Research Network WWU/USP on Social Security and Social Rights

Report on Current Stage

by Marcus Orione and Heinz-Dietrich Steinmeyer

I. Introduction

Since 2014 there is a permanent network between the University of Münster and the University of Sao Paulo which is led by Prof. Marcus Orione Gonçalves Correia (University of Sao Paulo) on the Brazilian side and Prof. Dr. Heinz-Dietrich Steinmeyer (WestfälischeWilhelms-Universität Münster) on the German side. This research group – also consisting of Prof. Flavio Batista (Universidade de São Paulo) on the Brazilian side and Prof. Dr. Katharina von Koppenfels-Spies (Albert-Ludwigs – University Freiburg), Prof. Dr. Jacob Joussen (Ruhr – University Bochum) and Katharina Knuf on the German side – has had a separate project within the general project "Law Network Germany-Brazil – Globalization and the Social State" which in its starting phase was sponsored by DAAD (German Academic Exchange Service) and CAPES. This separate project was named "Meeting the Challenges of Social Policy – the Role of the Constitution and its Interpretation – Different approaches to similar problems?" and it was focused on the two constitutions, which in a different way influence social policy. While the German constitution contains only few details, the Brazilian constitution is very detailed in that respect. The German constitution influences social policy by the principle of the social state in Article 20 and by treating pensions and other benefits paid as a consequence of contribution as a property (Article 14).

On these topics and, in consequence, on other topics of social policy we have had two meetings (two seminars in "workshop Brazil/Germany") – one in May 2014 in Sao Paulo and another one in July 2015 in Münster, in which Professor Steinmeyer gave a lecture on "Labor Law and social security law in Germany", Professor Marcus Orione Gonçalves Correia gave a lecture on "Brazilian state and production of common good", "Social security in Brasil – constitutional treatment" and "Maternity leave benefit" and the professors of both side presented several topics in social security and labour law.

In August 2017 Prof. Steinmeyer taught the seminar "Social rights in comparative perspective: law and politics in the post-socialist transition" (as part of post graduation classes) at USP. In July 2018 there was another meeting of the research group in Münster which especially was focused on pensions and as part of it there have been meetings in Berlin and Münster with high officials from public pension insurance (Deutsche Rentenversicherung Bund and Deutsche Rentenversicherung Westfalen) as well as the occupational pension side (Arbeitsgemeinschaft für betriebliche Altersversorgung). In these meetings each team made speeches about social security system in both countries, trying to understand the common and the different aspects between then.

II. Current situation and prospects of project (by Marcus Orione and Heinz-Dietrich Steinmeyer)

During this last seminar it was decided to proceed with a more specific project. The objective now is a comparative reflection between Brazil and Europe, with a focus on Western Europe, particularly the European Union, particularly Germany, which is also experiencing a process of reforms focussing on flexibilization - to reflect on the current processes of flexibilization of labor and social security rights in Brazil. There is a certain different view and understanding of the term "flexibilization" in Europe and in Brazil. While in Europe flexibilization is something to be achieved for the benefit of companies as well as workers – for example flexible working hours to help people to coordinate family and work – in Brazil it seems to be an instrument only for the benefit of the economy and thus it has a different effect on social rights than in Europe. This is to be examined in labor law as well as in social security law and the European experiences are important for the Brazilian discussion and vice versa. The title of the project is "Impact of Flexibilization on Social Security Law and Labour Law".

As a first step on researching this new topic, Prof. Steinmeyer taught on that topic in August 2019 in Sao Paulo. It was intended that the students be able to reflect critically on the Brazilian experience with precarious reforms. This stay also gave opportunity to do further research and coordinate it. The new project requires in the first place more knowledge on both sides concerning the basic situation of the labor law and the social security law of Brazil on the one side and Germany – including EU law aspects – on the other side. Due to the collaboration in the earlier years and other research in the past (see Steinmeyer, Verfassungsrechtliche Rahmenbedingungen und Grenzen für Reformen der Sozialsysteme im Zeitalter der Globalisierung, Neue Zeitschrift für Sozialrecht 2012, pp. 721-727) there is knowledge about the social security systems of both countries by all members of the research group. There should be more discussion and information on the specific aspect of flexibilization – examples and what it means. So for example in Germany there is a discussion on flexibilization of starting retirement.

When it comes to the labor law aspect of the topic, there is also knowledge about the system of the other side by the members of the research group. But here there should be worked out a more detailed view of the labor law of both countries – including new developments especially in Brazil. So the next step of the work of the research group will be to exchange views and information on the Brazilian and German/ European labor law with a special emphasis on current developments. On both sides there has to be a special focus on the social rights which means in this case that the measures of flexibilization have to be examined in both countries /regions concerning the aim of these measures and how and by what means social rights are protected. It has to be worked out if these measures are in the first place for the benefit of the workers like a number of measures in Germany/Europe or to improve competitiveness within the country or in competition with other countries. Last but not least it might be a political move to foster industry. In the first case in Germany there is a discussion on whether this is in detail compatible with the functioning of production, for example. In the second case lowering of labor standards and cutting benefits might improve competitiveness but on the expense of social rights. Here the EU approach of harmonization of the legal systems might be an interesting approach from a comparative point of view and is worth to be examined thoroughly. In the last case it has to be found out if such measures lead to the aim proclaimed and if this aim is legitimate. It has to be examined if this not only limits but also violates worker´s rights. This has to be done on the background of the constitutions but also international

conventions and human rights. In this article we intend just to report the social security system in both countries and the method of investigation used by each team.

