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

Casenote – The Fundamental Right to the Guarantee of a Subsistence Minimum in the *Hartz IV* Decision of the German Federal Constitutional Court

By Stefanie Egidy[*]

A. Introduction

In February 2010, the German Federal Constitutional Court (*Bundesverfassungsgericht*) issued a ruling[1] on the so-called "Hartz IV legislation."[2] The ruling dealt with the law on social benefits according to the Second Book of the German Code of Social Law[3] and was based on the "fundamental right to the guarantee of a subsistence minimum"[4] derived from the declaration of human dignity in Article 1(1) of the German Basic Law[5] in conjunction with Article 20(1), the principle of the social welfare state.

The Court declared the provisions on standard benefits for adults and children to be unconstitutional, primarily because of the lack of underlying statistical investigation by the legislature. In enacting the Hartz IV legislation, the legislature relied on "'random

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[1] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 9 Feb. 2010 (*Hartz IV*), 125 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 175 (__), 1 BVL 1/09, para. 1–220, 2010 (Ger.), *available at* http://www.bverfg.de/entscheidungen/ls20100209_1bvl000109.html (last visited 4 Nov. 2011).

[2] Viertes Gesetz für moderne Dienstleistungen am Arbeitsmarkt [Fourth Act for Modern Services on the Labor Market], 24 Dec. 2003, BUNDESGESETZBLATT, Teil 1 [BGBL. I] 2954 (Ger.). The so-called "Hartz IV legislation" was named after Peter Hartz, who chaired the Hartz Commission that developed the statutory provisions. On the effects of the Hartz reforms, see Claudia Bittner, *Human Dignity as a Matter of Legislative Consistency in an Ideal World*, 12 GERMAN L.J., 1941, 1946 (2011).

[3] SOZIALGESETZBUCH ZWEITES BUCH - GRUNDSICHERUNG FÜR ARBEITSUCHENDE [SGB II] [Social Code], 24 Dec. 2003, BUNDESGESETZBLATT, TEIL 1 [BGBL. I] at 2954 (Ger.).

[4] *Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, para. 132.

[5] GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND [GRUNDGESETZ] [GG] [Basic Law], 23 May 1949, BGBl. at 1 (Ger.), *available at* http://www.bundestag.de/dokumente/rechtsgrundlagen/grundgesetz/gg.html (last visited 5 Nov. 2011). An English version is available at http://www.gesetze-im-internet.de/englisch_gg/index.html (last visited 9 Nov. 2011).

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estimates"[6] instead of conducting separate empirical research. The Court ruled that, while the legislature has discretion to choose the statistical models that determine how benefits are calculated, this discretion must be used consistently and transparently.

The *Hartz IV* decision directly affects the 6.7 million people who receive social support in Germany.[7] Even more people are affected indirectly, since changes concerning the subsistence minimum can influence other legal provisions based on or referring to the subsistence minimum such as children's allowances, rates of child support, seizure exemption limits, and the calculation of benefits for people seeking asylum.[8]

Instead of declaring the exact amount of social benefits to be unconstitutional, the Court found that the procedure used to determine the subsistence minimum to be in violation of the Constitution. The ruling does not require that these benefits be increased. Basing its decision on improper procedure is potentially less confrontational than subjecting social welfare legislation to full substantive review by the Court, which would entail questioning the decisions made by the democratically elected German *Bundestag*. This procedural approach to judicial review could serve as a model for other countries when adjudicating welfare legislation. As a significant part of the modern social welfare state, the analysis of the content and doctrinal structure of the right to a subsistence minimum is of interest beyond German law.[9]

[6] *Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, paras. 171, 175.

[7] Statistisches Bundesamt Deutschland [German Federal Statistics Office], Quote der Empfänger sozialer Mindestsicherung steigt leicht auf 9.5%, press release No. 458 (9 Dec. 2010), http://www.destatis.de/jetspeed/portal/cms/Sites/destatis/Internet/DE/Presse/pm/2010/12/PD10__458__221,templateId=renderPrint.psml (last visited 5 Nov. 2011). Statistics of 2009 provided by the German Federal Statistics Office including beneficiaries receiving unemployment benefit II (73 %) or social allowance (27 %, mainly consisting of children under 15).

[8] For two provisions directly referring to the subsistence minimum, see Bundeskindergeldgesetz [BKGG][Federal Child Benefit Act], 10 Nov. 1995, § 6a (Kinderzuschlag) (Ger.), and Einkommenssteuergesetz [EStG][Income Taxation Act], 16 Oct. 1934, §§ 31 (Familienleistungsausgleich), 32 (Kinder, Freibeträge für Kinder) (Ger.); see also *Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, para. 158 as well as the ruling of the Second Chamber of the First Senate of the German Federal Constitutional Court, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 11 Mar. 2010, 1 BVR 3163/09 (Ger.); Karl-Jürgen Bieback, *Existenzsicherung ohne Bildung*, 58 RECHT DER JUGEND UND DES BILDUNGSWESENS 137, 138–39 (2010), who criticizes the failure of the Hartz IV decision to apply the principle of equality in regard of these provisions.

[9] *See* Andreas von Arnauld, *Das Existenzminimum*, *in* STRUKTURFRAGEN DES SOZIALVERFASSUNGSRECHTS 251, 252–53 (Andreas von Arnauld & Andreas Musil eds., 2009).

B. Facts and Background of the Case

The social welfare system in Germany is built around a basic distinction between employable and non-employable needy people and their families.[10] Employable needy persons receive long-term assistance in the form of unemployment benefits. Their dependants, including partners and children under the age of 15, living in a joint household receive social allowances according to the Second Book of the German Code of Social Law as amended through the Hartz IV legislation. All other needy persons who are not employable, especially those who are unemployable because of their age or reduced earning capacity, receive subsidiary social allowances according to the Twelfth Book of the German Code of Social Law.

The main elements of unemployment benefits and the social allowance are the "standard benefit paid to secure one's livelihood,"[11] as well as subsidies for accommodation and heating.[12] Special non-recurring needs are taken into account only under exceptional and narrow circumstances in the form of non-recurring assistance for particular events such as pregnancy, birth, and school field trips. Any regularly recurring needs should already be covered by the standard benefits since they have been calculated to enable recipients to save money in order to fulfill both their present and future needs. This system is used by the Second Book of the German Code of Social Law. All of these benefits are provided only in the absence of personal means such as income or property, and are paid as a lump sum. Dependants or children living in a joint household receive a specific percentage of the total benefit payment. The standard benefit rates are calculated according to a statistical model as part of the sample survey the German Federal Statistical Office conducts on income and expenditure every five years.[13] The sample size is approximately sixty thousand households. Private households, excluding the recipients of social assistance, are ranked according to their income and the poorest twenty percent of these households are surveyed on their expenditures. In between the five-year survey period, standard benefits are adjusted according to the changes in the current pension value in the statutory pension insurance scheme.[14]

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[10] *See Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, paras. 2–4.

[11] *Id.* at para. 6.

[12] *Id.* at paras. 5–23.

[13] *See* Gesetz über die Statistik der Wirtschaftsrechnungen privater Haushalte [Act on Statistics of Household Budget Surveys in Private Households] 14 Mar. 1980, Bundesgesetzblatt, Teil 1 [BGBl. I] at 294; *see Hartz IV*, 125 BVERFGE 175 (__), 1 BVL 1/09 of 9 Feb. 2010, paras. 27, 43–44, 57–59, 63–66.

