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Practices of Social Constitutionalism: Poverty, Socio-economic Status and Social Exclusion in the Jurisprudence of the German Federal Constitutional Court

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Abstract
The German Federal Constitutional Court has defined constitutional limits for exclusionary legislation in social law. In these judgments, the Federal Constitutional Court has used human dignity and social equality doctrines to address poverty and social exclusion based on a specific group status as constitutional issues. In doing that, the Federal Constitutional Court has developed practices of a social constitutionalism. While the reviewing power of apex courts for restrictions in classic civil liberties is generally accepted, it is more contested and less obvious for distributive welfare policies. That is why, the practices of social constitutionalism of the Federal Constitutional Court have been an important constitutional development in recent years. The case law shows that they strengthen the social rights protection of the most vulnerable groups in society: people in need and refugees.

Keywords: Social rights; social law; human diginity; equality; socio-economic status; poverty; German Federal Constitutional Court

A. Introduction: Exclusionary Policies in Social Law

Since the 2000s, the German legislature has passed major neoliberal social reforms. These reforms were designed to put pressure on job-seekers and the working poor by reducing the level of social assistance and imposing welfare sanctions in case of noncompliance. Driven by anti-migration discourses, the German legislature has also passed several laws that exclude EU citizens, refugees, and other migrants from certain social benefits, namely social assistance, child and parental allowances. These exclusionary policies in social welfare law have in common that they are legitimatized by derogatory stereotypes and populist narratives about socially disadvantaged and vulnerable groups. They contribute to persisting inequalities and undermine democracy.[1]

From a constitutional law point of view, the legislature has very broad margin of appreciation in social law, especially in the area of tax-financed benefit legislation and mass administration

[1]Catharine A. MacKinnon, *Three Crises, or Saving the World,* 26 GERMAN L.J. 360a (2025) (Addendum to this Special Issue), available via https://germanlawjournal.com/addendum-mackinnon/ (last visited Aug. 4, 2025).

such as social assistance and family transfer payments. The legislature has a wide scope to decide who should be entitled to allowances and how to standardize social welfare benefits.[2] Despite that, the German Federal Constitutional Court has intervened in several cases and defined the constitutional limits for exclusionary legislation in social law.[3] In these judgments, the Federal Constitutional Court has used human dignity and social equality doctrines to address poverty and social exclusion based on a specific group status as constitutional issues. In doing that, the Federal Constitutional Court has developed practices of a social constitutionalism.[4] Social constitutionalism refers to the protection of social rights and social equality under constitutional law; it recognizes the power of apex courts to review social welfare policies and define constitutional limits for the in fact broad margin of appreciation of the legislature in social law.[5] While the reviewing power of apex courts for restrictions in classic civil liberties is generally accepted, it is more contested and less obvious for distributive welfare policies. That is why, the practices of social constitutionalism of the Federal Constitutional Court have been an important constitutional development in recent years. The case law shows that they strengthen the social rights protection of the most vulnerable groups in society—people in need and refugees—and address issues such as the amount of welfare benefits, welfare sanctions and the exclusion from benefits based on not being integrated in the labour market.

Regarding the exclusionary potentials of present and future distributive conflicts, however, the social constitutionalism of the Federal Constitutional Court could be developed further. The doctrinal approaches it has employed do not yet fully grasp the structural harm and discriminatory dimension of poverty and social exclusion in context of a capitalist and racialized society. The structural, group-based, and intersectional dimension of socio-economic inequality only shines through in some cases. That can lead to shortcomings in the fundamental rights protection of people in vulnerable socio-economic situations. An approach that is directed towards the structural dimension of socio-economic inequality could contribute to a stronger protection against social exclusion in times of distributive crises. Theses distributive crises challenge the social foundations of democracy as they undermine social cohesion.[6] That is why social constitutionalism is important for the future of democracy.

In legal theory and critical legal scholarship, there is a marginal but growing interest in the structural dimension of socio-economic, class-based inequality and translating it into doctrinal figures.[7] In that vein, I suggest to use a relational methodology to interpret human dignity and the general principle of equality. That approach can help to foster a social constitutionalism that offers a stronger and intersectional protection of social rights and social equality.

[2]*See e.g.* Sigrid Boysen, *Art. 3 Rn. 111*, *in* VON MÜNCH/KUNIG, BASIC LAW COMMENTARY (vol I, 7th ed. 2021); Hans Jarass, *Art. 20 Rn. 153-155b, Rn. 32, in* JARASS/PIEROTH, GRUNDGESETZ FÜR DIE BUNDESREPUBLIK DEUTSCHLAND: GG (18th ed. 2024). *See e.g.,* BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] July 18, 2012, 1 BvL 10/10 et al., Judgment of 18.7.2012, concerning *asylum seekers benefit act* (Ger.); BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] June 8, 2004, 2 BvL 5/00, 110, 412 (445), Teilkindergeld/EstG (Ger.); BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] 103, 271 (288), Pflegeversicherung (Ger.).

[3]*See, infra,* Section C.

[4]"Social constitutionalism" is not "societal constitutionalism": The term "societal constitutionalism" is used by Teubner to describe constitutionalism that is not state-centric but produced by private actors of civil society. *See* GUNTHER TEUBNER, CONSTITUTIONAL FRAGMENTS: SOCIETAL CONSTITUTIONALISM AND GLOBALIZATION (2012).

[5]For a similar definition, see Natalia Angel-Cabo & Domingo Lovera Parmo, Domingo, *Latin America Social Constitutionalism: Courts and Popular Participation*, *in* SOCIAL & ECONOMIC RIGHTS IN THEORY AND PRACTICE: CRITICAL INQUIRIES (Helena Alviar Garcia, Karl Klare & Lucy Williams eds. 2014).

[6]On the German AfD, see, Manès Weisskricher, *The Strength of Far-Right AfD in Eastern Germany: The East-West Divide and the Multiple Causes behind 'Populism'*, 91 The Pol. Q. 495 (2020); Philip Manow & Hanna Schwander, *Eine differenzierte Erklärung für den Erfolg der AfD in West- und Ostdeutschland, in* RECHTSPOPULISMUS IN DEUTSCHLAND 163 (Heinz Ulrich Brinkmann & Karl-Heinz Reuband eds., 2022). For constitutional theory in the Weimar era, see Hermann Heller, *Rechtsstaat oder dictatorship?,* 16 Econ. & Soc'y 127 (1987).

[7]*See, infra,* Section B.

In the following, I first outline in Section B how socio-economic inequality is conceptualized as a structural inequality issue in the current critical legal scholarship. Then I present in Section C the jurisprudence of the Federal Constitutional Court on the fundamental right to a guarantee of an existential minimum in accordance with human dignity in the context of social assistance law and on the general principle of equality regarding family benefits for refugee parents. In a third step, I show how a relational methodology can strengthen practices of social constitutionalism regarding the distributive as well as to the cultural dimension of socio-economic inequality. That is essential for transforming persisting inequalities and the future of democracy in times of multiple distributive crises, as discussed in Section D.

B. Socio-economic Inequality as Structural Inequality

For practices of social constitutionalism it is crucial to understand socio-economic inequality as a structural phenomen and to translate that into doctrinal terms. Constitutional review standards need to reflect the different and intersectional dimensions of being socially disadvantaged. Then poverty and and social exclusion are not individualized but can be addressed in terms of unequal social relations using stricter review standard in constitutional review. Therefore, in this section, I give an overview how socio-economic inequality is conceptualized as a structural issue in legal academic research.

In critical legal scholarship, Nancy Fraser's political theory approach is a key reference for thinking about socio-economic inequality in its different dimensions.[8] She argues for a multidimensional understanding of inequality and differentiates between redistribution, recognition and representation. Fraser emphazises that modern societies are structured by the two hierarchizing orders of class and status. While status refers to hierarchizing cultural patterns and value schemata, class is a relationship of economic subordination. Although it is possible to differentiate analytically between these two dimensions of inequality, in reality all inequalities are intertwined with class and status hierarchies and must be addressed by redistribution and recognition strategies. Redistribution ensures that individuals have sufficient means to interact as equals. Recognition guarantees that persons receive equal respect. Representation, as a third dimension, refers to voice and participation in democratic processes. All these dimensions of inequality in their intertwined nature should be considered in constitutional cases regarding poverty, welfare state dependancy, social exclusion and social welfare benefits.

