Special Section
The *Hartz IV Case* and the German *Sozialstaat*

Casenote – Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court's Judgment of 9 February 2010

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A. Introduction

"Human dignity shall be inviolable. To respect and protect shall be the duty of all state authority." It is with this proclamation in Article 1(1) Basic Law ("*Grundgesetz*" or "GG") that the German Constitution starts its section on fundamental rights.[1] When the Parliamentary Council formulated this basic right, they had in mind the denial of fundamental rights during the period of National Socialism and the atrocities of the Holocaust. The framers, however, did not envisage a constitutional right to state benefits despite Article 151(1) of the Weimar Imperial Constitution of 1919 linking the ordering of economic life with the purpose of ensuring a dignified existence for all.[2] Utilizing a constitutional originalism approach the German Federal Constitutional Court ("FCC") never could have arrived at what is referred to as the *Hartz IV* decision.[3] This decision creates a constitutional right to guarantee by law a subsistence minimum based on Article 1(1) GG in conjunction with the social state principle in Article 20(1) GG.[4] The decision can be read

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[1] For a very thorough presentation of the FCC's adjudication on human dignity in the English language see Henk Botha, *Human Dignity in Comparative Perspective*, 2 STELL. L. REV. 171, 178–96 (2009).

[2] *Id*. at 179. Article 151(1) of the Weimar Imperial Constitution (WRV) states that the ordering of economic life should conform to the principles of justice, with the goal of achieving a dignified existence for all. Within these limits economic freedom of the individual has to be secured.

[3] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], 1 BVL 1/09, 1 BVL 3/09, 1 BVL 4/09 of 9 Feb. 2010 (*Hartz IV*). Citations refer to the official collection of the FCC's decisions at senate level ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE 125, 175] and to the English translation available at http://www.bverfg.de/entscheidungen/ls20100209_1bvl000109en.html (last visited 16 Nov. 2011), cited as bverfg.de.

[4] Article 20(1) GG (social state principle) reads: "The Federal Republic of Germany is a democratic and social federal state."

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as—possibly the first—conceptualisation of a constitutional socio-economic right to statutory state benefits by a Constitutional Court.[5]

B. The Court's Adjudication on the Economic Subsistence Minimum Prior to the 9 February 2010 Decision

With the *Hartz IV* decision, the Court does not enter completely new and uncharted territory. The concept of the "economic subsistence minimum" has long been established in the FCC's adjudication on human dignity. The first decision of 19 December 1951,[6] however, explicitly denied a constitutional right. The order dealt with the law regarding war victims' provisions. The claimant argued that the statutory entitlements were too low. The FCC held that there is no constitutional right that entitles a person to legislation granting his or her claims to be appropriately sustained by the state. Article 1(1) GG is interpreted as obligating the state to protect against humiliation, persecution, condemnation, and ostracism, but not to protect against material hardship. It was also stated, however, that a duty of the state to provide for bearable and tolerable living conditions follows from the social state principle found in Article 20(1) GG. This approach, "duty of the state to provide for a subsistence minimum but no individual right" dominated the Court's adjudication for almost sixty years.

The FCC invoked the state's obligation to provide for minimum living conditions primarily in the field of tax law and used it to limit income tax,[7] exemplified by a decision of 29 May 1990.[8] The Court held, based on Article 1(1) GG in conjunction with Article 20(1) GG, that the state has an obligation to provide the minimum conditions for an existence in human dignity with social transfers if necessary. The tax payer must be allowed a tax-free income that is sufficient to provide for himself or herself and for parents to provide for themselves as well as their children. In order to ensure the children's minimum conditions for an existence in human dignity, the aliments to be paid by the parents have to be tax-free.

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[5] It appears that a comparison with the Supreme Court of India's adjudication on the protection of life and personal liberty (Article 21 of the Constitution of India) read in conjunction with the directive principle of policy that the State shall direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood (Article 39(a) of the Constitution of India) could be very interesting. For a brief overview on the Supreme Court of India's adjudication in this field see M.B. Shah, *The Indian Supreme Court Acknowledges the Right to Food as a Human Right*, ENTWICKLUNG UND LÄNDLICHER RAUM 24–26 (2006), *available at* http://archiv.rural-development.de/fileadmin/rural-development/volltexte/2006/01/ELR_dt_24-26.pdf (last visited 9 Nov. 2011).

[6] BVERFGE 1, 97 (104), 1 BVR 220/51 of 19 Dec. 1951 (Ger.).

[7] *See* Tobias Aubel, *Das Gewährleistungsrecht auf ein menschenwürdiges Existenzminimum*, *in* LINIEN DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS ERÖRTERT VON DEN WISSENSCHAFTLICHEN MITARBEITERN, VOL. 2, 173, 273, 275 (Sigrid Emmenegger & Ariane Wiedemann eds., 2011).

[8] BVERFGE 82, 60, 1 BVL 20/84, 1 BVL 26/84, 1 BVL 4/86 of 29 May 1990 (Ger.).

In a subsequent decision of 12 June 1991,[9] the FCC was confronted with a claim to social benefits regarding the financing of toys. The Court held that the standard benefit under the Federal Social Assistance Act[10] was sufficient to provide the minimum conditions for an existence in human dignity, without explaining how this economic subsistence minimum was to be ascertained. Aside from the normal everyday living costs, the Court concluded that the state is not constitutionally obligated to provide a one-off payment for the purchase of toys, such as a doll house or a tricycle, as requested by the complainant.

In an early decision dealing with the *Hartz IV* legislation, the Court concentrated on procedural requirements with regard to interim injunctions. Since the subsistence minimum has to be guaranteed at any given moment, retroactive payments do not satisfy the obligation of the state to insure the subsistence minimum under Article 1(1) GG in conjunction with Article 20(1) GG.[11] Therefore, a high standard was imposed for the legal analysis of the justification of the claim at hand regarding when the claimant seeks provisional injunctive relief.

A later decision of 24 July 2008[12] dealt with a person who had committed a criminal offense. While living in a psychiatric institution, the claimant received pocket money of €88 per month without an existing statutory basis for these payments. This amount was later reduced to €44 per month, the level of benefits prisoners received at that time. The claimant argued unsuccessfully that the amount of €44 was insufficient. The court restated that there is a duty of the state to provide the minimum conditions for an existence in human dignity via state benefits if necessary. The important point in the Court's argument was that it is inadequate to provide these benefits as a matter of fact. There has to be a statutorily based entitlement in the law.[13]

The FCC's case law, as exemplified above, set in place the two pillars on which the *Hartz IV* decision is based. First, there is the concept of an economic subsistence minimum that the state has a duty to provide if necessary. Second, it is not enough for the state to provide this level of material security matter-of-factly. There has to be a legal entitlement. The state has to provide the minimum conditions for an existence in human dignity by defining a statutory claim to this minimum.

