

# The German Right to an *Existenzminimum*, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection

By Ingrid Leijten\*

## A. Introduction

Due to the financial crisis, European states are struggling to make both ends meet and comply with budgetary requirements. This results in cutting pensions and the public wage bill, as well as in phasing out subsidies and other forms of assistance. Although welfare state arrangements have become more limited in the past several decades, especially now, in these times of austerity, it is worth asking how far states can go in limiting social welfare programs. On the one hand, it can be said that there need to be fundamental rights-based limits to the legitimate phasing out or cutting down of existing arrangements to ensure that a minimum level of social arrangements is at all times guaranteed. On the other hand, it is hard to curtail the legislature's freedom by setting such limits, as the political sensitivity, technical aspects, and budgetary implications of social measures seemingly do not allow for too much fundamental rights rhetoric.

In trying to set reasonable fundamental rights limits we can first look at economic and social rights norms enumerated, for example, in national constitutions. However, not all European states have constitutions including an economic and social rights catalogue. And if they do, this catalogue mostly only confers duties on the state, rather than provide for subjective rights.<sup>1</sup> Another option is to take recourse to international socioeconomic rights. The United Nations Covenant on Economic, Social, and Cultural Rights (ICESCR),<sup>2</sup> for

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<sup>1</sup> Instead of enabling individuals to bring a claim to certain socioeconomic guarantees before a (constitutional) court, they often guide government behavior—but may be overshadowed, at least in times of austerity, by other state concerns. See, on social rights in European constitutions generally, for example, JUSTICIABILITY OF ECONOMIC AND SOCIAL RIGHTS: EXPERIENCES FROM DOMESTIC SYSTEMS (Fons Coomans ed., 2006); SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW (Malcolm Langford ed., 2009). Interesting are also Avi Ben-Bassat & Momi Dahan, *Social Rights in the Constitution and in Practice*, 36 J. COMP. ECON. 103 (2008) (on the effects of constitutional commitments to social rights on policy) and Monica Brito Vieira & Filipe Carreira da Silva, *Getting Rights Right: Explaining Social Rights Constitutionalization in Portugal*, 11 INT'L J. CONST. LAW (ICON) 898 (2013).

<sup>2</sup> International Covenant on Economic, Social, and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

example, lays down a right to social security, including social assistance, as well as a right to an adequate standard of living.<sup>3</sup> Within the Council of Europe framework, moreover, thirty-three states have signed and ratified the (Revised) European Social Charter ((R)ESC),<sup>4</sup> enumerating a right for all workers and their dependents to social security, to social and medical assistance for anyone without adequate resources, and a right to benefit from social welfare services.<sup>5</sup> Yet the enforceability of these international rights remains limited. Regardless of the Optional Protocol entering into force,<sup>6</sup> the ICESCR still primarily serves as a touchstone for the international monitoring process in order to increase the level of socioeconomic standards throughout the world.<sup>7</sup> The rights laid out in the (R)ESC can form the starting point for collective complaints before the European Committee on Social Rights (ECSR),<sup>8</sup> but ensuring actual compliance continues to be difficult because the decisions of this Committee lack binding force.<sup>9</sup> Finally, the Charter of Fundamental Rights of the European Union covers, next to a list of classical fundamental rights, a number of economic and social rights, like the right to social security.<sup>10</sup> But not only is the scope of application of the Charter limited,<sup>11</sup> the status of the socioeconomic guarantees is also

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<sup>3</sup> See *id.* arts. 9, 11.

<sup>4</sup> European Social Charter (Revised), ETS 163 (May 3, 1996), <http://conventions.coe.int/Treaty/en/Treaties/Html/163.htm>.

<sup>5</sup> See *id.* arts. 12, 13, 14.

<sup>6</sup> See Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Dec. 10 2008) (allowing for individual communications). On 5 May 2013, this Optional Protocol entered into force. Communications result in "views" by the CESCR on the alleged rights violation. These views do not have binding force. However, within six months the State Party is required to submit a written response.

<sup>7</sup> At the moment, only twelve states have ratified the Optional Protocol.

<sup>8</sup> See, e.g., Additional Protocol to the European Social Charter Providing for a System of Collective Complaints, Nov. 9, 1995, C.E.T.S. No. 158; <http://hudoc.esc.coe.int/eng#> (for the case law of the ECSR).

<sup>9</sup> Instead, when a violation is found, the Committee of Ministers of the Council of Europe can adopt a recommendation addressed to the State Party concerned. An interesting development is, however, that the ECSR has started taking decisions on interim measures. See, e.g., Complaint No. 90/2013, Conference of European Churches v. the Netherlands (Oct. 25, 2013), [http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC90DecisionImmediateMeasures\\_en.pdf](http://www.coe.int/T/DGHL/Monitoring/SocialCharter/Complaints/CC90DecisionImmediateMeasures_en.pdf).

<sup>10</sup> See Charter of Fundamental Rights of the European Union [CFR] art. 34, Mar. 30, 2010, 2010 O.J. (C 83) 2.

<sup>11</sup> Art. 51(1) CFR reads:

The provisions of this Charter are addressed to the institutions and bodies of the Union with due regard for the principle of subsidiarity and to the Member States only when they are implementing Union law. They shall therefore respect the rights, observe the principles and promote the application thereof in accordance with their

second rank—they provide at most for negative protection against interferences, rather than offering enforceable individual rights.<sup>12</sup>

All in all, it might be valuable to explore a different fundamental rights route. Classic, civil and political rights are generally phrased in negative terms requiring non-interference rather than positive state action. The European Convention on Human Rights (the ECHR; the Convention),<sup>13</sup> for example, contains amongst other things a prohibition of inhuman treatment,<sup>14</sup> the right to respect for private and family life,<sup>15</sup> and to the peaceful enjoyment of possessions.<sup>16</sup> At first sight, protection of socioeconomic rights via such civil and political rights norms can be considered a bridge too far. It is not for nothing that economic and social rights norms have obtained a secondary status: Their content was and has remained hard to translate to concrete individual cases and guarantees.<sup>17</sup> How and why could economic and social guarantees then be protected under the header of negatively phrased civil and political rights, which do not provide the necessary linguistic starting points, and were never meant to constitute a basis for such positive protection?

The possibilities to provide for a floor of socioeconomic protection on the basis of civil and political norms are, however, not as limited as one might assume. First, negatively formulated rights are generally understood as bringing along positive rights and obligations.<sup>18</sup> Moreover, the strict separation between civil and political interests and

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respective powers.

<sup>12</sup> In the explanatory report to the CFR, it is stated with regard to Article 34 that “[t]he reference to social services relates to cases in which such services have been introduced to provide certain advantages but does not imply that such services must be created where they do not exist.” Explanations Relating to the Charter of Fundamental Rights, Dec. 14, 2007, 2007 O.J. (C 303) 2.

<sup>13</sup> European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 222.

<sup>14</sup> See *id.* art. 3(1).

<sup>15</sup> See *id.* art. 8(1).

<sup>16</sup> See Protocol to the European Convention for the Protection of Human Rights and Fundamental Freedoms, May 18, 1954, 213 U.N.T.S. 262, art. 1.

<sup>17</sup> E.g., Philip Alston, *Out of the Abyss: The Challenges Confronting the New U.N. Committee on Economic, Social and Cultural Rights*, 9 HUM. RTS. Q. 332, 351 (1987) (with regard to the task of the CESCR). Cf. also Conor Gearty, *Against Judicial Enforcement*, in *DEBATING SOCIAL RIGHTS* 1, 58 (2011).

<sup>18</sup> See, for some early examples in the case law of the ECtHR, Case “Relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium” v. Belgium, ECHR App. Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64, 6 EUR. CT. H.R. (ser. A) § I(B)(3)–(4) (1968); *Marckx v. Belgium*, ECHR App. No. 6833/74, 31 EUR. CT. H.R. (ser. A) para. 31 (1979). This is different in the United States, however. See, e.g., *Deshaney v. Winnebago Cnty. Dep’t. of Soc. Serv.*, 109 U.S. 998 (1989).

economic and social interests has failed to hold water in practice,<sup>19</sup> though this can be different for the norms laid down to protect them.<sup>20</sup> The case law of the European Court of Human Rights (the ECtHR; the Court) serves as a good example, as this Court has in several instances provided for protection in relation to housing claims,<sup>21</sup> benefits-related interests,<sup>22</sup> and health care issues.<sup>23</sup> Nevertheless, when the Court is confronted with economic or social interests that demand positive action, this does evoke some hesitation on the part of the Strasbourg Court. After all, while it is authorized to adjudicate classic fundamental rights norms, protecting positive social rights might be perceived as not forming part of its ultimate task.<sup>24</sup> The protection offered is therefore very ad hoc and, moreover, not quite explicit and transparent.<sup>25</sup> This limits the predictability of the case law

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<sup>19</sup> This was confirmed by the ECtHR in *Airey v. Ireland*, ECHR App. No. 6289/73, 32 EUR. CT. H.R. (ser. A) para. 26 (1979). Cf. Cecile Fabre, *Constitutionalising Social Rights*, 6 J. POL. PHIL. 263, 267 (1998); Ida Elisabeth Koch, *Economic, Social and Cultural Rights as Components in Civil and Political Rights: A Hermeneutic Perspective*, 10 INT'L J. HUM. RTS. 405, 408 (2006).