With Fraser, one can understand why normativly welfare benefits are an important inclusion mechanism for participating on equal footing with others in a democracy and why special attention should be paid to the vulnerable positions of subjects depending on welfare because there is a danger of potentially punitive and discriminatory welfare policies. For Fraser, the welfare state forms a nexus between redistribution and recognition and welfare benefits can have unequal effects. "Welfare states distribute material benefits, but they also institutionalize cultural norms for beneficiaries; they construct various different (and often unequal) subject positions or identities of their claimants and beneficiaries."[9] According to her, welfare state policy must therefore be formulated in such a way that transfer payments do not lead to stigmatization and the production of the "needy," but serve to challenge economic privileges: "The welfare state should also be

[8]Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation, in* The Tanner Lectures on Human Values (1996). *See also* Nancy Fraser & Axel Honneth, Redistribution or Recognition? A Political-Philosophical Exchange (2003).

[9]Nancy Fraser, *Social Justice in the Age of Identity Politics: Redistribution, Recognition and Participation, in* The Tanner Lectures on Human Values 55 (1996).

understood as playing an important role in promoting mutual recognition by institutionalizing non-prejudicial norms that express equal respect for all citizens."[10]

The issues of property privleges, welfare benefits as compensating mechanisms and welfare state dependency are addressed in current critical legal scholarship as a critique of legal individualism. Legal individualism individualizes and naturalizes social inequalities. This critique is helpful to avoid individualizing accounts of poverty and a low socio-economic status in the formation of review standards. Such a critique was put forward by Athena D. Mutua. She criticizes the individualizing effects of a formal understanding of equality.[11] Formal equality presupposes that all people in a society are fundamentally similarly situated and that social differences between them are legally irrelevant. Socio-economic inequality is therefore not seen as a structural phenomenon, but as the result of individual behavior and the anonymous market, and thus as a problem of the individual. In the liberal paradigm, social differentiation is not based on the unequal distribution of private property and economic power, but on different interests, talents, and levels of education. The privileges and power that come with private property appear as a natural market difference and are naturalized. The legal analysis predominantly focuses on the economic "others," the socially disadvantaged, and not on the analysis of privileges and the reduction of these privileges. Mutua emphasizes that poverty and welfare state dependency must not conceived independently of capitalism. For that, she deconstructs the inequality producing effects of the hegemonic norm of middle-classness.[12] This norm is linked to the norm of gainful employment and the expectation that individuals can provide themselves with sufficient material and immaterial resources through their own economic activity. Deviations are negatively marked as "a-normal" or as "deviance," so that the economic "others" must adapt to the middleclass norm or otherwise experience cultural devaluation and exclusion. The middleclass norm gives the impression that beneficiaries of social welfare benefits get something "extra." It makes it more difficult to understand redistributive social benefits as compensation for structural disadvantages and private property induced socio-economic hierarchies. That norm conceals the fact that socio-economic privileges persist across generations due to legal institutions such as property ownership, family inheritance law, and the educational system, meaning that the privileged are for these reasons not dependent on social benefits.

As Fraser and Mutua emphazise, social inequality is not only about the distribution of ressources and welfare state benefits but also about discrimination as a social hierarchy formation. Socio-economic hierarchies are created through social classifications such as "poor," "unemployed," "not normal" and negative attributions of characteristics such as "lazy," "unreasonable," "bad parents," and "criminal." They legitimize social disadvantage, discrimination, and exclusion. People experience these disadvantages because they belong or appear to belong to a social group with few economic resources or a low social status, such as the unemployed, the poor, the homeless, beneficiaries of social welfare benefits, prisoners, single parents, the working class or workers with precarious jobs, sex workers, members of minorities such as Roma, refugees, and migrants with a precarious resident status. Status-based disadvantaged groups are often also socially disadvantaged und experience intersectional discrimination on both accounts. The European Network of Equality Bodies assumes that discrimination is a cause of poverty and social exclusion, that poverty and social exclusion also increase the risk of experiencing discrimination and also lead to those affected being less likely to defend themselves against discrimination.[13]

[10] *Id.*

[11] Athena D. Mutua, *Introducing ClassCrits: From Class Blindness to a Critical Legal Analysis of Economic Inequality,* 56 Buffalo L. Rev. 859, 872 (2008). For a class-based antidiscrimination approach, see Alex Benn, *The Big Gap in Discrimination Law: Class and the Equality Act 2010*, 2020 Oxford Hum. Rts. Hub J. 30 (2020).

[12] *Id.*

[13] European Network of Equality Bodies, Addressing Poverty and Discrimination: Two Sides of one Coin 5 (2010).

In constitutional jurisprudence these harmful effects of discrimination on grounds of poverty and the socio-ecnomic situation need to be addressed. For that, Shreya Atrey argues for a substantive, group-based and intersectional equality approach for discrimination law. Like Mutua, Atrey contrast a "liberal view which sees harm and injustice as something inflicted by and against individuals" in an episodic and isolated instance from a structural view that "places individual victims and perpetrators within the broader dimensions of the social, legal, political, economic and cultural context in which they exist."[14] She describes the structural dimension of inequality with the term structural harm. Structural harm focuses on the norms and practices that cause what Kate O'Regan calls harmful patterns of group disadvantages.[15] In terms of equality doctrine, Atrey argues for such a structural view that not focuses on discrimination based on grounds but on the structures of inequality such as racism, sexism, classism, etcetera. In a non-ground-centric, intersectional and substantive equality approach she sees the key for addressing poverty within discrimination law.[16]

While Atrey uses the notion structural harm, Sarah Ganty and Julie Ringelheim differentiate between recognition harm and distributive harm – as inspired by Nancy Fraser and outlined by Sandra Fredman.[17] Recognition harm refers to status-based discrimination and often involves stigma, prejudices and stereotypes as negative narratives[18] about people in poverty. Distributive harm addresses misdistribution. Misrecognition can be the cause of misdistribution, such as in the case of lesser socio-economic opportunities for vulnerable groups such as minorities, single women and persons with disabilities.[19] However, anti-discrimination law also has a redistributive function within the welfare state and ensures that people are not treated differently directly or indirectly because of their socio-economic situation. Distributive harm includes denied access to certain goods and services or an unfairly allocation of resources, such as state funded housing or social welfare benefits.[20]

In terms of doctrine within the European human rights framework, Ganty shows how Article 14 ECHR can be a tool to protect socially disadvantaged people if one interprets the prohibition of discrimination on grounds of "other status" as "socio-economic situation."[21] Ganty argues that

[14]Shreya Atrey, *Equality Law: A Structural Turn*, 26 GERMAN L.J. 153 (2025) (in this same Special Issue).

[15]Kate O'Regan, *Undoing Humiliation, Fostering Equal Citizenship: Human Dignity in South Africa's Sexual Orientation Equality Jurisprudence*, 37 NYU Rev. of L. & Soc. Change 307 (2013).

[16]Shreya Atrey, *The intersectional case of poverty in discrimination law,* 18 Hum. Rts. L. Rev. 411 (2018). *See also* Alex Benn, *The Big Gap in Discrimination Law: Class and the Equality Act 2010*, 2020 Oxford Hum. Rts. Hub J. 30 (2020); Olivier De Schutter, *Combating Discrimination on Grounds of Socio-Economic Disadvantage: A Tool in the Fight against Poverty*, 3 Eur. J. of Hum. Rts. [Journal Européen des Droits de l'Homme] 223 (2022); Juan Carlos Benito Sánchez, *Towering Grenfell: Reflections around Socioeconomic Disadvantage in Anti-discrimination Law,* 5 Queen Mary Hum. Rts. L. Rev. 1 (2019).

[17]Julie Ringelheim and Sarah Ganty, *Anti-Discrimination Law and Economic Inequalities*, 2023–1 CRIDHO Working Paper 1, 19, 24 (2023); Sandra Fredman, *Redistribution and Recognition: Reconciling Inequalities*, 23 S. Afr. J. on Hum. Rts. 214 (2007); Sandra Fredman, *The Potential and Limits of an Equal Rights Paradigm in Addressing Poverty*, 22 Stellenbosch L. Rev. 566 (2011).

[18]On poverty narratives see Courts as Narrators see Sarah Ganty, *Poverty in Judgecraft: New Narratives through the Language of Discrimination Law,* 26 German L.J. 170 (2025) (in this same Special Issue).

[19]Sarah Ganty, *Socioeconomic Precariousness in times of COVID-19: A Human Rights Quandary under the ECHR*, XL Polish Yearbook of Int'l L. 165 (2020).

[20]*See* Ringelheim & Ganty, *supra* note 17, at 25.

