

SOCIAL AND ECONOMIC RIGHTS IN THE GERMAN BASIC LAW? AN ANALYSIS WITH RESPECT TO JURISPRUDENCE OF THE FEDERAL CONSTITUTIONAL COURT

Christoph Enders*

Faculty of Law, University of Leipzig, Germany
chenders@uni-leipzig.de

Received: 25 September 2019 | Revised: 15 September 2020 | Accepted: 3 October 2020

Abstract

The Basic Law for the Federal Republic of Germany did originally not provide for social or economic rights understood as claims to benefits. The Federal Constitutional Court (FCC) did, indeed, recognise the states obligation to protect individuals against assault by others (right to security) and further ruled that everyone has the right to use facilities provided by the state under equal conditions (right to participation). These rights, however, aim to ensure that the state uses existing means as intended. In addition, the FCC by now has recognised a “right to the guarantee of a dignified minimum subsistence”. It is an original entitlement as the state is obliged to create and provide benefits for individuals in need. This new legal construction, however, misconceives the division of responsibilities between the FCC and the legislator and collides with the principle of the separation of powers.

Keywords: Claim to Benefits, Dignified Minimum Subsistence, FCC, Human Dignity, Right to Participation.

* Professor of Public Law, Political and Constitutional Theory and Executive Director of the Institute for Foundations of Law at the Faculty of Law at the University of Leipzig.

I. INTRODUCTION

When the Basic Law for the Federal Republic of Germany was enacted in 1949, the inhuman despotic rule of the Nazi State had only just been defeated by the Allied powers of the Second World War. In consequence of this war that Germany had induced upon the world, the country was almost entirely destructed and suffered great economic privations. In this situation, the Basic Law, which was supposed to re-establish a liberal order in West Germany, was confronted with a twofold challenge: it had to both take stand against Germany's past while simultaneously espousing a sense of humility and sobriety.¹

The intention of the constituent assemblies in their response hereto was to embody a clear renunciation of Nazi injustices. Due to the systematic disenfranchisement of humans under Nazi rule, the commitment to human rights was paramount for the new constitution and ranked even higher in importance than a democratic organisation of the prospective political order.² A man is a being vested with dignity and thus has a right to rights.³ These rights, the Human Rights,⁴ protect the freedom of everyone to lead a self-determined life, i.e. to shape one's life according to one's own ideal of happiness. The revolutionary constitutional movement of North America has described this idea as "the pursuit of happiness". Recognising and protecting this interest of the individual is, as Article 1 of the Basic Law illustrates and declares by basing the acknowledgement of human rights on the term "human dignity", the pivotal aim of the Basic Law.⁵ The Basic Law thus established a State Philosophy or even

¹ See Christian Bumke and Andreas Voßkuhle, *German Constitutional Law. Introduction, Cases and Principles* (Oxford: Oxford University Press, 2019), 6 f.

² As shows a comparison between the initial provision of the Constitution of the German Empire of 11 August 1919 (the so-called Weimar Constitution) which declared: "Art. 1: The German Reich is a republic. State authority derives from the people." to Art. 1 of the German Basic Law of 1949.

³ For the first time having said this probably: Jacques Maritain, *The Rights of Man and Natural Law* (London: Geoffrey Bles: The Centenary Press, 1944), 37. See also Christoph Enders, *Die Menschenwürde in der Verfassungsordnung* [Human Dignity in the constitutional order] (Tübingen: Mohr Siebeck, 1997), 501 f.; Christoph Enders, "Freiheit und Gleichheit zwischen Recht und Politik – Die Grundrechte des Grundgesetzes der Bundesrepublik Deutschland / Kebebasan dan Kesamaan antara Hukum dan Politik – Hak Asasi di Grundgesetz Republik Federal Jerman [Freedom and Equality between Law and Politics – The Basic Rights of the Basic Law for the Federal Republic of Germany]," *Arena Hukum* 3, no. 5 (2010): 6; Christoph Enders, "Human Dignity in Germany," in *Handbook of Human Dignity in Europe*, eds. Paolo Becchi, Klaus Mathis (Cham: Springer, 2018), 288.

⁴ Art. 1.2 of the Basic Law: "The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world".

⁵ Art. 1.1 of the Basic Law: "Human dignity is inviolable. To respect and protect it shall be the duty of all state authority."

State Ideology unalterable by future amendments of the constitution⁶ – very similar to the function Pancasila fulfils in the Indonesian 1945 Constitution.⁷

In its definite commitment to human rights – substantiated in the constitution by the embodiment of individual enforceable basic rights (see Article 1.3 of the Basic Law⁸) – the State Philosophy of the Basic Law evidently is based on the tradition of a constitutionalism predicated on the realisation of freedom as the fundamental legitimation of the authority for the state. This notion, however, remains an abstraction. The human individual does not exist in isolation: individuals require economic resources and financial means with which to structure their lives and sustain themselves, and to communicate with others and participate in social life.⁹ For this reason, the question, whether an unmitigated recognition of each individual's "pursuit of happiness" necessitates social and economic rights guaranteeing rights to substantive means, inevitably arose already at the deliberations on the Basic Law. This elaborately discussed option was, however, explicitly rejected: in times of great economic hardship, the state should not lightly promise services that could ultimately exceed what the collective strength of the community could sustain.

