

GENERAL RIGHTS AND OBLIGATIONS IN THE GERMAN SOCIAL SECURITY LAW

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INTRODUCTION

For more than 40 years now the German Social Security Code No I ('Sozialgesetzbuch Allgemeiner Teil' - 'SGB I') has provided the general legal framework for social equity and social security in Germany¹. The Social Security Code No I provides general rules for the whole social security administration in Germany, based at arts 20 and 28 of the German Constitution² (Basic Law of the Federal Republic of Germany 'Grundgesetz' – 'GG'). The principle in art 20 and art 28 GG is called 'Sozialstaatsprinzip'³. The term is according to the basic guidelines of the German state, but means only an objective ('Staatsziel'); it is not used to claim social rights⁴.

Why is this something special? These rules providing social law shall be effectively administrated on the one hand, but all the time facing the citizen, the applicant.

Compared with other fields of law, we are facing a very 'citizens-friendly' legislation. 40 years – a good reason to speak about this 'old' law. This article will try to give an answer to the question above. Is this legislation still 'up to date'?

The core elements of all the different social security laws are to provide conditions of equal development chances for each person and the possibility to maintain oneself by individually chosen work, and, last but not least, alleviating difficult situations in life with the help of public support⁵.

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¹ Declaration of the Social Security Code No I at 01.12.1975.

² Arts 20 and 28 German Constitution statute Germany as a democratic and social federal state, the so called 'principle of a social state – 'Sozialstaatsprinzip'.

³ Hans F. Zacher, *Abhandlungen zum Sozialrecht* (1th edn, CF Müller 1993) 3.

⁴ It is not possible to claim social benefits in cash out of arts 20, 28 German Constitution.

⁵ Art 1 Social Security Code No I – hereinafter: SGB I, of 11.12.1975, Bundesgesetzblatt – Official Federal Journal of Laws, hereinafter: BGBl. I 3015, last amendment 17.08.2017, BGBl. I 32147.

First of all, the so called 'Social Rights'⁶ are written down in arts 2-10 Social Security Code No I. These provisions transfer these aims into law as the legal base for the whole administration of social security. Social rights, for instance, are the promotion of education and employment, social insurances and social welfare⁷.

Jurisdiction and the legal literature agree about the interpretation that those written 'rights' only have the character of a declaration⁸ and not the character of real 'rights'⁹.

In fact, they are rather principles or headlines¹⁰. The transfer into real 'rights' is specified by the special social security law, stated in the Social Security Code No II-XII ('Sozialgesetzbuch Zweites Buch – Sozialgesetzbuch Zwölftes Buch' – 'SGB II-SGB XII')¹¹. This article will not answer the long discussed question as to the value of these principles in the German social security system¹². The intention in this article would be to expand the classic notion of the 'Social Rights' and focus all readers on some special legal norms out of the 'Social Security Code No I', which contain real 'rights', but also duties – two sides of the same coin.

Usually duties for the institutions of social security administration are rights of the residents at the same time (and also the other way round, duties of the residents are rights of the administration).

It seems important to focus on these basic legal statements. They are sometimes 'a little bit' in the background or forgotten as guidelines and borderlines at daily work. In the end, it is about nothing less than a 'best practice' in social security administration.

Implementing the social law and providing social services correctly according to the 'Social Security Codes No I-XII' might be one small, but in my opinion important, piece to integrate people into the society.

The hypothesis is: Especially if people believe that they are separated from the mainstream society, that they are no longer 'shareholders' of the generated economic success, they may finally opt out from the democratic process. It is all the more important to use the social administration, the 'legal' interface between citizens and the government, to

⁶ No benefits in cash can be required; see Wolfgang Klose in Kurt Jahn, Gustav Figge, Günter Wätermann, Dietrich Wiegand, Lutz Menard (eds), *Sozialgesetzbuch für die Praxis* (Haufe-Lexware 2011) art 2 m. n. 8.

⁷ Arts 3-10 Social Security Code No I.

⁸ Robert Steinbach in Karl Hauck, Wolfgang Nofz, Ulrich Becker (eds), *Sozialgesetzbuch SGB I Allgemeiner Teil* (Erich-Schmidt-Verlag ESV 2017) K para 2 m. n. 25.

⁹ Ottfried Seewald in Anne Körner, Stephan Leitherer, Bernd Mutschler (eds), *Kasseler Kommentar - Sozialversicherungsrecht* (CH Beck 2017) art 2 m. n. 7.

¹⁰ Bertram Schulin, 'Einführung' in Bertram Schulin (ed), *Sozialgesetzbuch* (dtv Beck 2017) XXIII.