III. Brazil (by Marcus Orione and Flavio Batista)

A. The basis of the social security system in Brazil

Brazilian Social Security System is composed by three systems: social insurance, health care and social assistance. This organization started with the new Constitution in 1988, unifying these three different forms of social protection in a system guided by the solidarity principle. The main goal of the Constitution was to universalize social protection. However, social insurance system was, and remains, attached to the contribution principle, so that is difficult to make this change. Also, several reforms prevented that the conversion to a universalized system could be finished.

So, Brazilian social insurance system has three bases: General Social Insurance System, Complementary Social Insurance System (open and closed) and Civil Servants' social insurance system. The first one, known by its initials in Portuguese – RGPS - is national in scope, being applicable to any worker that is not protected by one of the Civil Servants' Social Insurance System. It is managed by the National Institute of Social Security (INSS). The benefits granted by the RGPS, for the most part, depend on the insurance period. They cover especially pension, retirement, incapacity for work and removal from work as a result of maternity. Retirement is paid monthly and during the rest of the insured's life, and can be granted by age, contribution time – which may vary in special conditions of work – and disability.

As a result of twentieth Constitutional Amendment, adopted in 1988, the social insurance factor was created. It consists of a mathematical formula applied in the granting of retirement by contribution time and in retirement by age and, in the majority of cases, reduces by up to forty percent the value of the initial monthly income of the benefit (besides aiming to keep the insured more time contributing to the system). Thus, the younger the insured persons retire, the lower the initial value of their retirement. As it did not respond to the social clamor, there was a partial revocation of the social insurance factor. Thus, if the insured person counts eighty five years (in the case of a woman) and ninety five years (in the case of a man) from the sum of the age and the time of contribution, it is possible not to apply the social insurance factor. In other words, a man must have at least thirty-five years of contribution that, added to his age, sum up ninety - five points and the woman must have at least thirty years of contribution that, along with her age, sum up eighty-five points. These numbers of points are progressive and will reach ninety and one hundred, respectively for women and men. For the teacher who proves – exclusively – a time of effective exercise of teaching kids in early childhood, elementary or high school, five points will be added to the sum of the age and the time of contribution. Financing method means the arrangement that will allow the existence of a flow of resources to cover the expenses of the system as they occur. A public social insurance system is the responsibility of the state and is created from an initial number of taxpayers considering as certain that there will be an infinite regular flow of new participants in the future (whether as an insured employee or a liberal professional).In Brazil, the financing method adopted in the general social insurance system is simple, proposing a pact between generations, in which active insured persons (current generation) pay the benefits of inactive insured persons (past generation).In this type of financing, the volume of insured persons who contribute to the system is very important, as it will guarantee the

sustainability of the fund. In international terms it is a Pay-As-You-Go-System (PAYG). However, factors such as the increasing unemployment rate in Brazil, the precariousness of labor (promoted by the labor reform), the replacement of jobs by technology (automation, robots) in the long run will negatively impact the collection of contributions and, consequently, on intergenerational financing. Starting from the premise that the system needs workers (employees or freelancers) to guarantee its financing, problems with the substitution of human work by technology (technological revolution: artificial intelligence, robotization) will soon arise. To solve this problem, some countries are already facing the issue of universal basic income, with a contribution from the sector responsible for the implementation of this technology, especially Finland. In the future, also the countries in the periphery of capitalism, such as Brazil, will have to face the issue as fundamental to their social protection system.

B. Outlook of health protection in Brazilian social security system in its various manifestations

Brazilian society, in the way it was organized by Federal Constitution, is a work society. Indeed, the social value of work is one of the backgrounds of the Federative Republic of Brazil, pursuant to Article 1, III, of the Constitution. Moreover, the right to work is one of the social rights under Article 6 of the same text, and the workers are supported by a long list of rights, expressly declared as exemplificative, contained in Article 7. Yet, Article 170 provides that the economic order is founded on the value of human labor, and one of its principles is the pursuit of full employment. Finally, Article 193 establishes that the primacy of labor is the basis of social order, in which is included the Social Security system, our subject of analysis. Now, if the primacy of labor is the basis of social order, which includes the Social Security, it is clear that the latter must be organized around the primacy of labor, right and duty of citizens, which must be properly valued. For this, we must wonder what means the primacy of labor and its social value, since the Constitution ran such ideas in an abstract and vague way, without defining accurately its contours. The value of labor established in the Constitution means to assign to work and workers a treatment suitable to modern capitalist society, in which work shall receive not merely philanthropic protection but politically rational protection. This follows from the fact that the value of labor has the function of looking for conciliation of interests between capital and labor, but with the consciousness of being impossible, resulting in a state of social protection.

