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## State and Perspectives of the History of Social Law in Germany

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### 1 Preliminary Remarks

If a report on state and perspectives of the history of social law is to be written, two problems involving demarcation have to be dealt with in advance. 1. What is social law? 2. What kind of literature has to be considered as a part of the history of social law? In both cases the boundaries can definitely be drawn in a subjective manner and can be oriented towards the interests and competences of the author insofar as the criteria are plausible.

First, regarding the notion of »social law«: In general, »social law« can be defined as the whole of all regulations that set rights and duties concerning those situations in life in which individuals are no longer able to take precautions for the preservation of certain standards of living on their own. Thus, in principle, the existence of social law could always be noted in those cases where some of these regulations can be found. Working from this assumption, the history of social law could be traced back to ancient times.<sup>1</sup> The other extreme would be to assert the existence of social law only where it has established itself as a particular field of law, that is, with its own codifications, its own textbooks, its own special journals, and ideally with its own jurisdiction, etc. In this sense social law first developed over the course of the 20<sup>th</sup> century. However, according to the view presented here, social law is situated somewhere in the middle of these two extremes. Social law is to be acknowledged if regulatory complexes can be identified which govern social aid and social precautionary measures in a comprehensive way on a micro-, meso-, and macro-level. Seen from this perspective, social law did not develop until

the 19<sup>th</sup> century. Consequently, this paper concentrates on the 19<sup>th</sup> and 20<sup>th</sup> centuries.

Additionally, it is equally difficult to select the literature that ought to represent the current state of the history of social law. Research on this topic does not only consist of research with a genuine legal historical focus, i. e. which is only interested in legal aspects: the development of legislation and jurisdiction, the application of social law norms by the administration, the emergence of jurisprudential doctrines, etc. Given the rich literature regarding the history of social policy, which does not primarily focus on legal aspects, but integrates questions of legislation and administrative norm-enforcement into its investigative program and vice versa, legal historical research is, of course, reliant on the knowledge of non-legal development factors. Thus, while the results of the legal historical research represent the main focus of this contribution, other forms of historical research will be taken into consideration as well, provided that they are highly relevant to the legal historical issues at hand.

### 2 A Provisional Description of the General Situation

The significance of social policy as a basic pillar of our community is not reflected by an equally extensive legal historical attention. First, this is visible in a main field of publications – namely, dissertations. Although we still deal with a large production of legal historical dissertations, a sampling of the most important legal historical book series delivers almost no hits with regard to the history of social law.<sup>2</sup> Second, this fact is reflected

\* I would like to thank Johannes Heymann and James Thompson for their assistance in preparing the final version of this contribution.

1 BEHRENDTS (2008) 5 ff.

2 Looked through were »Schriften zur Rechtsgeschichte« from Duncker &

Humblot, the »Rechtshistorische Reihe« from the publishing house Peter Lang, the »Rechtsgeschichtlichen Studien« from the publishing house Dr. Kovač and the series »Studien zur europäischen Rechtsgeschichte« (former »Ius Commune

Sonderhefte«), published at the MPI for European Legal History, Frankfurt am Main.

by the contents of German legal historical journals: the »Zeitschrift für Neuere Rechtsgeschichte«,<sup>3</sup> the »Zeitschrift für Rechtsgeschichte / Germanistische Abteilung«, the journal »Ius Commune (which was published until 2001), »Rechtshistorisches Journal« (published until 2001), the internet journal »Forum Historiae Iuris«, and this journal, as well.<sup>4</sup> With very few exceptions, the history of social law is not present in these journals.