<sup>20</sup> In the sense that the norms (the articles as they are written down) enumerated in for example the ECHR are mostly phrased in 'civil and political' terms and can thus be labeled as such.

<sup>21</sup> E.g., *Marzari v. Italy*, ECHR App. No. 36448/97, 28 EUR. CT. H.R. 175 (1999); *Bah v. the United Kingdom*, ECHR App. No. 56328/07 (Sept. 27, 2011), <http://hudoc.echr.coe.int/>. For a recent example see, *Winterstein and Others v. France*, ECHR App. No. 27013/07 (Oct. 17, 2013), <http://hudoc.echr.coe.int/>.

<sup>22</sup> E.g., *Stec and Others v. the United Kingdom*, ECHR App. Nos. 65731/01, 65900/01, 2005-X EUR. CT. H.R. 321. A recent example is *Damjanac v. Croatia*, ECHR App. No. 52943/10 (Oct. 24, 2013), <http://hudoc.echr.coe.int/>. For an overview see Ingrid Leijten, *From Stec to Valkov: Possessions and Margins in the Social Security Case Law of the European Court of Human Rights*, 13 HUM. RTS. L. REV. 309 (2013).

<sup>23</sup> E.g., *D. v. the United Kingdom*, ECHR App. No. 30240/96, 1997-III EUR. CT. H.R. 777.

<sup>24</sup> See for this critique, for example, Marc Bossuyt, *Should the Strasbourg Court Exercise More Self-Restraint? On the extension of the jurisdiction of the European Court of Human Rights to Social Security Regulations*, 28 HUM. RTS. L.J. 321 (2007).

<sup>25</sup> The ECtHR is explicit with regard to one thing only, namely that it does not provide for social rights generally. See, e.g., *Pancenکو v. Latvia*, ECHR App. No. 40772/98 (28 October 1999), <http://hudoc.echr.coe.int/> ("[T]he Convention does not guarantee, as such, socioeconomic rights, including the right to charge-free dwelling, the right to work, the right to free medical assistance, or the right to claim financial assistance from a State to maintain a certain level of living."). See on the lack of a clear interpretation of socioeconomic guarantees under the Convention, Ingrid Leijten, *Defining the Scope of Economic and Social Guarantees in the Case Law of the ECtHR*, in *SHAPING RIGHTS IN THE ECHR: THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DETERMINING THE SCOPE OF HUMAN RIGHTS* 109, 116–20 (Eva Brems & Janneke Gerards eds., 2014). Examples are *Valkov and Other v. Bulgaria*, ECHR App. Nos. 2033/04, 19125/04, 19475/04, 19490/04, 19495/04, 19497/04, 24729/04, 171/05, 2041/05, paras. 87, 113 (Oct. 25, 2011), <http://hudoc.echr.coe.int/>; *Sentges*, ECHR App. No. 27677/02. Also, the ECtHR holds that responsibility of the State under Article 3 "may be engaged . . . where an applicant, who was wholly dependent on State support, found herself faced with official indifference in a situation of serious deprivation or want incompatible with human dignity" (emphasis added). See *M.S.S. v. Belgium and Greece*, ECHR App. No. 30696/09, para. 253. (Jan. 21, 2011), <http://hudoc.echr.coe.int/>. Cf. *Budina v. Russia*, App. No. 45603/05 (June 18, 2009), <http://hudoc.echr.coe.int/>, and *Laroshina v. Russia*, ECHR App. No. 56869/00 (Apr. 23, 2002), <http://hudoc.echr.coe.int/>.

and causes individuals and member states to remain in doubt about their actual rights and obligations.<sup>26</sup> Whether and exactly which concrete fundamental guarantees apply in the field of social arrangements, in other words, remains unclear.<sup>27</sup>

The German Federal Constitutional Court (the FCC; the *Bundesverfassungsgericht*) in this regard sets a more promising example. This court has explicitly read into the German Basic Law (the *Grundgesetz*) well-defined guarantees in the field of socioeconomic policy, while on the face of it, these would not be included or need not necessarily be inferred from the Basic Law's text. It concerns the constitutionally guaranteed *Existenzminimum*, or "subsistence minimum," that involves the means for living a life in accordance with human dignity.<sup>28</sup> Although the Basic Law does not mention a right to social security, or socioeconomic rights generally, the legislature has an obligation to provide for this minimum.<sup>29</sup> More importantly, individual claims concerning the individual right to such minimum can be brought before the court, which has allowed the *Bundesverfassungsgericht* to further elaborate how and when the legislature has discharged its obligation in a constitutional manner.<sup>30</sup> Thus, the FCC has the final say on whether the minimum set by the legislature passes the Basic Law's test. It reviews this not in an ad hoc way, but according to a structured test laying down clear-cut requirements.

It is for such reasons that the FCC's defense of the *Existenzminimum* serves as an interesting example that is worth elaborating. Because the FCC explicitly recognizes a socioeconomic requirement under the classic Basic Law, it is interesting to investigate how this requirement has been construed in a transparent, yet vindicable manner. Next to that,

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<sup>26</sup> Cf. Leijten, *supra* note 22, and Leijten, *supra* note 25. See more generally Janneke Gerards & Hanneke Senden, *The Structure of Fundamental Rights and the European Court of Human Rights*, 7 INT'L J. CONST. L. 619 (2009) (stressing the importance of distinguishing between the interpretation and application of Convention norms in order to enhance the clarity of the case law).

<sup>27</sup> On social rights in the jurisprudence of the ECtHR see also, for example, Eva Brems, *Indirect Protection of Social Rights by the European Court of Human Rights*, in *EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE* 135 (Daphne Barak-Erez & Aeyel M. Gross eds., 2007); Luke Clements & Allen Simmons, *European Court of Human Rights: Sympathetic Unease*, in *SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW*, 409 (Malcolm Langford ed., 2008); Colm O'Cinneide, *A Modest Proposal: Destitution, State Responsibility and the European Convention on Human Rights*, 5 EUROPEAN HUM. RTS. L. REV. 583 (2008); Ellie Palmer, *Protecting Socioeconomic Rights Through the European Convention on Human Rights: Trends and Developments in the European Court of Human Rights*, 2 ERASMUS L. REV. 397 (2009); IDA ELISABETH KOCH, *HUMAN RIGHTS AS INDIVISIBLE RIGHTS: THE PROTECTION OF SOCIOECONOMIC DEMANDS UNDER THE EUROPEAN CONVENTION ON HUMAN RIGHTS* (2009).

<sup>28</sup> See *infra* Section B.

<sup>29</sup> Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 220/51, 1 BVERFGE 97, 104 (Dec. 19, 1951). See, e.g., Claudia Bittner, Casenote, *Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court's Judgment of 9 February 2010*, 12 GERMAN L.J. 1941, 1942 (2011).

<sup>30</sup> See *infra* Section B.

the way the FCC applies the requirement of the subsistence minimum deserves attention. For it is one thing to interpret a constitution as covering a socioeconomic guarantee, it is yet another to have a court self-consciously stepping in and deciding whether the legislature is using its *Spielraum* to elaborate this requirement in an unconstitutional fashion. It will be shown that even while the FCC does not start from the review of interferences with socioeconomic arrangements, but instead from the requirement of a positive minimum thereof, it is nevertheless capable of leaving some room for political decision-making. Indeed, the FCC's practice can be understood as offering a kind of minimum core socioeconomic rights protection, while arguably avoiding the criticism that usually is triggered by such an approach.

In order to substantiate this and explore the possible value of the German example for other legal contexts like that of the ECHR, this article will proceed as follows. First, in section B, the FCC's case law on the *Existenzminimum* will be introduced. Special attention will be had to two landmark cases, namely the *Hartz IV* and the *Asylbewerberleistungsgesetz* cases.<sup>31</sup> This section will highlight exactly how the FCC interprets the Basic Law so as to cover a right to a subsistence minimum, and how this guarantee is applied in specific instances. Section C then analyzes the FCC's protection of the subsistence minimum and compares it to the idea of minimum core obligations in the field of socioeconomic rights protection. It explains why the FCC's approach can be understood as a form of minimum core protection, thereby showing the possibility of such protection in the context of a classic rights document and without falling prey to the risk of absolute definition of minimum core guarantees. Finally, in section D, some remarks are made as to the chances and pitfalls of applying minimum core socioeconomic protection on the basis of the FCC's example in the Strasbourg context. Given the challenges posed by austerity and other social measures, this article concludes by showing what could be learned from this example to improve the socioeconomic protection offered by the ECtHR.

