SMU | Dedman School of Law

SMU Law Review

Volume 53 | Issue 2 Article 11

January 2000

Global Economy, Lean Budgets, and Public Needs

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I. INTRODUCTION

THE present topic has rather sober connotations—a leaner State and leaner budgets in a globalized economy. But the subject also opens the way to more encouraging perspectives, inviting us to

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consider how the tenets of economic wisdom can be channelled through constitutional principles.

During the 50 years of its existence, the German Constitution has, on the face of it, demonstrated remarkable solidity in light of global challenges in the economic sector. The framers of the German Basic Law refrained from laying down a tight corset of economic, social, budgetary, and monetary rules. Consequently, the flexibly tailored constitutional framework not only fits the fully-fledged social State verging on the welfare State, but also accommodates the phenomenon of the shrinking State, which we have been experiencing since the mid-nineties.[1]

The famous formula of the "neutrality of the Basic Law in economic policy," coined by the Federal Constitutional Court in the early fifties[2] is rather misleading. In fact, the German Constitution rules out all economic regimes apart from the "social market economy" (*soziale Marktwirtschaft*) whose basic tenets are now enshrined in the Treaty establishing the European Community ("EC Treaty")[3] and in the Charter of Paris.[4] A glance at the 15 European Union (EU) member states, however, demonstrates that the concept of a "social market economy" is a house among many mansions. The constitutional underpinnings of the *soziale Marktwirtschaft* lie on the one hand in the system of fundamental freedoms (including free exercise of profession[5] and protection of property[6]) as bulwarks against state intervention, and on the other hand in the principle of the "social state."[7]

The text of the Basic Law only partially reflects constitutional changes. The realization of European Economic and Monetary Union has made it obvious that certain fundamental principles of the EC Treaty have become part of Germany's constitutional order. A mixed national and European "constitutional" system now governs monetary policy in particular.[8] The amendment of Article 88 of the Basic Law, now espousing the dominance of price stability as a constitutional directive, must be read in light of the EC Treaty. In some ways, this constitutional amendment, in conjunction with the new article on European integration (Article 23 of the Basic Law) serves as a bridge connecting the Basic Law to the fundamental treaty principles underlying the Economic and Monetary Union. These fundamental treaty principles encompass an open

1. *See* MATTHIAS HERDEGEN, *Constitutional Rights and the Diminishing State*, CONSTITUTIONALISM, UNIVERSALISM AND DEMOCRACY—A COMPARATIVE ANALYSIS 183-198 (Christian Starck ed., 1999); WOLFGANG H. REINICKE, GLOBAL PUBLIC POLICY (1998) (examining the changing role of the state); WORLD DEVELOPMENT REPORT 1997, THE STATE IN A CHANGING WORLD, 19 (World Bank ed., 1997).

2. BverfGE 4, 7 (17) [Collection of Decisions of the Federal Constitutional Court]; *see also* BverfGE 50, 290 (338).

3. TREATY ESTABLISHING THE EUROPEAN COMMUNITY [hereinafter "EC Treaty"].

4. 30 ILM 190 (1991).

5. *See* GRUNDGESETZ [Constitution] [GG] art. 12 (F.R.G.).

6. *See* GG art. 14 (F.R.G.).

7. *See* GG art. 20 § 1, art. 28 § 1, cl. 1 (F.R.G.).

8. *See* Matthias Herdegen, *Art. 88*, GRUNDGESETZ KOMMENTAR (T. Maunz/G. Dürig eds, Looseleaf 1998), ¶¶ 1, 66.

market economy with free competition (Article 4 [1] EC Treaty), stable prices (Arts. 4 [3], 105 [1,1] EC Treaty), sound public finances, and monetary conditions (Arts. 4 [3], 104 [1] EC Treaty) and a sustainable balance of payment (Article 4 [3] EC Treaty). The most dramatic impact on economic policy flows from the Treaty's rules on budgetary discipline and the accompanying "Stability and Growth Pact," which form a quasi-constitutional straightjacket unparalleled in legal history.[9]

II. CONSTITUTIONAL FRAMEWORK: ECONOMIC AND SOCIAL PARAMETERS

A. ECONOMIC PARAMETERS

In rather broad terms the Basic Law subjects the Federation budgetary policy and its components to the "overall economic equilibrium" (Article 109 [2]). Many understand this as a reference to the "magic quadrangle" as defined in the Law on Stability (§ 1): stability of price level, high level of employment, balanced trade, and steady and adequate economic growth.

