

THE DUALISM OF RULE OF LAW AND WELFARE STATE (SOZIAL STAAT) IN THE CONSTITUTIONAL LAW OF THE FEDERAL REPUBLIC OF GERMANY

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GENERAL CONSIDERATIONS

Today the tensional relation between Rule of Law and Welfare State (Sozialstaat) is among the outstanding features of the German Federal Constitution of the 24th May 1949. A reflection of this state of tension is to be found in almost all the essential political and legal problems, combined with the Constitution of the Federal Republic of Germany.

The dualism of Welfare State (Sozialstaat) and Rule of Law, however, has not been peculiar to the German Federal Constitution from its origin, but only developed during the validity of this Constitution. This process is of general interest for several reasons. Therefore it may be briefly described first of all.

When the Parliamentary Council was constituted in the fall of 1948 by the Parliaments of the States of the three western occupation zones and directed to make a draft of a Constitution for the Federal Republic of Germany, there was no difference of opinion worth mentioning among the members of this committee regarding that in framing a Constitution the real aim ought to be the guarantee of individual liberty. Therefore they returned to the models of framing a Constitution in accordance with the Rule of Law. A catalogue of fundamental legal rights, which had been enlarged due to the experience gained in the National Socialist

period, was placed at the beginning of the Constitution. The separation of powers was secured as an invariable legal principle and the independence of the administration of justice, the jurisdiction of which is far extended, was also guaranteed. It was possible to give way to the intention of obtaining the greatest possible liberty and legal security for the individual, the more so, as at this time the occupation powers were still responsible for the external and internal security of the developing Federal Republic and as the Parliamentary Council therewith seemed to be released from the care of forming a State which will also be able to stand harder tests.

It is true that the unprecedented distressed conditions still subsisting at that time (destruction of numerous cities and of a considerable part of the industry through war and dismounting, misery of the more than ten million expellees from Central and Eastern Germany who had not yet been incorporated) left no doubt about the amount of social tasks which could hardly be mastered and which awaited the developing State and so it is easy to understand that the Parliamentary Council also considered to include social guarantees in the Constitution. If this was renounced, so it was done because they strictly abode by incorporating into the Constitution only a law which is immediately valid and executable and not mere programmatic statements, this being a dominating principle in framing a Constitution, which also found its expression in the wording of the Constitution (art. 1 1 (3)). But social guarantees cannot be codified as immediately executable rules within the scope of a Rule of Law Constitution. So the social function of the Federal Republic was only mentioned in the Constitution in so far as the Federal Republic was described as "social Federal State" (art. 20) and "social Rule of Law" (art. 28).

Today this self-qualification is claimed to be the constitutional basis for the interpretation of the Federal Constitution in the sense of the Welfare State. The inferences which are drawn from it, have far-reaching effects which change the whole structure of the Constitution. The so-called Welfare State (Sozialstaats-)

articles have only been recognized in this legal meaning several years after the effective date of the Federal Constitution. The connection, in which this came to pass, is remarkable. The Federal Constitution contains in art. (14) GG a guarantee of property, which excludes any deprivation of property without compensation. This provision protects private property the more effectively, as property is not to be understood here in the narrower sense of Private Law as real or personal right, but as also including choses in action and generally on principle all assets. This interpretation, which was already valid under the Constitution of the German Reich of 1919, was taken over by the Federal Constitution without doubt and the Courts interpret art. (14) in conformable jurisdiction in this broad sense. Art. (14) contains a comprehensive guarantee of property and therewith the constitutional guarantee of the economic status quo, as far as it is determined by the present distribution of properties among those concerned. It is obvious that such a guarantee is most important to the possibilities and limits of a social legislation and administration.

So the opinion was born that the guarantee of private property would defeat the fulfilment of any imperative social tasks, if it would not be diminished to a certain degree and reduced to a "socially bound property." It was believed that the juridical possibility, or even the necessity of such a restriction of the guarantee of property could be inferred from the "Welfare State clause" (Sozialstaatsklausel) of art. (20) and (28). This opinion, which revealed the "Welfare State clause" of the Federal Constitution, was pronounced for the first time two years after the effective date of the Federal Constitution and it was combined with the demand "to deepen and to enlarge the constitutional decision for the Welfare State (Sozialstaat) in accordance with the formation of social order"¹.

This declaration in favor of the "constitutional decision for the Welfare State" (Sozialstaat) had far-reaching and surprising results. In the aim towards protection of property in which it was

1) Ipsen at the beginning of his lecture "Expropriation and Socialization" addressed to the Association of German Teachers in the Field of Constitutional Law at the convention in October 1951; compare the publications of this association, number 10, 1952, p. 74 etc.)

pronounced, it remained without consequences: a diminishment of the guarantee of property was not achieved. If the German courts acknowledge certain encroachments on private property, which have a minor effect, without compensation referring to property "being socially bound", so this corresponds with the traditional judicature and is not necessarily connected with the so-called Welfare State clause (Sozialstaatsklausel). On the other hand, the Welfare State clause gained considerable importance in other fields, above all within the sphere of Labor Law. This will have to be dealt with later on.