¹¹ Raimund Waltermann in Bernd Baron von Maydell, Franz Ruland, Ulrich Becker, *Sozialrechtshandbuch (SRH)* (Nomos Verlag 2012) para 7 m. n. 1.

¹² Seewald (n 10) art 2 m. n. 3; there is still a discussion about the impact of these guidelines in literature and jurisdiction, and further on: Eberhard Eichenhofer, 'Soziale Rechte im Sozialgesetzbuch' (2011) 9 Sozialgerichtsbarkeit 301, 304; Wolfgang Fichte 'Die sozialen Rechte in der Rechtsprechung des Bundessozialgerichts - zugleich Replik zu Eichenhofer, Soziale Rechte im Sozialgesetzbuch, SGB 2011 (2011) 9 Sozialgerichtsbarkeit 492-498; Eberhard Eichenhofer, 'Bedeutung und Folgen sozialer Rechte des SGB I' (2011) 9 Sozialgerichtsbarkeit 511-513.

show these people that the law is on their side and will include and not exclude the citizens.

Numerous different and difficult terms and social legal norms intend a very good practice in advising citizens about their duties¹³ and first about their rights¹⁴. A fast and comprehensive treatment of their applications is the way to provide the support of the social welfare state¹⁵ and to communicate the idea of a society based democracy with equal rights and equal duties¹⁶.

Good practice in advising the citizens in consultations and objective treatment of social benefits are an important element for social peace within the society.

In fact, it is not enough having social rights in theory – it is important how these social rights are provided.

The 'founder' of the German social (insurance) system, Otto von Bismarck, concluded: 'My idea was to convince the working class, or shall I say to bribe them, to accept the state as a social institution that works for them and will take care of them.'

A true sentence, at his time and today as well. Social peace: one important precondition for economic success.

Today we find the guidelines to 'convince the working class' in arts 2-59 Social Security Code No I. Now some important rules shall be introduced.

I. THE ASPECT OF 'CONSULTING' (ART 14 SOCIAL SECURITY CODE NO I)

1. CONTENT

Article 14 Social Security Code No I proclaims: '... Anybody has the right of consultation about rights and duties contained in these Social Security Codes. ...'

The multitude of regulations in social law, especially their interrelation, are overwhelming most of the citizens, not only socially deprived or elderly people¹⁷. The German Federal Social Court ('Bundessozialgericht') deduced by 'Social State Principle'¹⁸ and the 'principle of equity and good faith' as a responsibility by the public social funding agency to support the citizens facing these principles¹⁹. The citizens should be treated in the best way by showing all possibilities to have the opportunity of using their social rights in the best way²⁰.

Popular information, for instance on websites or flyers, is not enough at this point (this is a matter of art 13 Social Security Code No I – public

¹³ Examples: Social Security Code No I art 33, arts 60-65, art 66.

¹⁴ Esp. Social Security Code No I arts 3-59.

¹⁵ According to Social Security Code No I art 17.

¹⁶ Basic Law of the Federal Republic of Germany arts 20 and 28.

¹⁷ Werner Lilge, *SGB I Sozialgesetzbuch Allgemeiner Teil* (Erich-Schmidt Verlag 2016) arts 13-15 m. n. 1.

¹⁸ Basic Law of the Federal Republic of Germany art 20 and art 28.

¹⁹ *ibid* n. 3.

²⁰ *ibid*. with further references.

information). It is the declared intention of the legislator in art 14 Social Security Code No I that social administration shall offer a detailed consultation focused on solving the individual problems of the individual person who is in need. Everybody has the right of 'consultation' about his claims based on the German Social Law²¹.

The consultation includes correct, unmistakable, comprehensive and individual information. Moreover, all obvious options open to the citizen that could be identified by a rational civilian shall be presented²². All open questions that are relevant for the citizen to make a decision now or in the future, have to be answered.

There is a still unsolved problem which is discussed in literature. This question touches the necessity to advise the citizen with the aim of optimizing the social benefits²³. That means, for example, it is necessary to advise the citizen in such a way that he will earn a maximum of benefit with a minimum of contribution or, as a second example, how to shelter personal financial assets while applying for basic welfare benefits.

In my opinion, there is no doubt about the correct answer: art 2 Social Security Code No I clearly states the so called 'principle of effectivity'²⁴: social rights have to be offered as extensively as possible²⁵. This leads to the conclusion that advising has to include such calculations of possibilities to realize this principle. It is the idea of empowering people to make their own informed decisions. But there are also borderlines. It does not mean spending social benefits like pouring them from a 'watering can'. It would be illegal to take arbitrary interpretation of a legal right or claim²⁶.