[21]Sarah Ganty, *The Double-Edged ECtHR Lăcătuș Judgment on Criminalisation of Begging: Da Mihi Elimo Sinam Propter Amorem Dei,* 3 Eur. Convention on Hum. Rts. L. Rev. 393 (2021). Olivier De Schutter, *Combating Discrimination on Grounds of Socio-Economic Disadvantage: A Tool in the Fight against Poverty*, 3 Eur. J. of Hum. Rts. [Journal Européen des Droits de l'Homme] 223 (2022) (arguing for the term "socioeconomical condition"). Alex Benn, *The Big Gap in Discrimination Law: Class and the Equality Act 2010*, 2020 Oxford Hum. Rts. Hub J. 30 (2020) (proposes the term "class" and "classism"). De Schutter and Benn address the main arguments raised against the recognition of class and socio-economic condition as a quasi-suspect ground in discrimination law. *See also* Juan Carlos Benito Sánchez, *Towering Grenfell: Reflections around Socioeconomic Disadvantage in Anti-discrimination Law,* 5 Queen Mary Hum. Rts. L. Rev. 1 (2019).

this could overcome pitfalls of the jurisprudence of the European Court of Human Rights, especially its limitation of protection in cases of extreme vulnerability and the silence of the Court on the socio-economic situation of applicants in some cases. It would allow for a group-based approach in cases of different treatment on grounds of the socio-economic situation and an intersectional perspective on poverty.[22] Ganty suggests that discrimination law offers a language that can unveil, challenge and transform myths about people in poverty. Judges have a key role in in narrating different stories about poverty and by doing that making the fundamental rights protection and participation of people in poverty more effective.[23]

The outlined approaches to poverty and socio-economic discrimination have in common that they require a structural perspective that pursues a contextual and intersectional[24] analysis and interpretation of law.[25] In my work I describe such approaches as relational in contrast to individualizing ones. In distinction to the liberal paradigm, relational perspectives are normatively oriented towards "good" or symmetrical social relationships, that is, relationships that enable freedom and equality.[26] That is why relational approaches directs "our attention to the structuring of power relations," as Jennifer Nedelsky argues.[27] Relational approaches shift the focus from the abstract free and equal legal subject to concrete social relations. I apply such a relational perspective not only to equality law but to all kinds of legal fields and legal conflicts and pay special attention to the formation of doctrinal standards in concrete cases.

Substantive equality, as developed by Catharine A. MacKinnon[28]—and in the German context by Ute Sacksofsky[29] and Susanne Baer[30]—can translate such a perspective into a specific mode of interpretation: Contrary to abstractions like sameness and difference, substantive equality theory begins with concrete hierarchies as group-based hierarchies and "asks whether a challenged regularity is a practice of structural domination, whether it enforces social inferiority and disadvantage of some and social superiority and advantages of others over them."[31] While substantive equality has been mainly applied for discrimination based on gender, sexual orientation, race,[32] and disability,[33] I argue that such an approach can be generalized and used to analyze inequality in its different dimensions of redistribution, recognition, and representation

[22]Sarah Ganty, *Socioeconomic Precariousness in times of COVID-19: A Human Rights Quandary under the ECHR*, XL Polish Yearbook of Int'l L. 164, 165 (2020); Sarah Ganty, *The Double-Edged ECtHR Lăcătuș Judgment on Criminalisation of Begging: Da Mihi Elimo Sinam Propter Amorem Dei,* 3 Eur. Convention on Hum. Rts. L. Rev. 393 (2021).

[23]Sarah Ganty, *Poverty in Judgecraft: New Narratives through the Language of Discrimination Law,* 26 German L.J. 170 (2025) (in this same Special Issue).

[24]Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1 Univ. of Chicago Legal F. 139 (1989).

[25]As Victoria Miyandazi argues judicial instruments are necessary to ensure state accountability and enforcement of court orders. *See* Victoria Miyandazi, *Role of Kenyan Courts in Tackling Persistent Inequalities: The Delicate Balance of Judicial Review,* 26 German L.J. 234 (2025) (in this same Special Issue).

[26]Jennifer Nedelsky, Law's Relations. A Relational Theory of Self, Autonomy, and Law (2011).

[27]*Id.* at 64.

[28]*See e.g.*, MacKinnon, *supra* note 1. Catharine A. MacKinnon, Sexual Harassment of Working Women 101–142 (1979); Catharine A. MacKinnon, Feminism Unmodified. Discourses on Life and Law 32–45 (1987); Catharine A. MacKinnon, *Substantive Equality: A Perspective*, 96 Minn. L. Rev. 383 (2011).

[29]Ute Sacksofsky, Das Grundrecht auf Gleichberechtigung: eine rechtsdogmatische Untersuchung zu Artikel 3 Absatz 2 des Grundgesetzes 310 (2d ed. 1996).

[30]Susanne Baer, Würde oder Gleichheit? Zur angemessenen grundrechtlichen Konzeption von Recht gegen Diskriminierung am Beispiel sexueller Belästigung am Arbeitsplatz in der Bundesrepublik Deutschland und den USA 235 (1995); Susanne Baer, *Traveling Concepts. Substantive Equality on the Road,* 46 Tulsa L. Rev. 59 (2010).

[31]MacKinnon, *supra* note 1, at 360c.

[32]Catherine O'Regan, *The Long Legacy of Aparthheid Geography and the Limited Reach of the South African Constitution's Equality Clause,* 26 German L.J. 198 (2025) (in this same Special Issue).

[33]For disability see, for example, Martha Minow, Making all the Difference. Inclusion, Exclusion, and American Law (1990).

and used for not only status-based but also socio-economic inequality in an intersectional way.[34] A relational approach can address welfare state dependency as a structural hierarchy as well as the associated cultural devaluation and stigmatization of socially disadvantaged people in constitutional law cases regarding welfare state benefits. It can further challenge punitive, disciplinary, and exclusionary social policies and foster relations of social inclusion, social security, and social equality.

In terms of doctrine, a relational approach translates into a specific mode of legal interpretation: The discussion of the social context using empirical facts, data, and studies, the consideration of the specific effects of a provision on those affected, and the reflection of the hegemonic norms and stereotypes that are inscribed in social law and define the constitutional standard gain importance over abstract-individualizing interpretations and justifications of legal provisions.

In the German context, such an approach has already been established in the substantive interpretation of gender equality[35] and has been recognized in the constitutional jurisprudence. For example, regarding discrimination against women, the Federal Constitutional Court has discussed in detail the social conditions and structural reasons for gender inequality by taking into account empirical data and social science research.[36] It has also addressed the hegemonic masculine norms inscribed in legal provisions and the unequal effects of supposedly neutral regulations on men and women, thereby making the perspective of the "others" visible. This contextual approach has contributed to a stereotype-sensitive standard of review that focuses on hierarchizing and exclusionary effects of cultural value schemata and finds legislation that is based on those schemata unconstitutional. For socio-economic inequality such an approach still needs to be developed.[37] In the case law of the Federal Constitutional Court one can find first criteria and concepts that hint to such a perspective, as I will show in the next section.

C. Constitutional Limits in Social Law: The Jurisprudence of the Federal Constitutional Court

Regarding social rights and distributive welfare policies, the legislator has a wide margin of discretion.[38] In a democracy, the parliament and not the constitutional court is supposed to decide on distributive issues. In German constitutional law that is reflected in the jurisprudence on the principle of the social state that allows for the legislator to interfere in economic freedoms and property rights but that does not provide for subjective claims of socially disadvantaged groups.[39] It is further reflected in the fact that in cases of welfare benefit legislation, the legislative discretion leads to judicial restraint.[40]

[34]Cara Röhner, Constitutions and Inequality. A Relational Analysis of Law 1–20 (2024) (translation of: Ungleichheit und Verfassung. Vorschlag für eine relationale Rechtsanalyse (2019)).

[35]Ute Sacksofsky, *supra* note 29. For the statutory General Act on Equal Treatment, See also Anna Katharina Mangold, Demokratische Inklusion durch Recht: Antidiskriminierungsrecht als Ermöglichungsbedingung der demokratischen Begegnung von Freien und Gleichen (2021).

[36]BVerfGE 85, 191, *ban on night work* (1992) (establishing case law). For an overview, see Cara Röhner, Constitutions and Inequality. A Relational Analysis of Law 126–204 (2024).

[37]Cara Röhner, *§ 11 Sozioökonomische Diskriminierung, in* Handbuch Antidiskriminierungsrecht – Strukturen, Rechtsfiguren und Konzepte 475 (Anna Katharina Mangold & Mehrdad Payandeh eds., 2022).

[38]From a comparative point of view see Francesco Lucherini, *The Constitutionalization of Social Rights in Italy, Germany, and Portugal: Legislative Discretion, Minimal Guarantees, and Distributive Integration*, 25 German L.J. 335 (2024).