[14] *Hartz IV*, 125 BVERFGE 175 (__), 1 BVL 1/09 of 9 Feb. 2010, paras. 24–26. *See* SOZIALGESETZBUCH SECHSTES BUCH - GESETZLICHE RENTENVERSICHERUNG [SGB VI] [Social Code], 18 Dec. 1989, BUNDESGESETZBLATT, TEIL 1 [BGBL. I] at 2261, 1990 I at 1337, § 68 (Ger.).

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At the time of the Constitutional Court's decision, the benefit for single adults was fixed at €359 per month.[15] In the case of an employable needy person living in a joint household with an adult partner, the rate was reduced by ten percent per person on the basis of savings from having a shared budget. In 2009, children of employable needy beneficiaries received sixty percent of the standard benefit rate of adults up to the age of seven, seventy percent from ages seven until fourteen, and eighty percent thereafter.[16] These provisions were the result of some modifications enacted after the underlying lawsuits were initiated, which however did not solve the structural problems of the social benefit system.[17]

These provisions on standard rates were challenged before the Constitutional Court through a reference to concrete review initiated by the Higher Social Court of Hesse and the German Federal Social Court.[18] The plaintiffs in the original lawsuits sued the state for an increase in the lump sum that was paid with respect to children. Therefore, the Constitutional Court had to decide the constitutionality of the standard benefits for children according to the Second Book of the German Code of Social Law. Since the amount of social support for adults served as the basis of calculation for children's standard benefits, the Court ultimately had to examine the wider issue of subsistence minimums to provide for people's livelihoods.

C. Decision of the German Federal Constitutional Court

The task of this case was to examine whether the German system of social benefits complies with the German Constitution. The Constitutional Court recognized an autonomous fundamental right to the guarantee of a subsistence minimum, jointly derived from the provision on human dignity in Article 1(1) and the principle of the social welfare state in Article 20(1) of the German Basic Law. Thus, every individual has an enforceable, subjective right (*subjektives Recht*) to be provided the "material prerequisites which are indispensable for his or her physical existence and for a minimum of participation in social, cultural and political life."[19] Accordingly, the legislature has to enact a formal statute,

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[15] *See* SGB II, § 20(2) in the version as per July 1, 2009, notice of June 17, 2009, BGBl. I at 1342; *Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, paras. 51–81; *see also* Bittner, *supra* note 2, at 1945.

[16] *See Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, paras. 68–74.

[17] *See id.* at paras. 199–203.

[18] *See id.* at paras. 82–106. *See also* suspension of proceedings and submission order of Hessisches Landessozialgericht [Higher Social Court of Hesse], 29 Oct. 2008-L 6 AS 336/07; suspension of proceedings and submission order of Bundessozialgericht [BSG] [Federal Social Court], 27 Jan. 2009-B 14 AS 5/08 R; suspension of proceedings and submission order of Bundessozialgericht [BSG] [Federal Social Court], 27 Jan. 2009-B 14/11b AS 9/07 R.

[19] *Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, headnote 1 and para. 135.

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covering the subsistence needs of an individual.[20] The German Constitution does not determine the exact amount, which gives the legislature latitude in specifying the amount of standard benefits, taking into account the state of society and the prevailing conditions of life.[21] The legislature has less discretion in determining the necessary means to secure physical existence and more discretion in setting the socio-cultural subsistence minimum.[22]

Due to the degree of legislative flexibility, the Court only examined whether the amount of the subsistence minimum was "evidently insufficient."[23] This is not the case here.[24] The Court analyzed the process by which the legislature calculated the amount of standard benefits, assuming that a determination by a constitutionally acceptable process will result in a constitutionally acceptable rate of standard benefits.

> The Federal Constitutional Court hence examines whether the legislature has covered and described the goal to ensure an existence that is in line with human dignity in a manner doing justice to Article 1(1) in conjunction with Article 20(1) of the Basic Law, whether within its margin of appreciation it has selected a calculation procedure that is fundamentally suited to an assessment of the subsistence minimum, whether, in essence, it has completely and correctly ascertained the necessary facts and, finally, whether it kept within the bounds of what is justifiable in all calculation steps with a comprehensible set of figures within this selected procedure and its structural principles.[25]

When applying this principle of consistency, any consideration outside of the chosen method has to be carefully justified. Further, "[i]n order to facilitate this constitutional review, there is an obligation for the legislature to disclose the methods and calculations

[20] *See id.* at paras. 136–37.

[21] *See id.* at para. 138.

[22] *See id.* (suggesting that the Constitutional Court, in contrast to the lower courts, only follows the concept of the socio-cultural subsistence minimum without adopting this notion).

[23] *See id.* at paras. 141, 151–52.

[24] *See id.* at paras. 151–58.

[25] *Id.* at para. 143.

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used to determine the subsistence minimum in the legislative procedure"[26] (principle of transparency).

After explaining the constitutional background of the fundamental right to the guarantee of a subsistence minimum, the Constitutional Court offered four reasons for the unconstitutionality of the provisions in question.[27]

First, the Court ruled that the legislature had appropriately defined the goal as the securing of the subsistence minimum.[28] The statistical model described above was an appropriate method to realistically determine the necessary means to secure a subsistence minimum that is in line with human dignity.[29] When calculating the standard benefits, it was constitutionally acceptable for the legislature to exclude expenses that were not necessary to secure existence. In choosing the kind and amount of expenses that should be excluded in the amount of social support, the legislature again was required to employ empirical analysis.[30] In calculating the Hartz IV standard benefits, the legislature deducted certain expenses from various subcategories deemed inessential to subsistence.[31] In the subcategory of furniture, division 5, for instance, expenses for camping furniture and art were subtracted from the amount that the lower quintile of households on average spent on furniture.[32] Likewise, the legislature did not include expenses for education, division 10, in the standard benefits. These decisions lacked an empirical basis, since no research had been performed to determine whether households actually spent money on those items or, if so, how much they spent.[33] The free estimates conducted at random could not be justified and violated the fundamental right to the guarantee of a subsistence minimum. Further, as the calculation of the standard benefit for a single adult was unconstitutional, by extension so too was the standard benefit for partners and children, since these latter benefits are derived as a percentage of the standard benefits of single adults.[34]

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[26] *Id.* at para. 144.

[27] *See id.* at paras. 132–220.

[28] *See id.* at paras. 147–50.

[29] *See id.* at paras. 159–72.

[30] *See id.* at para. 171.

[31] *See id.* at para. 175.

[32] For an explanation of the details of this calculation, see *id.* at paras. 59, 65, 175, 180, and 200.

[33] *See id.* at paras. 174–82.

[34] *See id.* at paras. 188–90.

Second,[35] it was found to be unconstitutional to provide children with standard benefits calculated as a certain percentage of adults, when this specific percentage was not supported by statistical evidence and therefore lacked any empirical basis. Since "[c]hildren are not small adults,"[36] their needs follow a completely different pattern, which the legislature had failed to research, even though this could have been easily done. The legislature had referred to the Organisation for Economic Co-operation and Development (OECD) scale[37] and the study by Münnich/Krebs,[38] but neither source was appropriate as neither one answered the question of the substantial needs of children.[39] Such arbitrary estimates again violated the fundamental right to the guarantee of a subsistence minimum.