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<sup>31</sup> Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvL 1/09, 125 BVERFGE 175 (Feb. 9 2010) [hereinafter *Hartz IV*] (English translation available at [www.bverfg.de/entscheidungen/ls20100209\\_1bv1000109en.html](http://www.bverfg.de/entscheidungen/ls20100209_1bv1000109en.html)); Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvL 10/10, 132 BVERFGE 134 (July 18, 2012) [hereinafter *Asylum Seekers Benefits*]. See, on the *Hartz IV* judgment, the special section on “The *Hartz IV* Case and the German *Sozialstaat*,” 12 GERMAN L.J. 1879 (2011), and in particular Bittner, *supra* note 29, and Stefanie Egidy, Casenote, *The Fundamental Right to the Guarantee of a Subsistence Minimum in the Hartz IV Decision of the German Federal Constitutional Court*, 12 GERMAN L.J. 1961 (2011). See, on the *Asylum Seekers Benefits* case in particular, Inga Winkler & Claudia Mahler, *Interpreting the Right to a Dignified Minimum Existence: A New Era in German Socioeconomic Rights Jurisprudence*, 13 HUM. RTS. L. REV. 388 (2013).

## B. The FCC's Protection of the *Existenzminimum*

The *Existenzminimum*, or subsistence minimum, is not a recent legal phenomenon in Germany. For a long time, the duty to provide for this minimum has been considered to flow from Article 20, Section 1 of the German Basic Law.<sup>32</sup> This Section of the Basic Law holds that “[t]he Federal Republic of Germany is a democratic and federal social state;”<sup>33</sup> this is known as the “social state principle.” Article 20 does not fall under the heading of “Basic Rights,” but forms the start of the Basic Law’s chapter on “The Federation and the Länder.” This means that the protection of the subsistence minimum was considered only a duty for the state, not an individual constitutional right. Although the state had to provide for tolerable living conditions on the basis of statutory entitlements in the law,<sup>34</sup> individuals could not go to court arguing that their fundamental rights had been breached when the state allegedly failed to do so. However, by combining Article 20 with Article 1 of the Basic Law, which lays down the (absolute) requirement of human dignity,<sup>35</sup> the FCC held in the early 1990s that in the field of income tax, the taxpayer must be allowed a tax free income that ensures an existence in human dignity.<sup>36</sup> It also became clear that the subsistence minimum cannot take the form of retroactive payments, but has to be provided for immediately.<sup>37</sup> However, the individual fundamental rights guarantee to an *Existenzminimum* only clearly surfaced in two landmark cases from 2010 and 2012.<sup>38</sup> This section discusses both of those cases in some detail to understand how the FCC construed and applied the *Existenzminimum* as a fundamental right.

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<sup>32</sup> See *supra* note 29.

<sup>33</sup> Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl. I, art. 20 (“Die Bundesrepublik Deutschland ist ein demokratischer und sozialer Bundesstaat.”).

<sup>34</sup> *E.g.*, Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. V C 78.54 1 BVERFGE 159, 161 (Jun. 24, 1954).

<sup>35</sup> Article 1 (1) of the German Basic Law reads: “Die Würde des Menschen ist unantastbar. Sie zu achten und zu schützen ist Verpflichtung aller staatlichen Gewalt.” (“Human dignity is inviolable. It is the duty of all public authorities to respect and protect it.”)

<sup>36</sup> *E.g.*, Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvL 20/84, 1 BvL 26/84, 1 BvL 4/86, 82 BVERFGE 60 (May 29, 1990). In order for parents to provide for their children, moreover, alimnts to be paid have to be tax free.

<sup>37</sup> See Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvR 569/05, 5 BVERFGE 237 (May 12, 2005).

<sup>38</sup> See *supra* note 30. See, on this development also, for example, Christian Seiler, *Das Grundrecht auf ein menschenwürdiges Existenzminimum: Zum Urteil des Bundesverfassungsgerichts vom 9.2.2010*, JURISTENZEITUNG 500 (2010); Thorsten Kingreen, *Schätzungen „ins Blaue hinein“: Zu den Auswirkungen des Hartz IV-Urteils des Bundesverfassungsgerichts auf das Asylbewerberleistungsgesetz*, NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT 558 (2010); Matthias Schnath, *Auswirkungen des neuen Grundrechts auf Gewährleistung des Existenzminimums auf die besonderen Hilfen nach dem Zwölften Sozialgesetzbuches (SGB XII)*, SOZIALRECHT AKTUELL 173 (2010); JENS-HENDRIK HÖRMANN, RECHTSPROBLEME DES GRUNDRECHTS AUF GEWÄHRLEISTUNG EINES MENSCHENWÜRDIGEN EXISTENZMINIMUMS. ZU DEN AUSWIRKUNGEN DES “REGELLEISTUNGURTEILS” AUF DIE “HARTZ IV“-GESETZGEBUNG UND ANDERE SOZIALGESETZE (2012).

*I. The Hartz IV Judgment*<sup>39</sup>

As Bittner notes, “[t]he special thrust of the *Hartz IV* decision is its subsequent step from a state’s obligation to formulate an individual’s enforceable constitutional right to statutory state benefits as the reverse image of the state’s obligation.”<sup>40</sup> The case concerned the constitutionality of social assistance benefits paid under federal legislation. As of 2005, the Second Book of the German Code of Social Law arranges for basic provisions for employable persons either without any income or earning low wages. The payments are not linked to prior wages and are completely tax-funded. They include, next to a standard benefit, benefits for accommodation and heating, and became known as *Hartz IV*.

The FCC in the *Hartz IV* case held that Article 1 of the Basic Law (human dignity), in combination with Article 20 (the “social state principle”), confers a right on individuals to a dignified minimum existence.<sup>41</sup> Rather than a mere duty for the state, every individual has an enforceable right to a subsistence minimum, and the entitlements under *Hartz IV* legislation could be reviewed in the light of this individual guarantee. The right to an *Existenzminimum*, as the FCC explained:

[O]nly covers those means which are vital to maintain an existence that is in line with human dignity. It guarantees the whole subsistence minimum by a uniform fundamental rights guarantee which encompasses both the physical existence of the individual, that is food, clothing, household goods, housing, heating, hygiene and health . . . , and ensuring the possibility to maintain inter-human relationships and a minimum of participation in social, cultural and political life.<sup>42</sup>

The FCC stressed that the subsistence minimum needs to be guaranteed by law; people should not be dependent on voluntary services.<sup>43</sup> It also recognized that the Basic Law

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<sup>39</sup> *Hartz IV*.

<sup>40</sup> Bittner, *supra* note 29, at 1944.

<sup>41</sup> See *Hartz IV* at para. 133.

<sup>42</sup> *Id.* at para. 135. Indeed, there is a right to both the physical and socio-cultural aspects thereof. Cf. Bittner, *supra* note 28, at 1952–53 (“The Court explicitly denied a division of this guarantee into an absolute part (for example food, housing and clothing) and additional parts covering the participation in social and political life.”). See, for a different view, Egidy, *supra* note 30, at 1976.

<sup>43</sup> Either from the state or from third persons. See *Hartz IV* at para. 136 (referring to earlier cases). Cf. also *Asylum Seekers Benefits* at para. 91.



does not permit for determining the precise shape of the right to a subsistence minimum.<sup>44</sup> However, it continued by stating that this does not mean that there cannot be any meaningful judicial assessment. First, the FCC stressed that the leeway of the legislature ends where the subsistence minimum provided is “evidently insufficient.”<sup>45</sup> Moreover, the court can review the basis and methods of calculation of the benefits, even if it cannot set any quantified requirements. The FCC explained:

The protection of the fundamental right therefore also covers the procedure to ascertain the subsistence minimum because a review of results can only be carried out to a restricted degree by the standard of this fundamental right. In order to ensure the traceability of the extent of the statutory assistance as commensurate with the significance of the fundamental right, as well as to ensure the review of the benefits by the courts, the assessment of the benefits must be clearly justifiable on the basis of reliable figures and plausible methods of calculation.<sup>46</sup>

More concretely, the FCC held that the legislature needs to comply with the following four criteria: (1) covering and describing the objective of ensuring an existence in line with Article 1(1) in conjunction with Article 20(1); (2) selecting—within its margin of appreciation—a procedure of calculation fundamentally suited to an assessment of the subsistence minimum; (3) ascertaining the necessary facts completely and correctly; and (4) staying within the bounds of what is justifiable within the chosen method and its structural principles at all steps of the calculation process.<sup>47</sup>

In *Hartz IV*, the FCC did not find the benefits granted “evidently insufficient.”<sup>48</sup> Besides that, the first three of the set of requirements had been met. However, since some expenditures were not fully considered in calculating the subsistence minimum and deductions had been estimated randomly, the fourth requirement, which is essentially one

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<sup>44</sup> See *Hartz IV* at para. 142.

<sup>45</sup> *Id.* para. 141 (“Since the Basic Law itself does not permit any precise figure to be put on the claim, the material review as regards the result is restricted to whether the benefits are evidently insufficient.” (referring to Bundesverfassungsgericht [BVerfG – Federal Constitutional Court], Case No. 1 BvL 20/84, 82 BVERfGE 60, 91–92 (May 29, 1990))).