[39]Hans F. Zacher, *§ 28 Das soziale Staatsziel*, *in* Handbuch des Staatsrechts der Bundesrepublik Deutschland. Band II 659 (Josef Isensee & Paul Kirchhof eds., 3d ed. 2004). *See also* Cara Röhner, Constitutions and Inequality. A Relational Analysis of Law 21–125 (2024).

[40]E.g Hartz IV: BVerfGE 125, 175 (225); 137, 34 (74 Rn. 80). *See* Ulrike Davy, *Soziale Gleichheit – ein Anliegen für Verfassungen? Zehn Thesen aus der Sicht der Rechtswissenschaf*, 56 ZSR 295 (2010).

Nevertheless, the Federal Constitutional Court has established the social right of the guarantee of an existential minimum for employable pesons and asylum-seekers—discussed in Section I — and has defined limits for social exclusion based on the equality principle, discussed in Section II. In the following, I reconstruct the constitutional review standards for social assistance and family benefits legislation. I analyze how these standards address poverty, welfare state dependency and having a disadvantaged socio-economic status and to what extent they pursue a relational, that is, contextual, group- and affected-persons-based and intersectional, approach. While in cases regarding the standard benefit rate for social assistance such a perspective is completly absent, a more contextual, group-based and intersectional interpretation is applied in the cases regarding welfare sanctions and benefits for asylum-seekers and refugee parents.

I. Human Dignity: The Existential Minimum for Employable Persons and Asylum-Seekers

Since 2010, in five judgments, the German Federal Constitutional Court has established the fundamental right to the guarantee of an existential minimum in accordance with human dignity for job-seekers, the working poor, and asylum-seekers.[41] With this line of case law, the Federal Constitutional Court has established a genuine social right to state social assistance derived directly from the German Constitution. This human right gives the Court the power to review social assistance provisions and to define constitutional limits for the legislature regarding the legal treatment of people in need. In doing that, it has set limits to the broad margin of appreciation of the legislator in the area of social assistance law.

The Federal Constitutional Court grounds the fundamental right to the guarantee of an existential minimum in human dignity and the social state principle—per Article 1(1) in conjunction with Article 20(1) of the Basic Law. This right "ensures to each person in need of assistance the material prerequisites which are indispensable for his or her physical existence and for a minimum of participation in social, cultural and political life."[42] Acknowledging the fact that humans as social creatures exist only in social relationships, it encompasses both the physical existence of the individual, that is food, clothing, housing, etcetera, and a minimum of participation in social, cultural, and political life.[43]

By anchoring the right to social assistance in human dignity, the Federal Constitutional Court emphasizes the fundamental importance of the existential minimum in a democratic society. It is not subject to the legislature's discretion[44] and requires a parliamentary statute that contains a concrete benefit claim for the citizen.[45] Concerning the amount of the benefit, it is up to the

[41]BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] Oct. 9, 2010, 1 BvL 1/09 et al., Judgment of 9.10.2010 concerning *social assistance for job-seekers* (Ger.); BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] July 23, 2014, 1 BvL 10/12 et al., Order of 23.7.2014 concerning *standard benefit* (Ger.); BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] July 18, 2012, 1 BvL 10/10 et al., Judgment of 18.7.2012, concerning *asylum seekers benefit act* (Ger.); BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] Nov. 5, 2019, 1 BvL 7/16, Judgment of 5.11.2019, concerning *welfare sanctions* (Ger.); BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] Oct. 19, 2022, 1 BvL 3/21, Order of 19.10.2022, conerning *reduced standard rate for asylum-seekers* (presening a press release in English) (Ger.).

[42]BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] Oct. 9, 2010, 1 BvL 1/09, Judgment of 9.10.2010, at headnote 1 (Ger.). For the case notes in English by Hans Michael Heinig, see Hans Michael Heinig, *The Political and the Basic Law's Sozialstaat Principle—Perspectives from Constitutional Law and Theory*, 12 GERMAN L.J. 1887 (2011); Claudia Bittner, *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 (2011); Stefanie Egidy, T*he 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).

[43]BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] Oct. 9, 2010, 1 BvL 1/09, marginal no. 135 (Ger.).

[44]BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] Oct. 9, 2010, 1 BvL 1/09, marginal no. 133 (Ger.).

[45]*Id.* at margin no. 136.

legislature "to orientate the benefits to be paid towards the respective stage of development of the polity and towards the existing conditions of life."[46]

Based as it is on human dignity, a right whose scope is not restricted to German citizens, the Federal Constitutional Court conceptualizes the fundamental right to the guarantee of an existential minimum as a human right that protects all human beings in Germany, independent of their origin and their residence status:[47] In consequence, asylum-seekers and other migrants in need have a human right to state welfare benefits that is in accordance with human dignity.[48]

1. Standard Benefit Rate: Convincing Method as a Standard of Review

The establishment of the right as such does not yet determine its content in terms of an exact amount. In the first judgement on the social assistance for employable persons in 2010, the Federal Constitutional Court had to decide wheter the, in 2005 newly introduced, lump sum benefit was high enough. It developed a standard of review that proceeds in two steps: first, the Court asks whether the granted benefit is *evidently* insufficient to cover one's needs;[49] second, it assesses whether the concrete amount of the standard benefit is determined in a convincing way. It requires the legislature to realistically and comprehensively assess all expenditures that are necessary for one's livelihood in a transparent, expedient procedure on the basis of reliable figures and plausible methods of calculation.[50] The existential minimum must be realistically determined using a convincing method. Thus, the Federal Constitutional Court has developed an approach that focuses on the procedure of how the amount of the standard benefit is calculated. One could say that the Federal Constitutional Court proceduralizes the fundamental right protection.

The Court generally has accepted the mixed-methods model chosen by the legislator.[51] Using the income and consumption survey of the German Federal Statistic Office, the minimum is calculated based on the average consumption expenditures of the lowest 15–20 percent income groups. Then, the legislature removes certain goods and services which it evaluates as not being relevant to the existential minimum—for example, plants, animals. The Court has decided that the legislator may retroactively remove o individual items from the statistical calculation of the benefits. However, because some reductions were made randomly without sufficient justification and/or insufficient data basis, the Court found in the 2010 decision that the legislature deviated from the structural principles of the statistical model "without a factual justification" and thus assessed the standard benefit rate to be unconstitutional.[52] Also, the monthly lump sum benefit was based on typical needs and did not cover atypical needs. The Federal Constitutional Court obliged the legislature to introduce an additional benefit for special needs that are not covered by the fixed amount of the standard benefit.[53]

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[46] *Id.* at margin no. 133.

[47] BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] July 18, 2012, 1 BvL 10/10 et al., *asylum seekers benefit act,* at headnote 2, marginal no. 63 (Ger.); BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] Oct. 19, 2022, 1 BvL 3/21, *reduced special rate for asylum-seekers* (presenting a press release in English) (Ger.).

[48] BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] July 18, 2012, 1 BvL 10/10 et al., *asylum seekers benefit act*, marginal no. 62 (Ger.).

[49] In 2012, the Federal Constitutional Court found the benefits for asylum-seekers to be evidently too low and unconstitutional because they were not raised since 1993, BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] July 18, 2012, 1 BvL 10/10 et al., *asylum seekers benefit act* (Ger.).

[50] BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] Oct. 9, 2010, 1 BvL 1/09 et al., *social assistance for job-seekers*, marginal no. 139, at headnote 3 (Ger.).

[51] BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] July 23, 2014, 1 BvL 10/12 et al., Order concerning *standard benefit,* marginal no. 86, headnote 2 (Ger.).

[52] BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] Oct. 9, 2010, 1 BvL 1/09 et al., Judgment of 9.10.2010, concerning *social assistance for job-seekers*, marginal no. 173 (Ger.).

[53] *Id.* at marginal no. 204.

Further, the Court found in the second decision on the social assistance for employable persons in 2014 that the legislator must take measures to prevent underfunding. It is its duty to update the standard benefit rate regularly and to adapt it to the price increases.[54] Because the legislature's removal of items of consumption had—at the time of the decision—led in sum to a standard rate that covered only about 72 per cent of the expenditures of the reference households, the Federal Constitutional Court concluded that this reached "the very limit of what is constitutionally required to secure minimum existence."[55] For that evaluation, the Court gave no criterion because the standard of a convincing calculation does not offer one. It remains unclear where one has to define the lower limit for the amount of the standard rate under constitutional law.

