Art. 20, VIII, marginal no. 9, 11.

¹⁰ See Art. 6(4) German Basic Law.

¹¹ Mark Eric Butt, Julia Kübert and Christiane Anne Schultz, *Soziale Grundrechte in Europa*, 1999, pp. 6, 12f.

¹² Bernd Grzeszick, in: Theodor Maunz and Günter Dürig, *Grundgesetz – Kommentar*, Stand: 2014, Art. 20, VIII, marginal no. 18f.

¹³ Christoph Degenhart, *Staatsrecht I – Staatsorganisationsrecht*, 2013, §6, Rn. 593.

¹⁴ Werner Heun, *The Constitution of Germany – A contextual Analysis*, 2011, p. 29.

¹⁵ The fundamental rights and the *Staatszielbestimmung* mentioned are contained in Arts. 1(1), 2(1), 2(2) and 20(1) German Basic Law.

• RIGHT OF A MINIMUM SUBSISTENCE LEVEL

The right of a minimum subsistence level is guaranteed based on Art. 1(1) German Basic Law read in conjunction with the social state principle laid down in Art 20(1) German Basic Law.¹⁶ According to the Federal Constitutional Court, a person in need cannot rely on the voluntary help of the State or a third party.¹⁷ Instead, he or she needs to have a right to social welfare, the scope and content of which, however, is left to the legislator's leeway.¹⁸ When determining the amount of social welfare, the legislator only has to make sure that the proceeding is rational and transparent.¹⁹

Art. 1(1) German Basic Law read in conjunction with the social state principle laid down in Art 20(1) German Basic Law, therefore, does not stipulate the entitlement of an individual without income to receive a given amount of money. However, the individual has a right to receive social welfare on the basis of a particular law.²⁰ The Federal Constitutional Court has defined that a minimum subsistence level includes both physical existence (such as nourishment, clothes, housing and health) and participation in society, meaning the possibility to meet people and attend cultural and political events.²¹ Social welfare cannot fall behind this minimum standard, except when the person in need intentionally does not contribute to end his or her social welfare neediness.²² The jurisprudence in this respect goes quite into details. For example, it has been decided that TV is part of the minimum standard of equipment.

Following the minimum subsistence level, also a right of an ecological minimum subsistence level is recognized.²³ This has been claimed recently when environmental protection organisations filed a constitutional complaint, saying the *2019 German Climate Protection Law* violates fundamental rights. The Federal Constitutional Court, however, did not further elaborate on this right of an ecological minimum subsistence level, but focussed on the violation of other fundamental rights instead, namely the right to life and physical integrity stipulated in Art. 2(2) German Basic Law and the guarantee of property enclosed in Art. 14(1) German Basic Law.²⁴

While the Federal Constitutional Court acknowledged the efforts Germany is undertaking at national and international level to cap the global warming by reducing greenhouse gas emissions until 2030,²⁵ it also states that the legislator needs to specify how

¹⁶ BVerfGE 125, 175–260, marginal no. 133 (accessible under www.bverfg.de/20100209).

¹⁷ BVerfGE 125, 175–260, marginal no. 136 (accessible under www.bverfg.de/20100209).

¹⁸ BVerfGE 125, 175–260, marginal no. 133 (accessible under www.bverfg.de/20100209).

¹⁹ BVerfGE 125, 175–260, marginal no. 139 (accessible under www.bverfg.de/20100209).

²⁰ Christoph Degenhart, *Staatsrecht I – Staatsorganisationsrecht*, 2013, §6, marginal no. 602.

²¹ BVerfGE 125, 175–260, marginal no. 135 (accessible under www.bverfg.de/20100209).

²² BVerfGE 152, 68–151, marginal no. 131, 133 (accessible under www.bverfg.de/20191105).

²³ Christian Calliess, *Rechtsstaat und Umweltstaat*, 2001, p. 300.

²⁴ Beschluss des Ersten Senats vom 24. März 2021, marginal no. 113ff. (accessible under www.bverfg.de/20210324).