Third,[40] the Court ruled that it is unconstitutional to link the development of the standard benefits to the development of the current pension value. The subsistence minimum is determined by "net income, consumption conduct and the cost of living."[41] The calculation of the pension "is based on the factors of the developments in gross wages and salaries, in the contribution rate to general pensions insurance and . . . on a sustainability factor,"[42] which are not suitable to guide the subsistence minimum.

Fourth, the Court found the absence of a provision granting benefits to secure "a need which is irrefutable, recurrent and not merely a single instance if this is necessary in individual cases for a subsistence minimum that is in line with human dignity"[43] to be unconstitutional. The statutory provisions on standard benefits must be flexible enough to enable the relevant administrative agencies to provide each and every individual with the means to live in accordance with human dignity.[44] The provisions in question covered only

[35] *See id.* at paras. 190–98.

[36] *Id.* at para. 191.

[37] *See What are Equivalence Scales?*, OECD, *available at* http://www.oecd.org/dataoecd/61/52/35411111.pdf (last visited 9 Nov. 2011). This chart is referenced in order to justify the Standard Rate Ordinance BR-Drs. 206/04, at 10–11.

[38] *See* M. Münnich and T. Krebs, *Ausgaben für Kinder in Deutschland—Berechnungen auf der Grundlage der Einkommens- und Verbrauchsstichprobe 1998*, WIRTSCHAFT UND STATISTIK 2002, at 1080 et seq.

[39] *See Hartz IV*, 125 BVERFGE 175 (__), 1 BVL 1/09 of 9 Feb. 2010, paras. 193–94.

[40] *See id.* at paras. 183–87.

[41] *Id.* at para. 184.

[42] *Id.*

[43] *Id.* at para. 206.

[44] *See id.* at paras. 205–06.

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some non-recurring special needs, and failed to include a provision that augmented the lump sums in the case of recurring special needs. Therefore, a provision for potential hardships in individual cases had to be included, if such hardships could not be overcome by using the money provided as a standard benefit. Since needy people are expected to accumulate some savings, it is anticipated that these hardships will only have to be accommodated in rare cases.[45]

The Court chose to declare the challenged provisions to be incompatible with the Basic Law rather than immediately striking the legislation down, which would have eliminated the statutory basis for all social benefits.[46] This remedy left the provisions in force for former and pending cases, thereby protecting the state's budget from undefined expenses for retroactive payments.[47] The legislature was given until 31 December 2010 to make the necessary corrections by following the procedural instructions the Court developed.[48] In the case of untimely or non-compliance with these instructions, any changes made after the deadline would have retroactive effect, since the state should not profit from constitutional violations at the expense of needy people.[49] The Court also stated that as for the transitional period of 2010, there existed a special entitlement to financial support based on the Constitution, even without a proper statutory basis.[50]

D. Assessment of the Decision

The assessment of the decision of the Constitutional Court will follow in two stages, examining first the fundamental right to the guarantee of a subsistence minimum and second, the principles of consistency and transparency.

I. The Fundamental Right to the Guarantee of a Subsistence Minimum

After analyzing the normative basis and the content of the fundamental right to the guarantee of a subsistence minimum, I will focus on the question whether the Constitutional Court created a new fundamental right in this decision. Finally, I will

[45] *See id.* at para. 208.

[46] *See id.* at para. 210.

[47] *See id.* at para. 217.

[48] *See id.* at para. 216.

[49] *See id.* at para. 218. See also Ulrich Wenner, *Was folgt aus dem Urteil des Bundesverfassungsgerichts?*, SOZIALE SICHERHEIT 69, 71 (2010), who points out that such a construction is not new.

[50] *See Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, para. 220. On this hardship clause, see Bittner, *supra* note 2, at 1955.

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examine the consequences of this decision on the absolute nature of human dignity as it is granted in the German Basic Law.

1. Normative Basis: The Principle of the Social Welfare State and Human Dignity

The German Basic Law does not contain an explicit fundamental right to the guarantee of a subsistence minimum,[51] which is why this right has been derived from other constitutional provisions. Thus, the Court employed human dignity in conjunction with the principle of the social welfare state as the normative basis of the guarantee to a subsistence minimum. It is important to recognize that this construction leads to a "uniform fundamental rights guarantee."[52] Therefore, this fundamental right cannot be split into a guarantee of physical existence derived solely from Article 1(1) of the Basic Law and a guarantee of the socio-cultural minimum solely derived from Article 20(1) of the Basic Law.[53]

Nevertheless, these two constitutive elements deserve a closer look. The first pillar of the fundamental right to the guarantee of a subsistence minimum, human dignity, documented in Article 1(1) of the Basic Law, is the "highest value" of the Constitution.[54] Due to its abstract nature, human dignity is in particular need of legislative interpretation.[55] The Court regularly uses the so-called "object theory" (*Objektformel*) that interprets human dignity as a prohibition on treating human beings as mere objects.[56] The

[51] *See, e.g.*, Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] 19 Dec. 1951, 1 ENTSCHEIDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVERFGE] 97 (104–05), 1951 (Ger.).

[52] *Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, para. 135.

[53] *See* Arnauld, *supra* note 9, at 291; *see also* Anne Lenze, *Hartz IV Regelsätze und gesellschaftliche Teilhabe, Das Urteil des BVerfG vom 9.2.2010 und seine Folgen*, WISO DISKURS 4 (May 2010). *But see* José Martínez Soria, *Das Recht auf Sicherung des Existenzminimums*, 60 JURISTENZEITUNG 644, 648 (2005).

[54] This is settled case-law since 6 BVERFGE 32 (41). *See* Christoph Enders, DIE MENSCHENWÜRDE IN DER VERFASSUNGSORDNUNG 74 et seq. (1997); Günter Dürig, *Der Grundrechtssatz von der Menschenwürde, Entwurf eines praktikablen Wertsystems der Grundrechte aus Art. 1 Abs.1 in Verbindung mit Art. 19 Abs. 2 des Grundgesetzes*, 81 ARCHIV DES ÖFFENTLICHEN RECHTS 117, 119, 122 (1956); Bittner, *supra* note 2, thus begins her article on the *Hartz IV* decision by quoting Article 1(1) of the Basic Law.

[55] Peter Häberle, *Die Menschenwürde als Grundlage der staatlichen Gemeinschaft*, 2 HANDBUCH DES DEUTSCHEN STAATSRECHTS § 22, para. 82 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2004).

[56] For an application of this theory as early as 1969, see Entscheidungen des Bundesverfassungsgerichts [BVerfG] [Federal Constitutional Court] 1 July 1969, 27 BVERFGE 1 (6) (Ger.). *See* Dürig, *supra* note 54, at 127; Dürig, *Article 1(1)*, *in* KOMMENTAR ZUM GRUNDGESETZ para. 28 (Theodor Maunz & Günter Dürig eds., loose-leaf, 1st ed. 1958). Based on the theory of Immanuel Kant: "Humanity is itself a dignity; for a human being cannot be used merely as a means by any human being . . but must always be used at the same time as an end. It is just in this that his dignity (personality) consists." IMMANUEL KANT, THE METAPHYSICS OF MORALS Part II, § 38, para. 209 (Mary Gregor trans. and ed., Cambridge Univ. Press 1996) (1797). *See also* Häberle, *supra* note 55, at para. 43; Enders, *supra* note 54, at 20 et seq. *But see* Horst Dreier, *Art. 1(1)*, *in* 1 GRUNDGESETZ—KOMMENTAR para. 53 (Horst Dreier ed., 2d ed. 2004).