<sup>46</sup> *Id.* at para. 142.

<sup>47</sup> See *id.* at para. 143. These can be translated in the “rationale,” “transparency” and “consistency requirement.” See also Bittner, *supra* note 29, at 1948.

<sup>48</sup> *Hartz IV* at para. 146.

of consistency, had not been fulfilled.<sup>49</sup> This, indeed, constituted sufficient reason for the FCC to conclude that there had been a breach of Article 1, Section 1, in conjunction with Article 20, Section 1 of the Basic Law.<sup>50</sup> Because of the existing leeway for the legislature, the FCC could not determine the correct amount of the benefit and it did not nullify the applicable provisions. Instead, it gave the legislature a fixed term—until the end of the year—to adapt the standard benefits with the help of “a renewed procedure for the realistic assessment of the benefits to secure a subsistence minimum in view of the life-determining significance of the provision for a very large number of people.”<sup>51</sup>

## *II. The Asylum Seekers Benefits Judgment*<sup>52</sup>

In 2012, the court decided another important subsistence minimum case. This case concerned benefits paid under the Asylum Seekers Benefits Act of 1993 (hereinafter “AsylbLG”). The statute arranged for a “separate rule for social benefits” in the sense that asylum seekers were not covered by arrangements made in the Second (including *Hartz IV*) and Twelfth Book of the Code of Social Law, but by this particular statute. The benefits granted under the AsylbLG were adjusted to the needs of people staying in Germany for a short time and were significantly lower than those provided under the general scheme.<sup>53</sup> Over time, however, the arrangements of the AsylbLG were also applied to people who remained in Germany for a significant period of time due to humanitarian reasons (e.g. war

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<sup>49</sup> See *id.* at para. 171. There it holds that:

‘[R]andom’ estimates . . . run counter to a procedure of realistic investigation, and hence violate Article 1.1 of the Basic Law in conjunction with the principle of the social welfare state contained in Article 20.1 of the Basic Law. To make it possible to examine whether the valuations and decisions taken by the legislature correspond to the constitutional guarantee of a subsistence minimum that is in line with human dignity, the legislature handing down the provision is subject to the obligation to reason them in a comprehensible manner; this is to be demanded above all if the legislature deviates from a method which it has selected itself.

See for a more detailed overview of the (very detailed) review of the FCC, Bittner, *supra* note 29, at 1949–50.

<sup>50</sup> See *Hartz IV* at paras. 144, 210.

<sup>51</sup> *Id.* at para. 216. In 2011, a new law was enacted (Regelbedarfs-Ermittlungsgesetz, Mar. 24, 2011, BGBL. I § 435 (Ger.)), see, e.g., Winkler & Mahler, *supra* note 31, at 401.

<sup>52</sup> *Asylum Seekers Benefits*.

<sup>53</sup> The shortfall was calculated to be at least 31 percent. See also Winkler & Mahler, *supra* note 31, at 391.

refugees); they received the lower benefits for up to four years. Importantly, the rate of the benefits had not been increased since 1993, when the statute entered into force.<sup>54</sup>

The FCC, asked to decide upon the constitutionality of section 3(2)(2) and (3) in conjunction with section 3(1)(4) of the AsylbLG, held first of all that:

When people lack the material means to guarantee a life in dignity . . . the state is—in accordance with its responsibility to protect human dignity and in compliance with its general social state mandate—obliged to ensure that the material conditions are provided to those in need. *As a human right, this fundamental right is granted to Germans as well as foreigners residing in Germany alike.* This objective obligation inferred from Article 1 Section 1 GG corresponds with an individual entitlement to state action, because the fundamental right protects the dignity of every single person . . . and in circumstances of economic distress it can only be guaranteed through material support.<sup>55</sup>

Thus, the right to a subsistence minimum applies to all persons, regardless of their residential status, in Germany. The FCC underlines this by referring to Germany's obligations under international law. It refers to secondary EU law (Council Directive 2003/9/EG laying down minimum standards for the reception of asylum seekers),<sup>56</sup> as well as to Articles 9 and 15 (1) ICESCR (the right to social security and to take part in cultural life), and the Convention on the Rights of the Child (CRC).<sup>57</sup> If the legislature, in its protection of this minimum, uses different methods of calculation for different groups, this must be objectively justified.<sup>58</sup> Regardless of the leeway granted to the legislature in this

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<sup>54</sup> In fact, already for some time, and especially after the *Hartz IV* judgment, doubts had been voiced as regards the constitutionality of the Act. See, e.g., Kingreen, *supra* note 38; HÖRMANN, *supra* note 38, at 208; Martina Haedrich, *Das Asylbewerberleistungsgesetz, das Existenzminimum und die Standards der EU-Aufnahmerichtlinie*, 30 ZEITSCHRIFT FÜR AUSLÄNDERRECHT UND AUSLÄNDERPOLITIK 227 (2010); Christoph Görsch, *Asylbewerberleistungsrechtliches Existenzminimum und gesetzgeberischer Gestaltungsspielraum*, NEUE ZEITSCHRIFT FÜR SOZIALRECHT 646 (2011).

<sup>55</sup> *Asylum Seekers Benefits*, at para. 63 (author's translation) (emphasis added).

<sup>56</sup> See Council Directive 2003/9, 2003 O.J. (L 31/18) (EC).

<sup>57</sup> See Convention on the Rights of the Child, arts. 22(1), 28, G.A. Res. 44/25, U.N. Doc. A/RES/44/25 (Nov. 20, 1989). See also *Asylum Seekers Benefits* at para. 94.

<sup>58</sup> See *Asylum Seekers Benefits* at paras. 97, 99.

respect, an *Existenzminimum* has to be determined in a way that is presently appropriate and realistic.<sup>59</sup>

The FCC ruled that the asylum seekers' benefits did not meet the requirements laid out in *Hartz IV*. The provisions such as the benefits granted to children had been miscalculated and determined in an inadequate way.<sup>60</sup> More importantly, the benefits were also considered "evidently insufficient."<sup>61</sup> The FCC stressed that the level of the payments had not changed since 1993 to take account of the considerable inflation since that time, regardless of the fact that Article 3(3) of the relevant statute provided for regular adjustments.<sup>62</sup> Also, the fact that the asylum seekers benefits were one-third lower than those provided under the Second and Twelfth Book of the Code of Social Law led to the conclusion that the constitutional right to an *Existenzminimum* had not been guaranteed.<sup>63</sup> In addition, the FCC noted that considerations related to migration politics to keep the benefits low in order to prevent the attraction of a high number of asylum seekers cannot form a sufficient reason for limiting benefits of asylum seekers compared to other groups.<sup>64</sup> Just as in *Hartz IV*, the FCC did not nullify the legislation, though it did arrange for a transitory period while it obliged the legislature to enact new provisions in order for the benefits to be in compliance with the constitution.

All in all, according to the judgments of the FCC, the duty to provide of a subsistence minimum derived from the social state principle, combined with the guarantee of human dignity, ensures an individual right to such minimum provided for by law. This fundamental right is a human right that can be invoked by German nationals as well as by individuals of other nationalities residing in Germany. It is up to the legislature to give shape to the *Existenzminimum* through the creation of legal entitlements to material support, which can take different forms and need not consist of money only.<sup>65</sup> Indeed, the FCC entirely refrains from defining the subsistence minimum in a quantifiable sense, but it does review whether what the legislature provides is evidently insufficient, as was the case in the *Asylum Seekers Benefits* case. If the law passes this test, the FCC may still assess whether the legislature has discharged its obligation in a justifiable manner, such as whether certain procedural requirements related to the calculation method and the principles of

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<sup>59</sup> See *id.* at para. 100. See also *Hartz IV* at para. 138.

<sup>60</sup> See *Asylum Seekers Benefits* at paras. 117, 122.

<sup>61</sup> See *id.* at paras. 106–15.

<sup>62</sup> See *id.* at paras. 108–11.

<sup>63</sup> See *id.* at paras. 112–15.

<sup>64</sup> See *id.* at para. 121.

<sup>65</sup> See *Hartz IV* at para. 138; *Asylum Seekers Benefits* at para. 93.

rationality, transparency, and consistency have been met. As we have seen in *Hartz IV*, a failure to comply with only one of the criteria suffices to find a breach of the individual right to minimum arrangements in line with human dignity as defined in accordance with the legislature's margin.

### **C. The German *Existenzminimum* Understood as Minimum Core Socioeconomic Rights Protection**

As briefly outlined in section A, the protection of individual social interests under international economic and social rights norms is limited. This has to do with the fact that even if the possibility of adjudication of these rights exists, this does not result in binding judgments. This is due to the still relatively strong belief that the wording of economic and social rights is too vague to allow for such judgments.<sup>66</sup> After all, how can a right to "health" or a right to "social security" be translated into a concrete subjective guarantee and a decisive entitlement, which can be applied and enforced by a court or other non-democratically elected body? It is unclear what such rights would exactly entail as long as no further subjective choices are being made. And this, indeed, is considered to be the prerogative of the legislature.