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[9] Case no. 1 BvR 540/91, *in* INFORMATIONEN ZUM ARBEITSLOSENRECHT UND SOZIALHILFERECHT (INFO ALSO) 154 (1991).

[10] Bundessozialhilfegesetz (BSHG).

[11] *See* BVERFGK 5, 237 [official collection of the FCC's decisions at chamber level], 1 BvR 569/05 of 12 May 2005 (Ger.).

[12] *See* BVERFGK 14, 99, 2 BvR 840/06 of 24 July 2008 (Ger.).

[13] This point was already well established in the adjudication of the Federal Administrative Court (Bundesverwaltungsgericht). *See* BVERWGE 1, 159 (161), V C 78.54 of 24 June 1954 (Ger.).

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This constitutes the adjudicative background of the *Hartz IV* decision. The state's obligation to provide the needy with the necessary means for an existence in human dignity was already accepted in the legal community and part of not only constitutional law, but also part of the political and social consensus in Germany in general. The special thrust of the *Hartz IV* decision is its subsequent step from a state's obligation to formulate an individual's enforceable constitutional right to statutory state benefits as the reverse image of the state's obligation.[14] With the benefit of hindsight, one may find a hint of possible change in the adjudication of an order dated 20 May 1987. In this decision, involving claims under the mandatory accident insurance scheme,[15] the Court explicitly left open whether Article 1(1) GG could give a fundamental right to the statutory specification of claims for appropriate assistance.[16] This point was contested in academic writing.

C. The *Hartz IV* Decision

I. Factual Background

Hartz IV[17] is the popular name for the fourth stage of a series of Labor Market Reforms in Germany that took place from 2003–05. The so-called *Hartz IV* law was primarily an institutional reform. Prior to this reform, there were two systems of legal safety nets for unemployed people and others unable to sustain themselves. The first system under the Third Book of the German Code of Social Law[18] is an insurance system based on contributions paid during employment. The insured is entitled to "unemployment benefit" if he or she becomes unemployed regardless of whether there are other sources of income or assets. Also part of this system within the legal framework of the Third Book of the German Code of Social Law was a tax-financed benefit ("unemployment assistance") for those who stayed unemployed for longer periods of time and were needy. Unemployed persons were downgraded from the insurance-based unemployment benefit to the lower tax-financed unemployment assistance after a certain period of time depending on how

[14] Aubel, *supra* note 7, at 273, 275; Schätzungen Kingreen, *"ins Blaue hinein:" Zu den Auswirkungen des Hartz IV-Urteils des Bundesverfassungsgerichts auf das Asylbewerberleistungsgesetz*, 2010 NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 558. For a different view, see Egidy, *The Fundamental Right to the Guarantee of a Subsistence Minimum in the* Hartz IV *Decision of the German Federal Constitutional Court*, 12 GERMAN. L.J. 1961, 19760 (2011).

[15] This insurance scheme is now found in the Seventh Book of the German Code of Social Law (SGB VII).

[16] BVERFGE 75, 348 (360), 1 BvR 762/85 of 20 May 1987 (Ger.).

[17] *See* Egidy, *supra* note 14, at 1961. The reforms were named after their architect, Peter Hartz, a member of the Board at Volkswagen in charge of personnel and the advisor to chancellor Schröder at the time.

[18] Sozialgesetzbuch Drittes Buch (SGB III).

long they had paid contributions.[19] The level of both payments was dependent on the net wage earned before becoming unemployed.

The second system under the Federal Social Assistance Act provided for minimum social assistance (social aid) for the needy. The payments were completely tax-financed and not linked to prior wages, if any existed. They were paid as a standard rate, with additional funds for appropriate housing and payments for individual needs (for example, winter coat, washing machine).

As of 1 January 2005, the *Hartz IV* law merged the two tax-financed systems of "unemployment assistance" and "minimum social assistance" into one, termed "unemployment benefit II." The insurance-based system "unemployment benefit" remained unaffected in principle. The term "unemployment benefit II" is somewhat misleading, as neediness and employability are the defining eligibility requirements, whereas unemployment is not a requirement at all. Persons without any income as well as workers earning low wages are entitled to this benefit. The benefits are granted where no sufficient means of one's own, especially income or property, exist ("neediness"). A person is still regarded as being "needy" if he or she has savings of €3100 (basic allowance) or more depending on his or her age.[20] Thus, neediness does not mean absolute poverty. The unemployment benefit II became popularly known as *Hartz IV*. For those unable to work for health reasons and those above the retirement age (non-employable people), there is yet another system of "social assistance" basically on an equal level as the unemployment benefit II.[21]

Hartz IV is completely tax-financed and paid in a lump sum. In principle, with few exceptions, there are no additional payments for individual needs. Non-recurring assistance is only paid in exceptional cases for a special need (for example, in cases of pregnancy, the statute provides for payments to purchase maternity wear, a buggy, etc.). In 2005, the level of benefits for a single adult was as follows: a lump sum payment of €345 per month (standard benefit), plus funds for appropriate housing (usually rent and heating costs with the actual amount depending on the area of living), plus payment of contributions for the mandatory health insurance,[22] plus payments into the mandatory

[19] The shortening and lengthening of this period of time—currently 6 to 24 months according to § 127 of the Third Book of the German Code of Social Law (SGB III)—has been a preferred field of action to make statements of social policy according to the outcome of the latest election.

[20] *See* SECOND BOOK OF THE GERMAN CODE OF SOCIAL LAW (SGB II) § 12.

[21] *See* TWELFTH BOOK OF THE GERMAN CODE OF SOCIAL LAW (SGB XII).

[22] *See* FIFTH BOOK OF THE GERMAN CODE OF SOCIAL LAW (SGB V) §251(4).

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statutory pension scheme.[23] As the standard benefit was indexed to the pension value,[24] it had been increased to €359 as of 1 July 2009.

The law determined the standard benefit for the other members of a joint household as percentages of the amount for single adults. As of 1 January 2005, this resulted in an amount of €311 (90%) for spouses, civil partners, and live-in partners. Children under the age of fourteen received €207 (60%), and those above this age received €276 (80%). These provisions were subsequently modified,[25] but the children's entitlements were still defined as percentages of the employable adults' standard benefit. These amounts were increased according to the increase of the standard benefit.