On the other hand, the history of social law now has a general work at its disposal: Michael Stolleis' *Geschichte des Sozialrechts in Deutschland* (2003),<sup>5</sup> which has since been translated into English;<sup>6</sup> it is precisely this overview that distinguishes the history of social law, for example, from the more intensively explored history of labor law.<sup>7</sup> Both a bibliography<sup>8</sup> and a voluminous research report<sup>9</sup> are available; however, they only cover the literature up till 1996. The existence of other important publications should also be mentioned in this context: publications oriented toward surveying longer time periods treating social politics, which, first, take into account the strong legal-normative imprint of this field of policy, and, second, which present valuable legal historical knowledge or ancillae by means of source editions or comprehensive reference apparatuses.<sup>10</sup> Above all, the »Quellensammlung zu Geschichte der deutschen Sozialpolitik 1867 bis 1914«<sup>11</sup> should be mentioned. This collection of sources, currently consisting of 34 volumes, documents the formation of the German welfare state. Because the legal or legally relevant texts in these volumes represent the majority of the published sources, and the introduc-

tions demonstrate a high level of sensitivity for legal historical questions, this collection can justly be called the most important project in social law history. However, the analyze of these printed materials for legal historical purposes is still in the initial stages.<sup>12</sup> Perhaps this will change once all the volumes are available in the planned digital format.

When it comes to the era of National Socialism, Mason's edition of primary sources still represents an important working basis,<sup>13</sup> albeit with a narrower thematic range, and the third volume of »Geschichte der Armenfürsorge« by Sachße/Tennstedt<sup>14</sup> provides an instructive overview. For the period after 1945, a comprehensive multipart publication on the history of social policy of the Federal Republic of Germany and the German Democratic Republic is available, which also takes legal historical aspects into consideration.<sup>15</sup> Moreover, other epoch-spanning syntheses of historiography could be mentioned – e.g. the vivid and colorful study »Geschichte der Armenfürsorge« by Sachße and Tennstedt<sup>16</sup> – which are also indispensable for legal history.<sup>17</sup>

Thus, even an initial glance at the general overviews is already sufficient to ascertain that the overall situation is quite good, especially with regard to 1. the existence of a general overview reliably conveying the significant stages as well as central tendencies, and 2. the dynamic research on social policy – though the account given here should not be limited to such an overarching sketch. At this point, I would like to focus on the specific research fields and research results.

3 An important exception is SCHERNER (1996).

4 »Rechtsgeschichte / Legal History« admittedly did focus on »solidarity« in its volumes 5 (2004) and 6 (2004), but articles published in these issues rather treated fundamental questions, and not so much concrete problems.

5 STOLLEIS (2003). A modern, concise and informed account of social law history from the 1880s onward is also provided by HÄNLEIN/ TENNSTEDT (2012), though, unfortunately, only accompanied by an rather meagre bibliography. See additionally, the legal historical essays in STOLLEIS (2011) 777–937, which mostly cover a longer span of time.

6 STOLLEIS (2014).

7 KITNER's book (2005) concentrates on collective labour law and therefore only on one – even though significant – aspect. As a »functional equivalent« to a monographic portrayal of labour law history RÜCKER's (2013) treatise can be fallen back on, for it is rich in substance.