In the context of the ICESCR, the practice of monitoring compliance with economic and social rights has suffered from the comprehensiveness of the norms contained in the Covenant. The ICESCR rights have to be "realized progressively" in the light of the resources a state has at its disposal. In combination with their ambitious wording, this means that states can only be requested to evidence that they were spending the means available on "something" that arguably helped towards achieving the full socioeconomic rights.<sup>67</sup> In order to overcome the fact that the guarantees would thereby run empty, the Committee on Economic Social and Cultural Rights (CESCR) has developed the concept of the "minimum core" of socioeconomic rights. Starting in 1990, in various General

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<sup>66</sup> See, e.g., Gearty, *supra* note 17.

<sup>67</sup> Article 2(1) of the ICESCR reads:

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.

International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), U.N. Doc. A/6316 (Dec. 16, 1966). On the problematic effects on this requirement, see Audrey R. Chapman & Sage Russell, *Introduction, in CORE OBLIGATIONS: BUILDING A FRAMEWORK FOR ECONOMIC, SOCIAL AND CULTURAL RIGHTS* 4–5 (Audrey R. Chapman & Sage Russell eds., 2002). According to Henry J. Steiner and others, "Governments can present themselves as defenders of ESR without international imposition of any precise constraints on their policies and behavior." STEINER ET AL., *INTERNATIONAL HUMAN RIGHTS IN CONTEXT* (Henry J. Steiner et al. eds., 3rd ed. 2007).

Comments, the CESCR has tried to concretize the entitlements and obligations that follow from the ICESCR.<sup>68</sup> More precisely, it has identified aspects of these rights that are of “core” relevance. This identifies what has to be assured first and foremost, and even if resources are limited.<sup>69</sup> Rather than, for example, ensuring the progressive realization of “the highest attainable standard of health”<sup>70</sup> in the light of the available resources, states are now required to always “ensure the right of access to health facilities, goods and services on a non-discriminatory basis, especially for vulnerable or marginalized groups, . . . provide essential drugs, as from time to time defined under the WHO Action Program on Essential Drugs,” etc.<sup>71</sup> In relation to the right to social security, the CESCR has held that, among other things, a state first must arrange for “access to a social security scheme that provides a minimum essential level of benefits to all individuals and families,” as well as ensure “access to social security systems or schemes on a non-discriminatory basis.”<sup>72</sup> With the help of these minimum core requirements, the CESCR has narrowed down the problematic scope of economic and social rights norms, while underlining the need for a minimum level of social protection for all.

The FCC’s protection of the subsistence minimum can also be understood as a kind of “minimum core” socioeconomic rights protection.<sup>73</sup> It is “minimal” because it does not imply a right to material prerequisites and means of subsistence generally; it only applies to those things necessary for leading a life consistent with dignity.<sup>74</sup> It also does not entail a

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<sup>68</sup> For the different General Comments, see United Nations Human Rights, Office of the High Commissioner for Human Rights, [http://tbinternet.ohchr.org/\\_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11](http://tbinternet.ohchr.org/_layouts/treatybodyexternal/TBSearch.aspx?Lang=en&TreatyID=9&DocTypeID=11).

<sup>69</sup> See, in particular, Comm. on Economic, Social and Cultural Rights, General Comment 3, Rep. on its 5th Sess., U.N. Doc. E/1991/23 (Dec. 14, 1990) (“The Nature of State Parties Obligations”), where it was stated that “the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party.” This recognition of the existence of minimum core obligations has been further elaborated in General Comments concerning the separate economic and social rights like the right to housing, health, social security, etc.

<sup>70</sup> The broadly phrased Article 12(1) of the ICESCR reads: “The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.” ICESCR, *supra* note 67, art. 12(1).

<sup>71</sup> Comm. on Economic, Social and Cultural Rights, General Comment 14, para. 43, Rep. on its 22nd Sess., U.N. Doc. E/C.12/2000/4 (Aug. 11, 2000) (“The Highest Attainable Standard of Health”).

<sup>72</sup> Comm. on Economic, Social and Cultural Rights, General Comment 19, para. 59, Rep. on its 39th Sess., U.N. Doc. E/C.12/GC/19 (Feb. 4, 2008) (“The Right to Social Security”).

<sup>73</sup> Cf. Egidy, *supra* note 31, at 1972.

<sup>74</sup> The right to an *Existenzminimum* “only covers those means which are vital to maintain an existence that is in line with human dignity. It guarantees the whole subsistence minimum by a uniform fundamental rights guarantee which encompasses both the physical existence of the individual, that is food, clothing, household goods, housing, heating, hygiene and health.” *Hartz IV* at para. 135. See also *Asylum Seekers Benefits* at para. 90. Different from the ICESCR example, however, in Germany there is no fundamental right to anything beyond this

right to the full range of possibilities of participating in social, cultural, and political life, but only to an “essential” level thereof.<sup>75</sup> With the identification of the right to an *Existenzminimum*, the FCC can ignore the impractical character of full socioeconomic rights—that are indeed also not enumerated in the text of the Basic Law—while aiming at the assurance of “core,” but minimal, social protection. As in the context of the ICESCR, the recognized core requirement is so urgent that postponing its fulfillment results in a fundamental rights violation. According to the FCC, “a person’s elementary requirement for life can in principle only be satisfied at the moment when it arises.”<sup>76</sup> This implies that the legislature has the obligation to constantly determine whether the minimum provided for is still sufficient,<sup>77</sup> but also that what is urgently needed cannot be provided at a later stage.

The FCC has not only provided for what can be called minimum core protection, it has also done so in a sensible manner. This section contends that a deeper comparison of the example of the FCC and the notion of socioeconomic minimum cores in other contexts allows us to identify feasible possibilities for courts to provide minimum social protection—even in the context of classic rights—while invalidating some of the criticism that is regularly directed at the use of minimum core guarantees. After expanding upon this, the final section of this article will explore the potential use of minimum core protection on the basis of the German example for the ECtHR.

#### *I. An Absolute but Abstract Minimum Guarantee . . .*

The minimum core approach developed by the CESCR is valuable in that it informs states where their efforts must be directed, and what rights must always be guaranteed. Thus, a failure to meet the standards set seems inexcusable: “[A] State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, *prima facie*, failing to discharge its obligations under the Covenant.”<sup>78</sup>

The requirement to immediately fulfill certain specific obligations, however, turned out to be a source of criticism of the minimum core approach. First, it appeared that a significant number of states would be unable to meet the encompassing immediate requirements. By

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minimum, whereas fundamental economic and social rights ideally be guaranteed “in full,” at least when the available resources allow for this.

<sup>75</sup> *See id.*

<sup>76</sup> *Hartz IV* at para. 140. *See also Asylum Seekers Benefits* at para. 98.

<sup>77</sup> *See Hartz IV* at para. 140; *Asylum Seekers Benefits* at para. 98.

<sup>78</sup> General Comment No. 3, *supra* note 69.

identifying cores, the CESCR created absolute obligations, but the practical circumstances in many states clearly did not enable them to fulfill these obligations. Thus, because compliance is impossible in the first place, the minimum core seems to have lost some of its initial attractiveness.<sup>79</sup> Second, and more generally, the minimum core has been criticized on the grounds of its absoluteness.<sup>80</sup> After all, *who* can determine—and *how* can it be determined—what should be required at a bare minimum? Especially if requirements do not allow for any exceptions, it appears necessary that they be determined in an objective way acceptable for all. Yet such an objective definition hardly seems possible. When a court determines the core obligations, this is regarded as an undesirable extension of judicial power. After all, it seems that, as with the inevitable policy choices necessary to fulfill fundamental socioeconomic rights generally, the undertaking to determine minimum cores—because multiple answers are possible<sup>80</sup>—should be part of the task of a democratically accountable legislature. Indeed, in the South African debate on the adjudication of the economic and social rights laid down in the constitution, the identification of core guarantees has been criticized by academics and others who argued that it is impossible for the court to determine what socioeconomic guarantees lie at the heart of the South African Constitution.<sup>81</sup>

This two-fold critique on the minimum core approach has resulted in the protection offered becoming more flexible, as well as—to a more serious extent—the jettisoning of the notion of core protection. On the one hand, the practical impossibility of meeting certain cores has led the CESCR to adopt a more relative approach that shifts the burden of proof in cases involving core rights and leaves room for a justification in cases of non-compliance.<sup>82</sup> On the other hand, in South Africa the perceived strictness of the minimum core has made the Constitutional Court admit that it is incapable of determining such cores

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<sup>79</sup> It is considered impossible to come up with a workable standard all states can comply with. At the same time, even if there could be a state based minimum core, the actual provision of essential means might be too big a burden. This was recognized by the South African Constitutional Court in the *TAC* case. See *Minister of Health & Others v. Treatment Action Campaign & Others* 2002 (5) SA 721 (CC) at para. 35 (S. Afr.).