Therefore, the Basic Law provides for a freedom of occupation, but does not stipulate a right to work; it includes a guarantee of the right to property and a right to equal treatment, but no right to a just supply of goods; and the Basic Law refers to the public school system, but recognises no right to education. The basic rights thus serve to protect the equal freedom of the individual and primarily defend it against arbitrariness by the state. But they do not deal with

⁶ Amendments to the Basic Law "affecting ... the principles laid down in Art. 1 and 20 shall be inadmissible" according to Art. 79.3 of the Basic Law.

⁷ See Simon Butt and Tim Lindsey, *The Constitution of Indonesia* (Portland: Hart Publishing, 2012), 13 f., 23.

⁸ Art. 1.3 of the Basic Law: "The following basic rights shall bind the legislature, the executive and the judiciary as directly applicable law." Explaining the duty to uphold basic rights: Bumke and Voßkuhle, *German Constitutional Law*, 41 margin no. 36.

⁹ Considering the characteristic of human nature and the conditions of individual freedom, the Federal Constitutional Court stated in 1954 that "the Basic Law's conception of man is not that of an isolated sovereign individual; rather, the Basic Law has decided the tension between the individual and the community in the sense of the person's relation to and attachment to the community, without touching their intrinsic value." Federal Constitutional Court (FCC) Judgment of 20 July 1954 - 1 BvR 459, 484, 548, 555, 623, 651, 748, 783, 801/52, 5, 9/53, 96, 114/54 = BVerfGE 4, 7 (15 f).

questions of social justice and do not stipulate social and economic rights. Instead, the principle of the social welfare state determines that social justice is an aim of policy and that the state should countervail social injustices (Article 20.1 of the Basic Law).¹⁰

This is the textual baseline of the Basic Law. However, the jurisprudence of the FCC has in many cases modified the construction of the original provisions of the constitution. In the following analyses it will be demonstrated how the FCC in a first step systemised and structured the protection of individual freedom, which is the primary aim of the basic rights of the Basic Law (II). At the same time, the court has extended the legal effect of the basic rights and added to their function as a means of protection against the superiority of state powers and arbitrary exercise of state powers elements of rights to certain state services (III). It has recognised a dimension of the basic rights entitling the individual to measures of state protection, in particular, protection against assault by others (i.e. a right to security) and to equal (derivative) participation in public services and utilities. Above all, the FCC in 2010 recognised a right to the guarantee of a minimum subsistence derived from the constitutional provision stipulating human dignity. This right contains an individual claim directed against the state, aiming at the public services necessary to secure an individual's existence (IV). This right thus does not react to the disregard of rights by other persons, as well as this right further does not aim to ensure a fair distribution of already existing state benefits. Through this right, the constitution guarantees an immediate original entitlement to benefits that are ultimately to be concretely assessed and distributed. This development of jurisprudence is not only in direct contradiction to the considerations of the constituent assembly. It also poses the question: can such a right truly function as a justiciable claim? The answer to this question, whatever it turns out to be, is indeed confronted with the fact that adjudication by a constitutional court is subject to unique conditions and is not readily comparable with judicature in general (V).

¹⁰ Art. 20.1 of the Basic Law: "The Federal Republic of Germany is a democratic and social federal state." Explaining the principle of the social state: Bumke and Voßkuhle, *German Constitutional Law*, 333 margin no. 1348; Gerhard Robbers, *An Introduction to German Law* (Baden-Baden: Nomos Verlagsgesellschaft, 2012), 50 margin no. 157.

II. THE BASIC RIGHTS AS THE EMBODIMENT OF A “RIGHT TO JUSTIFICATION”

The basic rights of the Basic Law primarily serve to maintain individual freedom and ensure its protection from state interference. This has been formulated by the FCC as an essential principle and has been demonstrated in numerous decisions. The individual has a legitimate interest to shape his or her life according to his or her own ideas without being unduly influenced from the outside. What the Americans refer to as “the pursuit of happiness” is recognised in the Basic Law by Article 1 as a preeminent principle of importance: a conception of human beings “as persons who can make free and self-determined decisions and shape their destiny independently”.¹¹ The state, in contrast, recurrently finds, as is known, reasons to encroach on this freedom in favour of its own aims. Basic rights do not create absolutely insurmountable obstacles for state regulation. But because the state, even the legislator, is bound by the basic rights enshrined in the Basic Law (see Article 1.3 of the Basic Law¹²), encroachments on the freedom guaranteed by these basic rights require justification. Justified is any encroachment indispensable to protect public goods or to maintain the existence of the constitutional community. In this respect, the basic rights are an embodiment of a general “right to justification” which is laid down in Article 1 of the Basic Law.¹³

How does such a “right to justification” attain a tangible form and how can the courts deduce criteria from this notion by which to inform the process of scrutinising state actions? First of all, the FCC has addressed the issue of a tangible legal criterion by stressing the principle of proportionality that applies in every case where the state, in order to accomplish its aims, encroaches on individual freedoms.¹⁴ This encroachment as an instrument to accomplish a

¹¹ FCC Judgment of 17 January 2017 - 2 BvB 1/13, para. 539 = BVerfGE 144, 20 (2017, para. 539) (Unconstitutionality of the NPD).

¹² Butt and Lindsey, *The Constitution of Indonesia*.

¹³ Enders, *Die Menschenwürde*, 430-431; see also Enders, “Human Dignity in Germany,” 291; Wolfgang Forst, “*Das grundlegende Recht auf Rechtfertigung* [The basic right to justification],” in *Recht auf Menschenrechte* [Right to human rights], eds. Hauke Brunkhorst, Wolfgang R. Köhler, Matthias Lutz-Bachmann (Frankfurt am Main: Suhrkamp, 1999), 75; Christoph Möllers, “Democracy and Human Dignity: Limits of a Moralized Conception of Rights in German Constitutional Law,” *Israel Law Review* 42, no. 2 (2009): 435.