The positive effects of the Hartz reforms on the labor market included greater flexibility and job creation. These jobs were, however, quite often low paying with little job security ("precarious jobs"). Consequently, a significant percentage of those who became employed are still not able to fully finance their family's living and are entitled to benefits which supplement their wages under the *Hartz IV* system. They are, however, moderately better off than if they did not work due to an amount that is exempt from the offsetting of income against need (personal allowance).[26]

The *Hartz IV* reform led to a wave of lawsuits in the Social Court system[27] that has yet to subside. This is due to the complexity of the statutory law, whose intricacies cannot be presented here,[28] as well as to a pervasive feeling among the recipients of being worse off. Generally speaking, those long-term unemployed who previously had held well-paid jobs and who, prior to the reform, were entitled to "unemployment assistance," and those persons who, prior to the reform, were entitled to "minimum social assistance," were

[23] See SIXTH BOOK OF THE GERMAN CODE OF SOCIAL LAW (SGB VI) §170(1) (valid from 1 Jan. 2005 to 31 Dec. 2010).

[24] This mechanism is one of the reasons why the Court held the law to be unconstitutional under the consistency requirement. *See Hartz IV*, BVERFGE 125, 175 (242, 243), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 183, 184 (Ger.). The amending legislation found a new formula to provide for the adjustment of the standard benefit; see the Law on the Ascertainment of Standard Needs and on the Amendment of the Second Book and Twelfth Book of the Code of Social Law (Regelbedarfs-Ermittlungsgesetz) § 8, 2011 BGBl (FEDERAL LAW GAZETTE) 453.

[25] *See* Egidy, *supra* note 14, at 1963.

[26] SECOND BOOK OF THE GERMAN CODE OF SOCIAL LAW (SGB II) § 11.

[27] Lawsuits in the social courts are free of cost for the claimants (Sozialgerichtsbarkeit [SGG] [Statute on Social Jurisdiction] § 183), regardless of the outcome of the lawsuit.

[28] A lot of claims in the social courts do not deal with the level of benefits, but with a bundle of other questions such as: what effort a person has to make in order to get back into work; whether the flat in which he or she is living is appropriate and has to be, therefore, fully paid for; how different kinds of income are to be counted against the need as expressed in the standard benefit; what kind of associated living counts as a "joint household" with the consequence of an aggregation of incomes and needs of the persons living together, etc.

equalized by law.[29] The latter had often lost any contact to the labour market or had never been employed at all. As a result, members of the first group are often entitled to reduced benefits compared to what they were previously paid whereas members of the second group are better off with regard to the lump sum payment since the standard benefit had increased to meet needs that recur irregularly (for example, the purchase and maintenance of a washing machine). The latter were confronted, however, with the necessity to spend the benefits wisely as additional entitlements for specific needs that once could be requested under the "minimum social assistance" scheme were abolished. In other words, they had to learn to save their benefits for larger purchases.

Utilizing concrete judicial review, two social courts, a court of second instance and the Federal Social Court, challenged the standard benefit level as being insufficient and therefore unconstitutional.[30]

II. The Court's Holding

The FCC's holding is not that the standard benefit under *Hartz IV* is too low and thus has to be increased.[31] The Constitution does not define a quantifiable claim to state benefits as such. The actual level of benefits is to be fixed by the legislature on the basis of a transparent and appropriate procedure according to the actual need, i.e. in line with reality. The criteria include the state of community development and the existing living conditions. The legislature has latitude to shape specific legal claims and to assess the benefits. As the Basic Law itself does not allow the quantifying of claims, substantive review of the result is restricted to ascertaining whether the benefits are evidently insufficient or faulty. Within the range which is left by this test of evident faultiness, the fundamental right to guarantee a subsistence minimum does not provide any quantifiable guidelines.[32]

Having said that, the Court could have stopped at this point, concluding that without evident faultiness, the legislature had met the required standard in enacting *Hartz IV*. The Court went further, however, and required an examination of the basis and assessment method regarding the benefits so as to ascertain whether they do justice to the objective

[29] An exception is the additional benefit that those previously entitled to unemployment benefit received for a limited period of time under SECOND BOOK OF THE GERMAN CODE OF SOCIAL LAW (SGB II) § 24, effective until 31 Dec. 2010, which cushioned the shift from unemployment benefit to Hartz IV. *See supra* Section C.I.

[30] According to Article 100(1) GG. The Higher Social Court of Hesse, proceedings 1 BvL 1/09, addressed specifically the children's benefits. *See* Hessisches Landessozialgericht [Higher Social Court of Hesse] L 6 AS 336/07 of 29 Oct. 2008 (Ger.).

[31] *See* Egidy, *supra* note 14, at 1962.

[32] *See Hartz IV*, BVERFGE 125 , 175 (225, 226), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 141 (Ger.).

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of the fundamental right to guarantee a subsistence minimum. Given the significance of the fundamental right, the statutory benefits have to be traceable—the assessment of the benefits must be justifiable on the basis of reliable figures and plausible methods of calculation thereby ensuring the review of the benefits by the Court.[33]

The FCC therefore examines the calculation of the standard benefit in a four step test as to:[34] (1) whether the legislature has considered and described the objective of ensuring an existence in human dignity doing justice to Article 1(1) GG in conjunction with Article 20(1) GG; (2) whether it has, within the boundaries of its latitude, chosen a fundamentally suitable method of calculation for assessing the subsistence minimum; (3) whether in essence, it has completely and correctly ascertained the necessary facts; and (4) whether it has kept within the boundaries of what is justifiable within the chosen method and its structural principles in all stages of calculation with plausible figures (consistency requirement). To make this review by the FCC possible, the legislature is obliged to disclose the methods and stages of calculation employed in the legislative procedure. If the legislature does not sufficiently meet this obligation, the ascertainment of the subsistence minimum is already no longer in harmony with Article 1(1) GG due to these shortcomings (rationale and transparency requirement).[35]

The standard benefit for a single person as set by *Hartz IV* failed the fourth step of the above test only.[36] With regard to the benefits for children that were defined as a percentage of the standard benefit for adults, the Court criticized that no independent empirical research had been performed as to the specific needs of children.[37]

The Court held that the statistical model, which had been applied to the calculation of the standard rate for minimum social assistance ("social aid") under the Federal Social Assistance Act, and, according to the will of the legislature, was also the basis for assessing the standard benefit, was a justifiable, and hence constitutionally permissible method to realistically determine the subsistence minimum for a single person. Moreover, it was

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[33] *See Hartz IV*, BVERFGE 125 , 175 (225-227), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 142–44 (Ger.)