The politically rational social protection, which constitutes the peculiar treatment of labor by the 1988 Constitution, is integrated by Social Security, for which reason, as much as possible, it will be organized around the phenomenon of labor, basis of social order. As we care for our topic, in spite of the semantic content of the expressions used by the Federal Constitution to draw the social insurance system, they should be read in the context of other constitutional provisions, especially those that underlie the system in which they operate. Thus, when the Constitution elects the disease as a contingency covered by the social insurance system, it's not the disease itself it wants to refer, but the disease as a harm that affects the individual as a worker, that is, the illness that affects the working capacity. So well with disability, but in that case, the relationship is much more immediate, by the Constitution have already used words semantically linked to the ability to work. So, is fully justified, given the constitutional order, the reading taken by the legislature to establish the benefits of disease, disability pension and accident assistance, in addition to professional rehabilitation services, in Law No. 8.213/91. Let us now examine its contents. The difference between those three benefits, in our view, is the

possibility to perform the activity, albeit with greater effort or adaptation, in the recovery of the worker to return to the exercise of his or her activity or the rehabilitation to another function different from that which he or she exercised. Indeed, the disease benefit is payable in respect of incapacity for habitual activity of the worker, the disability pension is payable in respect of incapacity for habitual activity added of impossibility of rehabilitation for an activity that ensures the survival of the insured person, while the accident assistance is due in case of sequel that reduce the ability to exercise the usual activity of the insured person. Thus, in order to grant disability retirement, the insured person must be unable to habitual activity and should be impossible to rehabilitate him for the exercise of other activity which guarantees the subsistence.

This leads to the need to make a few comments about the possibility of rehabilitation. Firstly, it is worth noting that the possibility of rehabilitation should be assessed in perspective, that is, not taking into account the possibility of effective rehabilitation during the period between the diagnosis and prognosis of healing, but after consolidating a possible inability to habitual activity, failing to bring about a complete emptying of the benefit for disease. Thus, even if their rehabilitation is in fact impossible before it is fully recovered, the insured person, in perspective, is fully capable of rehabilitation when the prognosis indicates his healing, so that should be granted the benefit for disease, and not the disability retirement. The solution would be different if the insured person was affected, for instance, by a quadriplegia. This insured person, regardless of the time prescribed by the doctor for their discharge from the hospital, would be not subject, even in perspective, of professional rehabilitation for any activity, so that he should receive the benefit of disability pension from the beginning of disability. Another aspect worth mentioning about the possibility of rehabilitation is the question of the criteria to be taken into account for assessment. The question acquires high relevance in the Brazilian context, where much of the participants of the system and, especially, of those receiving disability benefits, are manual workers with low education. This can be measured by means of an interesting statistic published by the Ministry of Social Insurance since 2006, concerning the distribution of disability benefits granted in accordance with the disease that led to the concession. In 2007, for example, 23.38% of disability claims were due to non-traumatic orthopedic diseases, which represents the largest share among disease groups. Of this, about a half is due to back problems, the most consistent in back pain from unidentified causes. Clearly, from the medical point of view, these diseases give cause for granting so many benefits because the work of the insured person in question require intense physical effort; otherwise, there would be no disability. Indeed, if a manual worker suffer from back pain, it is impossible to bend all day in the exercise of his activity, because of what he or she was evidently unable to habitual activity. The same could not be said of a worker with the same health problem that did not use his body to work .On the other hand, still in a strictly clinical point of view, these manual workers with low education may perfectly be rehabilitated for intellectual professions. The actual facts, however, points out a different solution. Indeed, it is quite impossible that a worker, after spending a lifetime developing activities without specialization, at the end of his labor life, could be recovered to an intellectual profession, especially taking into account that those few who have some study are often functionally illiterate. There is, again, the influence of the centrality of labor in disability benefits. The possibility of rehabilitation treated by the law is not a medical possibility, but a possibility of rehabilitation for the work, which must therefore take into account the personal circumstances of the employee, such as age and education, and the conditions of the labor market in which he was supposed to be reinserted after this rehabilitation.

One last point to be taken into account with regard to professional rehabilitation are the functions that the insured person could exert after rehab. This, to some extent, is the opposite problem than discussed so far. The quoted article 42 of Law No. 8.213/91 statue that the insured person, to be able to receive disability retirement benefit, shall be incapable of rehabilitation for the exercise of activity which guarantees the subsistence. When the legislature qualifies the activity for which the insured person shall be rehabilitated, this makes clear that rehabilitation for any activity is not enough to disfigure the possibility of granting disability retirement.