¹⁴ Bernhard Schlink, “Proportionality (1),” in *The Oxford Handbook of Comparative Constitutional Law*, eds. Michel

particular purpose must be proportionate in relation to the aim. It must not repress individual freedom more than necessary to achieve the purpose.¹⁵ Illustrative of this conception is a decision of the FCC ruling that a law preventing motorists from taking passengers against cost-sharing without permission of the competent authorities utilising a car sharing agency was disproportionate.¹⁶ In the explanatory memorandum to the draft bill, the Federal Government had stated that the law was intended to enhance road safety and protection of passengers. According to the FCC, however, the required permission was not a suitable measure to enhance general road safety, because the motorist would take their drive as planned even without a passenger. Nor would the protection of passengers improve as the requirement of permission did not generate any special protection in favour of the passengers exceeding the general provisions. The encroachment – by means of the requirement of permission – is thus unsuitable to accomplish the purpose, therefore disproportionate and must be omitted as it is unnecessary.

In a further case, the FCC ruled that it was disproportionate to order the extraction of cerebrospinal fluid in order to determine the mental capacity of a defendant if the accused offence was of relatively little significance.¹⁷ This encroachment on the physical integrity is particularly painful and holds very high risks for the health of the defendant. It was, therefore proportionate, namely appropriate and balanced, only when utilised to resolve serious crimes.

The FCC thus has established a decision-making system that, when furnished with the pertinent information, produces solutions to cases or at least structures the process of finding such solutions to a large extent.¹⁸ The system operates (in a way digitally) by employing questions answerable only with “yes” or “no”: Is a behaviour protected by basic rights (1) and did the state encroach on that

Rosenfeld, András Sajó (Oxford: Oxford University Press, 2012), 718; Bernhard Schlink, “Proportionality in Constitutional Law: Why Everywhere but Here?,” *Duke Journal of Comparative & International Law* 22, (2012): 291; Martin Borowski, “Absolute Rights and Proportionality,” *German Yearbook of International Law* 56, (2013): 388 f.

¹⁵ See also: Giri Ahmad Taufik, “Proportionality Test in the 1945 Constitution: Limiting Hizbut Tahrir Freedom of Assembly,” *Constitutional Review* 4, no. 1 (May 2018): 66.

¹⁶ FCC Judgment of 7 April 1964 - 1 BvL 12/63 = BVerfGE 17, 306 (315 f.).

¹⁷ FCC Judgment of 10 June 1963 - 1 BvR 790/58 = BVerfGE 16, 194; Schlink, “Proportionality in Constitutional Law,” 293.

¹⁸ Regarding the proportionality test outside of Germany, see Juan Cianciardo, “The Principle of Proportionality: The Challenges of Human Rights,” *Journal of Civil Law Studies* 3 (2010): 177 ff.; Moshe Cohen-Eliya and Iddo Porat, “Proportionality and the Culture of Justification,” *The American Journal of Comparative Law* 59 (2011): 463 ff.

behaviour with a measure (2)? If so, is this encroachment in accordance with the constitution? That is the case if there are reasons approved of by the constitution justifying the encroachment (3). Above all, the purpose of the encroachment has to be legitimate, it must not be prohibited by the constitution (a), and the chosen measure must not disproportionately encroach on the freedom considering the legitimate purpose it is intended to achieve (b). In particular, the means encroaching on the freedom must be suitable and necessary to achieve the purpose. Finally, the encroachment must also be appropriate considering the effect of the encroachment and balancing it with the purpose aimed to be achieved by the means employed. In other words: The end has to be “important enough to justify the intrusion.”¹⁹

Such a “right to justification”, construed according to a system of Yes/No questions, however, is only able to operate when freedom is presupposed as a rule, and state interference, in contrast, is defined as an exception requiring a specific justification in every individual case of an encroachment on a basic right. The burden of proof for such justifications rests with the state. Such a system of Yes/No questions derived from the notion of a right to justification, however, fails when addressing the issue of state services – an issue frequently and in many aspects arising in law. Since here the state shall not be restrained, but on the contrary, a claim to positive actions by state institutions shall be established, the reasoning with basic rights needs a different foundation. Wherever claims to state services are concerned, the argument of protecting individual freedom is insufficient because it only aims to preserve what already exists.²⁰ It does not give any rights to extend the legal status or provide for further material goods. Therefore, partly it was assumed that such legal cases, which are outside the scope of the system of Yes/No questions, are impossible to solve on the basis of basic rights and for that reason are not basic rights cases but require political solutions.²¹ This appraisal has, however, not prevailed.

¹⁹ Schlink, “Proportionality in Constitutional Law,” 294. Explaining the principle of proportionality in detail: Bumke and Voßkuhle, *German Constitutional Law*, 60 ff. margin no. 123 ff.

²⁰ Ernst-Wolfgang Böckenförde, “Fundamental Rights: Theory and Interpretation [1974],” in *Constitutional and Political Theory – Selected Writings*, vol. 1, eds. Mirjam Künkler, Tine Stein (Oxford: Oxford University Press, 2017), 285.

²¹ Böckenförde, “Fundamental Rights,” 288 f.