In the wake of the Maastricht Treaty, the amendment of Article 88 of the Basic Law has shifted the balance considerably between these potentially conflicting parameters. Thus, price stability now ranks as an "overriding goal" under the Constitution (Article 88, 2), in line with its dominance under the (Arts. 4 [2], 105 [1,1] EC Treaty). This commitment qualifies as a constitutional objective (*Staatsziel*).[10] The constitutional entrenchment of monetary stability is a rather intriguing example of the "enoblement" of an economic objective via European treaty making.[11]

The rules on budgetary discipline in the EC Treaty[12] and the constitutional limitations on deficit-spending operate in close connection with monetary stability.[13] These rules also buttress the State's responsibility *vis-à-vis* future generations.

Both the Community goal of a high employment level (Article 2 EC Treaty) and the new provisions on employment that the Treaty of Amsterdam (Article 125 EC Treaty *et seq.*) introduced reflect an important social concern. But they neither affect the commitment to price stability as a dominant objective nor relax the clear obligation of budgetary discipline. Similar considerations apply to the "Employment Pact" recently

9. *See* Matthias Herdegen, *Price Stability and Budgetary Restraints in the Economic and Monetary Union: The Law as Guardian of Economic Wisdom*, 35 COMMON MKT. L. REV. 9-32 (1998); Hugo H. Hahn, *The Stability Pact for European Monetary Union: Compliance with Deficit Limit as a Constant Legal Duty*, 35 COMMON MKT. L. REV. 77-100 (1998).

10. Peter Badura, *Das Staatsziel "Europäische Integration" im Grundgesetz*, FESTSCHRIFT FÜR HERBERT SCHAMBECK 888, 904 (1994); Herdegen, *supra* note 8, at ¶¶ 69-73.

11. *See* Herdegen, *supra* note 8, at 16.

12. *See* EC TREATY arts. 104 (1, 2), 121 (1, 3); Herdegen, *supra* note 9, at 17.

13. *See* GRUNDGESETZ [GG] art. 115 § 1, 4.2 (F.R.G.) ("Revenue obtained by borrowing shall not exceed the total of investment expenditures provided for in the budget; exceptions shall be permissible only to avert a disturbance of the overall economic equilibrium.").

adopted by the European Council during its June 1999 Cologne Summit. This pact will operate only as a semantic counterpart to the legally binding commitment to monetary stability.

B. The Social State

In their constitutional asceticism, the framers of the Basic Law abstained from formulating social rights. The different approach taken in many of the new federal States of East Germany did not influence later amendments of the Basic Law.[14] Rather, the social responsibility of the State expresses social responsibility in the principles of the "social State" as a constitutional objective (Article 20 [1], 28 [1,1] of the Basic Law) and the respect for human dignity (Article 1[1] of the Basic Law). The "social State's" constitutional objective leaves ample room for legislative intervention. But it remains to be seen, for example, whether a radical transformation of our pension scheme would withstand constitutional scrutiny in light of the guarantee of property.[15]

C. Fundamental Rights, Proportionality, and the Protection of Legitimate Expectations

Case law and constitutional doctrine have transformed the fundamental rights into a rather subtle instrument employed against excessive State intervention. In particular, the freedom of profession (Article 12 [1] of the Basic Law) and the property clause (article 14 of the Basic Law) considerably limit the potential for a tightly regulated economic sector. In the context of these and other freedoms, a strict scrutiny of proportionality and the protection of legitimate expectations (*Vertrauensschutz*)[16] call for a finely-tuned balance between public purposes and individual interests. Moreover, the principle of equality (article 3[1] of the Basic Law) requires not only rational differentiation, but also a sound empirical basis for the burdening of specific groups.[17] Such scrutiny will also extend to certain facets of recent legislation which purport to reduce contributions to social insurance via higher taxes on the electricity and mineral oil consumption ("Ecological Tax Reform").[18]

In this context, it is appropriate to emphasize the difference between the general perception of the legislative process in Germany and the American deference to congressional choices. Constitutional doctrine, the political establishment itself, and citizens at large tend to perceive the legislative process in light of possible defects and eradication of these defects by constitutional review. Legislative choices thus appear inherently

14. Herdegen, *supra* note 1, at 195.

15. *See* Grundgesetz [GG] art. 14 (F.R.G.).