It is necessary, therefore, to investigate the meaning of "activity that guarantees the subsistence". The subsistence of the insured person is his or her maintenance. Each insured person, of course, maintains himself and possibly his family with the incomes from his activities, which are replaced by a social security benefit when it is in a contingency situation covered by the system. Therefore, to consider legitimate the possibility of rehabilitation of the insured person to another activity, this alternate activity should replace the income earned in the previous activity, if not exactly, at least to a level that allows the insured person to maintain the standard of living once owned, which is inherent in the notion of his possibility of subsistence. Subsistence, therefore, is a concept that lacks of an universal formulation, that is, one cannot express a notion of subsistence which is applicable to all insured persons in all situations. It must be determined case by case, with particular attention to the personal circumstances of each insured person. If it is true that it is not mandatory to the Social Insurance guarantee the exact level of income of the insured person, whatever it is, it is also true that the Constitution and the Laws 8.212 and 8.213/91 established an upper limit for social security, that is, a limit up to which the General Social Insurance compromises with the level of income of the insured person, so that it offers benefits calculated according to the average contribution of each one. Thus, one can not consider that an insured person whose average contribution is next to the upper limit has his subsistence guaranteed with the rehabilitation for an activity that earns income equal to the minimum wage. Up to this limit, the system must commit maintaining the approximate level of income of the insured person. What will definitely cause some confusion and practical difficulty is the exact contents of the "approximation" of the income level of the insured person. In other words: what is the limit in which the income of the activity resulting from rehabilitation stops being approached and shall not guarantee the subsistence?

We believe the answer to this question is an assessment of the benefit of accident assistance. For an accurate understanding of the benefit of accident assistance, it is essential to make a comparison between its norms before and after major modifications suffered by it by means of Law No. 9.032/95. The original wording of Article 86 of Law No 8.213/91 provided the granting of the benefit of accident assistance in case of remaining sequel after stabilization of injuries caused by accident at work, in three different scenarios: reduction of working capacity that requires greater effort or need for adaptation to exercise the same activity regardless of professional rehabilitation; reduction of working capacity that prevent, by itself, the performance of activity exercised at the time of the accident, but not another, at the same level of complexity, after professional rehabilitation; or reduction of work capacity that prevent, by itself, the performance of activity exercised at the time of the accident, but not another, at a lower level of complexity, after professional rehabilitation. Each of these scenarios attributed a different percentage to the insured person, applied to the median of his wages, to make the initial monthly income: respectively, thirty, forty or sixty percent. The correct interpretation of this provision shows that the understanding of the legislator that accident

assistance fulfilled distinct functions as the insured person continued or not performing their usual activities after consolidation of the effects of the accident. That's because, of course, only the latter two are related to the professional rehabilitation. In the first case, the monthly payment of thirty percent of the median of wages is intended to recover an alleged loss of earnings of the insured person due to a lower uptake in the labor market, caused by his acquired sequel. In the other two cases, however, the completion of forty or sixty percent is paid to the insured person only after professional rehabilitation, that is, when it proves impossible to maintain the same activity and it is necessary for the insured person to perform another activity to maintain his subsistence. Occurred the professional rehabilitation, the law establishes two possibilities: a new activity of the insured person could have the same complexity of usual or a lower complexity. It makes sense, noting that in a wholly exceptional case where the insured person could be rehabilitated to an activity of greater complexity, it would not be necessary any supplementary income, since he presumably would obtain in the labor market higher yields than the usual.

We can conclude, thus, that the prior legislation provided, even implicitly, an absolutely accurate criterion to the concept of activity that ensures the subsistence of the insured person: that which causes reduction of the usual income not exceeding sixty percent. The fall of the income up to this limit is a contingency covered by the system and financially compensated, so that the insured person could not claim a menace of his subsistence in case of maintenance his usual level of income, even though it were necessary to add the job gains with the benefit of accident assistance. On the other hand, exceeded this limit, the insured person would be in a contingency not covered by accident assistance benefit, but for disability retirement, since it would not be possible to guarantee subsistence combining job earnings and benefit of accident assistance. Article 86 of Law No. 8.213/91 was reformed by Law No. 9.032/95, which expanded the coverage of the accident assistance for accidents of any nature and eliminated the prediction of three scenarios for granting it, consolidating them into a single, more vague and general: "The accident assistance will be granted, as a reparation, to the insured person when, after consolidation of injuries from an accident of any kind, resulting sequels involving reduction of capacity for the work he regularly exercised". Also the coefficient was unified in fifty percent of the medium of wages. Although the new wording of the law demands some interpretation, because of its vagueness and the use of the expression "reduction of capacity for work he regularly exercised", it’s possible to conclude that the prior reasoning undertaken with the original text keep applicable, because the impossibility of exercising the same activity and the need for rehabilitation for diverse activity does not cease to be a particularly severe case of reduction of capacity for usual activity. Similarly, we can observe that the Decree No. 3.048/99, which regulates Law No. 8.213/91, brings in its Article 104, whose current wording was assigned by Decree 4.729/03, provision quite similar to the text revoked by Law No. 9.032/95, showing that the old scenarios are perfectly assimilated to the present. Thus, the same reasoning developed above can be applied to the new wording of the law, observing the mathematical correction: the insured person will be considered impossible to be rehabilitated if his new activity has an income decrease greater than fifty percent of the income earned by habitual activity. To end this topic, it remains only to consider what type of incapacity for work that will give rise to the professional rehabilitation service.