III. THE RIGHT TO SECURITY AND THE RIGHT TO PARTICIPATION (IN STATE SERVICES)

3.1. Rights to Protection in the Spirit of the Right to Security

Which modes of state services can be distinguished? An essential part of the Virginia Declaration of Rights of 12 June 1776, of the United States Declaration of Independence of 4 July 1776 and the French Declaration of the Rights of Man and of the Citizen of 1789 was the human right to security (or: safety).²² This right was referring to an individual claim directed against the state in order to safeguard personal security against assaults by other persons. The state should by way of its institutions (courts of law, police forces) prevent such assaults and in any case of such assaults avenge them accordingly. For it is a crucial purpose of the state (a legitimation of its sovereignty) – this is illustrated here – to guarantee the security of people on its sovereign territory.

Initially, the drafts of the Basic Law also provided for such a basic right to security. This right was, however, not included in the final text of the institution. This is on the one hand presumably due to the fact that the basic right to freedom of action was not guaranteed boundlessly but explicitly merely within the limits of the rights of others (see Article 2.1 of the Basic Law²³). On the other hand, it probably seemed self-evident that the state institutions – bound by law and the constitution (see Article 20.3 of the Basic Law²⁴) – would enforce these boundaries when confronted with people infringing upon them. It may nevertheless occur that these institutions neglect and do not fully live up to their duty to protect. In this case, it is not about state institutions restraining from interference, keeping distance and doing no more than the absolute necessities, rather it is about taking positive measures to protect. Nevertheless, the FCC soon decided that the basic rights also bear significance in these instances as well. The basic rights of those who are adversely affected by the consequences of the ruthless

²² Also in the Universal Declaration of Human Rights from 1948, Article 3: "Everyone has the right to life, liberty and security of person."

²³ Art. 2.1 of the Basic Law: "Every person shall have the right to free development of his personality insofar as he does not violate the rights of others or offend against the constitutional order or the moral law."

²⁴ Art. 20.3 of the Basic Law: "The legislature shall be bound by the constitutional order, the executive and the judiciary by law and justice."

exercise of individual freedom of others must be adequately taken into account and ought to be protected.²⁵ An important application of this notion constitutes the decision of the FCC regarding abortion: The court stressed that the state in principle had to adhere to penalisation of abortion in order to effectuate sufficient protection of the unborn life – even if the pregnant women attended abortion counselling prior to this.

Since in cases pertaining to the relation of individual freedom of one individual and the individual freedom of another individual frequently two legal positions of equal importance confront – in the aforementioned example, the health and the autonomy of decision of the pregnant woman and the life of the unborn child – the system of Yes/No questions deriving from the right to justification fails. Neither legal position can as a matter of principle call for priority and set a standard. In consequence, it inevitably comes to a balancing act by means of which it must be determined whichever legal position is to experience restrictions and how significant these turn out to be. In the abortion case, the FCC argued that the pregnant woman with the birth of the child takes on burdens and experiences limitations whereas through the termination of pregnancy the unborn child loses its life; thereby its right to exist is negated entirely and the unborn child becomes – like a mere object – subject to a decision of another person.²⁶ The weight distribution of this balancing act is, however, not always so manifest. But the FCC has also developed criteria and rules directing the balancing act in less unambiguous cases. For example, regarding the conflict of freedom of opinion with the personality rights, the Court ruled that an expression of opinion that is qualified as hate speech or abusive criticism is not worthy of any legal protection.²⁷

3.2. The Right to Participation in State Services

Whilst in these cases protective measures provided by the state through means and institutions of the law are up for debate, often a just allocation of services

²⁵ FCC Judgment of 15 January 1958 - 1 BvR 400/51 = BVerfGE 7, 198 (204 f.).

²⁶ FCC Judgment of 25 February 1975 - 1 BvF 1, 2, 3, 4, 5, 6/74 = BVerfGE 39, 1 (43); see also FCC Judgment of 28 May 1993 - 2 BvF 2/90 and 4, 5/92 = BVerfGE 88, 203 (255).

²⁷ E.g. FCC Judgment of 10 October 1995 - 1 BvR 1476, 1980/91 and 102, 221/92 = BVerfGE 93, 266 (294).

in a narrower sense, which the state provides through its institutions, is at stake. What criterion ought to be applied when persons, despite meeting the general requirements to qualify for an entitlement, are precluded from its enjoyment due to lack of capacity? The right to justification does not offer a reasonable standard for this purpose, as existing possibilities of individual fulfilment are to be expanded by use of state resources, for instance by attending state-run educational institutions. For this issue the FCC again tried to establish criteria and rules to ensure a decision as just as possible when distributing services among a multitude of aspirants. Since capacities are limited and not everybody can partake, the FCC ruled that appropriate criteria are required as to who is ultimately to benefit.

Thus, the FCC ruled that in fact the freedom of occupation and the right to equal treatment stipulate a right of every German citizen to university studies of his or her choice. But this right is subject to constraints respecting the realms of possibility.²⁸ The state, therefore, must exhaust available capacities entirely and the legislature must establish rules governing the admission of applicants contingent on appropriate criteria, which have to permit a realistic chance of every applicant fulfilling the general requirements to partake (criteria: academic performance, waiting period, cases of hardship²⁹).³⁰ An individual entitlement creating additional capacity at universities nevertheless does not exist.³¹

IV. THE RIGHT TO THE GUARANTEE OF A DIGNIFIED MINIMUM SUBSISTENCE

4.1. The Status of Man as a Legal Subject and Individual Entitlements

This is different in the case of the right to the guarantee of a dignified minimum subsistence. This right, which the FCC describes as a right that applies

²⁸ FCC Judgment of 18 July 1972 - 1 BvL 32/70 and 25/71 = BVerfGE 33, 303 (332, 333); Bumke and Voßkuhle, *German Constitutional Law*, 86 f. margin no. 248.