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Court has ruled that human dignity is based on the inherent value of an individual and her status as a human being, without considering an individual's "characteristics, achievements and social status."[57] The negative side of human dignity protects the individual against state intrusions, such as torture, that actively violate human dignity.[58] The positive side of human dignity imposes on the state a duty to protect individuals against violations of their human dignity by third parties.[59] The idea that human dignity also contains material benefits for individuals developed later.[60] As human dignity is distinct from social status, the human dignity of poor people is independent of their financial means. Therefore, a human being's dignity can be violated when a lack of material resources causes a profound decrease in the quality of their existence.[61] By providing the subsistence minimum, the state does not give human dignity to poor people, but merely enables every individual to lead a life that is consistent with human dignity, and upholding the possibility of self-determination and autonomy.[62]

The principle of the social welfare state in Article 20(1) of the Basic Law, the second pillar, is a legally binding constitutional principle that has to be given effect by the legislature.[63] Initially, the principle of a social welfare state was interpreted as demanding to show a certain degree of solidarity with socially weak members of society in order to secure public order and inner stability.[64] Beginning in the 1950s, the interpretation of the principle of the social welfare state increasingly emphasized the individual's needs and dignity.[65] Now,

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[57] 87 BVERFGE 209 (228); *see also* 96 BVERFGE 375 (399); 115 BVERFGE 118 (152).

[58] *See* Dreier, *supra* note 56 *passim*; Häberle, *supra* note 55, at para. 72.

[59] *See* 1 BVERFGE 97 (104); Dreier, *supra* note 56, at para. 149; Christian Hillgruber, *Article 1(1)*, *in* BECK'SCHER ONLINE-KOMMENTARZUM GRUNDGESETZ para. 7 (Volker Epping & Christian Hillgruber ed., 10th ed. 2011).

[60] See Dreier, *supra* note 56, at para. 158 n.529 with further references on academic literature to the duty to secure the minimal requirements for a dignified subsistence ("Still rejected in BVerfGE 1, 97 (104), hinted at in BVerfGE 40, 121 (133), left open in BVerfGE 75, 348 (360), implicitly affirmed in BVerfGE 82, 60 (80, 85).").

[61] Maximilian Wallerath, *Zur Dogmatik eines Rechts auf Sicherung des Existenzminimums*, 63 JURISTENZEITUNG 157, 161 (2008).

[62] *Id.*

[63] Settled case-law since 1 BVERFGE 97 (105); Horst Dreier, *Art. 20(1)*, *in* 2 GRUNDGESEZ—KOMMENTAR, paras. 31–32 (Horst Dreier ed., 2d ed. 2006); Stefan Huster and Johannes Rux, *Article 20*, *in* BECK'SCHER ONLINE-KOMMENTAR ZUM GRUNDGESETZ para. 196 (Volker Epping & Christian Hillgruber ed., 10th ed. 2011); Hans F. Zacher, *Soziale Gleichheit: Zur Rechtsprechung des Bundesverfassungsgerichts zum Gleichheitssatz und Sozialstaatsprinzip*, 93 ARCHIV DES ÖFFENTLICHEN RECHTS 341 et seq. (1968).

[64] *See* Dreier, *supra* note 63, at para. 56; Wallerath, *supra* note 61, at 158; Wolfgang Rüfner, *Daseinsvorsorge und soziale Sicherheit*, *in* 4 HANDBUCH DES STAATRECHTS § 96 para. 121 (Josef Isensee & Paul Kirchhof, eds., 3d ed. 2006); Roman Herzog, *Article 20*, *in* KOMMENTAR ZUM GRUNDGESETZ VIII para. 10 (Theodor Maunz & Günter Dürig eds., loose-leaf, 62d ed. 2011).

[65] Rüfner, *supra* note 64, at 122; Wallerath, *supra* note 61, at 158.

one of the principle's aims is to provide help for poor and needy people to enable them to live a dignified existence.[66] The principle of the social welfare state can be further defined by three overlapping and mutually complementary elements: the element of social equalization, which demands an equal chance to make use of fundamental freedoms; the element of social security, specified by the social security system; and the element of social justice.[67] The application of the principle of the social welfare state is most intense in situations where individuals facing substantial hardships seek help.[68] The Court has often applied the principle of the social welfare state in a limited way.[69] The *Hartz IV* decision has now added some texture to this constitutional principle.

2. Content of the Fundamental Right to the Guarantee of a Subsistence Minimum

The principle of the social welfare state and human dignity are highly abstract, offering hardly any guidance on how to define the content of the fundamental right to the guarantee of a subsistence minimum. The Constitutional Court does not offer much guidance either.[70] In the *Hartz IV* decision the Court concluded that the "fundamental right to the guarantee of a subsistence minimum . . . ensures to each person in need of assistance the material prerequisites which are indispensable for his or her physical existence and for a minimum of participation in social, cultural and political life."[71] As the wording indicates, the fundamental right to the guarantee of a subsistence minimum consists of two parts—physical and socio-cultural—but only minimal requirements are being protected.[72] The standard benefits fall short of the subsistence minimum when "the human being is forced to economically exist under conditions that demean this human being to be an object."[73] The legislature has to fulfill needs with restricted means,[74] while

[66] 1 BVERFGE 97 (105); 35 BVERFGE 202 (236); 40 BVERFGE 121 (133); 44 BVERFGE 353 (375); 82 BVERFGE 60 (80); 110 BVERFGE 412 (445–46); Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court] 12 Oct. 1989, 82 ENTSCHEIDUNGEN DES BUNDESVERWALTUNGSGERICHTS [BVERWGE] 364 (368), 1989 (Ger.); *see* Hans F. Zacher, Das soziale Staatsziel, *in* 2 HANDBUCH DES STAATSRECHTS § 28, para. 25 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2004); Dreier, *supra* note 63, at para. 17.

[67] *See* Dreier, *supra* note 63, at para. 37 et seq; *see also* 100 BVERFGE 271 (284) (discussing equality); 45 BVERFGE 376 (387–88) (discussing security); 110 BVERFGE 412 (445) (discussing justice).

[68] *See* Wallerath, *supra* note 61, at 160.

[69] *See* Lenze, *supra* note 53, at 22; *see also* Zacher, *supra* note 63, at 370.

[70] *Compare* Bieback, *supra* note 8, at 142, *with* Bittner, *supra* note 2, at 1951 (further interpreting the term "subsistence minimum," and distinguishing between tax and social benefits law).

[71] *Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, headnote 1.

[72] *See* Soria, *supra* note 53, at 647–48; Arnauld, *supra* note 9, at 261–62, 279.

[73] Soria, *supra* note 53, at 647.