[34] *See Hartz IV*, BVERFGE 125 , 175 (226), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 143 (Ger.).

[35] On this aspect, see Timo Hebeler, *Ist der Gesetzgeber verpflichtet, Gesetze zu begründen?*, 18 DIE ÖFFENTLICHE VERWALTUNG (DÖV) 754 (2010). The procedural approach was not entirely new but well established in the adjudication of the Federal Administrative Court. *See* Egidy, *supra* note 14, at 1975; Ralf Rothkegel, *Ein Danaergeschenk für den Gesetzgeber*, 2010 ZEITSCHRIFT FÜR DIE SOZIALRECHTLICHE PRAXIS (ZFSH/SGB) 135, 141.

[36] *See Hartz IV*, BVERFGE 125, 175 (238), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 173 (Ger.). Therefore, Egidy, *supra* note 14, at 1961-62, is too harsh.

[37] The empirical evaluation and interpretation undertaken by the Ministry in preparation for the amending legislation rendered the result that the children's entitlements prior to January 2011 had actually been too high. They were, however, not reduced in the amending legislation. *See* Law on the Ascertainment of Standard Needs and on the Amendment of the Second Book and Twelfth Book of the Code of Social Law § 8, *supra* note 24.

based on suitable empirical data. The statistical basis, the "Sample Survey on Income and Expenditure" (SSIE), reflected the expenditure behaviour of the population in a statistically reliable manner. The choice of the twenty percent of the single-person households with the lowest net income after leaving out the recipients of social assistance as the reference group (lowest quintile) for ascertaining the standard benefit for a single person was constitutionally unobjectionable. The legislature could also justifiably assume that the reference group on which the evaluation of the 1998 SSIE was based was situated above the social assistance threshold in a statistically reliable manner. Finally, the Court found it constitutionally unobjectionable that the expenditure of the lowest quintile ascertained in the different divisions of the SSIE was not fully considered, but that only a certain percentage was taken into account as being relevant for assessing the standard benefit.[38]

The legislature, however, had to make the decision as to which expenditure is part of the subsistence minimum in an appropriate and justifiable manner. Since some expenditures of the lowest quintile were not fully considered and since the deductions were based on random estimates, the legislature's aims were not met. The reduction of expenditure items in the divisions of the SSIE required an empirical basis for their justification. The legislature may only regard expenditures incurred by the reference group as not relevant if it was certain that the expenditures could be covered otherwise, or if the expenditure was not necessary to secure the subsistence minimum. To ascertain the amount of the reductions, an estimate should not be completely ruled out if it was performed on a sound empirical basis. Estimates conducted at random were, however, not a realistic way of ascertaining the amount.[39]

One example which illustrates the detailed scrutiny the FCC undertook[40] is that the SSIE 1998 contained empirical data on the spending behaviour of the lowest quintile (excluding those receiving state benefits to avoid circularity) regarding different kinds of needs (for example, food, clothing, energy, home appliances, health care, mobility). Section 3 of the SSIE dealt with expenditures on clothing. The amount spent by the lowest quintile on these items was reduced to eighty nine percent as being relevant to the standard benefit. The reason given by the legislature was that expenditures on furs and tailor-made clothes need not be covered by the standard benefit. This exception of items and reduction of relevant expenditures was made, however, without it being certain whether the reference group (lowest quintile) had incurred any expenditures on these luxury items at all.[41] Therefore, the Court's ruling is that the legislature could not reduce the lowest quintile's spending on particular groups of goods if there was no empirical support that a certain

[38] *See Hartz IV*, BVERFGE 125, 175 (232-238), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 159–172 (Ger.).

[39] *Id*. BVERFGE 125, 175 (238); bverfg.de at para. 171.

[40] *Id*. BVERFGE 125, 175 (238, 239); bverfg.de at para. 175.

[41] *Id*. BVERFGE 125, 175 (238, 239); bverfg.de at para. 175, 176.

percentage of the expenditures were superfluous to meeting the subsistence minimum requirement. If superfluous, it would be irrelevant to the standard benefit. Such a reduction is inconsistent since unsupported estimates – the Court speaks of "shots in the dark" – do not meet the consistency requirement[42].

Having found a number of inconsistencies, the Court concluded that the standard benefit of €345 had not been ascertained in a constitutional manner because the structural principles of the statistical model were abandoned without factual justification. The Court set a deadline of 31 December 2010, whereby the legislature had to create a statutory definition of the standard benefit that met the requirements of transparency and consistency. The nullification of the provisions regarding the standard benefit was not an option as the separation of power requires the legislature to set a standard. It would have been impossible to pay out benefits without a statutory basis.[43]

III. Analysis

1. Economic Right as a New Category of a Constitutional Right Against the State

The *Hartz IV* decision formulates a new type of constitutional right based on Article 1(1) GG in conjunction with Article 20(1) GG. The absolute guarantee of human dignity is transformed into an economic entitlement. There is a "fundamental right to the guarantee of a subsistence minimum that is in line with human dignity."[44] The state's obligation to ensure the conditions of a dignified existence based on the duty to respect human dignity combined with the principle of the social state as such is not a new concept. However, the additional step in the evolving jurisdiction is that human dignity, read in conjunction with the social state principle, constitutes a subjective individual right entitling the individual to statutory state benefits.[45] The FCC declares this guarantee to be a basic and fundamental right against the state. This creates a constitutional right of a new type

[42] *See Hartz IV*, BVERFGE 125, 175 (237, 238), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 171 (Ger.).

[43] *Id*. BVERFGE 125, 175 (259, 260); bverfg.de at para. 220.

[44] *Id*. BVERFGE 125, 175; bverfg.de headnote 1.