16. BVerfGE 97, 67 (78); Thilo Rensmann, *Reformdruck und Vertrauensschutz*, 54 Juristenzeitung 168-75 (1999).

17. *See* BVerfGE 88, 87 (96).

18. Law on the First Phase of Ecological Tax Reform, BGB1. I S. 378 (1999); *see also* Government Draft, Bundestags-Drucksache 14/40, at 1.

susceptible to inconsistencies and subsequent falsification by empirical analysis. From this perspective, constitutional review, despite all warnings against excessive intervention by the Federal Constitutional Court, in some way forms part of the legislative process. The recourse to fundamental rights against legislative discretion operates as a decisive factor in this process. Naturally, constitutional doctrine, despite frequent criticism, hardly operates as a truly restraining force against judicial activism—expanded constitutional review enhances the political impact and influence of constitutional lawyers.

1. The Economic Dimension

Fundamental rights severely curtail the State's power to ban certain technologies, such as the operation of nuclear power plants.[19] These rights also protect against the inhibition of modern technologies, in particular genetic engineering, on the basis of mere speculative phantom risks.[20] Fundamental freedoms and the principle of equality restrain the State's insatiable quest for higher taxes and similar revenues. In a recent judgement, the Federal Constitutional Court activated the property clause as a barrier to excessive taxation. The Court has developed the famous and controversial formula of "semi-partition" (*Halbteilungsgrundsatz*) dealing with property taxes.[21] Application of this formula to other forms of revenue would put an end to Germany's leadership in high income tax tariffs.

The Federal Finance Court recently emphasized that large discrepancies between the tariffs for the taxation of private income and corporate revenue are incompatible with the principle of equality.[22] The Constitutional Court has also established strict conditions for special levies that affect only specific activities or individuals such as the tax-like levy on the production of electricity used to finance an uncompetitive coal industry.[23]

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19. *See* Fritz Ossenbühl, *Verfassungsrechtliche Fragen eines Ausstiegs aus der friedlichen Nutzung der Kernenergie*, 124 ARCHIV DES ÖFFENTLICHEN RECHTS 1-54 (1999).

20. *See* Matthias Herdegen, *Biotechnology and Regulatory Risk Assessment*, TRANSATLANTIC REGULATORY COOPERATION (G. Bermann/M. Herdegen/P. Lindseth eds., 1999).

21. BVerfGE 93, 121 (138):

> Notwithstanding the legal guarantee with regard to the substance of assets, revenue accruing from assets is also encompassed by the legal protection afforded to assets as a basis for individual liberty. According to Article 14 (2) of the Basic Law, the use of property serves both private interests and the public good. Therefore while revenue accruing from assets is subject to general taxation, sufficient revenue for private use must be granted to the owner of the assets. Hence, taxes on assets may only be levied in addition to other taxes so long as the overall tax burden on the revenue remains close to a semi-partition between private and public benefit, taking into account—by means of generalizing—income, deductible expenses and other tax relief.

See also id. at 149 (Böckenförde, J., dissenting).

22. *See Bundesfinanzhof*, 52 NEUE JURISTISCHE WOCHENSCHRIFT 1736 (1999).

23. *See* BVerfGE 91, 186 (203).

2. Global Implications

In an era of global competition for capital, fundamental rights play an important role in ensuring attractive conditions for investment.[24] As vehicles in opposition to excessive regulation, fundamental rights yield an important spin-off in favor of free trade. This "global" dimension of fundamental rights becomes apparent when we look at current transatlantic trade conflicts—the protectionist banana regime of the European Community raises constitutional issues with respect to the free exercise of profession and property.[25] The cultural protectionism inherent in the quota clauses of the European television directive collides with free expression and related freedoms of communication under Article 5 of the Basic Law.[26] The insistence on transparent and empirically sound risk assessment, voiced in the *Hormone* case by the Appellate Body in the WTO dispute settlement procedure,[27] seems like *déjà vu* to the connoisseur of the constitutional standards formulated in German case law.