8 KAISER/ SCHÖNBERG (1996) 265–314.

9 SCHERNER (1996).

10 Concentrating on the decisive laws: STOLLEIS (1976).

11 Quellensammlung (1982–2015).

12 However, see COLLIN (2011); COLLIN (2016), as well as the numerous references in STOLLEIS (2003).

13 MASON (1975).

14 SACHSSE/ TENNSTEDT (1993).

15 Geschichte der Sozialpolitik (2001–2008).

16 SACHSSE/ TENNSTEDT (1988); SACHSSE/ TENNSTEDT (1993); SACHSSE/ TENNSTEDT (1998); SACHSSE/ TENNSTEDT (2012).

17 RITTER (1998); METZLER (2003); REIDEGELD (2006a); REIDEGELD (2006b); SCHMIDT (2012).

### 3 Research Fields and Research Results

#### 3.1 History of Concepts: the Term »Sozialrecht«

Originally, the term »Sozialrecht« had a different meaning. Toward the end of the 19<sup>th</sup> century, reservations regarding a division of the law into private and public law as well as a concept of law that did not take the manifold collective bindings of the people into consideration were bundled together in this term. To this end, the term »Sozialrecht« incorporated law regulating the internal relations of such collectives – associations, corporations, cooperatives, municipalities, and, in the end, the state as the overarching association – along with the relations between the individual and these collectives. In so doing a new dichotomy was created: the dichotomy of social law (public law and collective-related private law) and private law, which exclusively regulated the legal relations of the person as an individual.<sup>18</sup> Just such an understanding of »Sozialrecht« can be observed well into the first half of the 20<sup>th</sup> century.<sup>19</sup> This also implies that the modern notion of »Sozialrecht«, as a collective term for the law of social precaution and social care, developed at a relatively late stage. Even after it had lost its mobilizing power in terms of legal policy and had become a general term for legal matters fixed by positive law, its scope was unclear, e. g. labor law was often seen as a part of social law.<sup>20</sup> These terminological changes can be traced in the works of Schmid.<sup>21</sup>

#### 3.2 Poor Law / Law of Social Aid

The system of poor relief developed in the 19<sup>th</sup> century did not bring forth a self-contained system of poor law.<sup>22</sup> Caring for the poor was a matter of police law, which included task assignments to the municipalities, the corporations (guilds, etc.), and other subjects obliged to help (the state had only a subsidiary competence), but

also repressive elements, including criminal law instruments, which in particular were aimed at non-local paupers and »work-shy persons«. These aspects have been investigated above all by Wolfgang Ayass.<sup>23</sup>

A substantial change occurred in the middle of the 19<sup>th</sup> century, when the legislation took account of the society's increasing mobility and changed from the »principle of origin residence« (*Heimatsitzprinzip*) to the »principle of residence« (*Unterstützungswohnsitzprinzip*), i. e. not the home – in the sense of origin – municipality but the municipality of the respective residence was responsible for poor relief. The new standards were set by the Prussian *Gesetz über den Unterstützungswohnsitz* from 1842.<sup>24</sup> However, once these regulations had been unified for the entire German Empire (*Unterstützungswohnsitzgesetz*, 1870), the poor law was still not yet fully regulated by state law. Both the conditions and degree of support were ultimately determined by the municipalities.<sup>25</sup> All this has been treated in quite some detail by the above-mentioned »*Quellensammlung zur Geschichte der deutschen Sozialpolitik*«. <sup>26</sup>

The structures of poor law only changed during World War I. Up till this point, the policy of poor relief was, to a great extent, stigmatizing and discriminating. Given the tremendous number of wounded persons returning from the trenches, the widows and orphans, as well as the soldiers' families all suffering from poverty, such an attitude could no longer be tolerated. A branch of quality social assistance (*gebobene Fürsorge*) emerged and developed, which privileged certain groups of needy persons. This was accompanied by a stronger legal regulation of the service profile of social assistance. A uniform regulation for the whole German Empire was created by a 1924 law, which, in principle, maintained the separation of quality social assistance and poor relief. The path to a modern social assistance legislation that also finally

18 GIERKE (1902) 25 ff. In a similar way, earlier under the term »Genossenschaftsrecht« BÄHR (1864) 19.

19 RADBRUCH (1930) esp. 39; DIEHL (1941).

20 GITTER (2009) esp. 229.

21 SCHMID (1981).

22 Though for the time before that SCHERNER (1999).

23 AYASS (1992); AYASS (1993); AYASS (1995), but also RUDOLPH (1995).

24 SCHINKEL (1963).

25 ROCHOLL (1872) 250 ff.

26 *Quellensammlung* Vol I 7 (2000); *Quellensammlung* Vol II 7 (2015).

incorporated legally enforceable claims of the »poor« against the state is described in detail in Föcking's book.<sup>27</sup>