²⁹ One example of such a case of hardship is the diagnosis of a disease with a regressive prognosis wherein it would be impossible for a student to finish their studies if the commencement of the studies is delayed (see Higher Administrative Court of North Rhine-Westphalia Decision of 02 July 2012 – 13 B 656/12).

³⁰ FCC Judgment of 18 July 1972 - 1 BvL 32/70 and 25/71 = BVerfGE 33, 303 (338, 345); Bumke and Voßkuhle, *German Constitutional Law*, 87 margin no. 250.

³¹ FCC Judgment of 18 July 1972 - 1 BvL 32/70 and 25/71 = BVerfGE 33, 303 (334); Bumke and Voßkuhle, *German Constitutional Law*, 87 margin no. 250 and 334 margin no. 1352.

to everyone (i. e. a human right) and derives from Article 1 of the Basic Law (in conjunction with the principle of the social welfare state, Article 20.1 of the Basic Law), “ensures to each person in need of assistance the material prerequisites which are indispensable for his or her physical subsistence and for a minimum of participation in social, cultural and political life.”³² Thus, it is an immediate constitutionally rooted claim to material benefits necessary to lead a life under conditions appropriate for a human being.

The FCC notes rightly that this guarantee stipulating an original claim to state services is entirely autonomous alongside common contexts of application of the rule of human dignity which have been recognised thus far.³³ For in all other cases the status of the human being as a legal subject is concerned: according to this status human dignity consists the human being as a legal subject; hence the human being has a ‘right to rights’ and is an addressee of rights and obligations.³⁴ It follows from this notion that there is a universal right to recognition as a legal subject. In relation to state action this is first achieved by the right to justification (see above I.) that is stipulated more concisely in the form of human rights – embodied in the Basic law as the basic rights – tailored for specific areas of life, which are traditionally threatened by state power. According to Article 1 of the Basic Law, the status of humans as legal subjects shall, however, also rule over interpersonal relationships.³⁵ The state is therefore obliged to protect the individual against assaults by others, i.e. to guarantee by means of formation and enforcement of the legal order the unimpeded development, as embodied in the right to security (see above 3.1).³⁶ But the status of the human being as a legal subject forms also the basis of the right to participate in state services made available to the general public (such as kindergartens, schools and universities;

³² FCC Judgment of 9 February 2010 - 1 BvL 1, 3, 4/09 = BVerfGE 125, 175 (head note 1).

³³ FCC Judgment of 9 February 2010 - 1 BvL 1, 3, 4/09 = BVerfGE 125, 175 (head note 2, 222).

³⁴ Stephan Kirste, “A Legal Concept of Dignity as a Foundation of Law,” in *Human dignity as a foundation of law*, Archiv für Rechts- und Sozialphilosophie – Beihefte, vol. 137, eds. Winfried Brugger, Stephan Kirste (Stuttgart: Franz Steiner Verlag, 2013), 78; Möllers, “Democracy and Human Dignity,” 434 f.

³⁵ See FCC Judgment of 29 July 1968 - 1 BvL 20/63, 31/66 and 5/67 = BVerfGE 24, 119 (144).

³⁶ FCC Judgment of 19 December 1951 - 1 BvR 220/51 = BVerfGE 1, 97 (104). The court remarks that the obligation of the state to respect human dignity aims at defending against the interference of the state and that the further stipulated obligation to protect human dignity means “protection of human dignity against violations by others” and not protection against material deprivation.

see above 3.2) according to equal criteria. In particular, it is as legal subjects, that all humans must be treated equally and are entitled to equal participation in services provided by the state.

4.2. An Own Tradition of the Right to the Guarantee of a Minimum Subsistence

In contrast, the right to the guarantee of a dignified minimum subsistence does not relate to the status of the human being as a legal subject. It is therefore accurate when the FCC refers to an “autonomous significance” of this right.³⁷ The dignity of the human being does not depend on social status and economic circumstance. Man is under all conceivable circumstances a legal subject. A situation of economic deprivation is not an attack targeted on the status as a legal subject. Therefore, the nature of a legal subject of having rights and obligations has no implications on the endowment with material means enabling a life under appropriate conditions. Recent research has accordingly demonstrated that the right to the guarantee of a minimum subsistence follows from a different tradition. The right to a dignified standard of living finds its historical origin in the political struggles of the working class for the improvement of their living conditions, in which the slogan of the dignified standard of living was utilised to denounce the extortionate exploitation by the ruling class and to claim a socially just economic order.³⁸

By deriving the right to the guarantee of a dignified minimum subsistence directly from the term “human dignity”, the FCC refers to this different tradition: there are no entitlements in a strict sense arising from the basic rights of the Basic Law. In 1949 the constituent assembly explicitly decided against such an option³⁹, and instead declared social justice an aim of policy by implementing the constitutional principle of the social welfare state and thereby delegated the

³⁷ FCC Judgment of 9 February 2010 - 1 BvL 1, 3, 4/09 = BVerfGE 125, 175 (head note 2, 222).