It is however another circumstance which is surprising and informative about the forces which determine the development of the Constitution. In 1951 when the "constitutional decision for the Welfare State" (Sozialstaat) was enounced for the first time, the overcoming of the distressed conditions caused by war and after-war had only just been started. At this time this interpretation could still refer to urgent social needs in justification of itself. In the meantime a change for the better has been possible from year to year and although the after-math of war can by no means be considered as having been overcome, incomparably much more has been done for improving social conditions than even optimistic judges thought possible in 1951. In view of this development a superficial looker-on would think it likely that the demand for a realization of the Welfare State clause (Sozialstaatsklausel) would have lost in emphasis according as the social conditions have been improved.

But that is not the case. On the contrary, it can be ascertained that, if the declaration in favor of the Welfare State (Sozialstaat) did not just increase in juridical persuasive power with receding social emergencies, it has constantly gained importance with regard to constitutional politics. From this fact it is evident that the Welfare State tendencies in law and politics have not their causa efficiens in the concrete real circumstances but in political consciousness. In these tendencies the desires, expectations and demands are combined which the modern man advances to the State, ay any rate in the Federal Republic of Germany.

These expectations and demands are by no means only directed towards freedom, as in the 19th century. They refer with at least the same intensity to social security and reaching beyond it to social rise. We do not go wrong in stating that the urge to rise is much greater than all the other tendencies being effective in the society of the Federal Republic. The present rising society knows that it is in so far closely connected with the State as it assigns to it an essential task in realizing this process of a constant rise of very great masses of the population. Today the achievement of this task is welfare politics, which is no longer justified by referring (Sozialpolitik) to effective social emergencies, but with reference to the realization of raises in wages and rising facilities. So the modern State is cramped with the modern rising society by means of the "Welfare State clause" (Sozialstaatsklausel).

These are only allusions which shall by no means dispose of a comprehensive and complex subject in passing by, but they shall merely demonstrate, that the "Welfare State clause" (Sozialstaatsklausel) of art. (20) and (28) is not only a problem of legal logic in interpreting the Constitution, but that as a matter of fact this clause has become the place where powerful political intensions make an inroad into the sphere of constitutional law.

But this does not release the lawyer from the duty to take as seriously as possible the problematic of the relation between Welfare State (Sozialstaat) and Rule of Law, which is included in the Welfare State clause (Sozialstaatsklausel). For it will become evident what is at stake with it. Only the power of the expectations and demands advanced to the State, according to a change in state consciousness, can explain that the qualification of the Federal Republic — given in the wording of the Constitution — as a social Rule of Law was interpreted as a "constitutional decision(!) in favor of the Welfare State (Sozialstaat) in the sense of an imperative rule. The genetic history of these constitutional articles does not give any clue to this. Added to this, the use of those formulas correspond with the style of the Constitutions after 1945. So the Constitution of Rhineland-Palatinate of the 18th May 1947 describes the State Rhineland-Palatinate in art. (74) as a

"democratic and social member-state of Germany". The Bavarian Constitution of December 2nd, 1946, even goes further in art. (3): "Bavaria is a Rule of Law, a cultural State and Welfare State (Sozialstaat) It serves the common weal." In view of the accumulation of the predicates in this article, it should be difficult to adjudge the character of an imperative rule to it. Which should for instance be the binding content ascribed to the term cultural State?

It is true that since Positivism has been overcome the "principles" "basic thoughts", "leading ideas" and "general principles" of law have been introduced into legal science and legal practice and here and there they have assumed the function of practicable legal terms. But it will scarcely be possible to look upon the attempts to reify the Welfare State (Sozialstaat) to a practicable legal conception as successful. The equalization of the Welfare State (Sozialstaat) with the State of Justice does not help on the interpreter of the Constitution. The characterization as a refusal to the Totalitarian State on the one hand and the Liberal State on the other hand is also only a general description which is of no consequence in the concrete and which besides is not correct in the demarcation from the Totalitarian State, which can very well be a Welfare State.

By the way, this difficulty of reifying social formulations to legal terms is not only one of German law. French jurisprudence faces the same problem in the interpretation of the preamble of the Constitution of October 28th, 1946. The comments of such an eminent scholar as Ripert (1) on the attempts of prematurely dogmatizing such social formulations indicates that French jurisprudence also fully realizes the problematic and its significance.