[45] Hebeler claims that the FCC had already derived an entitlement from Article 1(1) in conjunction with Article 20(1) GG. *See* Hebeler, *supra* note 36, at 756. However, the cited decision on child benefits did not formulate a claim against the state but stated that the reduction of child benefits for tax paying parents did not affect the state's duty derived from the social state principle to create the minimum conditions for an existence in human dignity. *See* BVERFGE 82, 60 (85), 1 BVL 20/84, 1 BVL 26/84, 1 BVL 4/86 of 29 May 1990 (Ger.). Egidy points out that none of the decisions that the FCC cites in support of the fundamental right to the guarantee of a subsistence minimum deals with an entitlement of the individual to social benefits that might be derived directly from the Constitution. *See* Egidy, *supra* note 14, at 1971. Berlit sees a consolidation of the prior adjudication but no quantum leap. *See* Uwe Berlit, *Paukenschlag mit Kompromisscharakter – zum SGB II-Regelleistungsurteil des Bundesverfassungsgerichts vom 9 Februar 2010*, 2 KRITISCHE JUSTIZ (KJ) 145, 147 (2010).

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(*"Gewährleistungsrecht"*):[46] a constitutional guarantee as opposed to a defensive right against the state or a right to participation or protection. It is the socio-economic right of every needy person to be provided, via statutory law, with material conditions that are indispensable for his or her physical existence and for a minimum participation in social, cultural, and political life.

The Court mandated the subsistence needs of every person must be met at all times.[47] This made an additional statutory clause necessary to cover exceptional recurring needs for which there had not previously been a provision.[48] The Court also declared that the benefits need not necessarily be provided in cash.[49] This posed the opportunity for the legislature to create a system of educational vouchers to meet the educational needs (for example, extra tuition or membership in sports clubs) of children.[50]

2. Different Concepts of the "Subsistence Minimum" Depending on Whether a Defensive Right or an Entitlement Right is at Stake

One section in the judgment explains the "subsistence minimum" as depending on whether a defensive right or an entitlement right is at stake. The term "subsistence minimum" has to be understood differently whether it is, on one hand, invoked as a limit to taxation, or on the other hand, as a constitutional right to guarantee state benefits.[51] Tax credits for payments to provide for one's own child are dependent on what level of aliments the child actually receives. Article 3(1) GG, the constitutional equality clause, demands horizontal equity in taxation. Parents providing for their children incur higher expenditures and are limited in job opportunities.[52] Therefore, the subsistence minimum in the tax context is understood differently than in the social benefit context. The standard benefit (*Sozialgeld*) for dependent children can be lower than the tax allowance granted to tax-paying parents. The Court held that if the method of calculating these benefits meets the test of transparency and consistency, there is no requirement that children in poor

[46] *See* Aubel, *supra* note 7, at 275, 276. *See also* Egidy, *supra* note 14, at 1971 (including Egidy's succinct formula, "right to a specification of statutory entitlements").

[47] *See Hartz IV*, BVERFGE 125, 175 (225, 259), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 140, 220 (Ger.).

[48] *See* SECOND BOOK OF THE GERMAN CODE OF SOCIAL LAW (SGB II) § 21(6).

[49] *See Hartz IV*, BVERFGE 125, 175 (224, 225), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 138 (Ger.).

[50] See SECOND BOOK OF THE GERMAN CODE OF SOCIAL LAW (SGB II) §§ 28, 29 (valid from 1 April 2011).

[51] "Expenditure which is to be taken into account in fiscal terms and means-tested social benefits may come to divergent amounts." *Hartz IV*, BVERFGE 125, 175 (232), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 158 (Ger.).

[52] *See* Aubel, *supra* note 7, at 283.

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families receive the same amount of benefits that the state distributes as tax credits to well-off parents paying for their children's upbringing.[53]

3. One Unified, All-Encompassing Right

The Court does not spell out what philosophical theory of human dignity is underpinning its adjudication. It has been a long-standing adjudication that a life in human dignity comprises both the need to interact in society and the need to not be left out.[54] Thus, the Court's approach could be labelled as a communicative theory.[55] According to this approach, human dignity is grounded in social recognition, whereby dignity is conceived as a relational and communicative concept. This interpretation of human dignity means inter-subjectivity and situates dignity within a particular national community from which no individual may be disenfranchised. The *Hartz IV* decision stresses that there is a unified and all-encompassing fundamental guarantee that covers the material conditions that are indispensable for his or her physical existence (for example, housing, food, and clothing), for a minimum participation in human interaction (for example, telephone costs), and for a minimum participation in social, cultural, and political life (for example, membership in sport clubs, and going to the cinema).[56] Only people who have the means to participate in society via its cultural and political life are not disenfranchised. The Court explicitly denied a division of this guarantee into an absolute part (for example, food, housing, and clothing)

[53] *See Hartz IV*, BVERFGE 125, 175 (232), 1 BVL 1/09 ET AL. of 9 Feb. 2010, para. 158 (Ger.).

[54] *Id.* BVERFGE 125, 175 (223); bverfg.de at para. 135. For a comparable phrasing of a right to live with human dignity, note a decision by the Supreme Court of India addressing the right of a detainee to have contact with her children, but not the right to entitlement of social benefits. The Court found that:

> The right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessaries of life such as adequate nutrition, clothing and shelter and facilities for reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings. The magnitude and content of the components of this right would depend upon the extent of the economic development of the country, but it must, in any view of the matter, include the right to the basic necessities of life and also the right to carry on such functions and activities as constitute the bare minimum expression of the human self.

Francis Coralie Mullin v. The Administrator, Union Territory of Delhi, (1981) 2 S.C.R. 516, 529 (India).

[55] *See* Botha, *supra* note 1, at 189, 190.

[56] "Uniform fundamental rights guarantee [that] which encompasses both the physical existence of the individual, that is food, clothing, household goods, housing, heating, hygiene and health . . . and ensuring the possibility to maintain inter-human relationships and a minimum of participation in social, cultural and political life, given that humans as persons of necessity exist in social relationships." *Hartz IV*, BVERFGE 125, 175 (223), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 135 (Ger.).

and additional parts covering the participation in social and political life.[57] It would be a severe misunderstanding to split the fundamental right into a fundamental guarantee of physical existence guaranteed under Article 1(1) GG, and a socio-cultural subsistence minimum protected under Article 20(1) GG.[58] Any adjustments in the statutory benefits must be made under the single umbrella of the absolute guarantee which is not subject to considerations of policy or proportionality.[59]

Having said that, under the unified, all-encompassing right to a subsistence minimum, the Court concedes more discretion to the legislature regarding the guarantee of participation in social and political life, and less discretion as to the guarantee of physical existence. Thus, the standard of constitutional control differs.[60]

4. Absolute but Fluctuating Nature of the Right

The constitutional basis of the indivisible right to guarantee the subsistence minimum (Article 1(1) GG in conjunction with the social state principle of Article 20(1) GG) implies that the right is dynamic. It is impossible to define an absolute level of the subsistence minimum as the development of society and both the economic and living conditions must be taken into account.[61] The substantive outcome can fluctuate while the procedural due process requirement of transparency and consistency is absolute and has to be met in all situations. This raises problems regarding limited resources of time, manpower, and funds of the legislature. The more the Court defines rights in terms of transparency, consistency, and consecutive legislation,[62] the more the legislature will struggle to meet these requirements both in substance and in time. The absolute nature of the right to guarantee a subsistence minimum implies a right of way for legislation pertaining to this right. Thus, legislation demanded only by the principle of equality (Article 3(1) GG) and not by human dignity (Article 1(1) GG) will have to wait its turn.