³⁸ An expression of these efforts is e. g. Article 151.1 of the Constitution of the German Reich from 11 August 1919, which stipulates: “The economy has to be organized based on the principles of justice, with the goal of achieving life in dignity for everyone. Within these limits the economic liberty of the individual is to be secured.” Manfred Baldus, *Kämpfe um die Menschenwürde* [Fights about Human Dignity] (Berlin: Suhrkamp, 2016), 230-36.

³⁹ This option was partly realised in other constitutions, e. g. in Article 194 of Brazil’s Constitution: “Social security consists of an integrated group of actions initiated by the Government and society, designed to assure rights relating to health, social security and social assistance.”

concretisation of the social just endowment with material means to the legislator (Article 20.1 of the Basic Law).⁴⁰ In the term “human dignity”, amenable to a plurality of interpretations, different traditions convene – not only the tradition emphasising the status of man as a legal subject that is expressed in human and basic rights. Even the right to social justice and a right to the endowment with indispensable goods can be associated with the term “human dignity”. The FCC took up this different, socio-political tradition of understanding human dignity when recognising the right to the guarantee of a dignified minimum subsistence despite it being rejected by the constituent assembly.

4.3. Legal Functioning of a Right to the Guarantee of a Minimum Subsistence?

Does a right to the guarantee of a minimum subsistence in fact function? Is there a legal standard governing which material prerequisites are indispensable for a dignified standard of living that can be applied by the courts? Upon thorough consideration, the following applies not only in times of economic hardship but also in times of economic prosperity: social benefits depend on the current economic circumstances of a society and can only be granted whilst being subject to capacity constraints.⁴¹ Needs and prospects must be balanced. The results will differ depending on the historical and economic situation. On the whole, the entitlements to social services must not exceed the limit that can be afforded by the community. As also the FCC has seen, the requisite considerations and weightings must first and foremost be assigned to the legislator as this determination concerns a value judgment: “In light of the unavoidable value judgments needed to determine the amount of what guarantees the physical and social subsistence of a human being, the legislature enjoys a margin of appreciation.”⁴²

⁴⁰ FCC Judgment of 19 December 1951 - 1 BvR 220/51 = BVerfGE 1, 97 (105); FCC Judgment of 17 August 1956 - 1 BvB 2/51 = BVerfGE 5, 85 (198).

⁴¹ That social benefits depend on resources being available, but also on positive state action which may never be prescribed strictly and in detail, is also expressed by Article 2.1 of the International Covenant on Economic, Social and Cultural Rights of 19 December 1966: “Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.” Apropos hereto see Hennie Strydom, “The Protection of Economic, Social and Cultural Rights in International Law,” *Constitutional Review* 5, no. 2 (December 2019): 228 f. and 233.

⁴² FCC Judgment of 18 July 2012 - 1 BvL 10/10, 2/11, para. 62 = BVerfGE 132, 134 (159, para. 62).

However, it is not only a value judgement but ultimately a political decision. So the question is posed if legal criteria and standards to review such decisions of the legislator can exist at all. Even the FCC has conceded that the Basic Law “does not prescribe what, how and precisely when such reasoning and calculations are to be carried out in the legislative process. It allows for negotiations and for political compromise.”⁴³ Issues amenable for compromise are typically no questions of constitutional law, which must be resolved by the application of legal criteria. They are, instead, political issues to be determined within the parameters of the constitution. Political issues, however, ought not to be decided by courts, but by the democratically legitimised legislator. As *Ernst-Wolfgang Böckenförde* already analysed: “... decisions about priorities – inevitable if resources are scarce – cease to be a matter of political discretion when it comes to the use and distribution of funds available to the state. They now become a matter of fulfilling the fundamental rights – or, more precisely, an issue of competing and conflicting fundamental rights. In formal terms that makes them a matter of the interpretation of the fundamental rights. Following this through logically, the responsibility for making those decisions would shift from parliament or the government as the agency invested with budgetary authority to the courts – and ultimately onto the FCC. A juridification of political disputes would ensue, coupled with a substantial shift of responsibility towards the judiciary.”⁴⁴ Hence, the FCC has far too eagerly defied the principle of the separation of powers.⁴⁵

In its most recent judgment regarding this issue, handed down on 5 November 2019, the FCC confirmed its previous rulings in the field of social benefits guaranteeing a minimum subsistence. However, what the court criticised was a lack of inner consistency of the applicable Second Book of the “Code of the Social Law”. Refraining from backtracking its former position, the Court nevertheless changed its approach in applying the principle of proportionality for adherence by the legislator. Benefits designed to ensure a minimum subsistence “are only

⁴³ FCC Judgment of 18 July 2012 - 1 BvL 10/10, 2/11, para. 70 = BVerfGE 132, 134 (162, para. 70).

⁴⁴ Böckenförde, “Fundamental Rights,” 284.

⁴⁵ The principle of the separation of powers is laid down in Article 20.2 of the Basic Law: “All state authority is derived from the people. It shall be exercised by the people through elections and other votes and through specific legislative, executive and judicial bodies.”