In the conflicts engineered by Community legislation, however, the standard of individual protection depends primarily on the unwritten fundamental rights recognized in Community law. The German Constitutional Court has suspended its scrutiny of Community acts so long as they do not display grave disrespect for the fundamental rights that the Basic Law protects.[28] Thus, the German Constitutional Court defers to scrutiny by the European Court of Justice. It is a matter of serious concern that the European Court vests the Community legislator with excessive discretion in its economic measures and falls short of providing clearly justiciable patterns of control. The Court's case law often pays lip-service to such fundamental rights as the freedom of profession and the protection of property.[29]

3. Rights to Public Payments and Access to Public Institutions

In the future, the State's receding role may find its limits in the distributive and participatory dimensions of fundamental rights. In our industrial societies, the effective enjoyment of individual freedoms depends in many ways on State assistance. The German Constitutional Court has very cautiously recognized constitutional claims to benefit from public facilities, where the exercise of a fundamental right depends on such ac-

24. For the Court's role with respect to the German position in this global competition, see Matthias Herdegen, *Standortsicherung durch Rechtsprechung*, FESTSCHRIFT FÜR KARLHEINZ BOUJONG 869 (Carsten Thomas Ebenroth et al. eds., 1996).

25. *See* Bundesverfassungsgericht, 48 NEUE JURISTISCHE WOCHENSCHRIFT 950 (1995); 6 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 412 (1995).

26. *See* Matthias Herdegen, *After the TV Judgment of the German Constitutional Court: Decision-making within the EU Council and the German Länder*, 32 COMMON MKT. L. REV. 1369 (1995).

27. WTO Doc. WT/DS26/AB/R&WT/DS48/AB/R (Jan. 16, 1998).

28. *See* BVerfGE 73, 339 (387); BverfGE 89, 155 (175).

29. *See* MATTHIAS HERDEGEN, EUROPARECHT 158 (2d ed. 1999); Martin Nettesheim, *Grundrechtliche Prüfdichte durch den EuGH*, 6 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 106 (1995).

cess.[30] But the Court has been careful to limit such claims to what the individual can reasonably expect from society.[31] This limitation defers to Parliament's responsibility for competing social interests, for the overall economic equilibrium, and for the budgetary discipline recently imposed by the EC Treaty.

III. BUDGETARY DISCIPLINE

In the zoological garden of constitutional concepts, substantive and substantial limitations of the power of the purse have only recently emerged and are still rare animals. Attempts to devise material rules aimed at sound public finances have rarely materialized on a constitutional level. In 1798, Thomas Jefferson expressed his wish to remove the borrowing power from the government. Years later, the then President Jefferson fought for a loan of $15 million for the purchase of the Louisiana Territories.[32]

A. RESTRAINTS ON THE POWER TO BORROW

The German Basic Law provides temporary restraints on the power to borrow in Article 115 (1, 2).[33] This clause establishes a constitutional balance between revenue obtained by borrowing and the investment expenditures that foster the future production and growth potential.[34] The future burdens resulting from borrowing must be balanced against the future benefits resulting from investment. The escape provided in the case of a disturbance of the economic equilibrium vests the parliamentary legislator with broad discretion in balancing conflicting public interests. The balancing process must, however, be plausible with regard to existing economic and financial data.[35]

Many have challenged the rationale underlying the symmetry between borrowing and investment on the ground that actual investments should receive equal treatment to actual benefits resulting from investments made in the past (and not as justification for future burdens flowing from

30. *See* BverfGE 33, 303 (329) (discussing access to university education).

31. *See* BVerfGE 33, 303 (333):

> Although participatory rights are not *per se* limited to pre-existing public facilities, they are, however, only granted under the caveat of what is possible, in the sense of what the individual may reasonably expect from society. This is primarily within the judgment of the legislator who in his budgetary decisions also has to take other public needs into account and must heed the requirements of the overall economic equilibrium as expressly laid down in Article 109 (2) of the Basic Law.

32. *See* Donald B. Tobin, *The Balanced Budget Amendment: Will Judges Become Accountants? A Look at State Experience*, 12 J.L. & POL. 153 (1996).