²⁵ Beschluss des Ersten Senats vom 24. März 2021, marginal no. 115 (accessible under www.bverfg.de/20210324).

to go forward after 2030.²⁶ So far, the climate protection law only provides for a greenhouse gas emissions reduction aim until 2030.²⁷ The reduction aim for the period to follow are entrusted to the Executive, which shall enact a statutory order in 2025.²⁸

By not making clear which measures need to be adopted after 2030, the legislator fails to prevent that future generations be exposed to measures that encroach upon fundamental rights more intensively than the measures imposed today.²⁹ This is due to the *Staatszielbestimmung* laid down in Art. 20a German Basic Law,³⁰ which obliges the State to protect the climate and is used to justify restrictions of fundamental rights.³¹ In case the measures imposed today are not sufficient to reach the greenhouse gas emissions reduction aim, further measures need to be adopted for the period after 2030. These can be justified then as Art. 20a German Basic Law allows for more intense encroachments in fundamental rights if the threat of climate change has been increased.³²

Against this backdrop, the Federal Constitutional Court argues that the Climate Protection Law delays necessary steps to reach the greenhouse gas emissions reduction aim to the future and thus infringes the complainants' fundamental rights, such as those included in Art. 2 German Basic Law (general freedom of action and right to life and physical integrity).³³ With that, the Federal Constitutional Court emphasises that Art. 2(2) German Basic Law consists of both a right prohibiting the State to interfere with the individual's right to life and physical integrity and the State's obligation to protect and promote the exercise of this right, including the right to live in a healthy environment.³⁴ The violation of the State's obligation can be stated by the Federal Constitutional Court in case no protection measures were made at all or if the measures imposed are evidently inappropriate.³⁵

²⁶ Beschluss des Ersten Senats vom 24. März 2021, marginal no. 263, 266, 268 (accessible under www.bverfg.de/20210324).

²⁷ See § 3(1) Climate Protection Law.

²⁸ See § 4(1) and (6) Climate Protection Law.

²⁹ Beschluss des Ersten Senats vom 24. März 2021, marginal no. 142, 182 (accessible under www.bverfg.de/20210324).

³⁰ According to the Federal Constitutional Court, Art. 20a German Basic Law is justiciable, but does not provide for rights of the individual on which grounds a constitutional complaint can be based (Beschluss des Ersten Senats vom 24. März 2021, marginal no. 112 (accessible under www.bverfg.de/20210324)).

³¹ Beschluss des Ersten Senats vom 24. März 2021, marginal no. 189f. (accessible under www.bverfg.de/20210324).

³² Beschluss des Ersten Senats vom 24. März 2021, marginal no. 117 (accessible under www.bverfg.de/20210324).

³³ Beschluss des Ersten Senats vom 24. März 2021, marginal no. 117, 142 (accessible under www.bverfg.de/20210324).

³⁴ Beschluss des Ersten Senats vom 24. März 2021, marginal no. 145, 147 (accessible under www.bverfg.de/20210324).

³⁵ Beschluss des Ersten Senats vom 24. März 2021, marginal no. 152 [mit weiteren Nachweisen] (accessible under www.bverfg.de/20210324).

• RIGHT TO WORK AND EDUCATION

As such, both the right to work and education are not explicitly mentioned in the German Basic Law. Interestingly, the right to work is stipulated in a few *Länder* constitutions (federal states).³⁶ This remains, however, without consequences: the law relating to economic matters as well as the labour law are matters under concurrent legislative powers³⁷ and the federal State has made use of its powers extensively already.³⁸ Hence, the right to work enshrined in *Länder* constitutions are programmatic only and non-justiciable.³⁹ At federal level, Art. 12(1) German Basic Law comprises the freedom to choose and the freedom to practise a profession.⁴⁰ This freedom, by contrast, does not stipulate any state obligation to guarantee every single citizen a place of work.⁴¹ In addition, the individual is also not protected against the loss of his or her place of work.⁴² Based on the obligation to adhere to the budget discipline⁴³ read in conjunction with Art. 12(1) German Basic Law and the social state principle, however, some say that the State is obliged to generate the highest employment level possible.⁴⁴

The right to education, on the other hand, has been developed out of both Art. 12(1)⁴⁵ and Art. 1(1) of the German Basic Law protecting human dignity.⁴⁶ Despite the State's *de facto* inability to guarantee education for everybody, Art. 12(1) German Basic Law read in conjunction with the principle of equality laid down in Art. 3(1) German Basic Law stipulates a right of equal access to university education. Provided that the number of places to study is below the number of applicants, the social state principle laid down in Art. 20(1) German Basic Law obliges the legislator not necessarily to generate more places to study, but to formulate requirements, which do not exclude applicants permanently. Initially, this led to centrally organised allocation of places to study for very popular courses of studies.⁴⁷ Later, another decision by the Federal Constitutional Court directed that the main criterion for the admission to the course of studies shall be eligibility evidenced by the final grade

³⁶ See *Länder* constitutions of Bayern (Art. 66(2)), Berlin (Art. 18(1)) Bremen (Art. 8(1)), Hessen (Art. 28(2)), Nordrhein-Westfalen (Art. 24(1)) and Saarland (Art. 45(2)).