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trying to provide a "just social system"[75] and taking the social reality of our modern time into consideration.[76] This is difficult as there is no necessary consensus on what needs are considered vital.[77] Further, a lack of specific criteria for a dignified existence causes difficulty in evaluating and excluding some socio-cultural needs.[78] The state should protect against social exclusion by enabling the beneficiaries to participate in the nation's political, cultural and social life, at least to some extent. The standard of living of the economically weaker population serves as a frame of reference, so the socio-cultural minimum can be adjusted accordingly.[79]

The legislature is subject to full judicial review in cases concerning the physical requirements of an existence in accordance with human dignity as the core of this fundamental right.[80] The legislature has wider latitude to define the socio-cultural subsistence minimum, and as a result the judicial standard of review is more limited.[81] The courts can only review the procedure involved in determining the socio-cultural subsistence minimum, which must be based on objective criteria and adequate data that has to be evaluated properly.[82] The legislature cannot deny social security benefits, even if the needy person is responsible for creating his own state of need.[83] The legislature may, however, create norms that reduce payments, if the beneficiaries are not willing to help themselves, as long as the absolutely protected core area of the physical subsistence minimum is not infringed.[84]

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[74] *See* 33 BVERFGE 303 (333); Thorsten Kingreen, DAS SOZIALSTAATSPRINZIP IM EUROPÄISCHEN VERFASSUNGSVERBUND 187, 196–97 (2003).

[75] *See supra* note 67.

[76] *See Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, para. 138; Dreier, *supra* note 56, at para. 158.

[77] *See* Soria, *supra* note 53, at 647–48.

[78] *See id.* at 648.

[79] *See* Arnauld, *supra* note 9, at 262; Soria, *supra* note 53, at 648–49.

[80] *See Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, para.138; Soria, *supra* note 53, at 648.

[81] *See Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, para. 138; Soria, *supra* note 53, at 649.

[82] *See* Soria, *supra* note 53, at 649; 94 BVERWGE 326 (331–32); Ralf Rothkegel, *Ein Danaergeschenk für den Gesetzgeber, Zum Urteil des Bundesverfassungsgerichts vom 9. Februar 2010* – 1 BVL 1, 3, 4/09 -, 49 ZEITSCHRIFT FÜR DIE SOZIALRECHTLICHE PRAXIS 135, 137 (2010).

[83] *See* 29 BVERWGE 99 (104); Soria, *supra* note 53, at 651.

[84] *See* Arnauld, *supra* note 9, at 287; *see also* Volker Neumann, *Menschenwürde und Existenzminimum*, NEUE ZEITSCHRIFT FUR VERWALTUNGSRECHT 426, 432 (1995); Soria, *supra* note 53, at 651. Regarding the question of the consistency of the respective provisions, see Stephan Rixen, *Verfassungsrecht ersetzt Sozialpolitik? "Hartz IV" auf dem Prüfstand des Bundesverfassungsgerichts*, 14 SOZIALRECHT AKTUELL 81, 87 (2010).

3. Creation of a New Fundamental Right?

Although the *Hartz IV* decision did not create a new fundamental right to the guarantee of a subsistence minimum,[85] the decision redefined existing understandings of this fundamental right.[86] The interpretation of two constitutional provisions to ground an independent fundamental right is not a novelty: The Constitutional Court often joins human dignity with fundamental rights or constitutional principles, such as in the well-established case of the right to personality, for example, which is derived from human dignity in conjunction with the right of freedom of action in Article 2(1) of the Basic Law.[87]

The fundamental right to the guarantee of a subsistence minimum first appeared in an early decision of the Federal Administrative Court, which derived the duty of the state to provide public care from Articles 1 (human dignity), 2(2) (freedom to life and physical integrity), 3 (principle of equality), 14(2) (use of property for the public good), 19(4) (right to legal remedies), 20 (constitutional principles) and 79(3) (eternity clause) of the Basic Law and interpreted it as a subjective right.[88] Since the 45th volume of case reports, the Constitutional Court has also recognized that "the fundamental right to the guarantee of a subsistence minimum that is in line with human dignity emerges from Article 1(1) of the Basic Law in conjunction with Article 20(1) of the Basic Law."[89] In line with the early interpretation of fundamental rights as negative protections against the state and not as positive rights to a particular state action, the Court initially characterized the guarantee to a subsistence minimum as a negative right.[90] The Court used this negative right, particularly in tax law, where a tax exemption for the subsistence minimum was derived from human dignity in conjunction with the principle of a social welfare state, the principle

[85] For the argument that the Constitutional Court again creates another fundamental right, see Thorsten Kingreen, *Schätzungen "ins Blaue hinein": Zu den Auswirkungen des Hartz IV-Urteils des Bundesverfassungsgerichts auf das Asylbewerberleistungsgesetz*, NEUE ZEITSCHRIFT FUR VERWALTUNGSRECHT 558 (2010). *See also* Lenze, *supra* note 53, at 4–5 (although she includes the previous mentions of this right); Bittner, *supra* note 2, at 1944.

[86] See Rixen, *supra* note 84, at 82. Regarding the "adjudicative background of the Hartz IV-decision" *see* Bittner, *supra* note 2, at 1942-44.

[87] *See* Dreier, *supra* note 56, at para. 138.

[88] *See* 1 BVERWGE 159 (161–62); *see also* Neumann, *supra* note 84, at 427 (recognizing only a statutory entitlement); Wallerath, *supra* note 61, at 159.

[89] *Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, para. 133; *see also* 45 BVERFGE 187 (228); 82 BVERFGE 60 (85). 40 BVERFGE 121 (133) bases this right only on the principle of a social state, as does 44 BVERFGE 353 (375).

[90] *See* 1 BVERFGE 97 (104). On the development of the minimum standard of living, see Arnauld, *supra* note 9, at 257; *see also* Neumann, *supra* note 84, at 431.

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of equality, and the right to the protection of the family.[91] In addition, the fundamental right to the guarantee of a subsistence minimum includes the right to protection against third parties, which finds expression in the provisions on income and property exempt from execution and in the calculation of alimony.[92] Later, the Court expanded the fundamental right in question to include a constitutional right to access social goods and services.[93] This participatory component forms the basis of the *Hartz IV* decision and is reflected by the fundamental right to the guarantee of a subsistence minimum.

Although the Court correctly cited five former decisions as having dealt with the fundamental right to the guarantee of a subsistence minimum,[94] three of them examined questions outside of social law and all gave the fundamental right to the guarantee of a subsistence minimum only brief consideration.[95] Although the Court has not created or invented a new right in the *Hartz IV* decision, it has further developed the criteria on how to calculate the social benefits to provide for the individual's existence.[96] According to the Court, the right guarantees not only the subsistence minimum necessary to secure the physical needs but also a socio-cultural component. The beneficiary has to be enabled to participate in human interactions and to share a minimum of social, cultural, and political life. This emphasis however will hardly affect the calculation of standard benefits since they already included the socio-cultural subsistence minimum prior to this decision. Nevertheless, this decision puts new emphasis on the right of children to have a realistic chance of leading a life independent of state aid and not to be deprived of life-chances.[97]

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[91] *See* 82 BVERFGE 60 (85); Lenze, *supra* note 53, at 4; Wallerath, *supra* note 61, at 161; Arnauld, *supra* note 9, at 280.

[92] *See* Zivilprozessordnung [ZPO] [Civil Procedure Code] §§ 811, 850; Soria, *supra* note 53, at 652; Arnauld, *supra* note 9, at 284–85.