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[57] *See* Aubel, *supra* note 7, at 280.

[58] *See Hartz IV*, BVERFGE 125, 175 (223), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 135 (Ger.). Egidy acknowledges this essential argument in the Court's decision, but advocates such a splitting up of the right to the guarantee of a subsistence minimum in its two parts. *See* Egidy, *supra* note 14, at 1966, 1972.

[59] *See* Egidy, *supra* note 14, at 1972.

[60] *See Hartz IV*, BVERFGE 125, 175 (224, 225), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 138 (Ger.). *Accord* Sönke E. Schulz, *Neues zum Grundrecht auf Gewährung des menschenwürdigen Existenzminimums*, 2010 DIE SOZIALGERICHTSBARKEIT (SGB) 201, 206. *Contra* Rothkegel, *supra* note 35, at 143.

[61] *See* Aubel, *supra* note 7, at 278, 279.

[62] The principle of consistency or congruity ("Folgerichtigkeit") plays a prominent role in the Court's adjudication on tax law. *See* Aubel, *supra* note 7, at 287; Christian Thiemann, *Das Folgerichtigkeitsgebot als verfassungsrechtliche Leitlinie der Besteuerung*, *in* LINIEN DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS ERÖRTERT VON DEN WISSENSCHAFTLICHEN MITARBEITERN, VOL. 2, 206 (Sigrid Emmenegger & Ariane Wiedemann eds., 2011).

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5. Separation of Powers—Legislative Supremacy Within Boundaries Set by the Court

The judgment spells out who the responsible player is in the constitutional framework competent to define the subsistence minimum. The Court's general line of adjudication is that the legislature has to determine in essence the social state principle. The principles of law and democracy (Article 20(1) and (3) GG) demand that the legislature, rather than the executive, gives concrete shape to the social state principle.[63] It is only the legislature that can create social benefits and define their levels.[64] Thus, judges cannot increase benefits above the statutory limits regardless of whether they find it appropriate to do so. Even judicial review by the FCC is restricted to evident faultiness as the substantive criterion, and to transparency and consistency as procedural requirements, with different standards of control regarding the guarantee of participation in social and political life on one hand, and the guarantee of physical existence on the other. What looks like judicial restraint on the surface is really a Greek gift[65] if looked at closely. The mechanism to translate the inviolability of human dignity and the absolute quality of the constitutional right into a right that can be adapted to the state of the economy and the factual situation is burdensome. The legislature must set the subsistence minimum in a transparent and expedient procedure on the basis of reliable figures and plausible methods of calculation. It also has to subsequently monitor this statutory level.[66] This is an enormous task—even if the competent ministry makes every effort to implement a consistent scheme of calculating the standard benefits—because this result may be diluted and distorted in the political process leading up to the actual enactment. The goal of consistency is not what dominates the democratic legislative process in a pluralistic society.[67]

The Court's judgment leaves the substantive outcome to the legislature, thus acknowledging the separation of powers. There is no single right answer as to what level of standard is in line with the fundamental right.[68] The procedural guidelines, however, are so narrowly defined that there is not much room for policy considerations.[69] A

[63] *See* Aubel, *supra* note 7, at 287.

[64] *See* Christian Burkiczak, *Der Vorbehalt des Gesetzes als Instrument des Grundrechtsschutzes*, *in* LINIEN DER RECHTSPRECHUNG DES BUNDESVERFASSUNGSGERICHTS ERÖRTERT VON DEN WISSENSCHAFTLICHEN MITARBEITERN, VOL. 2, 129, 144 (Sigrid Emmenegger & Ariane Wiedemann eds., 2011).

[65] *See* Rothkegel, *supra* note 35, at 135 ("Danaergeschenk").

[66] *See Hartz IV*, BVERFGE 125, 175 (225), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 140 (Ger.).

[67] *See* Egidy, *supra* note 14, at 1975; Stephan Rixen, *Verfassungsrecht ersetzt Sozialpolitik? "Hartz IV" auf dem Prüfstand des Bundesverfassungsgerichts*, 14 SOZIALRECHT 81, 85 (2010).

[68] *See* Andy Groth, *Entspricht die neue Regelleistung den Anforderungen des Bundesverfassungsgerichts?*, 20 NEUE ZEITSCHRIFT FÜR SOZIALRECHT (NZS) 571, 574 (2011).

[69] See Rixen, *supra* note 67, at 87.

statutory provision, for example, placing a time limit on the collection of statutory benefits of no more than two consecutive years and no more than a collective total of five years over a lifetime[70] would be unconstitutional from the outset. The legislature would not meet the first step of the Court's test requiring it to consider and describe the objective of ensuring an existence that is in line with human dignity in a manner that does justice to Article 1(1) GG in conjunction with Article 20(1) GG. This means in particular that the subsistence needs of every person must be met at all times and not just during an arbitrarily chosen limited period of time.[71] Even though the Court appears to restrict judicial review, the procedural standard formulated in the *Hartz IV* decision substantively affects the legislature's choice as to policy.

6. Hardship Clause

There is only one passage in the Court's judgment with immediate and direct substantive impact. There was no provision in the Hartz IV law which provided for a claim to benefits that cover an irrefutable and recurrent special need, because the income and consumption statistics on which the standard benefit was based only reflect the average requirements in customary needs situations. The Court declared this incompatible with Article 1(1) GG in conjunction with Article 20(1) GG. For those atypical needs going over and above this,[72] the Court held that the legislature is obliged to create a statutory provision by 31 December 2010, at the latest, which ensures that an irrefutable and recurrent special need which is not merely a single instance is covered (hardship clause).[73] The almost incomprehensible concept of an "irrefutable recurrent special need which is not merely a single instance"[74] is due to the fact that "single instance" needs were already covered by a clause in the law allowing for loans to be given if such a special need arose.[75]

The Court, however, went further and stipulated that those benefit recipients who have a special recurring need must receive the necessary benefits in kind or cash even before the new provision is enacted. This order created, in lieu of legislation, an immediate

[70] For such a legislative approach in the United States, see the 1996 Personal Responsibility and Work Opportunity Reconciliation Act. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105.