33. *See* Badura, *supra*, note 10.

34. *See* Herbert Fischer-Menzhausen, *Art. 115*, 3 GRUNDGESETZ-KOMMENTAR (Ingo von Münch & Philipp Kunig eds., 1996), ¶ 13; Karl Heinrich Friauf, *Staatskredit*, 4 HANDBUCH DES STAATSRECHTS DER BUNDESREPUBLIK DEUTSCHLAND, § 91, ¶ 20 (Josef Isensee & Paul Kirchhof eds., 1990).

35. *See* BVerfGE 79, 311 (338).

actual borrowing).[36] But in light of the capital actually received, borrowing challenges inter-generation solidarity in terms of the interest rather than the repayment of the credit. The budgetary burdens resulting from interest payments harbor an inherent temptation for the State—inflation (fueled by deficit spending) privileges the State as greatest debtor, unless clauses protecting against monetary fluctuations flank its credits.[37]

B. Fiscal Discipline in the Economic and Monetary Union

The tight regime of fiscal discipline established by the Maastricht treaty is far more sweeping than existing constitutional patterns. The strict rules on public spending laid down in the EC Treaty[38] reflect the insight that monetary stability cannot be achieved without rigid spending discipline. This discipline is the most important component of solidarity within the "compound" of the European Union.

The fundamental obligation is to avoid excessive public deficits (Article 104 [1] EC Treaty). The EC Treaty provides the contours for this obligation: Member States must keep their government debt within 60% of the GDP and their government deficit within 3 percent of the GDP.[39] For the members of "Euroland," the provisions of the "Stability and Growth Pact" contain a quasi-automatic control mechanism with a sanction spiral leading to a deposit with macro-economic dimensions (up to 0.5 % of the GDP).[40] It remains to be seen to what extent the sanction scenario will carry sufficient dissuasive force and whether, in a worst case scenario, the Council of the European Union would be prepared to lash out against tenacious failure in fiscal discipline. The "Stability and Growth Pact" goes even beyond the "hard" obligation to avoid excessive deficits—EU Member States participating in the European currency must pursue the objective of a balanced budget or even of a budget surplus.[41]

It is hard to imagine such a stern regime of fiscal discipline resulting from an internal constitutional process. Such rules are only conceivable as the outcome of treaty-making where spending discipline is traded against the transfer of monetary sovereignty. The treaty rules on government spending can only be amended by common accord of all Member States. Such an accord would imply constitutional reforms in some Member States, including Germany. In constitutional terms, a stronger form of legal and political entrenchment is unimaginable.

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36. *See* Paul Kirchhof, *Der Staat als Organisationsform politischer Herrschaft und rechtlicher Bindung*, Deutsches Verwaltungsblatt 637, 646 (1999).

37. *See* Kirchhof, *supra* note 36, at 646.

38. EC Treaty art. 104.

39. *See* EC Treaty art. 104(1)(2) in conjunction with Maastricht Protocol art. 1 (No. 5) (discussing the Excessive Deficit Procedure).

40. *See* Commission Regulation 1467/97, art. 12(3), 1997 O.J. (L 209) 6 (discussing expediting and clarifying the implementation of the excessive deficit procedure); *see also* Herdegen, *supra* note 9, at 30-31.

41. *See* Commission Regulation 1466/97, arts. 3(2, *lit.* a), 7 (2, *lit.* a) 1997 O.J. (L 209) 1 (discussing the strengthening and coordination of budgetary positions).