[93] *See* 33 BVERFGE 303; Franz Reimer, *Der Staat als Türöffner, Zugang—eine Kategorie des Sozialverfassungsrechts im Gewährleistungsstaat*, STRUKTURFRAGEN DES SOZIALVERFASSUNGSRECHTS 223, 223 et seq., 237; Rothkegel, *supra* note 82, at 140.

[94] *See Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, para. 133.

[95] *See* Christian Seiler, *Das Grundrecht auf ein menschenwürdiges Existenzminimum*, JURISTENZEITUNG 500, 503 (2010). 40 BVERFGE 121 (133) is only based on the principle of a social state.

[96] *See* Rixen, *supra* note 84, at 81–82 (referring to two decisions by one of the Chambers that deem all constitutional questions of the calculation of standard benefits to be resolved): BVerfG, 18 Feb. 2010, 1 BVR 1523/08 para. 5, *available at* http://www.bverfg.de/en/decisions/rk20100218_1bvr152308.html (last visited 10 Nov. 2011); BVerfG, 24 Mar. 2010, 1 BVR 395/09, para. 5, *available at* http://www.bverfg.de/en/decisions/rk20100324_1bvr039509.html (last visited 10 Nov. 2011); *Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, para. 217.

[97] *See Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, paras. 191–92.

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The Court also made clear in this decision that a right to a specification of statutory entitlements enacted by the legislature follows from the subjective nature of the right. None of the decisions that the Court cites in support of the fundamental right to the guarantee of a subsistence minimum deal with an entitlement of the individual to social benefits as a right directly derived from the Constitution. The closest decision only acknowledges the negative side of the fundamental right to the guarantee of a subsistence minimum and demands a certain amount to be free from taxation.[98] The duties of the welfare state have long been interpreted as mere objective obligations.[99] The duty for the state to recognize and grant a subsistence minimum, which was developed by the Court's prior adjudication, does not necessarily coincide with a subjective right of the individual.[100] In the *Hartz IV* decision, the Court clearly emphasized that the fundamental right to the guarantee of a subsistence minimum grants the individual a subjective, enforceable right to be provided with appropriate means by legislative and subsequent executive action. Moreover, the Court rejected opinions that the individual's entitlements are only to be derived from statutory provisions[101] or arise only when the use of a fundamental freedom would be severely endangered without support.[102] To the contrary, the Court explicitly recognized the need to grant financial support directly from the Constitution, although it is only in exceptional circumstances that an entitlement can be derived directly from the Basic Law since it is generally the task of the legislature to enact sufficient statutory guarantees.

The *Hartz IV* decision left the status of human dignity as a fundamental right unresolved.[103] The Court is clear on one aspect, however, that the guarantee of a subsistence minimum is indeed a fundamental right to be invoked by a constitutional complaint. Assuming that human dignity is not a fundamental right, the constitutional complaint in the *Hartz IV* case could neither be based on human dignity, nor on the principle of the social welfare state (Article 93(1) 4a of the Basic Law). By combining the two principles the Court explicitly developed a fundamental right to the guarantee of a subsistence minimum that can be invoked with a constitutional complaint by individuals. This is, however independent of the character of human dignity as a fundamental right. Therefore, this ruling cannot be seen as deciding the question of whether human dignity is a fundamental right.

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[98] *See* 82 BVERFGE 60 (78 et seq.); Seiler, *supra* note 95, at 503.

[99] *See* 1 BVERFGE 97 (104); Franz Merli, *Armut und Verfassung, Die Rechtslage in Deutschland*, *in* ARMUT UND VERFASSUNG 117, 124 (Rainer Hofmann, Pavel Holländer, Franz Merli & Ewald Wiederin eds., 1998); Arnauld, *supra* note 9, at 253–54.

[100] *See* Dreier, *supra* note 56, at para. 137.

[101] *See* Hillgruber, *supra* note 59, at 50; Huster and Rux, *supra* note 63, at 203.2.

[102] *See* Huster and Rux, *supra* note 63, at 203.2.

[103] *See* Dreier, *supra* note 56, at para. 124 (discussing this problem and concluding that human dignity is not a fundamental right). *But see* Häberle, *supra* note 55, at para. 74 (following the opposite opinion).

4. The Absolute Nature of Human Dignity

The guarantee of human dignity is absolute. Protected by the eternity clause in Article 79(3) of the Basic Law, any intrusion by the state into human dignity is a violation.[104] There is no room for justification through proportionality or a compelling state interest.[105] The fundamental right to the guarantee of a subsistence minimum however, is granted alongside this absolute guarantee and has independent meaning.[106] This fundamental right needs to be specified by the legislature and its meaning is relative according to the general state of society. The fact that this fundamental right is based on human dignity could be interpreted to prohibit limitations or reductions of standard benefits for fiscal or other reasons. A possible solution to this problem would be to split the right to the guarantee of a subsistence minimum into two parts.[107] The physical subsistence minimum as the core would then be derived from the absolute guarantee of human dignity and the socio-cultural subsistence minimum would be derived from the principle of a social welfare state. This construction would allow the legislature to limit the latter part while preserving the absolute nature of human dignity. The Constitutional Court solves this theoretical problem by interpreting the fundamental right to the guarantee of a subsistence minimum as an independent, separate, and uniform right, which allows room for balancing.[108] Nevertheless, human dignity still is a basis of this fundamental right. Subjecting the fundamental right to the guarantee of a subsistence minimum to the possibility of balancing with a compelling state interest can thus weaken the absoluteness of the guarantee of human dignity.[109]

Moreover, the use of human dignity as a basis can cause problems when the legislature wants to limit benefits for certain groups or under certain circumstances, such as the statutes providing standard benefits for people seeking asylum in Germany.[110] The

[104] *See* Dreier, *supra* note 56, at para. 41, 44 (with further references on prevailing opinion); Enders, *supra* note 54, at 102 et seq.

[105] *See* Hillgruber, *supra* note 59, at 10; Dreier, *supra* note 56, at para. 132; Häberle, *supra* note 55, at para. 56; Matthias Herdegen, *Article 1(1)*, KOMMENTAR ZUM GRUNDGESETZ para. 73 (Theodor Maunz & Günter Dürig eds., loose-leaf, 62d ed. 2011).

[106] *See Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, para. 133.

[107] *See supra*, note 53.

[108] *See Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, para. 135; Rixen, *supra* note 84, at 83.

[109] *See* Kingreen, *supra* note 85, at 558–59; Arnauld, *supra* note 9, at 291.

[110] *See* Bittner, *supra* note 2, at 1956-58 (pointing to a case about the "reduced level of payments" to asylum seekers that is already pending in the Constitutional Court (case no. 1 BVL 10/10)); Soria, *supra* note 53, at 645; Arnauld, *supra* note 9, at 281–82. On the determination of the subsistence minimum for people seeking asylum, see 49 BVERWGE 202 (206).

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amount of these benefits is far below the standard benefits of the Hartz IV legislation. How can this be justified in terms of human dignity? If the benefits are not going to be raised, a compelling state interest has to be balanced against the principle of human dignity. Here, the problem of absoluteness becomes vital.