2. RIGHT WITHOUT A LEGAL CONSEQUENCE?

The right of consultation is a real and valid legal claim²⁷. There is only a 'small' problem: if this right is denied, there is no legal consequence written down in art 14 SGB I. Especially the legal figures out of art 34 GG and art 839 German Civil Code ('Bürgerliches Gesetzbuch') are not directly fitting. To solve that problem, jurisdiction²⁸ developed a special solution in social law practice.

²¹ Attention: It does not mean claiming something – it is only about the consultation.

²² Lilge (n 18) art 14 m. n. 17 with further references.

²³ In German: 'Optimierungsberechnungen', cf. also Lilge (n 18) art 14 m. n. 34.

²⁴ In German 'Effektuierungsgrundsatz', Peter Mrozynski, *SGB I Sozialgesetzbuch Allgemeiner Teil* (4th edn, CH Beck 2010) art 2 m. n. 15.

²⁵ Seewald (n 10) art 2 m. n. 10.

²⁶ Example: it is impossible to insure people at the pension system without a legal entitlement.

²⁷ Mrozynski (n 25) art 14 m. n. 1.

²⁸ Richter des Bundessozialgerichts (eds) *BSGE - Entscheidungen des Bundessozialgerichts* (Carl Heymanns Verlag 2010) 71,17,22.

3. THE RIGHT TO REINSTATEMENT IN THE GERMAN SOCIAL LAW

The German jurisdiction answered this problem with a legal institution called 'Sozialrechtlicher Herstellungsanspruch'²⁹. This solution states that the administration of social law has to rehabilitate any citizen who got a wrong or incomplete consultation and therefore has a personal disadvantage or missed a claim³⁰. But note that this legal institution will not replace the legal institution of 'restitutio in integrum' out of art 27 Social Security Code No X ('SGB X')³¹.

The requirements are:

- Holder of a social right.
- Serious violation of duties by the social administration (wrong consultation).
- Personal disadvantage of the citizen due to the violation.
- The violation / disadvantage can be eliminated by lawful action.

But there is a problem: the citizen has to give evidence due to the violation and the causation between violation and disadvantage.

A possible way to solve this problem might be a detailed written protocol.

4. CONCLUSION

The right of consultation transfers the principle of the social state into the legal reality and supports the social rights as widely as possible³².

In the end, this leads to trust in the public social administration.

II. APPLICATION AND EXECUTION OF SOCIAL BENEFITS ACCORDING TO ARTS 16 AND 17 SOCIAL SECURITY CODE NO I

1. APPLICATION (ART 16 SOCIAL SECURITY CODE NO I)

Applications have to be filed at the competent social administration. But they will be also accepted by all other social administrations in Germany, by all municipalities and by all officially authorized German administrations in foreign countries. Applications received at a not competent administration have to be passed on to the competent social administration. So if there is a deadline for an application, it is also possible to meet it by giving the application to a not competent social administration or municipality. The social administrations are obliged to treat applicants to supply precise and comprehensive applications.

²⁹ Kai Grötschel, *Der sozialrechtliche Herstellungsanspruch* (Verlagshaus Monsenstein und Vannerdat 2015) 1.

³⁰ Steinbach (n 9), K para 2 m. n. 41.

³¹ Id. para 14 m. n. 23.

³² Lilge (n 18) art 14 SGB I m. n. 3.

There is almost a direct causal connection to the right of a consultation: the consultation is the basis for a precise application.

The applications do not have to have a special form. The whole administration procedure in social law shall be free of any special formalities. It shall be as easy as possible. But nevertheless, applications and forms shall always lead to a structured and effective processing in public administration. For this, accuracy and comprehensiveness are necessary, even if the failure to do so does not mean that the application is not effective³³.

The citizens will have several duties and obligations during the administrative process which will be discussed later on³⁴.

2. EXECUTION OF SOCIAL RIGHTS ACCORDING TO ART 17 SEC 1 SOCIAL SECURITY CODE NO I

The social administration has to process social benefits on time, comprehensively and quickly. Social services and social facilities and infrastructure have to be served on time and adequately.

Providing social benefits does not only include the monetary aspects³⁵, but also other goods and services such as medical care, especially at provincial level. The legislation calls for initiative by the social administration to realize the guidelines of the Social Security Code. It is a mandate to provide services and non-monetary benefits³⁶.

The right to quickly process applications and payment of social benefits correlates with the provision of art 42 Social Security Code No I. If there is a prolonged time period until an application is processed, an advanced payment can be paid by the social administration. If the problem is caused by a dissent of competence, the social administration that received the first application can process this advanced payment. Advanced payments always have to be granted, if claimed by the citizen. The link between consultation and processing the application is obvious.

³³ Lilge (n 18) art 16 m. n. 18, 20.

³⁴ Aspect: IV obligation to cooperate for the citizen.