[71] *See Hartz IV*, BVERFGE 125, 175 (225), 1 BVL 1/09 ET AL. of 9 Feb. 2010, para. 140 (Ger.).

[72] *Id*. BVERFGE 125, 175 (225); bverfg.de at para. 204.

[73] The legislature transplanted the Court's formula into a statutory provision, see SECOND BOOK OF THE GERMAN CODE OF SOCIAL LAW (SGB II) §21(6), valid form 1 April 2011, thus leaving to the social courts the task of defining what such a need could actually be.

[74] *See Hartz IV*, BVERFGE 125, 175 (252), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 204 and Ruling No. 3 (Ger.).

[75] SECOND BOOK OF THE GERMAN CODE OF SOCIAL LAW (SGB II) § 23, valid until 31 December 2010.

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entitlement for the transition period until the introduction of a corresponding hardship clause. The hardship clause is the ultimate safety net cast by the Court. The cases before the Court did not prompt such a provision and the only example the Court cites are costs incurred by a divorced parent to exercise his or her right of access to children living far away.[76] The Court held that to avoid the danger of violating Article 1(1) GG in conjunction with Article 20(1) GG, the unconstitutional gap must be closed from the pronouncement of the judgment onwards[77] by an order of the Federal Constitutional Court to this effect.

IV. Outlook for Future Cases

The *Hartz IV* decision has been widely discussed not only in the legal community but also in the general public. Public opinion and current politics do not recognize the constitutional subtleties of the legal basis invoked or the Court's holding—which was not that the level of payments is too low.

A fundamental and absolute right to guarantee a subsistence minimum that is, in essence, a due process right, is prone to be misunderstood by the general public. The discussion during the process leading up to the amending legislation addressed the favoured outcome, but not the intricacies regarding a consistent method of establishing the standard benefit. A popular misunderstanding is that an entitlement to social benefits springs directly from the basic right of human dignity, even though this has been explicitly denied by the Court.[78] Even claims under the hardship clause do not stem directly from the Constitution, but from the Court's order in lieu of a statute.[79]

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[76] *See Hartz IV*, BVERFGE 125, 175 (254), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 207 (Ger.). Another example could be recurring costs for irrefutably necessary health care items needed in special situations and not covered by the mandatory health insurance paid for by the state.

[77] This limitation was again stressed in the order of 24 Mar. 2010. *See* 1 BvR 395/09 of 24 Mar. 2010, para. 6 (Ger.), *available at* http://www.bundesverfassungsgericht.de/entscheidungen/rk20100324_1bvr039509.html. The limitation was, however, overlooked by the Federal Social Court in its judgment of 18 Feb. 2010. *See* Bundessozialgericht [BSG] [Federal Social Court], 18 Feb. 2010, ENTSCHEIDUNGEN DES BUNDESSOZIALGERICHTS [BSGE], B 4 AS 29/09 R of 18 Feb. 2010, BSGE 105, 279 (291) (Ger.). The FCC's formulation of the hardship clause was adopted by the legislature in § 21(6) of the amended Second Book of the German Code of Social Law (SGB II). A claim to additional benefits is defined as irrefutable if the need cannot be covered by benefits of third parties or using cost-saving methods and if the special need differs substantially from the average need.

[78] *See Hartz IV*, BVERFGE 125, 175 (223, 224, 256), 1 BVL 1/09 ET AL. of 9 Feb. 2010, bverfg.de at para. 136, 212 (Ger.).

[79] "It is ordered that until the legislature enacts new provisions, this claim can be asserted directly, taking into account the grounds of the decision, on the basis of Article 1(1) of the Basic Law in conjunction with Article 20(1) of the Basic Law, with the costs being borne by the Federation." *See id.,* BVerfGE 175, 177; bverfg.de, at No. 3 of the Court's ruling (Ger.).

The almost unrivalled publicity the judgment found may have inadvertent effects. If the argument in a case before a Social Court concerns whether the state, through its funding agency, should have transferred €790 to the plaintiff's account rather than €785 in a particular month, and this difference in payment is framed as a violation of the plaintiff's human dignity, then the term is used excessively. The constant and inflationary invocation of human dignity can ultimately lead to a loss of meaning. The absolute right to human dignity is in danger of being trivialized by the public at large.[80]

As already mentioned, it took the legislature longer than the set deadline to define anew the level of benefits, and this delay called into question its "devotion to the Rule of Law."[81] The amending legislation[82] moderately raised the standard benefit based on a number of decisions regarding the definition of the reference group (lowest quintile of family households, lowest fifteen percent of one person households), and which expenditures of the reference group are regarded as relevant to the subsistence minimum (for example, tobacco and alcohol no longer count).[83] These decisions, however, will eventually come under constitutional scrutiny again. It remains to be seen whether the ambitious standard set by the FCC can be met in practice. Consistency is a brilliant tool to assess arguments. It is, however, not the principle governing the political process because the legislature very often has to find compromises. If minor infringements of consistency doom the law to be in violation of Article 1(1) GG in conjunction with Article 20(1) GG, the constitutionality of the standard benefit could be a recurring problem.

Apart from the definition of the standard benefit, other questions will have to be answered by the FCC. The law provides for a complicated mechanism to reduce the payments significantly if the beneficiary is not willing to accept work or to cooperate in the efforts to make him or her fit for the job market.[84] Eventually, the Court will have to address the constitutionality of the prescribed lowering of the benefits by sanctioning behaviour such

[80] Kingreen sees human dignity weakened by the *Hartz IV* decision. *See* Kingreen, *supra* note 14, at 558. Botha refers to academic writing prior to the *Hartz IV* decision claiming that according dignity a too extensive meaning would either paralyse government or detract from the absolute nature of Article 1(1) GG. *See* Botha, *supra* note 1, at 183.

[81] For this rather lyrical formulation with respect to the usually speedy response of state or federal officials to Supreme Court decisions in the United States, see SANDRA DAY O'CONNOR, THE MAJESTY OF THE LAW 44 (2003).

[82] *See* Law on the Ascertainment of Standard Needs and on the Amendment of the Second Book and Twelfth Book of the Code of Social Law § 8, *supra* note 25. For an overview, see Groth, *supra* note 68.