Two conclusions can be drawn from the law. The first conclusion is that only the insured person whose incapacity is limited to the exercise of their usual activities will be inserted into the professional rehabilitation service; and the second is that it will occur only when the inability to usual activity is deemed as unrecoverable, that is, definitive. It is therefore

the only case in which the duration of the disability presents interference in benefit, which is consistent with the logic of functioning of the system. It makes no sense to rehabilitate an insured person to other activity if he hopefully can return to their usual activities after a period of medical treatment. In summary, therefore, we present the following table of the forms of work disability and the social security benefits that accompany them. When unable to habitual activity, the insured person will receive the disease benefit. This benefit will be paid while the insured person remains incapable just for his habitual activity with healing prognosis or with a rehabilitation to another activity that guarantees the subsistence prognosis. It is only in this case that the duration of the disability is relevant to the system. If the disability is seen as temporary, that is, with healing prognosis, the insured person may receive disease benefit until he recovers, being misplaced their inclusion in professional rehabilitation program. Once it is found that the inability to habitual activity is permanent, the provision of professional rehabilitation services will be necessary in order to make it fit to the performance of another activity, one that can ensure subsistence, different from the usual, which is known that he will not return to practice. If it is determined that it is impossible to rehabilitate the insured person for any activity, or that the only activities for which rehabilitation is possible cannot afford his subsistence, the insured person shall be retired for disability. It is understood by guarantee subsistence a difference of up to fifty percent of the incomes of new activity and of habitual activity. That's because, cured or rehabilitated the insured person, if remains sequels that diminish his ability to his usual work, whether in the form of increased effort or adaptation to exercise, either in the form of need for rehabilitation for diverse activity, and the sequel has been caused by accident of any kind, including situations equivalent (labor diseases, accidents in way to job etc.), it will be paid to the insured person the benefit of accident assistance until he retires.

The first part of this exposition merely outlined the social security protection of labor disability due to health problems, not considering so far health care. It is that, unlike what happens in Germany, the system of health care is uncoupled from coverage of disability benefits. Indeed, while the latter are contributory, health care is universal and its performance is independent of any affiliation, and even the Brazilian nationality. This raises some interesting issues to think about the organization of the system and especially its reflections in finance and his interaction with the question of the theory of fundamental rights .Health, until 1988, was linked to social insurance, similarly to what currently happens in Germany. The current Constitution universalized the system, establishing a social security system as articulated set of pension, health care and assistance, and organized the unified health system, which serves anyone who needs it, regardless of any formality. Therefore, the Brazilian social security is divided into a contributory system, similar to the old structure of social insurance operation, and two non-contributory systems, universal health care system and the means-tested system of social assistance. The health of the population, therefore, enjoys double protection: when it concerns with the ability to gain, there is the payment of disability benefits; but, in general, health is the object of promotion, prevention and treatment provided by the public health system. This duality reveals the duplicity of access to health services: their enjoyment is individual, but his interest is diffuse. Hence also the duality in terms of financing, and the importance of the financing of health services be capillary throughout society.

V. Immanent critique of state as producer of common good (highlighting social rights): the method applied by Brazilian team to investigate the social rights

We learned that the state is responsible for the production of common good. Besides, it protects the collectivity and always acts according to public concerns – which, theoretically, would be convergent to the concerns of those who are under its rules. From an institutionalist view, it is said that, like every institution, the state is composed by the following elements: a set of people which, under a regency, are driven to a single purpose. The common purpose is constantly emphasized to cause in everyone the impression of a collective work to be accomplished in the institutional perspective. Under this view, state would be, for many, one of the most perfect examples of institution. Citizenship deliver, by means dictated by legal form and coherent with bourgeois democracy, the persecution of a common purpose (the concretization of common good). Collective good appears as a goal to be achieved.

It is not without reason that Brazilian Supreme Court's decisions frequently highlight the institutional character of state actions of collective protection, as we realize, for example, with judicial demands involving social welfare. This is a good example, since even with the loss of thousands of people, it is allowed, *in pejus*, the modification of welfare provision systems. The reason presented in the Court's decisions is always the same: it is rather the sacrifice of a "few" than the sacrifice of all. In general, when we are not directly affected, we agree without conditions with these premises – until the day (and it will come) that we will be hit by solutions in favor of what is usually called collective interest. Obviously, we could verify the same hypothesis in the matter of public health. It is not unknown to anyone that we must, in some hypothesis, see our individual interest sacrificed on behalf of the collective ones. However, the insufficiency of the answers provided by the institutionalist theory is obvious.