The fact that it has not been possible thus far to reify the Welfare State clause (Sozialstaatsklausel) of art. (20) and (28) in such a way that it is practicable for the execution of the Constitution has an obvious reason. It is given with the location which the Constitution assigns to the interpreter according to its whole structure. This location is the system of the Rule of Law, the com-

1) *Le déclin du Droit*, 1949, p. 22 etc.

mitments — less material than formal — to which the activities of the Rule of Law State are subjected. It is of course possible to imagine Constitutions for which an adjective apostrophizing will be absolutely sufficient for justifying certain functions. Such a State can give most far-reaching consequences to the constitutional qualification as Welfare State (*sozialer Staat*), for which no more is necessary than the legal authority to reify this formulation — which is still vague for the time being — within the very scope of the administrative execution of the Constitution. That is of course also a performance of the Constitution, but the contrary to an execution of the Constitution in accordance with the Rule of Law. For such an execution implies that the Constitution already reifies the commitment with regard to its contents which is only realized by executing the Constitution. It is a decisive feature of the execution of the Constitution in accordance with the Rule of Law that it is dependent on the Constitution with regard to contents and that it does not contain any material decisions, which had not already been made in the Constitution itself and so in the concrete and intelligible in itself. But such a concreteness cannot be achieved for social formulations in Rule of Law Constitutions. That has reasons which refer to the interior structural ambiguity of the Welfare State (*Sozialstaat*) and the Rule of Law.

In order to understand this structural contrast it must be recalled what liberty means, the guarantee of which is the real concern of the Rule of Law. Primarily it is of course the liberty of each individual. But a State which grants liberty to each of its residents, provides at the same time a certain social condition. Max Weber has clearly set forth in his economic history that the development of liberal market economy directly corresponds with the realization of the fundamental rights of the citizens, since the fundamental rights contain at the same time those freedoms on which any market economy is based: freedom of capital, work and market. Thus, an autonomous society moving and developing under its own laws necessarily coordinates with the Rule of Law. The intention of a liberal Rule of Law system based on the well-known conceptions of harmony comprises both inseparably: individual liberty and the super-individual autonomous society.

The Welfare State (sozialstaatlichen) interpretations of the Rule of Law Constitution have explicitly and implicitly the aim to maintain individual liberty, but they also aim to replace the autonomous society by a society which has been formed by the State according to social points of view and welfare purposes. They can indeed point out that this aim is imperative on the modern State. Further it is indisputable that the autonomous society belongs to the past, that the social formation is one of the main tasks of the modern Rule of Law. Nevertheless such interpretations must be denied. They inevitably result in dissolving the Rule of Law from within. And that for the following reasons:

The juridical feature of the Rule of Law is the rigorous styling of its forms. Neither is legislation a positivation of any content desired, nor is administration an action at choice, nor is jurisdiction any kind whatever of judging disputes. All functions of the State ingeniously concerted in the separation and balance of the powers are legally formed and characteristically fixed.

It may be said that the Rule of Law has been constructed with certain means of legal technique with which it fulfils its function of securing liberty. These means of legal technique are dependent on the assumptions, given with the guarantee of individual liberty. The main condition is the autonomy of the society. The whole Rule of Law Constitution is with regard to legal structure designed with the intention of forming a State which on principle does not interfere with social life by directing its course. So the law of the Rule of Law system in the sense of the abstract general rule is most unsuitable as an instrument for guiding social courses — that today the law is and must be used for this purpose, is another question and besides the cause of a deformation of the Rule of Law, for the detailed demonstration of which this is not the suitable place.

The fundamental rights represent bounds to the Supreme Power which are not only a safeguard for the individual with regard to his liberty, but which also will inevitably impede the guiding of social courses, if they will not make it impossible, and which will even exclude certain ways of guiding. Fundamental rights are

necessarily a legal confirmation of the social status quo at the time in question. This applies above all to the guarantee of private property, which withdraws the distribution of property existing at the time being from the transforming grip of the State.

To this corresponds also the logical structure of the constitutional rules of the Rule of Law system which refer to social and individual life. Rules of this kind — and it is specially a matter of fundamental rights — on principle can only restrict the functions of the State in acknowledging the specific state of the social conditions. They are on principle of an eliminating nature, in excluding social spheres from the field of action of the State. A fundamental law can only grant something exceptionally, that is if the subject to be granted can be defined exactly. This is the case with the legal judge, which has been stated with sufficient clearness in the judicature act. But a grant such as the following: "An adequate lodging is guaranteed to all the citizens" would not be a possible contents of a rule of the Rule of Law State, on account of its being indefinite and because it could not be executed. If it would be expressed like this: "The State has the task of taking care that all the citizens have an adequate lodging" so this would be a programmatic statement without obligation, but once more no rule of the Rule of Law State. A typical social guarantee, which is a good demonstration of the limits of the constitutional standardization of the Rule of Law system, is the title to employment. In the Hessian Constitution of December 11th, 1946, it is guaranteed in art. (28) (2) with the phrase: "Everybody is entitled to work according to his qualifications and is morally obliged to work without prejudice to his personal liberty." In the second part this phrase only contains the proclamation of a moral principle and so far it has no tangible legal content. In the first part, it turns out to be inexecutable. For to whom shall the individual assert his title to employment? Certainly not to the State, which to be sure is also an employer to a certain degree, by engaging officials, employees and workmen, but it cannot be the meaning of this provision to oblige the State to give work to everybody, by taking him into service, which would not be possible at all. And it would not either be allowed to interpret art. (28) (2) to the effect that this title to work would have