[83] This exception is not negligible as the reference group of one-person households (with the lowest 15% income) spent €8,11 on alcohol and €11,08 on tobacco per month; this would amount to more than 5% of the new standard benefit of €364. *See* BUNDESTAG DRUCKSACHE [BR] 17/3404, 53 (Ger.); *see also* Groth, *supra* note 68, at 574.

[84] *See* SECOND BOOK OF THE GERMAN CODE OF SOCIAL LAW (SGB II) § 31.

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as the refusal to accept an appropriate job offer.[85] It is doubtful that a satisfying answer to this question can be found in statistics and procedural requirements. The Court will be faced with the question of how absolute the absolute guarantee of a subsistence minimum is if people refuse to cooperate. The "if necessary" clause[86] will have to be developed. It is the litmus test of the Court's concept of human dignity—ascertaining how personal responsibility will play a role in defining not a standard benefit, but actual payments.[87]

The question whether it is constitutional to provide asylum seekers with reduced payments as compared to Hartz IV recipients is already pending in the FCC.[88] The benefits asylum seekers receive are challenged as random estimates not meeting the procedural standard set in the *Hartz IV* decision.[89] These cases might possibly force the Court to assess the concept of human dignity as a communicative right more precisely and address the fact that during the procedure of asylum, this particular group of persons does not yet fully participate in the society they are seeking asylum in and may, therefore, not incur expenditures fully integrated members do. The "unavoidable valuations linked to determining the amount of the subsistence minimum" have to be unfolded.[90] Given the legislative supremacy within the boundaries set by the Court, it is, however, a clear violation of the principle of law in Art. 20(3) GG[91] when a social court, rather than using the procedure of concrete judicial review, orders payments higher than what is statutorily prescribed.[92]

D. Conclusion: Adjudication for an Ideal World

The *Hartz IV* decision transfers a socio-economic right to state benefits from the sphere of moral philosophy and aspirational principles of policy—where it appears to belong according to the prevailing American perspective—to the sphere of constitutional hard law. The decision is an example of how to conceptualise and protect socio-economic

[85] For some additional remarks on the necessary consideration of different needs, see Aubel, *supra* note 7, at 297, 298.

[86] *Id*. *See also* 1 BVERWGE 159 (161), V C 78.54 of 24 June 1954 (Ger.).

[87] *See* Rixen, *supra* note 67, at 86, 87.

[88] Cases no. 1 BVL 10/10, 1 BVL 2/11 pending.

[89] Procedure of concrete judicial review: Landessozialgericht Nordrhein-Westfalen, [NRW LSG] [The Social Court of North Rhine-Westphalia], Vorlagebeschluss, L 20 AY 13/09 of 26 Jul. 2010, juris; NRW LSG, Vorlagebeschluss, L 20 AY 1/09 of 22 Nov. 2010, juris.

[90] For criticism of the Court for failing to give any guidance as to what might lead the legislature in making these unavoidable valuations, see Rothkegel, *supra* note 35, at 145.

[91] *See* BVERFGK 6, 323 (325–26), 1 BVR 1178/05 of 7 Nov. 2005 (Ger.).

[92] *See* Sozialgericht Mannheim [Social Court of Mannheim], S 9 AY 2678/11 ER of 10 Aug. 2011, juris.

rights. It translates one aspect of human dignity into an exercise of statistical evaluation and procedural requirements. The fundamental right to guarantee a subsistence minimum is dynamic and fluctuates depending on the level of economic performance. It is impossible to define an absolute level because the development of society and both the economic and living conditions have to be taken into account.[93]

The Court's decision has a significant influence on the provision of social benefits and thus has an indirect effect on the balance of budgetary expenditures. In a broader view, the Court's definition of an individual constitutional right demands a sound economy and a tax system able to finance the payments to needy individuals.[94] A certain part of the budget is to be set aside to finance the fundamental right to a guaranteed subsistence minimum. The FCC acknowledged this connection by stating that the "retroactive re-establishment of any higher benefits for the entire period from 1 January 2005 would also have an unjustifiable fiscal impact,"[95] thus limiting the effects of its ruling to the future.[96] A prominent author in the field of social assistance law commented on this by denying the very idea that the financial feasibility might be a limiting factor to the fundamental right to guarantee a subsistence minimum.[97] On one hand, this understanding is appealing in that a right would trump any utilitarian considerations.[98] On the other hand, it might be a good reason not to construe a socio-economic right as a right to legislative specification in absolute terms.

There is no guarantee of ever-increasing benefits. A downturn of the economy and a reduced standard of living may well result in the fiscal necessity to reduce benefits. The elaborate procedural requirements spelled out by the Court do, however, prevent such a measure from being taken in the short-term as a response to budgetary problems. The legislature while using its margin of appreciation can only react in a very cumbersome process. Thus, the procedural requirements defined by the Court can, on one hand, be viewed as a safeguard preventing the legislature from tailoring the benefits according to the budget of the day. On the other hand, it has to be noted that the German legislature was not able to meet the deadline set by the Court even under the stable political and

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[93] Aubel, *supra* note 7, at 278–79.

[94] *But see* Ronald Dworkin, *The Secular Papacy: Presentation*, *in* JUDGES IN CONTEMPORARY DEMOCRACY: AN INTERNATIONAL CONVERSATION 44, 45 (Robert Badinter & Stephen Breyer eds., 2004) (criticizing such a concept of a right).

[95] *See Hartz IV*, BVERFGE 125, 175 (258), 1 BVL 1/09 ET AL. of 9 Feb. 2010; bverfg.de at para. 217 (Ger.).

[96] *See* Rothkegel, *supra* note 35, at 135 (speaking of a "Pyrrhic victory" for the claimants).

[97] *Id*. at 145.

[98] For the concept of rights as trumps, *see* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY XI (1977). *See also* RONALD DWORKIN, A MATTER OF PRINCIPLE 198, 359 (1985).

financial circumstances of 2010. The analysis and interpretation of the statistics in the Federal Ministry of Labour and Social Affairs required an almost herculean work and the parliamentary process was difficult. Considering the severe austerity measures currently demanded of the Greek legislature by the European Union and the International Monetary Fund in response to the debt crisis in Greece, the *Hartz IV* transparency and consistency requirements look like a constitutional adjudication for a legislative process in an ideal world. It is the crux of the absolute right to guarantee a subsistence minimum, as construed by the German Constitutional Court, that the state guaranteeing such a right may not be able to administer it when most urgently needed.

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