In sum, the Federal Constitutional Court tries to address the issue of being in need of state help as a constitutional issue but at the same time leaves the concrete content of the social right to be defined by the legislature in the spirit of judicial restraint.[56] The developed standard of review that focuses on the method of determining the amount of the benefit rate does not consider the social reality of being poor. Poverty and welfare state dependency are not conceptualize as problems of structural inequality and social hierarchy. The review standard leaves out the social context and the impacts of the welfare benefit design on the beneficiaries. That is why the neuralgic question whether the standard benefit rate is high enough to lead a life in dignity is not assessed from the perspective of those affected and with regard to the potentially excluding effects of the granted lump sum rate. Civil society and self-help organizations have criticized the lump sum standard rate as too low for a life in dignity, social inclusion and participation.[57] They have critized the method—the reference group of the lowest 15–20 per cent and the removal of items—as a tool to calculate the benefit down. An approach that includes the social reality of being in need for social assistance could have contributed to a stricter standard that asks wheter the standard benefit is calculated realistically from the point of view of the beneficiaries and that takes into account distributional harm and social exclusion caused by social assistance benefits.

2. Welfare Sanctions: No Punitive Purposes Allowed, Empirical Data Required

In the third decision on the social assistance for employable persons in 2019, the Federal Constitutional Court developed its approach further with a more structural equality-sensitive perspective. The Court had to decide whether welfare sanctions in the form of reducing the standard benefit rate are constitutional in case beneficiaries do not comply with their duties under social assistance law.[58]

In this decision, the Court acknowledges the existential dependency of social assistance beneficiaries on the state and implicitly also the inherent asymmetrical power relationship. Thus, the Court affirms that the fundamental right to the guarantee of an existential minimum in accordance with human dignity "cannot be lost even on grounds of supposedly 'undignified' behavior."[59] This is because human dignity does not have to be acquired, it is intrinsic to every person regardless of character traits.[60] Therefore punitive purposes may not be pursued under

[54]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 23, 2014, 1 BvL 10/12 et al., Order of 23.7.2014 concerning *standard benefit*, marginal no. 86, 121 (Ger.).

[55]*Id.* at marginal no. 121.

[56]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Oct. 9, 2010, 1 BvL 1/09 et al., Judgment of 9.10.2010, 1 BvL 1/09 et al. concerning *social assistance for job-seekers*, marginal no. 141 (Ger.). On judicial restraint, social benefits and the enforcement of court orders, see Victoria Miyandazi, *Role of Kenyan Courts in Tackling Persistent Inequalities: The Delicate Balance of Judicial Review*, 26 German L.J. 234 (2025) (in this same Special Issue).

[57]*See* references in Section D.I.

[58]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 5, 2019, 1 BvL 7/16, Judgment of 5.11.2019 concerning *welfare sanctions* (Ger.).

[59]*Id.* at headnote 1, marginal no. 120.

[60]*Id.* at marginal no. 123.

social assistance law.[61] The Federal Constitutional Court recognizes the danger of a punitive welfare state and wants to protect the social group of beneficiaries of social assistance. Welfare sanctions are therefore only allowed as incentives for compliance in the future.

Further, the Court addresses the vulnerable situation of welfare beneficiaries, the prevalence of family and health problems and psychological duress in this specific group, and other barriers to a life without welfare benefits.[62] For example, the Court requires the authorities to not only send written documents to the beneficiaries but obliges them to also conduct a personal interview with the beneficiaries in case of special circumstances: "Therefore, if there are indications of such special circumstances, affected persons must be given the possibility of presenting their personal situation not only in writing, but also at a hearing – which, in practice, to date is rare (. . .)."[63] This requirement is supposed to ensure voice and participation of socially disadvantaged beneficiaries in administrative procedures. Thereby the Court considers Fraser's representation dimension of equality.

In this judgment, an intersectional, group-based, and anti-stereotype perspective shines through by addressing different vulnerabilities in the group of social assistance beneficiaries and the dangers of a punitive welfare state and by pursuing a contextual approach. The main standard of review is a strict proportionality test that requires empirical data for justifying the effectiveness and reasonableness of welfare sanctions. The legislature is only allowed to "impose reasonable obligations to cooperate for overcoming their own need upon persons"[64] and to enforce these by means of sanctions, that is, the temporary reduction of the standard benefit. They are not allowed as means to repressively punish misconduct but only to make the affected persons cooperate to overcome their need for state aid.[65] The Federal Constitutional Court ruled that only the benefit reduction of 30 per cent can be justified on the basis of the plausible assumption that it would motivate affected persons to comply with their obligations to cooperate.[66] For sanctions that withhold more than 30 per cent of the standard benefit, the legislature cannot empirically prove that such sanctions are effective and reasonable measures to enforce obligations in social assistance law. Because of the extraordinary burden on those affected, the Federal Constitutional Court includes in the proportionality test the requirement that social assistance provisions that burden people in need to be based on empirical studies and data and not just mere assumptions. Thus, the Court pursues a contextual approach and emphasizes the importance of empirical data and social reality in the constitutional review of provisions in social assistance law. In this way, the Court has set tighter constitutional limits to the broad margin of appreciation of the legislature regarding potentially excluding and stigmatizing social law provisions for the vulnerable group of social assistance beneficiaries.

3. The Social Group of Asylum-Seekers: Prohibition of Differentiation on Grounds of Residence Status and Strictly Needs-Based as Review Standards

In its judgments on the existential minimum for asylum-seekers in 2012 and 2022, the Federal Constitutional Court has also developed a more group- and context-based approach that recognizes the specific danger of an exclusionary social policy regarding asylum-seekers.[67]

[61] *Id.* at marginal no. 131.
[62] *Id.* at marginal no. 143, 176.
[63] *Id.* at marginal no. 143.
[64] *Id.* at headnote 1.
[65] *Id.* at marginal 131
[66] *Id.* at headnote 3, marginal no. 136, 154, 189.
[67] BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] July 19, 2012, 1 BvL 10/10 et al., Judgment of 18.7.2012 concerning *asylum seekers benefit act* (Ger.); BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] Oct. 19, 2022, 1 BvL 3/21, Order of 19.10.2022 concerning *reduced special rate for asylum-seekers* (presenting a press release in English) (Ger.).

The Court stressed that foreign nationals cannot be treated differently in the area of social assistance law.[68] It affirmed that their claim to social assistance cannot be restricted because of their length of stay and cannot be reduced to the physical minimum: "Foreign nationals do not lose the right to be considered as social individuals by virtue of the fact that they leave their homes and temporarily reside in the Federal Republic of Germany only temporarily."[69] That fundamental right encompasses the physical and sociocultural minimum and must be guaranteed starting at the moment at which residence is taken in Germany.[70]

The amount of benefits for the physical and sociocultural minimum must be strictly needs based. If the legislature wants to define the existential minimum for a specific group, it is therefore not allowed to "differentiate across the board in light of the recipients' residence status."[71] Differentiations regarding the granted benefits are only possible if the specific need of the group deviates significantly from other people in need. That needs to be substantiated by empirical data and a transparent procedure.[72]

With that strictly needs-based approach the Federal Constitutional Court has established also very clear limits for migration-policy objectives in social assistance law. It has ruled that migration-policy considerations cannot justify lower benefits for asylum seekers and other migrants: "Human dignity, guaranteed in Article 1.1 of the Basic Law, may not be modified in light of migration-policy considerations."[73] Thus, for the social group of asylum-seekers the Federal Constitutional Court has introduced a social equality and antidiscrimination dimension in the doctrine of human dignity by ruling that the length of stay and the residence status cannot justify benefits below the constitutionally guaranteed physical and sociocultural minimum.

The strictly needs and empirical data-based approach of the Federal Constitutional Court rejects populist, anti-migration, and discriminatory reasons for reducing social assistance benefits. As one can also see in the welfare sanction decision, this approach works like a prohibition of discrimination on grounds of being poor. In the decision on welfare sanctions that antidiscrimination dimension of human dignity shines through when the Court states that the law cannot differentiate between deserving and undeserving poor, forbids punitive objectives of sanctions and requires empirical data for justifying the effectiveness and reasonableness of reductions of more then 30 per cent of the benefit rate.[74] In the first Asylum-Seekers Benefit Act judgment, the Court explicitly rules that the legislature is not allowed to differentiate on grounds of residence status.[75] In doing that, the Court recognizes the intersections of the socio-economic statuses of being economically in need and being an asylum-seeker. In this intersectional, also status-based discrimination case it seems easier for the Court to address socio-economic discrimination in its distributive dimension.

[68]BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] July 18, 2012, 1 BvL 10/10 et al., Judgment of 18.7.2012 concerning *asylum seekers benefit act*, at headnote 3 (Ger.).

[69]*Id.* at marginal no. 94.

[70]*Id.* at headnote 2, marginal no. 94.

[71]*Id.* at headnote 3, marginal no. 73.