### 3.3 Social Security Legislation

The second pillar of social law is social security law.<sup>28</sup> With the exception of unemployment insurance, in this respect, Germany can claim to have played a pioneering role. Therefore, very early on the implementation of health insurance, industrial injuries insurance, and pension insurance during the 1880s received particular attention from the historiography,<sup>29</sup> and it is one of the most thoroughly researched fields in the history of social law. This also applies to the »prehistory« of the social security legislation, for social security legislation did not emerge from nothing. Prior to the 1880s, manifold private or parastatal forms of social precautions against the risks of illness and invalidity had been in existence.<sup>30</sup> These structures and the attempts of state legislators to extend the circle of insured persons as well as to subject insurance bodies to state supervision have been the subject of considerable research.<sup>31</sup>

The process of the social security legislation is today not only well-documented in the »*Quellensammlung zur Geschichte der Sozialpolitik*«, but has also been analyzed in essays utilizing documents published in the *Quellensammlung*.<sup>32</sup> In summary, it can be said that the complexity of the events has become much more pronounced. Previous attributions, such as considering social security legislation as an element of a policy of carrot and stick are clearly to be relativized. It is now clear that the legislation was embedded within a policy of earnest social reformatory efforts – and not just in a conflict field with the state of Bismarck and the social-democratic working class as counterparties. Furthermore, it has become evident that, despite its state interventionist contours, liberal actors and

approaches played an important role – both on the side of the proponents and opponents of the legislation. And finally, it has become apparent that the legislation, due to significant knowledge deficits, represented a step into uncharted waters. Relevant statistical knowledge was scarcely available or could not be harnessed, and the science – particularly the »national economy« – was hardly of any use for the legislation.<sup>33</sup>

The *Quellensammlung* does not, unfortunately, document the implementation and further development of the social security legislation beyond 1914. However, for each of the social security system pillars there are – albeit partially older – comprehensive publications or, at least, elaborations available, which provide an overview: for injury insurance, one can refer to Wickenhagen's book;<sup>34</sup> for health insurance, Tennstedt's work<sup>35</sup> is worth looking at; and for pension insurance, a collection of essays has been published.<sup>36</sup> Lastly, the 1927 established unemployment insurance has, in the meanwhile, also been researched in great depth.<sup>37</sup>

### 3.4 History of Social Law and Administrative History

Administrative history is not legal history; their objects of research and their approaches differ. Nevertheless, administrative history research is often confronted with legal questions, for the status of the administrative staff as well as the organization of administrative authorities and administrative tasks have to a significant degree been shaped by law. Moreover, administrative activity is to a large extent law enforcement – at least, in systems with a legalistic administration such as in Germany. Administrative history can, therefore, investigate – as a dissertation has shown – how social law has been put into concrete terms, how the administration has responded to the challenges

27 FÖCKING (2007).

28 The essential criteria for distinguishing social security law from poor relief law are instructively summarized by RUDLOFF (2015a) XIV.

29 See, e. g. ROTHFELS (1927).

30 FRÖHLICH (1976); REININGHAUS (1983); STOLLBERG (1983); SCHULZ (1991); TENNSTEDT (2011).

31 See, in particular, *Quellensammlung* Vol I 2 (1993); *Quellensammlung*

Vol I 5 (1999); *Quellensammlung* Vol I 6 (2002); *Quellensammlung* Vol II 2/1 (1995); *Quellensammlung* Vol II 2/2 (2001); *Quellensammlung* Vol II 5 (2009); *Quellensammlung* Vol II 6 (2004).

32 For example, TENNSTEDT/WINTER (1993); TENNSTEDT (2009); AYASS (2012).

33 RUDLOFF (2000); HORSTMANN (2009); COLLIN (2016).

34 WICKENHAGEN (1980).

35 TENNSTEDT (1977).

36 FISCH/HAERENDEL (2000); about the prelude, see the comprehensive treatment by RÜCKERT (1990).

37 BENÖHR (1991); from a social historical perspective, especially FÜHRER (1990).

of these new laws, and how it has dealt with the problem of lacking legal regulation.<sup>38</sup> Meanwhile, administrative history has discovered social policy as a worthwhile field of research: in the form of local studies<sup>39</sup> focused on a certain administrative level,<sup>40</sup> or administrative sector, or from a comparative perspective.<sup>41</sup> Separate elaborations on social administration can be found in the multi-volume work »*Deutsche Verwaltungsgeschichte*«. <sup>42</sup>