There are questions that remain and put us in daily difficulties: are we actually in condition to say that the good produced is effectively collective? Is the common purpose actually being pursued? Observed current conditions, is it effectively possible to identify and distinguish the collective good? Can we actually identify the ones who claim themselves promoters of a collective good? As we emphasized in the beginning, there is a recurrent illusion about the idea that state, while promoter of collective interest, is the pillar of production of common good. We will see that this is no more than a recurrent and indispensable illusion for the consolidation of bourgeois democracy. Nevertheless, it is indispensable to think about an immanent critique of state, in order to, later, understand the existing limits in its acting as a supposed most important producer of common good. The immanent critique of state is not new (e.g.: HIRSCH, Joacquim. Teoria Materialista do estado. Trad. Luciano CaviniMartorano. Rio de Janeiro : Revan, 2010). Our intention is just to suggest some forms of analysis referring to the state in capitalist mode of production, towards the understanding of its role in the concretization of what is said as collective good. Well, once capital is the process of money accumulation by the extraction of surplus-value, state takes its higher expression as an intrinsic relation with the logic of capital. Once money is the universal equivalent, it is important that it has guarantees for its existence and its circulation, being indispensible an agent which promote them. Without production and circulation of commodities, there is no capital. Without the guarantee that they will consolidate themselves in the daily process of exchange through the universal equivalent (money), there is no capital. Without a guarantor of such production and circulation, the state, there is no capitalism. It would be very simple to reduce state to a reality that only got concretized with the advent of capitalist society.

Nevertheless, just like law, state, although concretized form in its utter condition only under capitalism, has been weaved with the gradual transformation of relations of production and the utter concretization of this mode of production. Thus, for instance, until the achievement of law in its contemporaneous patterns, there were many proto-forms that cannot be disdained for its comprehension as a specific form of capitalism. The same happens to the state. About the latter, considering its immediate interpenetration with politics, the question is tremendously complex. We do not disagree with the conclusion that, in its most evolved expression, state is a specific form of capitalism. Only this verification makes possible the comprehension about the capturing of the production of common good by capital's rationality. In other words, capitalism proceeds with a magic trick which makes us to see state as the only way to express the satisfaction of collective interests and, in addition, as an eternal expression of these interests. In order to understand such proposition, it is necessary to remember the change processed and the transformation of the mode of production to characterize it as capitalist. Wealth in capitalism presents itself (i.e., only appears like so) as an enormous collection of commodities. Nevertheless, behind this appearance, there is the essence: wealth in capitalism do not express itself in such manner, but as labor value. However, it is important that people do not notice that labor value constitutes wealth in capitalism. It is also indispensable the prevalence of the illusion (appearance) that capital's opulence comes from commodities.

For this, it is important that labor power is put as a commodity like any other. Thereof the relevance of putting worker as a free and equal subject, for, as a proprietor, he can sell the only commodity that he possesses: his own labor power. It did not happen since always in the history of mankind, there were conditions historically raised. On one side, the holder of money, with the capacity of organize means of production, which depend on him to be ordered – since money is the universal equivalent and the only way in this society to obtain the property over means of production –; on the other side, the worker, which possess nothing but his labor power. In this process, the states comes in. There is the necessity of a neutral being which makes us to believe that the relation is effectively established between free and equal subjects which act like proprietors, anyway, an agent that process the "work of its mutual advantage, of common utility, of general interest". Otherwise, capitalist himself would have to promote what capital means by interest and, certainly, it would be easier to doubt its neutrality as a part directly interested in the process of wealth accumulation.

Thereby, if the precepts of equality and freedom are violated, it is necessary to make legal mechanisms able to reestablish them. In this legal but also social process, there is a neutral producer of the applicable norms to the free and equal subjects – The legislative power. There is a neutral agent (executive power) that put them to work in the everyday life. And there is a last agent which, once the clauses of equality and freedom are broken, enforce them or impose penalty measures because of the noncompliance (judicial power).The presence of an agent becomes indispensable - the state, that **makes appear** that, in a neutral manner, it fulfills the promotion of equality and freedom, not individually considered, but in general. Therefore, the generalization of the appearance of freedom and equality, as vital condition to the logic of production and circulation of capital, cannot be achieved without the presence of state. State is, so, in its most developed structure, a typical form of capitalism.

Thereby, state and law evolved in time and have incipient features in the previous modes of production. However, the most consummated manifestation of both can only happen in capitalism. They deserve, hence, to be considered like typical forms of capitalism in

this perspective. In other moments of mankind, social figures which differed from state and law were developed. However, for the generalization of the figure of legal subject and its correlatives speeches of equality and freedom, state and legal forms coincide and are vital to the advent and the working of capitalism. Concerning historical forms, they did not exist before (even that existed in proto-forms) and will not exist forever, composing another mode of production. Thereby, they are just transitory forms, as they must be in light of historical and dialectical materialism. They are not eternal and transcendental forms, which would have existed since always and would inevitably exist forever. It is clear that institutionalist theory has limitations in its conception of the state as the great producer of common good. The clearest limitation emerges, as we saw, from its inevitable link to capital, as its specific social form. Because of this link, it is impossible for the state, in its connection with the logic of self-valorization of capital, to produce common good in a complete and uninterested way. Therefore, more than say that health, welfare provision, social assistance and education are treated, under capitalism, like exchange value (and they really are), we have to understand the inherent limitation to this public policies in the capitalist mode of production. Once the state is the promoter of such public policies, it finds itself limited by its specific position in the logic of capital previously revealed. Thereby, we cannot face this matter in an individual way – as if the quality of public policies depended on the skills of the manager or things like that –, but only through the logic of capitalism's structure, specially through the position of state in the typical reproduction of capital. State is an indispensable element to the production of absolute and relative surplus-value. Anyway, it is unthinkable, with the logic of capital, to expect that state can really be the uninterested producer of common good.