³⁷ See Art. 74(1) Nr. 11, 12 Basic German Law.

³⁸ Peter Badura, *Staatsrecht – Systematische Erläuterung des Grundgesetzes*, 2012, p. 98.

³⁹ Wolfgang Däubler, *Der Schutz der sozialen Grundrechte in der Rechtsordnung Deutschlands*, in: Julia Iliopoulos-Strangas, *Soziale Grundrechte in Europa nach Lissabon*, 2010, pp. 128f.

⁴⁰ Bodo Pieroth and Bernhard Schlink, *Grundrechte – Staatsrecht II*, 2008, § 21 II 1, Rn. 806.

⁴¹ BVerfGE 84, 133-160, marginal no. 48 (accessible under www.bverfg.de/19910424).

⁴² BVerfGE 84, 133-160, marginal no. 60 (accessible under www.bverfg.de/19910424).

⁴³ See Art. 109(2) German Basic Law.

⁴⁴ Wolfgang Däubler, *Der Schutz der sozialen Grundrechte in der Rechtsordnung Deutschlands*, in: Julia Iliopoulos-Strangas, *Soziale Grundrechte in Europa nach Lissabon*, 2010, p. 128.

⁴⁵ Bodo Pieroth and Bernhard Schlink, *Grundrechte – Staatsrecht II*, 2008, § 21 II 1, Rn. 819.

⁴⁶ Wissenschaftliche Dienste des Deutschen Bundestags, *Ausgewählte soziale Grundrechte in Deutschland, Frankreich, Spanien, Finnland und der Slowakei – Einklagbarkeit der Rechte auf soziale Sicherung, Bildung und Wohnung*, 2014, p. 7 (accessible under www.bundestag.de/WD-6-064-14).

⁴⁷ BVerfGE 33, 303 (accessible under www.hrk.de/bverfg_nc-urteil_18071972).

at school, educational background and work experience, or the score achieved in a selection procedure run by the university in question.⁴⁸

• RIGHT TO HOUSING

The German Basic Law does not provide for a right to housing. Art. 13 German Basic Law stipulates the inviolability of the home, protecting the individual against state action infringing the right established, not the individual's right to have a home at all.⁴⁹ In exceptional circumstances, the State may be obliged to commit a homeless person to an accommodation when the person is in danger of serious damage to health,⁵⁰ which again can be reasoned by referring to the State's obligation to protect and promote the exercise of the right to life and physical integrity.⁵¹

Contrary to the federal level, some *Länder* constitutions include a right to housing.⁵² These rights, however, do not lay down justiciable rights of individuals.⁵³ It should be noted that, at the moment, there is an intensive debate in Germany regarding affordable rent for housing. Various measures have been taken to increase the development of new and affordable housing. Putting a cap on rents is also under discussion.

3. SOCIAL RIGHTS AT LEVEL OF NATIONAL LAWS BELOW THE CONSTITUTION

The social rights outlined above are complemented by several national laws, such as the German Social Act, which details, *inter alia*, the right of a minimum subsistence level.⁵⁴ Furthermore, German labour law and the law of tenancy contain many regulations protecting the employee⁵⁵ and the tenant,⁵⁶ respectively. In more general terms, the 2006 *General Act on Equal Treatment* prohibits any forms of discrimination on the grounds of race or ethnic origin, gender, religion or belief, disability, age, or sexual orientation.⁵⁷

⁴⁸ BverfGE 147, 253 (accessible under www.bverfg.de/20171219).

⁴⁹ Wissenschaftliche Dienste des Deutschen Bundestags, *Ausgewählte soziale Grundrechte in Deutschland, Frankreich, Spanien, Finnland und der Slowakei – Einklagbarkeit der Rechte auf soziale Sicherung, Bildung und Wohnung*, 2014, p. 8 (accessible under www.bundestag.de/WD-6-064-14).

⁵⁰ *Ibid.*, p. 9.

⁵¹ See above and Art. 2(2) German Basic Law.

⁵² See *Länder* constitutions in Bayern (Art. 106(1)), Berlin (Art. 28(1)), Bremen (Art. 14(1)) and Sachsen (Art. 7(1)).