### 3.5 History of Social Law as the History of a Scientific Discipline

Social law as a scientific discipline evolved relatively late and, in particular, developed along different paths. Initially, extensive attention was paid to social insurance law. The new insurance laws were commented, and systematic compilations were written according to practical needs. Therefore, in the first period, legal practitioners dominated the scene, and only later, that is, during the Weimar Republic, did social insurance law increasingly become the focus of university jurisprudence. For a long time, poor law / social welfare law lacked extensive scientific attention, not least because of the absence of codification. All this has been dealt with in a wonderful dissertation by Mikešić.<sup>43</sup> Lastly, after 1945, social law had become an all-encompassing legal discipline. Hans F. Zacher was a pioneer in this regard, and he historicized his habilitation by renaming it on the occasion of its later publication.<sup>44</sup> In particular, the jurisprudence after 1945 was challenged by the establishment of the welfare state principle (»Sozialstaatsprinzip«) in the constitution. Initially, this caused fundamental debates on the character of statehood; meanwhile, a commonly accepted – albeit of only

little relevance for the under-constitutional law – constitutional understanding of the welfare state principle had been established, as Thurn demonstrates in his book.<sup>45</sup> For the entire period from the end of the 19<sup>th</sup> century to the present, the development of social law as a scholarly discipline can be tracked in the respective sections of Stolleis' work, »*Geschichte des öffentlichen Rechts*«. <sup>46</sup>

### 3.6 History of Social Law in Intertemporal and International Comparison

Modern statehood – even in the form of a dictatorship – cannot do without social policy. A comparative consideration of social law in successive political regimes of recent German history may, on the one hand, provide information on continuing elements, on the other, it can help to elaborate more precisely the legal contours of a specific social policy regime. Finally, this requires, of course, studies on legal developments in the respective historical periods. To a large extent, this has already been done: on the one hand, in general overviews or works using a wider approach (to the Weimar Republic,<sup>47</sup> to the National Socialism,<sup>48</sup> to Eastern<sup>49</sup> and Western Germany<sup>50</sup>)<sup>51</sup> – though these works are only partly of legal historical character – on the other, in detailed investigations of special fields.<sup>52</sup> However, the actual comparison can be found in works on the history of social policy.<sup>53</sup> The same applies to investigations that observe the German development within an international context. A comparative approach from a legal historical perspective can actually be found in earlier research;<sup>54</sup> otherwise, we have to deal with works on the history of social policy.<sup>55</sup>

38 JANS (1994) 42 ff., 102 ff., 317 ff.

39 RUDLOFF (1998).

40 ROTH (1999); LUTTENBERGER (2013). The current project studying the history of the Reich Ministry of Labour has to be mentioned, since it was to a considerable extent responsible for social administration (<http://www.historikerkommission-reichsarbeitsministerium.de>).

41 HEYEN (1993).

42 JESERICH et al. (1983–1985).

43 MIKEŠIĆ (2002).

44 ZACHER (1980).

45 THURN (2013).

46 STOLLEIS (1999) 216 ff.; STOLLEIS (2012) 278 ff.

47 BOGS (1981).

48 RECKER (1985); SACHSSE/TENNSTEDT (1992).

49 LOHMANN (1996); *Geschichte der Sozialpolitik* Vol 8–10 (2004–2008); SCHMIDT (2013).

50 KINGREEN (2012); *Geschichte der Sozialpolitik* Vol 3–7 (2005–2008).

51 See also the remarks about the individual periods in STOLLEIS (2003).

52 Along these lines, regarding national socialism: MASON (1977); HANSEN (1991); WIMMER (2014); for the GDR:

WILLING (2008); for West Germany: FÖCKING (2007).

53 See in particular HOCKERTS (1998).

54 ZACHER (1979); KÖHLER/ZACHER (1981).

55 RITTER (2010); HENNOCK (2007); a brief account about the development of historical comparisons in social policy is provided by KAEUBLE (2010).