to be met with by third parties, e.g. by manufacturers with regard to industrial jobs, by heads of the household with regard to domestic jobs. It is true that the title to work has a determinable addressee, viz. everybody, but there is not any possibility of realizing this title and so the whole provision proves not to be executable. That certain legal effects of this provision are recognized in the sense of a restriction of the termination of valid contracts of employment is another question. This does not alter the fact that the rule, as it is to be found in the Constitution, is inexecutable.

From this it becomes evident why the Constitution of the Rule of Law has to disapprove certain social elements for structural reasons. Constitutional rules in a Rule of Law system are only possible with regard to specific facts. This fact may also be a social achievement — but it has to be realized already, and shall not only be aimed at. So a Constitution can guarantee the tariff treaty as the legal form of a collective agreement about the working conditions. It herewith guarantees a legal institution which it even could establish by means of this guarantee. In the same way the Constitution can e.g. directly fulfil a social demand by establishing freedom from school fees for all public schools, as it has been done in the Hessian Constitution of December 11th, 1956, in art. (59). For this provision is self-contained and can be executed straight away. With its coming into force it establishes a new legal situation immediately.

But it is no question of such a guarantee of welfare (sozialer) institutions, if it is demanded that the Rule of Law should be understood and interpreted simultaneously as Welfare State (Sozialstaat). On the contrary, this demand has the intention to release the Rule of Law Constitution from the characterized commitment to the social status quo and to put it at the service of the social aspirations which command the modern rising society. It is believed that the justification of this new interpretation can be inferred from the declaration of the Federal Republic as social Rule of Law.

Quite apart from the ambiguity of this declaration this demand can not be fulfilled for the indicated reasons. Its realization would necessarily result in the destruction of the Rule of Law elements

of the Constitution. For here it is not a question of modifications which cannot be avoided by any Constitution during its validity. It is rather a matter of softening and denaturing that which is the juridical essence of the Rule of Law: its forms and institutions which determine its structure. The modern world would have every reason for being sensitive in this respect, for the chance and mission of the Rule of Law in the modern world properly speaking depends on the legal technique which places the Rule of Law outside of the contrasts in the outlook on life and makes it to a certain degree independent of human qualities, especially of virtue. There is no argument in accordance with Rule of Law which could justify such an internal deformation of the Rule of Law. The reference to the declaration of the Federal Republic as a social Rule of Law — quite apart from the fact that it overrates this declaration — is without doubt not such an argument.

Finally — apart from all the methodological and logical objections — the demand for giving a new interpretation to the Rule of Law in the sense of a Welfare State (*sozialstaatlichem Sinne*) is not either imperative because the Federal Republic was in a position to do to a great extent justice to the necessities of a Welfare State (*Sozialstaat*) (which shall by no means be denied) in another way without prejudice to the Rule of Law elements of the Constitution. Correct with regard to the Rule of Law the demarcation of the tax sovereignty of the State from the constitutional protection of property makes it possible to seize a large portion of the gross national product by way of taxation and to distribute it under social points of view. Almost one half of the revenue which the Federal Republic derives from taxation serves this shifting of purchasing power in favor of the socially needy classes of the population. If the Federal Republic of Germany is by rights considered a Welfare State (*Sozialstaat*), then above all on account of the large social achievements which have been made in this way. As a taxation State the Rule of Law can be a Welfare State (*Sozialstaat*), i.e. a State of distribution, and the Federal Republic of Germany sets a striking example of the intensity a Welfare State system

(Sozialstaatlichkeit) can gain which has been achieved in this way.

II

THE PRACTICE OF GERMAN LAW

Nothing is more characteristic of the intensity of the impulses of the Welfare State (sozialstaatlichen) than the fact that the fundamental objections to the dissolution of the Rule of Law in accordance with the Welfare State (sozialstaatliche), as they have been indicated above, are of no importance worth mentioning for practical German jurisdiction. Without having been refuted, they are being ignored more or less. Obviously new ideas derived from the Welfare State system are irresistibly getting control of the interpretation of the Constitution, transforming the constitutional institutions. This process, which practically drives back the liberal-independence elements of the Constitution and has them replaced by elements of a socially motivated commitment, is in full swing today and merits general attention.

The Federal Labor Court may be declared to be setting the pace for this internal transformation. Of course this is not a matter of chance. For the Labor Court is particularly a product of the social movements of this century. Several characteristic decisions of the Federal Labor Court may illustrate the turn to an interpretation of the Federal Constitution in the sense of the Welfare State (sozialstaatlichen).