⁵³ Wissenschaftliche Dienste des Deutschen Bundestags, *Recht auf Wohnen – Ausgestaltung und Rechtswirkung in den Verfassungen der Bundesländer und der EU-Mitgliedstaaten*, 2019, p. 3 (accessible under www.bundestag.de/WD-3-120-19).

⁵⁴ See especially the 2005 *Sozialgesetzbuch II* (§ 20).

⁵⁵ See, for example, the 1969 Employment Protection Act, the 2014 Minimum Wage Act and the 1963 Paid Annual Leave Act.

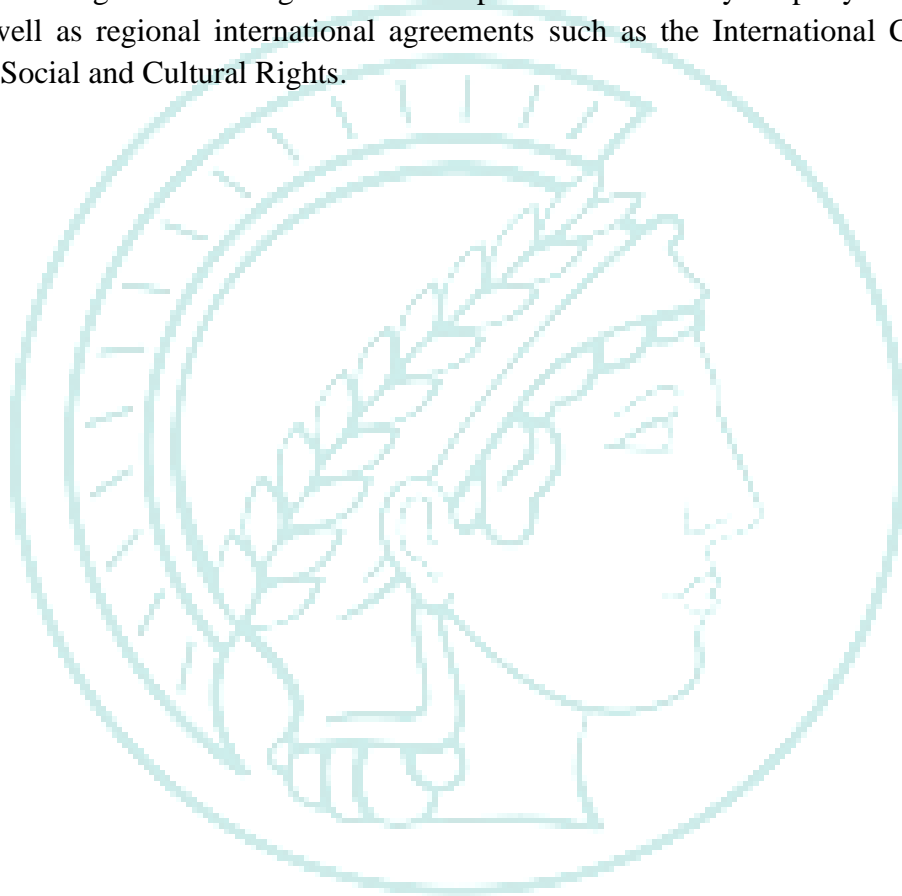
⁵⁶ See, for example, rent control acts at *Länder* level.

⁵⁷ See Section 1 of the 2006 General Act on Equal Treatment.

Additionally, Germany has ratified and adopted the ICESCR as well as the European Social Charter, which are both part of the domestic law and thus applicable at the level of national laws below the Constitution.⁵⁸

4. CONCLUSION

It can be concluded that the German Basic Law does not list, as other recent constitutions do, a catalogue of extensive social rights. However, such rights have been developed by national courts, mainly, the Federal Constitutional Court, on the basis on existing provisions and principles of the Basic Law, such as the right to life and physical integrity, the idea of human dignity and the social state principle recognized in Article 20 of the Basic Law. Germany's social state has been developed and is in a permanent process of development by national federal laws that regulate social rights in detail. Apart of that Germany is a party to international global as well as regional international agreements such as the International Covenant on Economic, Social and Cultural Rights.



⁵⁸ Wissenschaftliche Dienste des Deutschen Bundestags, *Ausgewählte soziale Grundrechte in Deutschland, Frankreich, Spanien, Finnland und der Slowakei – Einklagbarkeit der Rechte auf soziale Sicherung, Bildung und Wohnung*, 2014, p. 4 (accessible under www.bundestag.de/WD-6-064-14).

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