#### 4 Research Perspectives

If the current position is compared to the state of research as described by Scherner 20 years ago,<sup>56</sup> the history of social law has, despite its outsider role in legal history, made much progress: meanwhile, a general overview has been published,<sup>57</sup> and the legal sources concerning the emergence and early development of social security legislation have been thoroughly documented.<sup>58</sup> The challenges facing future research (noting, of course, that this is a subjective choice) are as follows:

First, a lack of investigations involving social law jurisdiction is quite apparent – even if the organizational structures and their development have been described in recent research.<sup>59</sup> Nevertheless, despite the accessibility of judicial decisions (at least when it comes to the superior courts) in print,<sup>60</sup> these decisions have yet to be analyzed.

Second, studies specifically dealing with the legal aspects of the emergence of the modern system of social care are scarce. While the legislation of the 1880s, indeed, established modern forms of social insurance, it left the system of poor relief in its traditional form untouched. At the legal level, initial approaches can only be observed during the First World War and during the Weimar Republic.

Third, there is a shortage of studies on the emergence of structures and institutions developed by legal doctrine. Social law – as a self-contained discipline of law – only reached parity with other legal disciplines when it developed its own legal juridical terms and systemic connections. The works of Stolleis<sup>61</sup> and Mikešić<sup>62</sup> have established foundations for analyses regarding these matters by outlining the scientific field; however, publications

concerning the doctrinal attention to detail are still not present. In this context it would also be important to investigate how socio-political guiding principles (and changes of guiding principles)<sup>63</sup> have been reflected by the legal doctrines.

Fourth, and lastly, social law is a reference field of state-private coordination. This was apparent in the early stages in the development of social insurance: once private actors had to be integrated into the new system of health insurance bodies and employer's liability insurance associations – this has been extensively documented in the *Quellensammlung*. There are also new inquiries into the coordination of health insurance bodies and panel doctors.<sup>64</sup> However, the broad spectrum of private charity, with its manifold entanglements of state and private actors (already noticed by contemporaries<sup>65</sup>), has hardly been analyzed by legal historians.

Currently, the scholarly starting conditions for further and future legal historical research are excellent. The major lines of development have been drawn, and the social, political, and economic contexts of legal developments can be unlocked by the comprehensive literature on the history of the social welfare state. When it comes to source materials, at least regarding printed sources, we are in a good position. Furthermore, given that other texts relevant to legal historical questions are not exclusively to be found in purely juridical publications, legal historical researchers should be open to investigating the numerous socio-political journals of that time, for they represent a virtual treasure trove of material when it comes to such questions.

56 SCHERNER (1996).

57 STOLLEIS (2003).

58 Quellensammlung (1982–2015).

59 AYASS (2014); AYASS (2016); see in addition the references in KAISER / SCHÖNBERG (1996) 313 f.

60 Multiple collections of decisions are available for the *Reichsversicherungsamt* (Social Insurance Office) – and partly for other judiciary bodies in the social insurance system as well: the »Entscheidungen des Reichs-Versi-

cherungsamts und der Landes-Versicherungsämter in Unfallversicherungs-Streitigkeiten« (1901–1912), as a successor to the »Sammlung von Entscheidungen des Reichsversicherungsamts, der Oberversicherungsämter und anderer Entscheidungen aus dem Gebiete der Reichsversicherung« (1912–1941) and the »Entscheidungen und Mitteilungen des Reichsversicherungsamts« (1914–1944). Relevant for cases in

poor law are particularly the »Entscheidungen des Bundesamtes für das Heimatwesen« (1873 ff.).

61 See, especially STOLLEIS (1999) 216 ff.; STOLLEIS (2012) 278 ff.

62 MIKEŠIĆ (2002).

63 See RUDLOFF (2015b).

64 COLLIN (2014); KÄSBAUER (2015).

65 MÜNSTERBERG et al. (1891); HUBER (1912); ZAHN (1916); WEINMANN (1930); BELZ (1931).

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