As consequences of an immanent critique of state for social rights, we have: 1) Apparently, social rights are mere production of a collective good, linked to its uninterested producer. However, hidden behind this fact there is the social struggle which prepare the path for social rights. This occultation lies in legal texts and concepts like welfare benefits or "free" period. The producer of collective good appears like a benefactor. Actually, there is struggle of classes within the state, and welfare measures are provided in face of claims and disputes, they are not gifts; 2) State looks to synthesize collective interest, but it is arranged to perpetuate capitalist reproduction by the extraction of surplus-value. Thereby, for instance, the payment of contributions from the worker to welfare system seems to put him in a level of equality with the company that also contributes. Nevertheless, he pays, in the logic of contribution, for something that will not provide him real advantages, but only to capital, which consume his labor power until the end. Collective effort pays for something that capitalist used until the edge, but never rewards it enough (it suffices to check the value of the welfare benefits in Brazilian system); 3) Once posed the immanent critique, it is easy to notice why peripheral countries like Brazil never passed and will never pass through an effective welfare state. Capitalism's structure, the relation between national states and capitalist globalization easily explain this situation. In general, what is going to occur in these countries, including Brazil, is a complete normative structure of social insurance and a fragile protection on the factual plain; 4) once observed the immanent critique by the optics of labor power as commodity, it is easy to notice how its commodification will also promote the appropriation of public services by private entities after a depreciation in the value of welfare benefits and public health. Here, it is enough to see the relation between SUS (Public Health System in Brazil) and private health services (named, with an euphemism, as "supplementary health").

IV. Social security system in Germany (Heinz-Dietrich Steinmeyer)

A. Some facts about Germany

Germany is a country of 80 million people and with the oldest social security system and a very sophisticated labor law –which might even be too protective. It is - like Japan - a highly industrialized country and a member state of the European Union. In Europe it is the largest country except Russia. In Germany industrialization started in the 19th century already, and therefore already then the social questions aroused which led to the introduction of social security, the establishment of trade unions and the start of making labor law. Germany lost the 1st World War in 1918 and faced severe economic problems and an extremely high inflation – and experienced mass-unemployment and like Japan – lost also the 2nd World War – the country was almost destroyed and very poor in the late 40s and then was very successful in re-establishing its economy. Now the German economy is still one of the strongest in the world. In 1990 Germany was reunified since after the World War Germany was divided like Korea and at the end of the „Cold War" in 1989 reunification was possible. This reunification was very much financed by the West and has brought a similar standard of living to the East. Just now the German economy is facing competition by other countries. Our rates of economic growth are now much smaller than those of a number especially of Asian countries – also because in Germany labour is quite expensive and maybe also less flexible than in other countries. On the other hand Germany is very strong amongst the EU countries and did not suffer from the financial crisis.

B. The German Federal Constitution

The German Constitution asks for a social state, out of which a social market economy was made. It asks also for a minimum protection for everybody in need. It also provides freedom of coalition which means freedom to establish trade unions and employer's association which can act in the area of labor issues. There is also a strong protection of property. Because of this we are required to have a social protection system – social security – and also social assistance covering everybody in need – not only Germans but also foreigners. There are also therefore relatively strong labor unions /trade unions as well as strong employer associations which by collective agreements organize most of the labor law system.

Social security law is better understood if you have the labor law background. Labor law in Germany consists of two elements: a) **Individual labor** law which means the labor contract and certain legal rules and regulations concerning health and safety, protection in case of motherhood, vacation, working hours and unfair dismissal and b) c**ollective labor law** which means the right to form trade unions and employers associations, to make collective agreements which are the basis for work relation. An important part of collective labor law is the Works Constitution Act establishing a system of co-determination of workers on the level of the plant.

C. History of Social Security

The German system is the oldest in the world and was established in the 80s of the 19th century. It was shortly after the first unification of Germany in modern history. The background was a very bad social situation of blue collar workers. In order to avoid hard conflicts Chancellor Bismarck proposed to ease the social tensions by introducing social

security – in a way it was that he and the nobles wanted to keep power – which worked – but in a very intelligent way. The special problem of the workers was that they had no more the protection of family like in rural areas and so in old age, in disability or in case of illness, they needed something. So for the blue collar workers a system was established containing disability and old age protection, health care protection and protection in case of industrial accidents. This system was extended to white collar workers, i.e., all workers, in 1911. In 1927 a protection in case of unemployment was added since we had a severe unemployment problem at that time. Bismarck‘s basic idea was that not the state would pay everything out of taxes but that in a way the workers would care for themselves. This meant the idea of social insurance.