IV. PRIVATIZATION

A. BACKGROUND

State withdrawal from certain functions in favor of private players has several causes. First, fiscal restraints pressure the State into reducing its presence in a number of economic and social sectors. The quest to qualify for "Euroland" has induced Germany and other Member States of the European Union to sell public enterprises (fully or in part), thus reducing the public deficit and the government debt. For example, the federal government sold a considerable part of its stock in *Deutsche Telekom* in 1997. In addition, fiscal restraints tempt the State to withdraw from the provision of unprofitable services and to cut social benefits. Leaner budgets provide the impetus for a leaner State.[42] Moreover, the shrinking role of the State broadens individual freedom in the economic sphere. Until recently, state monopolies existing in the postal and telecommunication sectors curtailed individual freedoms such as the free exercise of profession. Finally, the model of deregulated markets with open competition calls for a change in the State's share in economic activities. EC competition law is one of the driving forces in this process. The EC Treaty (Article 81) challenges State monopolies and public entities with exclusive rights if they fail to meet modern demands of the public at large or of specific sectors which, in turn, are fuelled by modern technological evolution.[43] In recent years, EC legislation has pushed for the dismantling of State monopolies and for the privatization of State functions, particularly in telecommunications and postal services.[44] The quest for private investments and global competition for an attractive investment climate have fueled the dismantling of State monopolies and the privatization of State functions. In 1994, for example, the Federal legislature passed the Act on the Construction and Financing of Federal Motorways by Private Persons.[45]

B. SPECIFIC SECTORS

1. Postal Services and Telecommunications

Until a 1994 constitutional amendment, an entity of the Federal administration, the German Postal Service, was responsible for the administration of postal services and telecommunications.[46] The 1994 constitutional amendment[47] opened the post and telecommunication sector to private

42. *See* SACHVERSTÄNDIGENRAT "SCHLANKER STAAT," ABSCHLUSSBERICHT (Bundesministerium des Inneren ed., 1997).

43. *See* A. Gardner, *The Velvet Revolution: Art. 90 and the Triumph of the Free Market in Europe's Regulated Sectors*, 2 ECLR 78 [1995] .

44. *See* European Commission, *Services of General Interest in Europe*, 1996 O.J. (C 281) 3, at § 34.

45. Act on Construction and Financing of Federal Motorways by Private Persons (Gesetz über den Bau und die Finanzierung von Bundesfernstraβen durch Private), BGBI. I S. 2243 (1997).

46. *See* GG art. 87 § 1, cl. 1 (F.R.G.).

47. *See* GG art. 87f § 2, cl. 1 (F.R.G.).

undertakings.[48] The three branches of the German Postal Service were transformed into public companies (*Deutsche Telekom AG*, *Deutsche Post AG*, and *Deutsche Postbank AG*) as envisaged by the constitutional amendment in 1994.[49] Private stockholders currently hold approximately one quarter of the *Deutsche Telekom AG* capital share. The Federal Government, as exclusive owner, currently holds all the shares of the *Deutsche Post AG* (which in turn has acquired the *Deutsche Postbank AG*). In line with the amended constitution,[50] the *Deutsche Post AG* holds an exclusive license for postal services for a transitional period.[51]

2. Broadcasting

Until the 1980s, the broadcasting sector in Germany was entirely reserved to public entities. Relying on the scarcity of frequencies in the electronic media at the time, the Federal Constitutional Court did not extend the constitutional freedom of communication through audio-visual media[52] to private entities.[53] In the wake of technological change, private channels have been admitted to radio and television broadcasting. Due to this technological evolution, the constitutional freedom of broadcasting now covers the establishment and operation of private channels, both under the Basic Law[54] and under the European Convention on Human Rights (article 10).[55]

3. Construction and Operation of Roads

Under the terms of legislation passed in 1994,[56] the federal government may delegate to private persons its obligation to construct, maintain, operate, and finance motorways. The private operator may levy tolls on road users. Private construction and financing of motorways alleviates the government's financial burdens and accelerates important construction projects (especially in eastern Germany).[57]

4. Public Order and Security

The maintenance of public safety and order remains a sector reserved to the State. The State may not transfer basic police powers to private

48. *See* Herdegen, *supra* note 1, at 186.
49. *See* GG art. 143b § 1 (F.R.G.).
50. *See* GG art. 143b § 2, cl. 1 (F.R.G.).
51. *See* Act on Postal Services, BGBl. I S. 3294, § 51, cl. 1 (1997).
52. *See* GG art. 5 § 1, cl. 2 (F.R.G.).
53. *See* BVerfGE 12, 205 (261).
54. *See* BVerfGE 73, 118 (157); BVerfGE 95, 220 (234).
55. *See* European Court on Human Rights, Ser. A, vol. 276 (1994) - *Informationsverein Lentia.*
56. *See* Act on Construction and Financing of Federal Motorways by Private Persons, *supra* note 45.
57. *See* BUNDESTAGS-DRUCKSACHE 12/6884, at 12; *cf.* BERICHT DER ARBEITSGRUPPE "PRIVATE FINANZIERUNG ÖFFENTLICHER STRUKTUREN" (Bundesministerium der Finanzen ed., 1991).

persons.[58] But the police may employ private agents to provide technical assistance.[59]

C. Public Needs and a Guarantee of Minimum Standards

In certain areas covered by constitutional parameters, the State remains responsible for meeting basic needs. This responsibility may either prevent the State from fully phasing out specific sectors or oblige the State to ensure that private players live up to minimum standards.