The following facts formed the basis of the judgment of July 14th, 1954, (vol. 1, p. 51). The plaintiff, a female worker in the stocking-factory of the defendant, had been refused the paid-for household day, legally granted to the female employees. The court had to decide whether the claim to the monthly paid-for household day of the female employees is still compatible with constitutional sex-equality (art. 3 (2) GG), as the male employees are not entitled to a paid-for household day. This induces the Court to make the following statements: "After all, the provisions of art. 3 (2), (3) GG shall not be considered separately. So there

is in addition to the principle of equality the irrevocable principle of the Welfare State system (Sozialstaatlichkeit) (art. 20, 79 (3), 28 GG) as a positive constitutional rule. The Federal Republic of Germany is a social Federal State and Rule of Law. That is a normative declaration in favor of the Welfare State (Sozialstaat), which is of decisive importance in the interpretation of the Federal Constitution and therewith also of the principle of equality in art. 3 (2) and (3) GG, as well as of other laws. The principle of equality and the principle of the Welfare State system (Sozialstaatlichkeit) have to be used together in the examination as to whether the law relating to the household day is unconstitutional or constitutional. They stand side by side in co-ordination, perhaps the welfare idea (Sozialgedanke) even has priority."

These statements are most characteristic of the argumentation in the sense of the Welfare State (sozialstaatlich). It is remarkable how the principle of equality and the principle of the Welfare State system (Sozialstaatlichkeit) are here interconnected, as if they were two principles of the same evidence and practicability. But this is absolutely not the case. What the Constitution will have understood by the sex-equality established in art. 3 (2) and (3), can be ascertained with the methods used in interpreting the Constitution. This is by no means the case with regard to the principle of Welfare State (Sozialstaatsprinzip), for the reification of which, with regard to the interpretation of the Constitution, nothing but the adjectif "social" is at command. In these circumstances it is no wonder that the most heterogeneous elements have been gathered from this word. The word 'social' is variegated, ambiguous and inaccurate to such a degree that here any logical deduction must be a failure. Therefore all the attempts at reifying the term 'social Rule of Law' or 'social Federal State', are not interpretations of the Constitution, but apocryphal formulations, for their being enveloped in the attire of interpretation. Here we also have such a formulation and not a logical deduction. That a Court can take the risk of such a re-formulation and that such formulations are practically successful, has several reasons. First of all, the special authority is to be mentioned with which the Federal Constitution has invested the judiciary power. The Federal Republic of Germany

is essentially also a State of justice. Added to this, there is the social trend which sanctions social formulations fitting in with it, where it does not matter, if the person who proclaims this formulation, is authorized to do so.

The importance of the reference to the "Welfare State clause" (Sozialstaatsklausel) is the greater, as this clause — the Court calls attention to it — is included in the provisions of the Federal Constitution which according to art. 79 GG are not allowed to be altered by way of the legislation which changes the Constitution. The result of this fact is that — if the statements of the Court on the term of social Rule of Law were correct — not even a change of the Constitution could deprive this jurisdiction of the normative basis. How narrow and ambiguous this normative basis is, can be seen from the decision of a superior Welfare Court (Sozialgericht), which declares that a pension, which is acknowledged to have been awarded contrary to law, cannot be withdrawn with the motivation that after the pension had been paid for twenty years, though contrary to law, it would violate the principle of the Welfare State system (Sozialstaatlichkeit) to withdraw it even now.

The result of the penetration of the principle of Welfare State (Sozialstaatsprinzip) into the interpretation of the Federal Constitution is, as has already been mentioned before an internal transformation of the Constitution, which is performed in the displacement of the liberal element and the introduction of new, viz. social commitments. The setting of this internal transformation are the fundamental rights.

The followers of the interpretation of the Federal Constitution in the sense of the Welfare State (sozialstaatlichen) stand up for a new interpretation of the fundamental rights which is quite different from the traditional interpretation. The fundamental rights have been established in order to restrain the Supreme Power with regard to the individual and they have not been understood differently in Germany up to the present time. From the liability of the Welfare State idea (Sozialstaatsgedanke), however, the inference has been drawn recently, that the guarantees of the fundamental rights would not only be effective in the relation of the

individual to the State, but in any case also with regard to third parties, that is to say that the fundamental rights — such as the right of equality or the right of freedom of speech — could not only be violated by measures of the State, but also by the procedure of individuals in accordance with legal transactions. Several Superior Federal Courts have in the meantime adopted this interpretation.