<sup>80</sup> See Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 YALE J. INT'L L. 113 (2008) (explaining different starting points for determining the minimum core).

<sup>81</sup> See, e.g., Albie Sachs, *The Judicial Enforcement of Socioeconomic Rights*, 56 CURRENT LEGAL PROBS. 579 (2003); Murray Wesson, *Grootboom and Beyond: Reassessing the Socioeconomic Jurisprudence of the South African Constitutional Court*, 20 S. AFRICAN J. OF HUM. RTS. 284 (2004); Mark S. Kende, *The South African Constitutional Court's Construction of Socioeconomic Rights: A Response to the Critics*, 19 CONN. J. INT'L L. 617, 622–24 (2004); Karin Lehmann, *In Defense of the Constitutional Court: Litigating Socioeconomic Rights and the Myth of the Minimum Core*, 22 AM. U. INT'L L. REV. 163, 182–94 (2006).

<sup>82</sup> Cf. General Comment No. 3, *supra* note 69, at para. 10 (“In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations”).



in the first place.<sup>83</sup> Instead, it opted for the concept of reasonableness, which up to today is considered the appropriate standard for the judiciary to work with.<sup>84</sup>

The question is whether the “minimum core protection” demonstrated in the German case law is capable of avoiding the criticism of the minimum core approach. It is argued here that the “two-step approach” the FCC has opted for in providing a minimum level of socioeconomic protection, indeed provides a worthwhile and promising alternative. The FCC first provides for a right to a general provision of minimum social assistance. Second, the FCC preserves the absoluteness and robustness of this right by applying it with the help of concrete, but non-quantifiable requirements. In other words, in the sensitive field of social policy and budgetary choices, it manages to combine a robust, non-derogable guarantee with the necessary leeway for the legislature.

To explain this in further detail, it is important to note that the Basic Law’s guarantee of human dignity is considered absolute. Once the FCC has found an interference with human dignity, it does not review the interference in light of the requirements of proportionality, but instead it directly finds that the Constitution has been violated.<sup>85</sup> This implies that the right to an *Existenzminimum*—as it is inferred from the guarantee of human dignity—is a strict, non-derogable guarantee.<sup>86</sup> While one of the objections to minimum core social protection is that it is not for non-elected bodies to identify absolute social guarantees, the FCC has done so in a relatively harmless manner. The right to an *Existenzminimum* is broadly formulated.<sup>87</sup> One could also say that it remains relatively abstract and, for that reason, is hardly objectionable. A subsistence minimum can be understood to mean many things, and while it leaves open a lot of questions, it is also a guarantee that is not likely to be questioned. It is minimal, which means that arguably it does not ensure too far-reaching social protection, given the limits of what a court could demand or of what could be covered by rights in the first place. Indeed, regardless of whether one is a supporter of

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<sup>83</sup> See *Government of the Republic of South Africa v. Grootboom & Others*, ZACC 19; 2001 (1) SA 46 (CC) (S. Afr.), paras. 32–33.

<sup>84</sup> *Id.* para. 41. *E.g.*, PAUL O’CONNELL, VINDICATING SOCIOECONOMIC RIGHTS: INTERNATIONAL STANDARDS AND COMPARATIVE EXPERIENCES 76–77 (2012).

<sup>85</sup> See, *e.g.*, Horst Dreier, *Art. 1 (1)*, in *GRUNDGESETZ KOMMENTAR* (Horst Dreier ed., 2013).

<sup>86</sup> Although this “absoluteness” is of a distinct kind. *Cf. id.* at 155; Volker Neumann, *Menschenwürde und Existenzminimum*, *NEUE ZEITSCHRIFT FÜR VERWALTUNGSRECHT*, 426, 428 (1995); Bittner, *supra* note 29, at 1953. Seiler, *supra* note 38, at 504 (holding that because the right has to be carved out by the legislature, “das Grundrecht auf materielle Existenzsicherung [ist] . . . seiner Natur nach relativ”).

<sup>87</sup> “[The *Existenzminimum*] guarantees the whole subsistence minimum by a uniform fundamental rights guarantee which encompasses both the physical existence of the individual, that is food, clothing, household goods, housing, heating, hygiene and health . . . , and ensuring the possibility to maintain inter-human relationships and a minimum of participation in social, cultural and political life.” *Hartz IV* at para. 135. *Cf.* Egidy, *supra* note 31, at 1971.

qualifying economic and social needs in terms of rights, the minimum provided for is so obviously linked to basic rights to life, dignity and freedom that framing this minimum as a right will generally be considered acceptable. Moreover, while the FCC admits that it is not capable of determining what and how much *exactly* is required as a subsistence minimum—in terms of money or other arrangements—the eventual choices are clearly and expressly left to the legislature to decide.

Thus, one can learn from the German example that even in the context of classic fundamental rights norms, courts can formulate absolute social guarantees.<sup>88</sup> They can do so in a way that seems generally acceptable and suits their limited role as non-elected rights protectors, namely by stating these absolute—but necessarily minimum—social guarantees in relatively abstract terms that need to be further defined by the legislature. Yet one could argue that with an abstract guarantee we do not get far in terms of actual protection. What is left of the “absoluteness” of a social guarantee when its concrete, practical implications are explicitly not provided for? It is because it avoids the pitfall of providing a concrete definition to the right to an *Existenzminimum* that in practice may run empty, that the second step of the FCC’s approach is so important.

#### *II. . . . Given Teeth Trough Procedural Requirements*

The FCC did not stop at the recognition of a right to a legally guaranteed subsistence minimum that has to be given content by the legislature. Instead, after interpreting the guarantee of human dignity in combination with the social state principle so as to cover a right to an *Existenzminimum*, it applied this guarantee by laying down certain requirements the legislative process must meet for any minimum provision to be held constitutional. In this way, it ensured the robustness of the right, yet it did so without quantifying it or doing away with the elbowroom the legislature should be granted.

Ensuring a minimum “physical existence” as well as a minimum “possibility to maintain inter-human relationships” and “participation in social, cultural and political life” can take many forms. Does it mean one should have a roof over one’s head, or that adequate social housing must be affordable for everyone? What constitutes minimum participation in social or political life? First of all, the FCC has stressed that when an *Existenzminimum* is “evidently insufficient” it will be unconstitutional. This was the case in the *Asylum Seekers Benefits* case, because asylum seekers were granted one-third less benefits than persons receiving *Hartz IV* and the benefits had not been uprated in line with inflation since 1993—even though the relevant statute provided for such uprating. When benefits granted are not *evidently* insufficient, it would normally be difficult for a court to step in. Yet by

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<sup>88</sup> It is important that actually “formulating” these guarantees, rather than implicitly recognizing them, increases the transparency of a court’s practice while—in the case of “classic” norms—it duly recognizes the principle of indivisibility. See, *infra* Section D.

requiring the process of calculating the *Existenzminimum* to meet a set of four criteria, the FCC arguably found a proper middle way that does not interfere with democratic decision-making nor decide what exactly the subsistence minimum entails. It requires that the objective of ensuring an existence in line with Article 1(1) in conjunction with Article 20(1) of the Basic Law is covered and described. The legislature must choose a fundamentally suitable method of calculation and the necessary facts must be completely and correctly ascertained. Finally, the legislature needs to stay within the bounds of what is justifiable within the chosen method and the underlying structural principles at all steps of the calculation process—*i.e.*, it needs to proceed in a consistent manner.<sup>89</sup>

Some have argued that by laying down these requirements, the FCC overstepped the boundaries of its task. On one hand, the requirements are arguably so precise that, in practice, hardly any room is left for the legislature.<sup>90</sup> On the other hand, it has been argued that the requirements make little difference for the persons concerned as they fail to provide clear guidance and leave open a number of questions the legislature will not easily come to an agreement about.<sup>91</sup> From this point of view, perhaps the FCC should have defined what an *Existenzminimum* entails more concretely. Regardless of the debate as to the proper measure of detail in defining the required minimum, however, the FCC's approach can be considered an interesting one, for it combines a broad yet minimal social guarantee with relatively concrete but non-quantifiable procedural requirements. In doing so, it overcomes two important problems. First, the criticism often addressed in respect to the use of minimum core obligations is that it is not suitable or possible for a court to identify such obligations. Especially when dealing with classic rights, the recognition of social rights—even if they are minimal—can evoke a skeptical response. The FCC has solved this by opting for an abstract guarantee that is hardly objectionable and fits the objectives and development of the German Basic Law.<sup>92</sup> It shows that a court is capable of

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<sup>89</sup> See *Hartz IV* at para. 143. These can be translated in the “rationale,” “transparency” and “consistency requirement.” See Bittner, *supra* note 29, at 1948.

<sup>90</sup> See Bittner, *supra* note 29, at 1957. Speaking of the requirement of consistency, she holds that:

This is an enormous task—even if the competent ministry makes every effort to implement a consistent scheme of calculating the standard benefits—because this result may be diluted and distorted in the political process leading up to enactment. The goal of consistency is not what dominates the democratic legislative process in a pluralistic society.