³⁵ Lilge (n 18) art 17 m. n. 11.

³⁶ *ibid*, art 17 m. n. 30.

III. OBLIGATIONS AND DUTIES OF COOPERATION BY THE CITIZEN ACCORDING TO ARTS 60-64 SOCIAL SECURITY CODE NO I

1. DUTIES OF THE APPLICANTS

Citizens applying for social benefits have to cooperate in different ways³⁷.

Citizens and the social administration have to 'protect' the difficult interests of each other.³⁸

On the one hand, the social administration has to investigate all positive and all negative legal requirements for social claims according to art 20 Social Security Code No X.³⁹ This simply means that the social administration has to investigate and provide information that may go further than the citizens initial claim in the application (principle of official investigation).

But nevertheless, with evidence, the residents have to first provide all basic facts necessary to process the application.

To bring the principle of art 20 Social Security Code No X into effect, the applicants first have to serve all related facts. Furthermore they have to appear in person, take part in medical investigation and treatment. They have to cooperate in all necessary measures with the social administration⁴⁰. These duties and obligations of cooperation are extensive⁴¹.

These duties are concluded regularly with the end of the administration process. But especially in all cases with permanent social benefit, duties continue to be effective. These obligations are the other side of the coin⁴².

2. BORDERLINES OF DUTIES

The legislation about this is quite abstract. According to art 65 Social Security Code No I duties of cooperation are not in effect, if they are in an incongruent relationship to the claimed social benefit or in case of other important reasons.

Especially if the social administration can fulfil the duty of serving information and facts easier or faster, the applicant does not have to fulfil his obligation. For instance, if the research in a special archive is easier for the administration, the administration has to collect the information by itself. Also in the case that these obligations may lead to injuries of life or body or if they are very harmful in other ways, the applicant is not asked to fulfil his duties. The example of amputation a part of the body might be impressive. After injuries sometimes a finger becoming crippled or

³⁷ Social Security Code No I arts 60-64.

³⁸ Lilge (n 18) art 60 m. n. 2.

³⁹ In German 'Amtsermittlungsgrundsatz' or 'Untersuchungsgrundsatz'.

⁴⁰ Social Security Code No I arts 60-64 sec 1.

⁴¹ Lilge, 'SGB I Sozialgesetzbuch Allgemeiner Teil' (n 18) art 60 m. n. 4.

⁴² In German 'Mitwirkungspflichten' – duties of cooperation.

stiffening. Because of that fact the whole hand can't be used in the right way. The amputation of this crippled finger would help to getting back a kind of mobility at this hand. The applicant does have not to agree with in such a surgery.

In addition, all information leading to possible danger of criminal prosecution of the citizen does not have to be disclosed to the social administration.

3. LEGAL CONSEQUENCES IN THE CASE OF VIOLATING COOPERATION DUTIES

If the person claiming social benefits violates the duties of cooperation according to art 60 and art 64 Social Security Code No I, the social administration can refuse or withdraw the social benefit until the citizen cooperates. It is necessary to notify the citizen in writing while setting an appropriate deadline to cooperate adequately.

4. LEGAL CONSEQUENCES IN THE CASE OF MAKING UP FOR COOPERATION

According to art 67 Social Security Code No I it is at the discretion of the social administration to provide the social benefit after the necessary cooperation.

5. WEAK DUTIES – WEAK STATE?

According to art 67 Social Security Code No I it is at the discretion of the social administration to provide the social benefit after the necessary cooperation.

On the one hand, especially in public media, we can read or hear about malpractice or abuse of social claims. But this is not a problem of having a lot of rights and only small duties. Each law might have small leaks. The legislation is asked to close these leaks in a way fitting to the German constitution and European legislation. At the end, it might be a question about how much social security will we offer. It is no weakness to offer social security in an easy and open way. But it is a sign for a very powerful state and a powerful social security system.

CONCLUSION

Only providing social benefits seems to be not enough. The way that social security is provided also matters. The German legislator, 40 years ago, had a very clear idea about this 'how to' provide social benefits. It is necessary to bring these general rules back to mind, again and again, they are even not 'old fashioned'. These basic principles are much more: a base

for our democratic and social state. They are an instrument of participation in a democratic state.

The public social administration often has to deal with the poor side of the society, with people who are really in need of help. Facing new formidable social challenges in Germany and Europe it seems to be very important bringing these ideas into effect, at least to create social compensation and social peace in society.

In the end, these rules from the German social security law can be used as general ethic rules or guidelines by anybody as well as in all branches of the executive power. It can be claimed to be a kind of a 'blueprint' for 'best practice' in administration. Why? Because public administration is always the showcase for a well-functioning state and its capacity to act and provide 'good governance'.

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