This turn in the interpretation of fundamental right is the cause for systematic considerations. It will not be possible to decide against those who contend that the fundamental rights are no longer in accordance with modern reality and that, in the altered social reality, they do therefore no longer fully reach their aim, the guarantee of the individual liberty. This assertion may be set forth exactly to the effect that, when the fundamental rights were established, the individual had only to reckon with an endangerment of his liberty by the State, whereas modern society, being organized in authoritative formations, is in a position to threaten and to suppress individual liberty to at least the same degree, because the collective social organizations have the power to possibly defeat the individual in the conditions of his professional or his other existence without his finding any protection against this in the fundamental rights — at any rate if they are interpreted in their traditional meaning. This is of course true and this knowledge is not new. With regard to this item the Marxist criticism of the liberal Rule of Law has been right in the end, also in non-Marxistic judgement. But this knowledge would at the most give a plausible motivation, but not a justification (in the sense of a substantiation in accordance with legal logic) for interpreting the protection of the fundamental law in a different way than has been done so far.

The declaration in favor of the Welfare State (Sozialstaat) is now claimed as this substantiation from the point of view of legal logic. So the respective fundamental decision of the Federal Labor Court states: (vol. 1, p. 193) "In a State, the Constitution of which forbids the public authority, — as it is the case in the

German Federal Republic — particularly also the legislators of the Federation and the States, to hurt the dignity of man, to discriminate race, religion, origin etc and to restrict the freedom of speech with regard to religion, politics or social questions which is practiced within the scope of the general laws, fundamental valuations of the dignity of man, the equality of the citizens and freedom of thought have been included in this structure of order which shall not either be openly contradicted with disdain of the liberally democratic Rule of Law by the works regulations, or by contracts and measures of those concerned. Consequently, such fundamental rights do not only concern the relation of the individual citizen to the State, but also the interrelations between the citizens of this State in their dependence on the same law. The normative declaration of the Federal Constitution in favor of the Welfare State (sozialen Staat) (art. 20, 28 GG) which is of fundamental importance to the interpretation of the Federal Constitution and of other laws (.....) also indicates that the provisions of the Federal Constitution, which are indispensable for the interrelations between those depending on the same law in a liberal and social community are immediately effective in accordance with Private Law."

These decisive phrases have been given in the wording for their being eminently characteristic of the internal transformation of the Constitution which takes place in the sense of the "Welfare State clause" (Sozialstaatsklausel). First of all, it is remarkable that the fundamental rights are now newly interpreted as valuations. In doing so, the Court follows a widely-held opinion, which will not only see values in the fundamental rights, but simply a system of values.

This opinion is not new, to be sure. It dates back to Rudolf Smend's book: "Constitution and Constitutional Law", which wanted that the part of the Weimar Constitution of the Reich of 1919 (art. 109-165), relating to fundamental law, is understood to be the attempt at the positivation of a system of values. But the method of questioning and proceeding, which led Smend to this theory, must not escape notice. At that time it was a question of special difficulties of interpretation, caused by the second part of

the Weimar Constitution of the Reich, for in this part of the Constitution of the Reich real indubitable fundamental rights were mixed up with all sorts of social formulations and it was left in suspense whether they represented practicable law or mere programmatic statements. In these circumstances sceptical voices rose, denying point-blank that this part of the Constitution formed a unity with any meaning. To this, Smend's objection was that the second part of the Constitution of the Reich which is "so annoyingly careless with regard to technique" should not merely be appreciated from the technical juridical point of view, as to which rules can be executed and which of them are nothing but programmatic statements. On the contrary, this part of the Constitution would get a universal meaning, if it is interpreted to the effect that the framer of the Constitution intended to create a system of the values of community life which are recognized by the Constitution.

Smend's interpretation thus endeavors to make a special feature of the Weimar Constitution of the Reich intelligible, which had deliberately been avoided in the wording of the Bonn Federal Constitution. For just with regard to this point the Parliamentary Council did not follow the Weimar model. It has not included mere programmatic statements in the draft of the Constitution and in art. 1 (3) is laid down expressly that: "The following fundamental laws oblige legislation, executive and jurisdiction as directly effective law."

So there is neither a cause for nor a possibility of resuming Smend's statements, which are determined by a quite different problematic, in interpreting the fundamental laws. To consider the catalogue of the fundamental laws of the Bonn Federal Constitution as the positivization of a system of values, is out of the question from the very beginning, for a political system of values, containing only individualistic values and not values of national community, would be absurd.

Dignity of man, equality, freedom of faith and of speech etc may well be described as values which the Constitution recognizes and protects in the fundamental laws. But this protection is restricted to the fact that the Constitution places these values before the interests of the State.

But the interpretation of the fundamental rights inspired from the "Welfare State clause" (Sozialstaatsklausel) uses the term 'values' in order to be able to interpret it anew inconspicuously as community values and to add the inference that these values should therefore be binding on everybody. In this way the fundamental rights are commuted from rules, which shall grant a title, into legal commitments for everybody. Then a firm, which deprives a newspaper of advertisements for any reasons whatever, (these are considerations of a recent legal decision) may possibly violate the fundamental right of liberty of the press, because it endangers the newspaper's foundations of existence. The consequences of this interpretation of fundamental rights are not to be foreseen, quite apart from the fact that they do not find the least clue in the genetic history of the Constitution.