In order to avoid these problems, it would have been preferable to derive the fundamental right to the guarantee of a subsistence minimum from provisions of the Basic Law other than the guarantee of human dignity, especially as the fundamental rights of Articles 1 to 19 of the Basic Law generally have to be applied prior to a resort to human dignity.[111] Potential candidates for application would be the right to personality, Article 2(1) in conjunction with Article 1(1), the right to life and physical integrity, Article 2(2), or even the protection of marriage and family, Articles 6(1), 6(2) of the Basic Law.[112] Since all these fundamental rights could serve as the basis for the implicit right to a subsistence minimum, there was no compelling reason to choose human dignity as the main basis and the decision to do so might cause more problems than it solves.[113]

II. The Duty of Consistency and Transparency in the Legislative Process

When enacting statutes, the legislature has to observe both fundamental rights, which entail substantive limitations on the legislature's powers and certain procedural requirements derived from the principle of democracy, the rule of law or even fundamental rights.[114] The legislature has a margin of discretion, especially when balancing conflicting fundamental rights or realizing fundamental positive rights by developing a legislative concept. The state has to follow certain procedures when legislating, executing, and adjudicating.[115] When the state is granted wider latitude to regulate in the area of fundamental rights, fundamental rights protection can be achieved through requiring a certain procedure (fundamental rights protection through procedure).[116] In the area of social benefits law, the legislature has to balance the conflict between the principle of equality between needy people, as well as between needy and non-needy people and the principle of individuality. The principle of equality calls for a

[111] *See* Hillgruber, *supra* note 59, at 9.

[112] *See* Kingreen, *supra* note 85, at 558–59; *see also* Bieback, *supra* note 8, at 142.

[113] *See* Kingreen, *supra* note 85, at 558–59.

[114] See the non-smoker decision 121 BVERFGE 317, where the principle of consistency was employed in the context of the occupational freedom provided by Article 12 Basic Law; Bittner, *supra* note 2, at 1955 emphasizes the limitations imposed by the separation of powers principle.

[115] *See* Paul Kirchhof, *Mittel staatlichen Handelns*, 4 HANDBUCH DES STAATSRECHTS § 99, para. 71 et seq. (Josef Isensee & Paul Kirchhof eds., 3d ed. 2007).

[116] *See* Kirchhof, *supra* note 115, at 69 et seq.; Wolfgang Kahl, *Grundrechtsschutz durch Verfahren in Deutschland und der EU*, VERWALTUNGSARCHIV 1 (2004); DANIEL BERGNER, GRUNDRECHTSSCHUTZDURCH VERFAHREN (1998).

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generalized framework, whilst the principle of individuality requests taking extraordinary individual needs into account.[117] In order to solve this conflict, the Court grants the legislature wide substantive latitude while emphasizing procedural requirements, mainly the duty of consistency and transparency. The idea behind this concept is to reach a constitutional result through the application of clear and consistent rules.[118]

1. The Principle of Consistency

In the most innovative part of the *Hartz IV* decision, the Constitutional Court took a further step in formalizing procedural requirements by recasting the legislature's duty of consistency in the area of social benefits law as a positive right of the individual.[119] This will very likely be meaningful far beyond the limits of social benefits law.[120]

The principle of consistency has been developed to give effect to the principle of equality, which is regularly employed by the Court's adjudication in the area of tax law and especially income tax law.[121] Here, the application of the principle of consistency follows a forty-year tradition.[122] The principle of consistency obliges the legislature to adhere to a chosen standard, which imposes a stricter requirement than the prohibition against arbitrary decisions.[123] The legislature has to commit to the rules that it has imposed on itself; any exemption needs to be justified.[124] The principle of consistency has recently also been applied outside of tax law in the Constitutional Court's "non-smoker decision," where the Court struck down the statute enacted to ban smoking in public restaurants as a violation of the right to occupational freedom.[125] In that decision, the Court invoked the

[117] *See* Soria, *supra* note 53, at 650; Wallerath, *supra* note 61, at 162, and 164, 165; Rüfner, *supra* note 64, at 125; Sven Mirko Damm, MENSCHENWÜRDE, FREIHEIT, KOMPLEXE GLEICHHEIT: DIMENSIONEN GRUNDRECHTLICHEN GLEICHHEITSSCHUTZES, 387 (2006) (emphasizing the principle of equality in a comparative context of German and U.S. law).

[118] *See* Rothkegel, *supra* note 82, at 141.

[119] *See* Rixen, *supra* note 84, at 81; Rothkegel, *supra* note 82, at 141.

[120] *See* Michael, *Folgerichtigkeit als Wettbewerbsgleichheit, Zur Verwerfung von Rauchverboten in Gaststätten durch das BVerfG*, JURISTENZEITUNG 875, 876 (2008) (examining the non-smoker decision, considering implications beyond the protection of non-smokers and the law governing restaurants to be possible, and pointing to similar concerns in the dissenting opinions of Justices Bryde and Masing in 121 BVERFGE 317 (380, 383)).

[121] *See* 23 BVERFGE 242 (256); 120 BVERFGE 125 (155); 122 BVERFGE 210. *See also* recent decision of the Federal Constitutional Court, 1 BvL 12/07 of 12 Oct. 2010, *available at* http://www.bverfg.de/en/decisions/ls20101012_1bvl001207.html (last visited 5 Nov. 2011).

[122] *See* Michael, *supra* note 120, at 880.

[123] *See id.* at 878–79.

[124] *See id.* at 880.

[125] *See* 121 BVERFGE 317 (362–63).

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principle of consistency, which was derived from a synthesis of the right to occupational freedom with the principle of equality, as a measure of the legislative ban on smoking and invalidated some of the provisions as inconsistent with the legislative concept.[126]

The *Hartz IV* decision does not deal with the principle of equality, nor does it employ any fundamental freedom. Instead, the decision deals with the positive right of individuals to be guaranteed a subsistence minimum, where even in the absence of a right to equality, the legislature has to fulfill the obligation of consistency.[127] This is a significant step towards procedural instead of substantive rights. The obligation of consistency, however, encounters practical problems. Although the principle of consistency does not demand the "purity of a legislative system" (*Systemreinheit*), its application in a political system, where the dynamics of the political process are shaped by the necessity of compromise, is challenging.[128] In his dissenting opinion in the Court's "non-smoker decision," Justice Bryde criticized the majority for demanding a consistency of legislation and purity of system that cannot be met, and which endangers the ability of the political system to adapt to change.[129] A certain amount of generalization and simplification is necessary.[130]

The legislature can modify standards, justify exemptions,[131] and is not bound by particular quantitative or qualitative methodologies.[132] This lack of clear rules on how to apply the principle of consistency creates the danger of arbitrary, case-by-case enforcement by the Court without sufficient guidance for legislative bodies.[133] This is especially important, since the Court has not specified the standards by which consistency is to be judged. It would be practically impossible to require the legislature to consistently apply the same methods throughout all areas of law and provide a justification for any deviation. The *Hartz IV* decision affects the distribution of powers between the legislature and the

[126] *See* 121 BVERFGE 317 (358, 369); *see also* Rixen, *supra* note 84, at 84.

[127] In substance, the Federal Constitutional Court transferred the procedural criteria for a determination of social aid by the executive, developed by the Federal Administrative Court, to the Hartz IV legislation Rothkegel, *supra* note 82, at 141. *See* 366 BVERWGE 102 (368); 108 BVERWGE 221 (227).