[72]*Id.* at marginal no. 71. In 2019, the legislator had introduced a reduction of the benefit on the grounds that asylum-seekers that live in collective accommodation had—like couples living together—opportunities to make savings by sharing goods. Because there is no empirical evidence that single adults who live in collective accommodation share goods like couples and have real and actual savings that reduction was based on mere assumptions and lacked empirical data and was declared unconstitutional. BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] Oct. 19, 2022, 1 BvL 3/21, Order of 19.10.2022 concerning *reduced special rate for asylum-seekers* (presenting a press release in English) (Ger.).

[73]BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] July 19, 2012, 1 BvL 10/10 et al., Judgment of 18.7.2012 concerning *asylum seekers benefit act* marginal no. 95 (Ger.).

[74]BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] Nov. 5, 2019, 1 BvL 7/16, Judgment of 5.11.2019 concerning *welfare sanctions,* at headnote 1, margional no. 120 (Ger.).

[75]BUNDESVERFASSUNGSGERICHT [BVerfG] [Federal Constitutional Court] July 19, 2012, 1 BvL 10/10 et al., Judgment of 18.7.2012 concerning *asylum seekers benefit act,* at headnote 3, marginal no. 73 (Ger.).

That strictly needs-based approach is a strong standard against the discrimination and exclusion of asylum-seekers in social assistance law. It has the potential to challenge one of the most pressing issues regarding welfare benefits for asylum-seekers: The restricted access to health care.[76] In first 36 months asylum-seekers and other migrants in precarious situations are excluded from the statutory health care insurance and have only access to the treatment of acute pan and illnesses. The treatment of chronical and psychological illnesses is only a discretionary benefit. The exclusion based on the residence status is justified with migration policy objectives and does not guarantee a needs-based health care treatment. Therefore, in the literature, it is assessed as a violation of the fundamental right to the guarantee of an existential minimum in accordance with human diginity.[77] However, no case has been brought forward to the Federal Constitutional Court yet.

II. General Principle of Equality: Social Benefits for Refugee Parents

For welfare state benefits beyond the subsistence minimum, the general principle of equality is usually applied for reviewing statutory differentiations and exclusions. The review standard of the principle of equality varies: Depending on the subject-matter of the provision and the chosen criterions upon which the differentiation is based, the standard ranges from prohibiting arbitrariness to the proportionality test.[78] If a specific group is treated differently, the Federal Constitutional Court uses the stricter standard of proportionality. It has done so regarding family benefits for foreign nationals. Thus, although the legislature has a very broad scope to decide how to design social welfare benefits, especially in the area of tax-financed benefit legislation, the general principle of equality sets constitutional limits for differentiating on ground of nationality and residence status in welfare state benefit legislation.

The Federal Constitutional Court has ruled twice on stricter eligibility requirements for refugee parents regarding the federal child-raising and parental allowances (*Bundeserziehungs- und elterngeld*) and the child allowance (*Kindergeld*). In both decisions, it declared the ineligibility of non-German nationals granted residency for humanitarian reasons to be unconstitutional.[79] Regarding the social group of refugees the Federal Constitutional Court derived stricter standards of review. In both decisions the Court found the requirement that this social group is integrated in the labor market—hence have a specific socio-economic status—for being eligible for the respective allowance to be unequal treatment.

[76]Also EU citizens that are economically inactive are excluded from health care in certain cases. Sozialgesetzbuch [SGB] [Social Code], § 23(3), https://www.gesetze-im-internet.de/englisch_sgb_14/.

[77]Constanze Janda, *Existenzminimum, Gleichbehandlung, Menschenwürde: Rechtliche Anforderungen an die Gesundheitsversorgung von Asylsuchenden*, *in* Flucht und Gesundheit. Facetten eines interdisziplinären Zugangs 31 (Anna Christina Nowak, Alexander Krämer & Kerstin Schmidt eds., 2021); Lena Frerichs, Der Anspruch auf Krankenbehandlung nach §§ 4, 6 AsylbLG (2023); CESCR, Concluding observations on the sixth periodic report of Germany, E/C.12/DEU/CO/6, para. 58 (2018); Louise Biddle, *Refugees: Negative health consequences without the anticipated savings,* 14 DIW Weekly Report 97 (2024). For discussion on the de facto exclusion from health care due to the obligation of the social welfare office to inform the immigration authorities, Section 87 of the Residence Act, see also Gesellschaft für Freiheitsrechte/Ärzte der Welt, Ohne Angst zum Arzt – Das Recht auf Gesundheit von Menschen ohne geregelten Aufenthaltsstatus in Deutschland. Eine grund- und menschenrechtliche Bewertung der Übermittlungspflicht im Aufenthaltsgesetz (2021).

[78]Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 10, 2012, 1 BvL 2/10 et al., Order of 10.7.2012, concerning *child-raising allowance and parental allowance for refugee parents*, at para 21 (Ger.).

[79]*Id.* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 28, 2022, 2 BvL 9/14 et al, Order of 28.6.2022 concerning *child allowance for refugee parents* (presenting press release in English) (Ger.).

1. The Social Group of Refugee Parents: Strict Proportionality Test and Strict Criteria for Typification of Mass Administration

In the two decisions on family welfare benefits for refugee parents, the Federal Constitutional Court applies a contextual, group-based and partly intersectional approach. It discusses the social situation refugee parents find themselves in and why they stay in Germany for a long duration of time.

In its judgment of 2012, the Federal Constitutional Court decided on the exclusion of refugee parents from the federal child-raising allowance and parental allowance.[80] In the first months of a child's life parents were/are entitled to these allowances to take care of their children. Refugees who had a residence permit under international law or on political or humanitarian grounds were not entitled to these allowances, except if they had been in Germany for at least three years and were integrated in the labor market. That latter criterion was fulfilled if the refugees were employed, received certain unemployment benefits, or were on parental leave.

The Federal Constitutional Court applied the proportionality test and ruled that—in contrast to the area of social assistance and human dignity—the legislature may differentiate with regard to the length of the stay in Germany.[81] It is a legitimate objective to restrict the child-raising allowance or a parental allowance only to foreign nationals who are likely to stay permanently in order to "promote a sustainable demographic development in Germany."[82]

However, the chosen distinguishing criteria were not suitable to predict the duration of residence and were therefore unreasonable. The Court shows in detail that the integration in the labor market does not predict the length of stay in Germany. How long refugees stay in Germany depends on developments in their country of origin and not their economic activity.[83] That is why the "differentiation criteria chosen by the legislature, ... do not determine the group of beneficiaries in a manner that is suitable (...)."[84] The employment-related prerequisites are "not suitable as delimitation criteria for drawing the benefits in question here."[85]

The Federal Constitutional Court further addresses the gender dimension of being integrated in the labor market and having gainful employment as a criterion for welfare benefits: for mothers of young children, especially when they breastfeed, it is more difficult to fulfill that criterion than for men.[86] That is why the exclusion from the child-raising allowance and parental allowance due to not being integrated in the labor market was also found to indirectly discriminate against women, per Article 3(3) of the Basic Law. In doing that, the Court recognizes the intersectional discrimination of refugee women that take care of young children and have therefore the socio-economic status of not being integrated into the labor market.

In 2022, the Federal Constitutional Court decided on the exclusion of refugee parents from the child allowance based on an identically worded provision.[87] The child allowance is granted to parents regardless of income until the child is 25 years old. The Federal Constitutional Court followed its 2012 reasoning—except it did not address the gender dimension of the challenged

[80] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 10, 2012, 1 BvL 2/10 et al., Order of 10.7.2012, concerning *child-raising allowance and parental allowance for refugee parents*, at para 21 (Ger.).

[81] *Id.* at marginal no. 20.

[82] *Id.* at marginal no. 26.

[83] Being integrated in the labour market cannot necessarily be influenced by individual behavior, as it can also depend on the respective labor market situation and the family situation of those affected. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 28, 2022, 2 BvL 9/14 et al, Order of 28.6.2022 concerning *child allowance for refugee parents,* at marginal no. 87 (presenting a press release in English) (Ger.).

[84] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] July 10, 2012, 1 BvL 2/10 et al., Order of 10.7.2012, concerning *child-raising allowance and parental allowance for refugee parents*, at marginal no. 26. (Ger.).

[85] *Id.*

[86] *Id.* at marginal no. 53.