granted if persons cannot support themselves by their own means. In addition, the legislature may impose upon those recipients of 'unemployment benefits II' ... who are fit to work reasonable obligations to cooperate for overcoming their own need, and may impose sanctions by temporarily withholding benefits if recipients violate such obligations. However, in imposing such sanctions the legislature places an extraordinary burden on the recipients of such benefits; therefore, strict proportionality requirements apply ..."⁴⁶ The principle of proportionality, therefore limits the legislature is usually broad margin of appreciation when it comes to sanctioning a lack of cooperation by a recipient of social benefits. As the absoluteness of the dignity of man, prohibiting its balancing with other rights and principles, and proportionality are mutually exclusive concepts, there must be different considerations decisive for reaching this conclusion. In not arguing that human dignity sets a certain absolute standard of social benefits which may either be missed or attained by the legislator, the Court generally follows the legislator's conception and construes the provisions in a manner aimed at achieving more coherency to the underlying conceptualisation. Where the legislature imposes obligations on the recipients of state benefits "to cooperate in order to pursue the legitimate aim of making persons prevent or overcome their own need, in particular through paid employment, these obligations must satisfy the requirements of proportionality; thus they must be suitable, necessary and reasonable for achieving that aim ..."⁴⁷ In this way the FCC recognises that the legal relationship between the state and the recipients of state benefits established by the legislator implies the duty to take seriously into account the legal position of the individual.⁴⁸ Hence, it is not about the balancing and apportioning of social benefits according to an absolute benchmark of justice derived from human dignity. At issue are the consequences attendant upon the legal status of the individual, that parliament has to take into consideration when it decides to grant social benefits only under certain conditions and determines to implement revocations in cases of misdemeanour by the recipient.

⁴⁶ FCC, Press Release No. 74/2019 of 05 November 2019, p. 1.

⁴⁷ FCC, Press Release No. 74/2019 of 05 November 2019, p. 2.

⁴⁸ This reasoning closely resembles a proposal made by the author in 2004, see Christoph Enders, "Sozialstaatlichkeit im Spannungsfeld von Eigenverantwortung und Fürsorge [The Social Welfare State between the poles of individual responsibility and care]," *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer VVDStRL* 64 (2005): 40.

V. CONCLUSION

The Basic Law did originally not provide for social and economic rights. The primary aim of the basic rights of the Basic Law is the protection against illegitimate encroachments by the state through the establishment of a “right to justification”. This right is a pivotal corollary derived from the status of man as a legal subject. The FCC did indeed in the course of its jurisprudence carve out additional elements of the basic rights pertaining to entitlements, i.e. to individual rights to positive actions by state institutions (the right to security with its rights to protection, the right to equal participation in state services). These rights are based, however, on the status of the human being as a legal subject and are amenable to arguments legal in nature, notwithstanding being subject to divergent modes of argumentation.

In contrast, the right to the guarantee of a dignified minimum subsistence eludes from being subject to legal argumentation: What under the historically prevailing economic and social circumstances is needed for a human being to live a dignified life, is in many respects a question of political assessment, which in a democracy ought to be determined by the legislator. Courts cannot provide a more credible answer to this question than the legislator. Since expedient legal rules to determine the minimum subsistence level cannot exist, judges are not trained and competent enough to formulate an authoritative definition.⁴⁹ Having regard to the principle of the separation of powers, such a definition should therefore remain to be determined by the legislator. The FCC has tardily taken note of the problematic consequences caused by its jurisprudence on the right of a dignified minimum subsistence.⁵⁰

Any self-authorisation of the Court in matters of social justice not only expands the political role of the Court, but does damage to the reputation of the democratically legitimised legislator.⁵¹ Implementing social rights on a constitutional level – for instance, the social right to a dignified minimum

⁴⁹ Christoph Enders, “Human Dignity, Happiness and Constitutional Rights”, *Boletim da Faculdade de Direito, Universidade de Coimbra* XCIV, no. II, (2018): 1210.

⁵⁰ See FCC Judgment of 18 July 2012 - 1 BvL 10/10, 2/11, para. 70 = BVerfGE 132, 134 (162, para. 70).

⁵¹ Enders, “Freiheit und Gleichheit”, 18.

existence – is not a sound approach to guaranteeing the viability of a liberal order in the long term. Whoever endorses individual rights on the constitutional level should be aware of their limited justiciability and of the boundaries placed on the jurisprudential function of a constitutional court in a state based on the division of powers.

If a constitution nevertheless normalizes social rights, these boundaries ought to serve as a touchstone for a constitutional jurisprudence that is aware of its responsibility in the realization of social justice. Constitutional jurisprudence ought not to discredit the social system worked out by the democratically elected legislator, with the individual's necessarily limited entitlements (due in part to limited resources). Rather, constitutional jurisprudence may simply put this system's inner consistency to the test of constitutional law. In any case, this regulating idea can be derived from the jurisprudence of the German Federal Constitutional Court.

BIBLIOGRAPHY

- Baldus, Manfred. *Kämpfe um die Menschenwürde* [Fights about Human Dignity]. Berlin: Suhrkamp, 2016.
- Böckenförde, Ernst-Wolfgang. "Fundamental Rights: Theory and Interpretation [1974]." In *Constitutional and Political Theory – Selected Writings*, vol. 1, edited by Mirjam Künkler, Tine Stein, 266-289. Oxford: Oxford University Press, 2017.
- Borowski, Martin. "Absolute Rights and Proportionality." *German Yearbook of International Law* 56, (2013), 385-423.
- Bumke, Christian and Andreas Voßkuhle. *German Constitutional Law. Introduction, Cases and Principles*. Oxford: Oxford University Press, 2019.
- Butt, Simon and Tim Lindsey. *The Constitution of Indonesia*. Portland: Hart Publishing, 2012.
- Cianciardo, Juan. "The Principle of Proportionality: The Challenges of Human Rights." *Journal of Civil Law Studies* 3 (2010), 177-186.