[128] *See* Michael, *supra* note 120, at 879; Rixen, *supra* note 84, at 85; Bittner, *supra* note 2, at C. IV para. 4. To the challenge of "good legislation," see Helmuth Schulze-Fielitz, *Wege, Umwege oder Holzwege zu besserer Gesetzgebung – durch sachverständige Beratung, Begründung, Folgenabschätzung und Wirkungskontrolle?*, JURISTENZEITUNG 862, 862 (2004).

[129] *See* Rixen, *supra* note 84, at 85 (citing 121 BVERFGE 317 (380) (Bryde, J., dissenting)).

[130] *See* Michael, *supra* note 120, at 880.

[131] *See id.* at 879.

[132] *See* Rixen, *supra* note 84, at 85.

[133] *See id.*

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judiciary[134] and therefore creates a certain tension between the principle of democracy and the rule of law.[135] Imposing duties on the legislature seems to expand the power of the courts, especially the Constitutional Court. This expansion is accompanied by a withdrawal of substantive control. It will depend on the interpretation of the principle of consistency whether the implications will limit legislative action or give an additional way of justifying politically controversial results.[136] The intensity and specificity of this decision however point to the former.

2. The Principle of Transparency

The Constitutional Court has imposed a duty of transparency on the legislature in addition to the duty of consistency. These two duties are related but conceptually distinct from each other, since a statute can be consistent but not transparent or transparent but inconsistent. As a key part of the *Hartz IV* decision,[137] the Court demanded that the legislature disclose its methods of calculation in a comprehensible way. The Court was clear that an absence of transparency can constitute a violation of fundamental rights and emphasized that transparency is necessary for the Court to effectively exercise its constitutional mandate to check legislative action.

This obligation of transparency was a new duty imposed by the Court on the legislature.[138] According to the prevailing opinion prior to this decision, the legislature was only required to produce a duly enacted, substantively valid statute—transparency was only required insofar the legislature was obliged to debate publicly, publish legislative materials and the enacted statute, and give reasons for the specific provisions. Apart from these objective obligations, the state did not need to provide additional transparency.[139]

In terms of constitutional politics, it is a significant step to penalize a lack of transparency with a finding of unconstitutionality.[140] Beneficiaries can now demand a comprehensible explanation from the state as to why they are given a certain subsistence minimum, which

[134] *See* Bittner, *supra* note 2, at 1954.

[135] *See* Rixen, *supra* note 84, at 85.

[136] *See* Michael, *supra* note 120, at 881–82.

[137] *See* Lenze, *supra* note 53, at 8.

[138] *See* Rothkegel, *supra* note 82, at 145.

[139] *See* Lenze, *supra* note 53, at 9 (mentioning that even the Federal Social Court saw no legal entitlement to a statistical-mathematical comprehensible method of calculation of the lump sum). Bundessozialgericht [BSG] [Federal Social Court], submission order of January 27, 2009, B 14 AS 5/08 R, at 3.c.

[140] *See* Rothkegel, *supra* note 82, at 145–46.

they will usually deem as too little.[141] By inferring the obligation to provide a transparent explanation, procedural support and protection is given to the fundamental right in question.[142] The *Hartz IV* decision can be interpreted to create a subjective right to sufficient transparency in all areas relevant to fundamental rights rooted in the principle of human dignity and the principle of the social welfare state, especially so when the legislature has wide latitude in giving effect to the fundamental right in question.[143] The duty of transparency includes both a duty to disclose and a duty to justify, thereby enhancing democracy and the rule of law.[144] The Court did not explicitly impose a duty of publicity on the legislature. However, in order to make the legislation transparent to the relevant audience, the records of the decision-making process effectively have to be published.[145] Prior to the *Hartz IV* decision, this was seen as a mere constitutional practice; the *Hartz IV* decision now transforms this practice into an enforceable constitutional duty.[146]

Despite these advantages it could be difficult to realize transparency under ordinary political circumstances, in which numerous decisions are made in closed committees and meetings. The secrecy of these committees and meetings increases the ability to compromise or to protect state interests, e.g., in determining which foreign country is not "safe" in regard to people seeking asylum.[147] Moreover, the legislature might at times be unable to explain the origin and motive of every legislative act. Striking down such political compromise puts a lot of pressure on the legislature, again shifting the power structure between the legislative and judicial branches of the state.

[141] *See* Lenze, *supra* note 53, at 8–9.

[142] *See* Rixen, *supra* note 84, at 86.

[143] *See* Rixen, *supra* note 84, at 86; Rothkegel, *supra* note 82, at 141.

[144] *See* Rothkegel, *supra* note 82, at 146, using the doctrine of the administrative act as a model.

[145] *See id.*

[146] *See id.*

[147] *See id.* at 142, 146.

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E. Conclusion

In 2010, the legislature recalculated all standard benefits with the result being that the lump sum for adults has been increased by five euros.[148] The previous standard benefits for children actually exceeded their needs, so the legislature decided to cease augmenting the lump sum until the difference has evened out rather than reduce the benefits.[149] In the process of legislation, the political parties tried to find a suitable compromise in accordance with their individual political goals. In the end, they tied together a package including amendments to various statutes, some of which were not prompted by the Constitutional Court.[150] Now, non-monetary support for children, such as meals at school and free tutoring, is included in § 28 of the Second Book of the German Code of Social Law.

As a consequence of the declaration of incompatibility, the provisions in question were still applicable to the cases up to the end of the year 2010.[151] The "retroactive re-establishment of any higher benefits for the entire period from 1 January 2005 would . . . have an unjustifiable fiscal impact."[152] Therefore, the complainants in the original cases did not benefit from their success before the Constitutional Court, as the unconstitutionality of the provisions can only be considered when deciding on the court costs.[153] However, individually occurring, special continuous needs that create an extraordinary burden had to be granted by the German Federal Employment Agency immediately; they are now guaranteed by § 21.6 of the Second Book of the German Code of Social Law. The amending legislation, however, missed the Constitutional Court's deadline, since it was only passed on 24 March 2011. Thus, it had to be enacted retroactively.[154] Although the Court was right to demand consistency and transparency, this process is a good example of the practical limitations of the political process.

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[148] *See* SOZIALGESETZBUCH [SGB II] [SECOND BOOK OF THE GERMAN CODE OF SOCIAL LAW] 1 Jan. 2011, § 20(2) (showing increase from €359 to €364). For a comparison to the former version, see *supra* note 15.

[149] *Id.* at § 77(4).

[150] GESETZ ZUR ERMITTLUNG VON REGELBEDARFEN UND ZUR ÄNDERUNG DES ZWEITEN UND ZWÖLFTEN BUCHES SOZIALGESETZBU [SGB II AND XII] [SECOND AND TWELFTH BOOK OF THE GERMAN CODE OF SOCIAL LAW] [ACT ON THE DETERMINATION OF STANDARD BENEFITS AND MODIFICATION] 24 Mar. 2011, BGBL. I at 453 (Ger.).

[151] *See* Wenner, *supra* note 49, at 71.

[152] *Hartz IV*, 125 BVERFGE 175 (__),1 BVL 1/09 of 9 Feb. 2010, para. 217.

[153] *See id.* at para. 219.

[154] *See* SGB II AND XII, *supra* note 150 at Art. 14(1).

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