In truth this interpretation of the fundamental rights is by no means motivated, considered from the logical point of view it is obtained surreptitiously. This statement is by no means intended to be moralizing. But it is necessary in this severity, so that the general consequence of this internal transformation of the valid constitutional law can be recognized. This consequence is not reduced by the fact that in almost all instances in which reference has been made to the "Welfare State clause" (Sozialstaatsklausel) and the common liability of the fundamental rights the intended result could also have been obtained without this reference.

The assumption that the fundamental rights are not only binding on the State, but also with regard to the interrelation between those who are subject to the same law does not mean at all only an extension of their efficacy, but a complete change of their normative content. So they are changed from guarantees of right and liberty in favor of the individual persons dependent on the same law, into binding rules, which restrict those dependent on the same law in their legally relevant actions. The Federal Court has already decided, that violation of personal dignity and interference with the free development of the person (fundamental rights according to art. (1) and (2) GG by a third party is violation of an absolute right and therewith tort liable for damages. (NJW 1957, p. 1146).

Certainly there is no objection to granting the individual such a protection in private administration of justice. But the fundamental rights were never intended as such protective rules and if they are altered in this way, liberty and legal guarantee are changed into duty and commitment. In this way the properly liberal element of the Rule of Law Constitution is given a new interpretation as social element. To this, the objection will certainly be raised, that with this change there will not be any reduction in the protection which the fundamental rights grant to the individual with regard to the State. But this is only conditionally correct.

If the interpretation of the fundamental rights is combined with the "Welfare State clause" (Sozialstaatsklausel), this will not be without influence on the definition of the contents of the fundamental rights. The view is already taken that the "Welfare State clause" (Sozialstaatsklausel) places the fundamental rights under the general reservation of the welfare system (des Sozialen). That will mean, that it is illicit to refer to the fundamental rights, if this is in contradiction to the social needs or only to social considerations. To this opinion, however, the objection can be made that, where the Constitution only grants a fundamental right under a social reservation, it will also give expression to this. Such a reservation is contained in the guarantee of private property in the rider: "Property obliges. Its use shall at the same time serve the public welfare." (art. 14 (2) GG). Hence we may infer, that a restrictive reservation is not allowed for the fundamental rights which do not include such a restriction.

But the matter is not so simple as that. At least one essential fundamental right, viz. the fundamental right of free choice of profession, is worded in the Federal Constitution (art. 12) in such an infelicitous way that, being used literally, it would result in an alteration of all the professional regulations, which is neither intended by the framer of the Constitution, nor is it desirable. In order to avoid this consequence, a restrictive interpretation is required. After the Courts had used different arguments in the beginning in order to obtain a restriction of the meaning beyond the mere wording, we may now declare as decisive the interpreta-

tion of the Federal Administrative Court, to the effect that all the fundamental rights have an immanent barrier to such a degree that the protection of the fundamental rights will fail, if it would be detrimental to the orders of human community life which cannot be abandoned.

If it must therefore be acknowledged that a restrictive interpretation of the fundamental rights cannot be avoided, it will be of decisive consequence from which points of view the restrictions are understood and exactly defined. The Federal Administrative Court has acknowledged the restriction within the narrow bounds of the orders of the community which cannot be renounced. An interpretation bound to the "Welfare State clause" (Sozialstaatsklausel) will certainly make the protection according to fundamental rights end before the social achievements and the acknowledged social postulates. There are many indications that the development will take this direction. Then the liberal content of the fundamental rights would be eliminated proportionally to their progress.

In the pointed-out internal development of the Constitution of the Federal Republic the following is fundamentally remarkable. It becomes evident that the strict rules of the legal and constitutional hermeneutics lose their cogency with the rise of the liberal Rule of Law. To the Rule of Law which in the main is designed statically, a method of interpretation of the law is coordinated in analogy, whose likewise essentially static feature has resulted in the high regard for the established rule according to sense and wording, which is to be looked upon as the distinguishing feature of positivist hermeneutics.

In the same measure, in which the State was obliged to interfere with the social courses, to establish social orders by which social anticipations were aroused, which could not be avoided, so that the State was under the necessity of becoming a Welfare State (Sozialstaat) — in the same measure in which this was going on, the Rule of Law method of the precise interpretation of Law and Constitution evidently drew more and more to a close.

This is a process which is in detail quite multifarious and

complex. Not only the standards of the interpreters of Law and Constitution became different, but also the rules themselves and their function. For it is comprehensible and can be logically deduced in every detail that the legal rule changes in structure, if it is no longer only related to a given condition, as in the 19th century, but becomes a means which has the task to bring about an aspired condition. And along with the logical and grammatical structure of the rule the logical procedures of interpretation and application will be changed as well. This is a cogency which can only be indicated here and which for the rest still awaits a systematic investigation.