- Cohen-Eliya, Moshe and Iddo Porat. "Proportionality and the Culture of Justification." *The American Journal of Comparative Law* 59 (2011): 463-490.
- Enders, Christoph. *Die Menschenwürde in der Verfassungsordnung* [Human Dignity in the constitutional order]. Tübingen: Mohr Siebeck, 1997.
- Enders, Christoph. "Sozialstaatlichkeit im Spannungsfeld von Eigenverantwortung und Fürsorge [The Social Welfare State between the poles of individual responsibility and care]." *Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer VVDStRL* 64, (2005), 7-52.
- Enders, Christoph. "Freiheit und Gleichheit zwischen Recht und Politik – Die Grundrechte des Grundgesetzes der Bundesrepublik Deutschland/Kebebasan dan Kesamaan antara Hukum dan Politik – Hak Asasi di Grundgesetz Republik Federal Jerman [Freedom and Equality between Law and Politics – The Basic Rights of the Basic Law for the Federal Republic of Germany]." *Arena Hukum* 3, no. 5 (2010), 1-21.
- Enders, Christoph. "Human Dignity in Germany." In *Handbook of Human Dignity in Europe*, edited by Paolo Becchi, Klaus Mathis, 281-318. Cham: Springer, 2018.
- Enders, Christoph. "Human Dignity, Happiness and Constitutional Rights." *Boletim da Faculdade de Direito, Universidade de Coimbra* XCIV, no. II, (2018), 1201-1211.
- Federal Constitutional Court (FCC) Decision of 19 December 1951 - 1 BvR 220/51 = BVerfGE 1, 97.
- Federal Constitutional Court (FCC) Judgment of 20 July 1954 - 1 BvR 459, 484, 548, 555, 623, 651, 748, 783, 801/52, 5, 9/53, 96, 114/54 = BVerfGE 4, 7.
- Federal Constitutional Court (FCC) Judgment of 17 August 1956 - 1 BvB 2/51 = BVerfGE 5, 85.
- Federal Constitutional Court (FCC) Judgment of 15 January 1958 - 1 BvR 400/51 = BVerfGE 7, 198.
- Federal Constitutional Court (FCC) Decision of 10 June 1963 - 1 BvR 790/58 = BVerfGE 16, 194.

- Federal Constitutional Court (FCC) Decision of 29 July 1968 - 1 BvL 20/63, 31/66 and 5/67 = BVerfGE 24, 119.
- Federal Constitutional Court (FCC) Judgment of 18 July 1972 - 1 BvL 32/70 and 25/71 = BVerfGE 33, 303.
- Federal Constitutional Court (FCC) Judgment of 25 February 1975 - 1 BvF 1, 2, 3, 4, 5, 6/74 = BVerfGE 39, 1.
- Federal Constitutional Court (FCC) Judgment of 28 May 1993 - 2 BvF 2/90 and 4, 5/92 = BVerfGE 88, 203.
- Federal Constitutional Court (FCC) Decision of 10 October 1995 - 1 BvR 1476, 1980/91 and 102, 221/92 = BVerfGE 93, 266.
- Federal Constitutional Court (FCC) Judgment of 9 February 2010 - 1 BvL 1, 3, 4/09 = BVerfGE 125, 175.
- Federal Constitutional Court (FCC) Judgment of 18 July 2012 - 1 BvL 10/10, 2/11 = BVerfGE 132, 134.
- Federal Constitutional Court (FCC) Judgment of 17 June 2017 - 2 BvB 1/13 = BVerfGE 144, 20.
- Federal Constitutional Court (FCC) Judgment of 05 November 2019 - 1 BvL 7/16.
- Forst, Wolfgang. “*Das grundlegende Recht auf Rechtfertigung* [The basic right to justification].” In *Recht auf Menschenrechte* [Right to human rights], edited by Hauke Brunkhorst, Wolfgang R. Köhler, Matthias Lutz-Bachmann, 66-105. Frankfurt am Main: Suhrkamp, 1999.
- Higher Administrative Court of North Rhine-Westphalia Decision of 02 July 2012 - 13 B 656/12.
- Kirste, Stephan. “A Legal Concept of Dignity as a Foundation of Law.” In *Human dignity as a foundation of law*, Archiv für Rechts- und Sozialphilosophie - Beihefte, vol. 137, edited by Winfried Brugger, Stephan Kirste, 63-81. Stuttgart: Franz Steiner Verlag, 2013.
- Maritain, Jacques. *The Rights of Man and Natural Law*. London: Geoffrey Bles: The Centenary Press, 1944.

- Möllers, Christoph. "Democracy and Human Dignity: Limits of a Moralized Conception of Rights in German Constitutional Law." *Israel Law Review* 42, no. 2 (2009), 416-439.
- Robbers, Gerhard. *An Introduction to German Law*. Baden-Baden: Nomos Verlagsgesellschaft, 2012.
- Schlink, Bernhard. "Proportionality in Constitutional Law: Why Everywhere but Here?" *Duke Journal of Comparative & International Law* 22, (2012), 291-302.
- Schlink, Bernhard. "Proportionality (1)." In *The Oxford Handbook of Comparative Constitutional Law*, edited by Michel Rosenfeld, András Sajó, 718-737. Oxford: Oxford University Press, 2012.
- Strydom, Hennie. "The Protection of Economic, Social and Cultural Rights in International Law." *Constitutional Review* 5, no. 2 (December 2019), 222-247.
- Taufik, Giri Ahmad. "Proportionality Test in the 1945 Constitution: Limiting Hizbut Tahrir Freedom of Assembly." *Constitutional Review* 4, no. 1 (May 2018), 45-76.