Egidy, *supra* note 31, at 1981.

<sup>91</sup> So far, no agreement has been reached on legislative alterations, which is disappointing according to some. See Winkler & Mahler, *supra* note 31, at 400. Cf. Egidy, *supra* note 31, at 1982 (regarding the effects of the judgments more generally); Bittner, *supra* note 29, at 1957.

<sup>92</sup> Having held for a long time that the *duty* of providing for a subsistence minimum could be conferred on the state on the basis of the social state principle, which does not entail individually enforceable fundamental rights,

determining generally acceptable minimum social guarantees, even if some debate is possible as to the exact level of concreteness necessary. Secondly, the FCC's example evades the risk that core requirements, because they appear too demanding or have been stated in too abstract or vague terms, are relativized to such an extent that their eventual practical meaning cannot be controlled. The right to an *Existenzminimum* needs not be trivialized *a priori*, as, due to its abstract wording, it seems neither impractical nor unacceptable.<sup>93</sup> In turn, the FCC has ensured that the absoluteness that comes with the guarantee of human dignity "has bite" by opting for a second step—namely, the concretization of the right to a subsistence minimum with the help of specific conditions for the legislature's method.

#### D. A Workable Exemplar for the ECtHR?

Having introduced the German right to an *Existenzminimum*, and having explained how this guarantee can be understood as a promising example of minimum core socioeconomic protection, it is interesting to examine whether it can be used in other contexts, in particular in the case law of the European Court of Human Rights. This inquiry is particularly relevant because current austerity agendas—as well as social measures more generally—that result in limiting social benefits, pensions and subsidies might ask for a rights-based response. It was explained above that the Strasbourg context at least seems to have the potential to offer some kind of social protection. This final section therefore concentrates on investigating the possibilities for transposing the FCC's protection of a minimum social guarantee as a fundamental right to the Strasbourg setting.

##### I. Human Dignity and the Recognition of Social Guarantees

According to the German FCC, the guarantee of human dignity can be understood as requiring positive protection. More precisely: Human dignity can form the starting point for legal guarantees regarding minimum social needs.<sup>94</sup> Because human dignity is hard to quantify and positive social protection by unelected courts remains a sensitive topic, this protection can be given hand and feet with the help of qualitative rather than quantitative

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the FCC goes one step further in the cases presented above. An actual and autonomous *right* to a subsistence minimum is inferred by combining the *Sozialstaatsprinzip* with Article 1, Section 1 of the Basic Law. *See supra* Section B.

<sup>93</sup> Of course this does not go for every state. For a great number of states, the provision of such a minimum does not seem feasible at all. As Bittner notes: "It is the crux of the absolute right to guarantee a subsistence minimum, . . . that the state guaranteeing such a right may not be able to administer it when most urgently needed." Bittner, *supra* note 29, at 1960.

<sup>94</sup> Yet, as Bittner argued, one needs to be mindful of not stretching the concept of human dignity too far as "[t]he constant and inflationary invocation of human dignity can ultimately lead to a loss of meaning. The absolute right to human dignity is in danger of being trivialized by the public at large." Bittner, *supra* note 29, at 1957.

requirements. Procedural demands—as the German example has shown—constitute a promising instrument for doing so.

The concept of human dignity is all but unique to the German constitutional context. It can be found in numerous socioeconomic fundamental rights documents.<sup>95</sup> Moreover, even where it is not explicitly mentioned, human dignity can be considered a foundational value. Indeed, although the term does not appear in the text of the ECHR,<sup>96</sup> the European Court of Human Rights regularly refers to the idea of human dignity by presenting it as an important—if not the most important—concept underlying the ECHR. The ECtHR has stated frequently that “[t]he very essence of the Convention is respect for human dignity . . . .”<sup>97</sup> However, before concluding that the presence of a “guarantee of human dignity” provides a sufficient baseline for a possible one-to-one transposition, a few more factors need to be considered.

First of all, the German right to an *Existenzminimum* is grounded not solely in the guarantee of human dignity, but in this guarantee *in conjunction with* the social state principle (*Sozialstaatsprinzip*). Indeed, this principle played a crucial role in the FCC’s interpretation of the right to human dignity as involving a basic social guarantee. As mentioned previously, the legal duty of the state (or legislature) to provide for an *Existenzminimum* already existed before the FCC in the *Hartz IV* case recognized a fundamental *right* to such a minimum. Originally, this duty was inferred from Article 20, Section 1 of the Basic Law, which implies that the social state principle provides a foundational element for the protection offered. The resulting question is whether a similar guarantee necessarily needs to be present in order for a court to find a guarantee for minimum social protection.

Of course, much depends on the legal traditions in a given legal order and the extent to which this order recognizes the welfare state to be a desirable and defensible goal. At the same time, explicit recognition of the welfare state by way of a constitutional norm does not appear necessary. The goal of building and maintaining a social environment can be expressed in different ways and it can form an implicit foundational value. In the

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<sup>95</sup> See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), pmbl., arts. 1, 22, 23 (Dec. 10, 1948); International Covenant on Civil and Political Rights, pmbl., art. 10, Dec. 16, 1966, 999 U.N.T.S. 171; International Covenant on Economic, Social, and Cultural Rights, pmbl., art. 13, Dec. 16, 1966, 993 U.N.T.S. 3; Charter of Fundamental Rights of the European Union [CFR] title I, arts. 1, 23, 31, Mar. 30, 2010, 2010 O.J. (C 83) 2.

<sup>96</sup> Except for in the Preamble to Protocol 13 to the ECHR, where it is stated “that everyone’s right to life is a basic value in a democratic society and that the abolition of the death penalty is essential for the protection of this right and for the full recognition of the inherent dignity of all human beings.” Protocol No. 13 to the 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms, pmbl., Jan. 7, 2003, E.T.S. No. 187.

<sup>97</sup> See, e.g., *Pretty v. the United Kingdom*, ECHR App. No. 2346/02, 35 Eur. Ct. H.R. 1, para. 65 (2002).

Strasbourg context, for example, it can be argued that where the notion of human dignity is implicit—but nevertheless important—the same could go for the value of social protection.<sup>98</sup> Moreover, it can be argued that the notion of the social state is not essential for the recognition of a subsistence *minimum* or similar *basic* guarantees because the idea of human dignity on its own can form a sufficient basis for this. It has been argued more than once that human dignity—as well as the protection of rights and freedoms generally—necessarily involves a degree of positive social protection.<sup>99</sup> The availability of basic means of subsistence may, thus, be considered to constitute an inherent aspect of respect for classic rights such as the ones taken up in the ECHR. Without such means, and without the capabilities they bring along, the enjoyment of almost every civil and political right appears illusory. Thus, either with the help of a more or less explicit social welfare notion or without it, it can be argued that these rights require that minimum social guarantees be recognized.

A second potential obstacle to the ECtHR's use of an approach similar to the FCC's cannot be overlooked. No matter how logically the requirement of a subsistence minimum may appear to follow from the notion of human dignity and the ECHR rights more generally, the transposition of this ideal might be complicated by the fact that the Strasbourg context is supranational rather than national. Indeed, in Germany the right to an *Existenzminimum* is explicitly linked to the idea of a social *state*. A state dedicated to ensuring basic means of subsistence for its nationals and those residing on its territory is, arguably, in need of the existence of a system of judicial protection. There is then a legitimate role for national courts to play in safeguarding this protection as long as the legislature's "*Gestaltungsspielraum*" is respected. A role for *supranational* protection is, however, thereby not yet given. Because the ECtHR does not directly or necessarily counterbalance the power of the national legislature, its interference with national social policy might misrecognize democratic choices and the balance achieved at the national level.<sup>100</sup> Indeed, especially when according to the national judiciary no reason for criticism was apparent, questioning a national approach can be problematic.

Additionally, it must be kept in mind that supranational courts like the ECtHR—of which the main task is to provide protection under negatively phrased fundamental rights norms—cannot provide for socioeconomic protection to the extent constitutional courts

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<sup>98</sup> Cf. *Airey v. Ireland*, ECHR App. No. 6289/73, 32 EUR. Ct. H.R. (ser. A) para. 26 (1979); *Stec and Others v. the United Kingdom*, ECHR App. Nos. 65731/01, 65900/01, paras. 50–51 (Apr. 12, 2006), <http://hudoc.echr.coe.int/> (stressing the provision of welfare benefits as rights).

<sup>99</sup> Cf. SANDRA FREDMAN, *HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES* 10–14 (2008); AMARTYA SEN, *DEVELOPMENT AS FREEDOM* 90–91 (1999); MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* 12 (2002).

<sup>100</sup> Unlike national courts, the ECtHR does not have the possibility to directly enter into a dialogue with the national legislature to find a compromise between the majority's will and the minority's concerns.