1. "Basic Service" in the Broadcasting Sector

The Federal Constitutional Court has held that the State remains responsible for offering a "basic service" (*Grundversorgung*) in the television sector. This in turn is entrusted to public channels that meet the basic needs of the public through information and cultural programs. Both the continued existence and the development of public broadcasting are thus constitutionally guaranteed.[60] According to the Constitutional Court, a completely deregulated private electronic media market financed exclusively by advertising could not represent the full spectrum of opinions in society that the freedom of broadcasting requires.[61] Such protection of public entities that compete with private players constitutes a rather curious interpretation of individual freedoms.

2. Universal Services in the Postal and Telecommunications Sectors

The deregulation of the postal and telecommunications sectors leaves the State to guarantee appropriate and adequate postal and telecommunication services.[62] Federal legislation provides for compulsory services (subject to compensation), should the market fail to adequately meet basic public needs.[63]

V. CONCLUSION

At the threshold of the new millennium, the German Basic Law provides a remarkably stable framework for Germany's role within both the European Union and the international economic order. The winds of global competition drive budgetary austerity and reduce State intervention. The pressure of fiscal discipline finds minimal resistance in the constitutional framework. Rather, the gradual withdrawal from high social

58. *See* Josef Isensee, *Gemeinwohl und Staatsaufgaben im Verfassungsstaat*, 3 HANDBUCH DES STAATSRECHTS, § 57 ¶ 150 (J. Isensee & P. Kirchhof eds. 2d ed. 1996).

59. *See* 128 BAYERISCHE VERWALTUNGSBLÄTTER 412 (1997) (discussing the carrying out of radio control of a speed limit Bayerisches Oberstes Landesgerichton); 127 BAYERISCHE VERWALTUNGSBLÄTTER 90 (1998) (discussing detection of illegally parked cars Bayerisches Oberstes Landesgericht).

60. *See* BVerfGE 74, 297 (327); BVerfGE 83, 238 (299).

61. *See* BVerfGE 97, 228 (256).

62. *See* GG art. 87f (F.R.G.).

63. *See* Telecommunication Act (Telekommunikationsgesetz), BGBl. I S. 1126 § 18 (1996); Act on Postal Services, *supra* note 51, at § 13.

standards meets opposition rooted in legitimate societal claims and a long-established political consensus. Like other EU member States, Germany has subscribed to a monetary regime sheltered from short-term political temptations, thanks to the constitutionally entrenched independence of the European Central Bank.[64] The treaty rules on price stability and fiscal discipline are an unprecedented attempt to subject majority rule to economic wisdom. This new regime has overcome the initial birth pangs. It remains to be seen how this regime will withstand the inevitable clashes with the social expectations that have been cherished for many decades.

An axiomatic vision of the "proper" role of the State cannot be resolved by the current debate concerning the leaner State and its constitutional underpinnings.[65] It is apt that almost 200 years ago, Wilhelm von Humboldt's famous treatise did not inquire into the limits of the State, but rather into the limits of the State's effectivity.[66] It seems that neither clinging to the fully-fledged social State nor driving towards the leaner State *eo ipso* reflects what "truly" belongs to the State. Rather, as with leaner or "fatter" budgets, these movements mirror the ebb and flow of the tide to which both political science and constitutional doctrine must constantly respond.

64. *See* EC TREATY art. 108; GG art. 88 § 2 (F.R.G.).

65. *See* Herdegen, *supra* note 1, at 191.

66. WILHELM VON HUMBOLDT, IDEEN ZU EINEM VERSUCH, DIE GRÄNZEN DER WIRKSAMKEIT DES STAATS ZU BESTIMMEN (E. Cauer ed., 1851).