[87] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] June 28, 2022, 2 BvL 9/14 et al, Order of 28.6.2022 concerning *child allowance for refugee parents,* at marginal no. 87 (presenting a press release in English) (Ger.).

criteria. It again applied the proportionality test and found that the differentiation criterion of being integrated in the labor market is not suitable for determining whether a refugee will stay in Germany for a long period of time and is therefore unsuitable for determining who is entitled to child allowance.[88]

Going beyond the 2012 standard, the Court discussed a further common justification for differentiations in welfare benefits: The legislator's power to use typification in mass administration.[89] According to this doctrine, in the case of mass phenomena, the legislator is generally allowed to introduce generalizing regulations for typical life circumstances; inevitable hardships associated with this regulating technique do not necessarily violate the general principle of equality if the typification criteria are met. However, due to the group- and context-based approach, the Court also rejected that line of justification and declared the exclusion of refugee parents from the child allowance to be unconstitutional.

2. Socio-Economic Status as a Criterion of Differentiation

Although the legislator has discretion in providing welfare benefits for families, the Federal Constitutional Court uses the hightened standard of the proportionality test and a strict interpretation of the criteria for typification in mass administration when it tests the statutory exclusions of the social group of foreign parents with a humanitarian residence status. For that, the Court pursues a contextual approach and takes into account the perspective of those affected. The strict standard of review reflects the vulnerable position of the specific social group of refugees as well as the implicit discriminatory reasons statutory exclusions in social law can be based on.

In sum, the Court requires that legal criteria for different treatment in social law must have a logical connection to the legislative objectives of the provisions. Because in the decided cases the length of stay had not a connection to the differentiation criterion of being integrated in the labor market, the Court did not have to clarify whether it would accept stereotypical objectives such as the notion that persons who do not have gainful employment—that is, who are not integrated in the labor market—are less deserving of social benefits such as the child allowance.

Although the Federal Constitutional Court does not speak of discrimination on grounds of the socio-economic status, it actually problematizes the exclusion of people based on their legal residence status in connection with their socio-economic status of not being integrated in the labor market. It also explains the gendered dimension of the criterion of being gainful employed. In doing that, the Court has de facto ruled on discrimination based on the socio-economic status in its intersectional relations: It addresses the social exclusion and discrimination resulting from the intersection of residence status, socio-economic status and also gender. With these judgments the Federal Constitutional Court has therefore strengthened the notion of social equality under constitutional law. For future distributional conflicts, however, an explicit prohibition on grounds of socio-economic status could contribute to address exclusions that are based on discriminatory reasons.

D. Strengthening Practices of Social Constitutionalism

The jurisprudence of the Federal Constitutional Court on social assistance law and welfare benefits for foreign parents can be described as a practice of social constitutionalism.[90] The fundamental right to a guarantee of an existential minimum in accordance with human dignity and the general principle of equality give the Federal Constitutional Court the power to review

[88] *Id.* at marginal no. 81.

[89] *Id.* at marginal no. 105.

[90] *See also* Cara Röhner, Gleichheitsrechtliche Grenzen in der sozialstaatlichen Leistungsgesetzgebung. Aktuelle Rechtsprechung von EuGH und BVerfG, NJW 646 (2023).

potentially exclusionary social policies based on the socio-economic status of being a welfare beneficiary, of not being integrated in the labor market, and/or having a certain residence status. These judicially enforceable fundamental rights thus give the Federal Constitutional Court the power to review social policy regarding the protection of the most vulnerable social groups in society. That can strengthen constitutional review standards in social law, especially in social assistance law, and contribute to a stronger protection against social exclusion in times of distributive crises.

These outlined practices of social constitutionalism of the Federal Constitutional Court could be developed further for a stronger protection of vulnerable social groups with a relational approach that focuses even more on the social reality of socio-economic inequality and its intersections with legal residence status and gender. For this, the structural dimension of economic inequality[91] must be addressed in doctrinal terms, accounting for the distributive dimension as well as the cultural dimension of socio-economic inequality.[92]

To interpret the constitution with this is mind, it is especially necessary to pursue a contextual interpretation that considers empirical studies and social science literature on economic inequality as well as the perspective of the "others." That gives us a clearer outlook on why people are poor in capitalist society and what is necessary to lead a life in accordance with human dignity. It helps to better understand the social situation of people in need and the effects of social law provisions on them. It can also problematize justifications of legal exclusion of specific social groups that reflect a non-empirical account of social reality, such as stereotypes, discriminatory anti-poverty and anti-migration narratives.[93]

I. Distributive Dimension: From Individualizing Poverty toward a Substantive Account of Socio-economic Inequality

In the case law of the Federal Constitutional Court, the focus is primarily on the individual in need when addressing poverty and social assistance law. The social context of a modern capitalist society, systemic causes of socio-economic inequality and the associated experiences of exclusion and stigmatization are not yet addressed. Social assistance benefits and the fundamental right to the guarantee of an existential minimum in accordance with human dignity are not understood as compensations for economic inequality and privileges as an unequal power relationship that is rooted in the private property system – as one could understand them with Fraser and Mutua.[94] Thus, one can oberve an individualization of being in need for social assistance benefits.

In terms of legal doctrine, the individualization of poverty has consequences for the content of the fundamental right to the guarantee of an existential minimum in accordance with human dignity: Its content remains undefined, especially regarding the lower limit of the existential minimum. In a democracy, it is the task of the legislature to define the appropriate amount of the subsistence minimum.[95] Nevertheless, in times of neoliberal, right-wing, and populist policies that seek to lower social security standards, either generally or for specific marginalized groups, the Federal Constitutional Court has the role of ensuring that the existential minimum is high enough for everyone to lead a life in accordance with human dignity. It has to make sure that the legislature's policies to do not fall below the lower limit. One could question therefore whether the procedural approach of the Federal Constitutional Court is a strict enough standard of review for

[91]In Atrey's words: Structural harm. *See* Shreya Atrey, *Equality Law: A Structural Turn,* 26 German L.J. 153 (2025) (in this same Special Issue).

[92]Or as Ringelheim and Ganty call it: Distributive and recognition harm. *See* Ringelheim & Ganty, *supra* note 17.

[93]Sarah Ganty, *Poverty in Judgecraft: New Narratives through the Language of Discrimination Law,* 26 German L.J. (2025) (appearing in this same special issue).

[94]As I have argued in more detail: Cara Röhner, Constitutions and Inequality. A Relational Analysis of Law 21–125 (2024).

[95]*Id.*

that objective. Several empirical studies have indicated that the method used by the legislature to calculate the subsistence minimum leads to underfunding, malnutrition, and social exclusion.[96] Also, the experiences made by the benefit recipients—as expressed by self-help and social welfare organizations—raise severe doubts whether the social assistance system allows people to lead a life in dignity, especially whether it is possible to participate politically, socially and culturally in society.[97] The procedural standard of review of the Federal Constitutional Court could be strengthened if the requirement that the existential minimum must be determined realistically was checked against empirical studies and the experiences of the beneficiaries. The standard of review should include a closer look at the risk of underfunding by taking the perspective of the "others" into account using empirical data.

Beyond the existential minimum and social assistance law, the distributive dimension of socio-economic inequality could be addressed using the principle of equality and a substantive account of discrimination on grounds of socio-economic status. That sharpens the view for how the socio-economic status leads to legal inclusions and exclusions. In the case law of the Federal Constitutional Court, the prohibition of discrimination on grounds of socio-economic status has not yet been developed as such. Such discrimination does, however, materialize in provisions of social law that exclude foreign nationals from social benefits because they are not integrated in the labor market and have not a specific legal residence status in Germany.

For example, EU citizens are excluded from the child allowance and social assistance benefits if they do not work or are looking for employment and therefore have no secure legal residence status.[98] This exclusion from social assistance has gendered effects, as it usually applies to unmarried mothers who do not work because they are taking care of young children.[99] In this

[96]*See e.g.*, Wissenschaftliche Beirat für Agrarpolitik, Ernährung und gesundheitlichen Verbraucherschutz beim Bundesministerium für Ernährung und Landwirtschaft, Politik für eine nachhaltigere Ernährung: Eine integrierte Ernährungspolitik entwickeln und faire Ernährungsumgebungen gestalten, Gutachten 108 (2020); Andreas Aust, Arm, abgehängt, ausgegrenzt. Eine Untersuchung zu Mangellagen eines Lebens mit Hartz IV, Expertise für Der Paritätische Gesamtverband (2020); Deutscher Verein, Problemanzeige des Deutschen Vereins zur Bemessung des Bedarfs an Haushaltsenergie und des Mehrbedarfs bei dezentraler Warmwasserbereitung in Haushalten der Grundsicherung und Sozialhilfe – Lösungsperspektiven (2019); Bertelsmann-Stiftung, Konzept für eine Teilhabe gewährleistende Existenzsicherung für Kinder und Jugendliche. Expertenbeirat und Projekt Familie und Bildung: Politik vom Kind aus denken (2017); Irene Becker, Regelbedarfsbemessung. Methode und Ergebnisse: Eine kritische Bestandsaufnahme. Kurzexpertise für die Fraktion DIE LINKE (2016).