(potentially) can.<sup>101</sup> The ECtHR needs to be aware of its limited role in opposing budget sensitive national arrangements that have been democratically decided upon. Unable to enter into as direct of a “dialogue” with the legislature as their national counterparts, interpreting human dignity as unequivocally including a right to means of subsistence is, thus, more difficult for a court operating at the supranational level. It is also unsurprising from this perspective that, although the ECtHR from time to time provides for social protection, it has refused to unequivocally recognize that any social rights exist under the Convention.<sup>102</sup>

However, whereas carefulness is required, the FCC’s recognition of the *Existenzminimum* shows that, even without having to actually incorporate or recognize socioeconomic rights, it is still possible to underline and protect at least an absolute minimum thereof. When a very basic social minimum is recognized—and, moreover, described in a not too detailed way—straightforward judicial recognition under the header of human dignity or another classic fundamental rights norm does not seem inherently problematic. Due to its special position, *minimum* social protection might be all that the ECtHR can provide for.<sup>103</sup> Yet, stating that this minimum is part of the Convention would enhance the clarity of the Court’s socioeconomic case law and need not be perceived as if the Court were going a step too far. Indeed, the ECtHR’s current reluctance to state positive social rights places too much emphasis on a no longer feasible dichotomy between civil and political rights on the one hand and socioeconomic ones on the other.<sup>104</sup> The recognition of minimum aspects of these rights would do justice to its fundamental task while also improving the transparency and consistency of its reasoning.

## *II. Applying Socioeconomic Minimum Cores in a Robust but “Neutral” Way*

As we have seen in the German example, interpreting fundamental norms as including minimum social rights would not, alone, necessarily bring the ECtHR very far. Were the Strasbourg Court to recognize certain minimum social guarantees, the question would still remain as to how these should be applied. It is argued here that in this respect as well, the way the FCC has further elaborated the right to an *Existenzminimum* sets an interesting example for the ECtHR. The most important lesson that can be learned from the FCC’s

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<sup>101</sup> Of course, the possibilities for courts to deal with social issues vary from state to state. In some states—for example, due to the fact that economic and social rights are enumerated in the Constitution—the role for courts in this respect is a relatively large one. In other states, the emphasis is on negative fundamental rights protection.

<sup>102</sup> See *supra* note 25.

<sup>103</sup> While for a “social state” it might be worth aiming for more than the provision of an absolute minimum. Cf. Görsch, *supra* note 54, at 649. The ECtHR should arguably not move beyond any minimum provision of social guarantees.

<sup>104</sup> Cf. Koch, *supra* note 27 (in relation to the ECHR).

practice in this regard is that minimum core protection does not necessarily need to result in the definition of quantified requirements. The FCC stresses that clear figures cannot be inferred from the norms laid down in the Basic Law and, thus, it would be overstepping the boundaries of its task if it nevertheless defined such norms.<sup>105</sup> Yet, the FCC did not leave it entirely to the legislature to determine what a subsistence minimum should, in practice, entail. As we have seen, the FCC started with a relatively abstract minimum, the protection of which it ensured with the help of procedural requirements. First of all, it reviewed whether the minimum provided would be evidently insufficient. Moreover, even if this was not the case, the legislature must nevertheless use its leeway in a way that complies with the demands formulated. Of course, the requirements should be sufficiently detailed so as to steer the legislature in a certain direction. Yet, as such they arguably provide the right middle way between dictating the legislature what to provide and not giving any substantive direction at all. They constitute the tools for ensuring that the subsistence minimum provided is actually capable of meeting one's most basic needs, while not interfering with the legislature more than is justified.

Translated into Strasbourg terms, this would imply that the ECtHR would do more than just asking whether the acts or omissions of the state—in light of the social guarantees provided under the Convention—are unreasonable, arbitrary, or disproportionate as such. Next to evident shortcomings, it could use additional requirements to guide its review of whether the state has made use of its *Gestaltungsspielraum* in a way that complies with the Convention. These review-guiding rules would need to take a qualitative form. Like the FCC, the Strasbourg Court could give hand and feet to a relatively abstract minimum social guarantee, while refraining from dictating the outcome of democratic decision-making processes.

It must be noted, however, that the German example does not seem to offer the ideal source of inspiration when it comes to answering the question of which “review-guiding requirements” would be suitable. In this regard, it can be said that although promising, the high level of detail disclosed by the German review goes beyond the possibilities and powers of other (supranational) courts.<sup>106</sup> The obligations following from the ECHR are obligations for the state in its entirety and—although the ECtHR from time to time speaks indirectly to the legislature<sup>107</sup>—it could never go as far as the FCC in this regard. Thus, the requirements it could formulate should be of a somewhat different nature. One could imagine the ECtHR relying on procedural demands that—instead of concerning the

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<sup>105</sup> See *Hartz IV* at para. 142.

<sup>106</sup> Indeed, even in the German context the requirements are arguably too detailed. See *Bittner*, *supra* note 90, at 1954.

<sup>107</sup> For example, in the so-called “pilot judgments” the legislature is indirectly called upon to alter the legal regime in place. See, e.g., *Broniowski v. Poland*, ECHR App. No. 31443/96 (June 22, 2004), <http://hudoc.echr.coe.int/>.



legislative process—relate to the procedural mechanisms in place for protecting the individual concerned.<sup>108</sup> The ECtHR also could take an equal treatment approach, requiring the state to explain why certain groups—for example, non-nationals—are treated differently when it comes to the provision of certain minimum social benefits.<sup>109</sup> Both approaches could further the actual socializing effect of minimum social guarantees, without encroaching upon the leeway of the national authorities in a too far-reaching manner. They are likely to lead to protection for vulnerable groups in particular—indeed, for those who need the protection of minimum social rights the most.

It is outside the scope of this article to determine in more detail how such minimum social rights guarantees could be given shape, as this also would be strongly connected to the type of social rights issues at stake in concrete cases. Nevertheless, it can be concluded from the above that recognizing relatively abstract essential socioeconomic guarantees, as well as applying these with the help of procedural or other non-quantitative requirements, might be possible and interesting for the Strasbourg Court. Indeed, the German example can point the way towards more transparent and, where necessary, robust fundamental social rights protection.

## E. Conclusion

Starting with the question of to what extent fundamental rights provide for a minimum of social guarantees in times of austerity, this article has analyzed one particularly interesting answer: The protection of the right to an *Existenzminimum* by the German FCC. It has traced the genealogy of this fundamental right and, thereby, shown the possibility of providing for basic social guarantees on the basis of a classic rights document. Moreover, it has explained that the protection of the right to a subsistence minimum can be understood as a kind of minimum core socioeconomic rights protection. The reason for this is that the protection offered is minimal and does not rely on full social rights, but instead on aspects thereof that are essential in the sense that they concern individuals' most basic needs. In fact, the German example seems to provide a comparatively promising example of minimum core protection. Whereas the definition of minimum cores in other legal contexts has led to some criticism and, eventually, even to the devaluation of the idea of minimum core protection as such, the FCC's protection of the *Existenzminimum* seems to overcome some of the apparent concerns. It was explained that it is the two-step approach

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<sup>108</sup> This could imply that in the case of the provision of social benefits, one has a right to have his personal situation considered by the responsible authorities. Cf. the Roma housing case law of the Court, where it has formulated demands as to the proportionality analysis that has to take place at the national level. See, e.g., *Winterstein and Others v. France*, ECHR App. No. 27013/07 (Oct. 17, 2013), <http://hudoc.echr.coe.int/>.

<sup>109</sup> Indeed, an equal treatment approach can have a significant “socializing” effect. See, e.g., Oddný Mjöll Arnardóttir, *Discrimination as a Magnifying Lens: Scope and Ambit under Article 14 and Protocol No. 12*, in *SHAPING RIGHTS IN THE ECHR: THE ROLE OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DETERMINING THE SCOPE OF HUMAN RIGHTS* 330 (Eva Brems & Janneke Gerards eds., 2014).

used by the FCC that makes its attempt a potentially successful one: It provides for a relatively abstract social guarantee that one can hardly disagree with, while ensuring the absoluteness—or at least the practical meaning of this guarantee—by demanding that certain more detailed procedural requirements are complied with. In this way, it leaves essential room for the legislature, while ensuring that the right to an *Existenzminimum* does not run empty.

The final section of this article asked whether the approach chosen by the FCC might also be translatable to other fundamental rights contexts. In particular, in the context of the provision of minimum social guarantees in times of austerity, it was noted that the European Court of Human Rights from time to time seems to be willing to grant social protection, but that it does so in a case-dependent and non-transparent manner. This obscures the clarity of the rights and obligations that follow from the Convention, and, for that reason, it was interesting to examine whether the FCC's minimum core protection could provide for any helpful advice in this regard. It was argued that, although the German and the Strasbourg context differ to a significant extent from one another, the ECtHR indeed could provide for more transparent basic social protection. Given the ECtHR's specific role, it needs to be extra careful when determining the requirements national authorities have to comply with. Yet, with the help of procedural or other non-quantitative requirements also in Strasbourg the minimum provision of social rights after the German example might be a possibility worth considering.