So the dualism of Welfare State (Sozialstaat) and Rule of Law is a fact which is not confined to constitutional law, but which concerns the modes of thinking and the methods of German jurisdiction as a whole. The Rule of Law of the 19th century has produced the type of the rigid Constitution in the form of privileged law. The rigidity of the Constitution was fortified by the severeness of the principles which apply to the interpretation of the Constitution. Thus the rigidity of the Constitution became a safe guarantee for legal freedom.

Social action is a correction of given circumstances through distribution, the latter being understood in the broadest sense of the word. Therefore a specific dynamic, which becomes effective wherever social action is in question, resides in the social-system. So we also have a social interpretation of the Constitution, which is determined by the dynamic of social action. Such an interpretation of the Constitution will look for its persuasive power less in the consistency of the logical deductions than in the fact that the intended aim is worthy of approval. For this the new interpretation of the Federal Constitution given according to the Welfare State (Sozialstaat) is a unique evidence. If this interpretation has been criticized in these pages and if the absence of logical conclusiveness has been emphasized, so this is a criticism in accordance with the legal facts of the Rule of Law. But it would be narrow-minded to fail to recognize that the Welfare State (Sozialstaat) also has its legal facts, which also include its own hermeneutics as it has been practised in the meantime by several superior Courts in the German

Federal Republic. Perhaps it will not be without consequence to the scientific situation, that thus far authors of Private Law have come forward as spokesmen of the constitutional interpretation in the sense of the Welfare State (Sozialstaat), whereas so far not any renowned teacher of Public Law has embraced this cause. But this is no wonder in view of the immense consequence, which is not to be foreseen, of the turn in the Constitutional interpretation in the sense of the Welfare State.

The interpretation in the sense of the Welfare State will mean the end of the rigid Constitution. It turns the constitutional rules to vehicles of vast endeavors and that is not all: it also enables such endeavors to become legitimate by reference to articles of the Constitution.

Therewith the question is raised as to whether two essentially different methods of interpretation are possible with regard to one Constitution. This question has no concern with the much-discussed problem, whether a method has to be "pure" or whether a methodical syncretism is allowed. Here something else is in question and also very much more. For the former methodical dispute was settled on the basis of a conception of rule which was conformable in the main. But this is no longer true with regard to the tensional relation between the interpretation of the Constitution in the sense of the Rule of Law and the Welfare State.

But it is out of the question to, suppose that with regard to the same normative Constitution two different interpretations of the normative could be valid in the same way. Only one of them can be correct. For which of them the decision will be, is dependent on how the Federal Constitution is interpreted as a whole, whether it is considered primarily as a Rule of Law Constitution or as a Welfare State Constitution.

This, however, scarcely is a decision which needs to be considered in detail, if the genetic history of the Federal Constitution is consulted. For the materials of the Constitution do not admit of any doubt about the fact that the trend towards a Constitution which guarantees liberty and which is based on the Rule of Law

absolutely dominated with all the persons concerned irrespective of their being members of a political party. The contents of the Constitution also complies with it. But it may be supposed that such references will scarcely convince the representatives of social-dynamic interpretation of the Constitution.

In the discussion between the interpretation of the Constitution in the sense of the Rule of Law and of the Welfare State it is therefore not a matter of interpreting one article or the other, nor is it a question of more or less social contents, but something else is at stake. Least of all it is a question of helping to realize politically acknowledged social tendencies which could not be realized without interpreting the Constitution in the sense of the Welfare State. It has already been pointed out that in most cases in which the interpretation of the Constitution in the sense of the Welfare State was used, it would have been possible to attain the same end without this kind of interpretation.

In truth, it is a matter of the Rule of Law Constitution as a whole, of its logical structure — which is by no means only a matter of legal theory — and of the principles of its interpretation and application.

This discussion is under way in the Federal Republic of Germany. It is the more difficult as it cannot be denied that the institutional development of the form of the Rule of Law, which has originated its origin on German ground in the 19th century, does no longer justice to the present situation and is not either able to do so, after autonomy of the society irrevocably belongs to the past. So the interpretation of the Constitution is again and again faced with the necessity of finding makeshifts, which are suitable for overcoming the difference between Constitution and reality. For this bold construction are sometimes necessary. It may be connected with this fact, that being conscious of the limits which are set to any interpretation of the Constitution, has to a certain degree become turbid. This is no declaration for the rising of the new interpretation of the Constitution in the sense of the Welfare State (sozialstaatlich), which has its origin in the general political conditions and which has its own dynamics and its own logic, diverging

from the hermeneutics in accordance with the Rule of Law. But this will perhaps make clear the fact that the consequence of the discussion between Rule of Law and Welfare State (Sozialstaat) is by no means generally recognized in Germany.