D. The Idea of Social Insurance

The system is following the insurance principle. This means that all the expenditures should be paid out of the contributions paid. Insurance also means that the risks are pooled. This means that if enough people are together the risk can be calculated very exactly. This rule applies to all kinds of insurance – but what is now **social** insurance? In **private insurance** the premium or contribution depends on the risk. Sick people have to pay more and healthy people have to pay less, older people have to pay more for a pension insurance than younger people. This for example would be a real problem in health insurance for a worker with a big family. Therefore in *social insurance* the amount of contribution does not depend on the risk but on the income. So for example the worker with the big family has to pay the same contribution as a single with the same income. Consequences of this principle: The contribution is expressed in percentage of income; Usually the employer pays one-half and the employee one-half; The system is mandatory – good and bad risks are covered alike; People are automatically covered when they start a job.

E. Social Security Law

The entire social security system is to be found in the **Social Code** – all acts in one big code. The most important areas are: a) Health insurance – covering health care; b) pension insurance covering old age, disability and survivors; c) industrial accidents insurance – covering industrial accidents; d) unemployment insurance – paying benefits in case of unemployment but also providing training and retraining etc.; e) long term care or nursing insurance covering basic needs in case a person needs nursing and f) as the last safety net – social assistance – covering everybody who is in need.

F. Social Health Insurance

The social health insurance is covered by this system and all workers including their families. The husband or wife or children are only covered if they have no own income. Otherwise they have their own health insurance. There is also the possibility of voluntary insurance in certain cases. Some people are not covered – if they have another kind of protection – for example certain civil servants. The contribution is currently 14,6 % of income which means that the employer pays 7,3% and the employee pays 7,3 %. The employee´s contributions are deducted from the salary which is done by the employer. The employer then pays his 7,3% in addition.

It is now provided by health insurance: a) health insurance covers all cases of illness; b) maternity; c) hospital care, care by doctors, additional necessary means like glasses,

wheelchairs but also recreational services in case people need it after surgery etc.; d) cash benefits in case a person is unable to work and cannot earn money; e) preventive measures like breast screening for women starting at a certain age and similar screening for men – to prevent cancer. It generally works like that in case of illness: the person goes for a doctor – almost all but not all doctors. So he proves to this doctor that he is insured by showing him a card and will get the medical treatment for free. If he needs medication, the doctor makes the prescription and with this prescription he goes to the pharmacy and they will give you the prescription either for free – if you are a needy person – or the person pays just a small amount irrespective of the price of the pharmaceutical. In case of hospital care, the doctor will send him to the hospital also for free.

This system in Germany is faced with the demographic issue but still there is no specific discussion on that.

G. Industrial Accident Insurance

In case of an industrial accident or an industrial disease the worker can claim compensation from the industrial accident insurance fund. The Funds will provide benefits – also invalidity (disability) pensions. The worker only has to show that the accident was caused during the job and was a result of the dangers of the job. The system is totally financed by the employer who in return is not liable in case of industrial accidents caused by him.

H. Unemployment Insurance

The special character of this system now is that it primarily tries to avoid unemployment. So it contains a lot of measures to avoid unemployment and to keep people in the job. There are measures of training and retraining. In the end there are two major parts of the system: one is all the measures to avoid unemployment –kind of preventive measures – and the other is compensation of loss of income in case of unemployment.

Unemployment insurance is currently in a relatively good situation due to shrinking unemployment for demographic reasons – the baby-boomers retire and the younger generation has difficulties to replace all the position because of lower birth-rate.

An important issue for the system is the challenge of digitalization which is especially seen as a problem of training and retraining.

I. Pension Insurance

The German pension insurance is also based on the insurance principle and provides pensions in old age and disability and also survivors benefits. The normal retirement age currently is rising towards 67. The contribution rate is 18.6 % (50 % paid by employer and 50 % by employee). The system is financed PAYG since 1957 and originally was aimed to provide about 70 % of last income. Due to the demographic situation in Germany the replacement currently is at about 50 %. There is an additional system of occupational pensions; but this covers only about 60 % of the German workforce.

This has led to a discussion on how to adjust the system in order to be able to meet the challenges. One idea is to introduce a basic pension in the pension insurance system rather than in the relatively generous social assistance system. But this leads to numerous legal problems since it is a mix of elements of social insurance and those of social assistance.

Another one could be a weighted benefit formula which also can be found in the US social security system. It is already more or less agreed to cover all people employed – also self-employed – which is not yet the case. Last but not least the coverage by the supplementary system should be improved. This could be done by introducing a mandatory supplementary scheme or a kind of automatic enrolment with an opting-out option.

The year 2020 will be a year of discussion on pensions since there will be the report by a Government Commission on Pensions as well as the Germany Lawyers Conference (Deutscher Juristentag) which also deals with pension based on a study written by the author of this paper.