[97]*See e.g.*, Tacheles e.V., *Stellungnahme zum Entwurf eines Zwölften Gesetzes zur Änderung des Zweiten Buches Sozialgesetzbuch und anderer Gesetze - Einführung eines Bürgergeldes (Bürgergeld-Gesetz)* [Opinion on the draft of a twelfth law amending the Second Book of the German Social Code and other laws – Introduction of a Citizen's Income (Citizen's Income Act)] (Aug. 22, 2022), available at https://tacheles-sozialhilfe.de/files/Aktuelles/2022/Tacheles-Stellungnahme-zum-Buergergeldgesetz-Final-22-08-2022-E.pdf; Der Paritätische Gesamtverband, *Stellungnahme des Deutschen Paritätischen Wohlfahrtsverbandes - Gesamtverband e.V. zum Entwurf eines Zwölften Gesetzes zur Änderung des Zweiten Buches Sozialgesetzbuch und anderer Gesetze - Einführung eines Bürgergeldes (Bürgergeld-Gesetz)* [Statement of the German Parity Welfare Association – Gesamtverband e.V. on the draft of a twelfth law amending the Second Book of the German Social Code and other laws – Introduction of a Citizen's Income (Citizen's Income Act)] (Aug. 21, 2022), available at https://www.der-paritaetische.de/fileadmin/user_upload/Paritaet-220823-Stellungnahme_RefE_Buergergeld.pdf.

[98]Case C-333/13, Elisabeta Dano and Florin Dano v. Jobcenter Leipzig, ECLI:EU:C:2014:2358 (Nov. 11, 2014); Case C-67/14, Jobcenter Berlin Neukölln v. Nazifa Alimanovic and Others, ECLI:EU:C:2015:597 (Sept. 15, 2015); Case C-299/14, Vestische Arbeit Jobcenter Kreis Recklinghausen v. Jovanna García-Nieto and Others, ECLI:EU:C:2016:114 (Feb. 25, 2016); Case C-181/19, Jobcenter Krefeld - Widerspruchsstelle v. JD, ECLI:EU:C:2020:794 (Oct. 6, 2020); Case C-411/20, S v. Familienkasse Niedersachsen-Bremen der Bundesagentur für Arbeit, ECLI:EU:C:2022:602 (Aug. 1, 2022). *See generally*, Cara Röhner, Constitutions and Inequality. A Relational Analysis of Law 21–125 (2024). *See also* Constanze Janda, *Steuerfinanzierte Sozialleistungen für Unionsbürger: Wer prüft das Aufenthaltsrecht?*, 21 ZESAR 407 (2022); Tillmann Löhr, *Die Rechtsprechung des EuGH im deutschen Migrationssozialrecht: Existenzsichernde Leistungen und Kindergeld*, *in* Der Schutz des Individuums durch das Recht (Philipp B. Donath, Alexander Heger, Moritz Malkmus & Orhan Bayrak eds., 2023).

[99]Cara Röhner, *Begrenzte Inklusion: Das Aufenthaltsrecht als Voraussetzung existenzsichernder Leistungen für Unionsbürger,* 10 DÖV 428 (2021); Cara Röhner, *Stratifizierte Sozialbürgerschaft. Zur Beschränkung des Kindergelds für wirtschaftlich nicht aktive oder arbeitssuchende Unionsbürgerinnen und Unionsbürger gem. § 62 Abs. 1a EStG*, *in*

context, a precarious legal residence status is a code for social class because the legal regulations aim at specifically excluding poor and unemployed EU citizen from welfare benefits. Indeed, the legal provisions do not exclude all EU citizens from welfare benefits, only those with the specific socio-economic status of not being economically active. In contrast, employed and self-employed persons as well as their family members are eligible for social benefits like German nationals.[100] This differentiation is justified by the narrative that poor EU citizens come to Germany to abuse social benefits, although there is no empirical evidence for poverty migration into the German welfare state system.[101] The act that introduced the exclusion from child allowance, for example, was called "Act Against Illegal Employment and Abuse of Social Benefits."[102]

The Federal Constitutional Court has not yet ruled on the exclusion of EU citizens in social law.[103] Under European Union law, the Court of Justice of the European Union has accepted the exclusion of EU citizens from German social assistance based on their economic inactivity because the member states are allowed to discriminate on grounds of nationality in the field of social assistance, Article 24(2) of the Directive 2004/38.[104] The Court of Justice of the European Union has, however, found the exclusion from child allowance in the first three months of the stay to be unlawful under European Union law because the child benefit is a social security benefit to compensate for family burdens to which the strict equality principles of Article 4 of Regulation 883/2004 and Article 24(1) of the Directive 2004/38 apply.[105] Under German fundamental rights law, the Federal Constitutional Court could address the exclusion of EU citizens based on their economic inactivity using the the strictly needs-based standard regarding the subsistence minimum; addinitionally a discrimination approach could make the recoginition dimension in the sense of recognition harm visible. A discrimination approach could also be used for benefits beyond the minimum like family benefits.

Problematizing discrimination on the grounds of socio-economic status could strengthen practices of social constitutionalism in the future by requiring justifications for the restriction of benefits to be reasonable and non-discriminatory and to correspond to an empirical account of social reality. By using such a standard, legal objectives that are based on narratives of migrants abusing German social benefits and unreasonably burden the social welfare system could be rejected constitutionally as unreasonable, discriminatory and without empirical basis.

Weiterdenken: Recht auf der Schnittstelle zur Medizin. Sozialrecht – Medizin – Medizinrecht. Festschrift für Hermann Plagemann 217 (Matthias Jacobs, Florian Plagemann, Martin Schafhausen & Ole Ziegler eds., 2020).

[100]Cara Röhner, *§ 11 Sozioökonomische Diskriminierung, in* Handbuch Antidiskriminierungsrecht – Strukturen, Rechtsfiguren und Konzepte 475 (Anna Katharina Mangold & Mehrdad Payandeh eds., 2022).

[101]Regarding the exclusion from social assistance for job-seekers, see, for example, BT-Plenarprotokoll 18/200, p. 20034A-20041C, p. 20037 (2018). For information concerning the exclusion from the child benefit, see Entwurf eines Gesetzes Gegen illegal Beschäftigung und Sozialleistungsmissbrauch [Draft Law Against Illegal Employment and Social Benefits Abuse] BT-Drucks. 19/8691, at 2 (Ger.).

[102]Gesetzes gegen illegale Beschäftigung und Sozialleistungsmissbrauch [Law against Illegal Employment and Abuse of Social Benefits], July 11, 2019, Bundesgesetzblatt, Teil I [BGBl I] at 1066 (Ger.). The draft bill stated, "[a]s it cannot be ruled out that child benefit may have an unintended incentivising effect on immigration from other member states, the entitlement to child benefit is restricted, particularly for EU citizens who are not gainfully employed." *See* Entwurf eines Gesetzes Gegen illegal Beschäftigung und Sozialleistungsmissbrauch [Draft Law Against Illegal Employment and Social Benefits Abuse] BT-Drucks. 97/19, at 25 (Ger.).

[103]The Federal Constitutional Court ruled on the granting on legal aid and the fundamental right to effective legal protection in such a case but has not yet ruled on the violation of the fundamental right to the guarantee of an existential minimum in accordance with human dignity. *See* Bundesverfassungsgericht [BVerfG], July 8, 2020, Order of 8.7.2020, 1 BvR 1094/20 (Ger.); Bundesverfassungsgericht [BVerfG], Sept. 4, 2019, Order of 4.10.2019, 1 BvR 1710/18 (Ger.).

[104]*See* references, *supra* note 88.

[105]Judgement of the Court (Grand Chamber), Case C-411/20, ECLI:EU:C:2022:602 (Aug. 1, 2022).

II. Cultural Dimension: Addressing Hierarchizing Stereotypes and Stigmatizing Effects

The established constitutional standards of review in social and social assistance law could be developed further by addressing the cultural dimension of socio-economic inequality with an anti-discrimination approach.[106] Stigmatizing and devaluing the poor as the "others" has served to justify persisting inequalities since the beginning of capitalism. Negative stereotypes imply that people are responsible for their economic situation and that poverty and unemployment are not rooted in the capitalist system but in the moral depravity of the individuals.[107] As Mutua has argued, deviations from the norm of middle-classness are marked negatively in the general perception. Focusing on the devaluing, racialized, stereotype-based, and stigmatizing effects of social law provisions can make visible how the cultural hierarchization of people based on their socio-economic status legitimizes exclusionary social policies.

In such a relational, anti-discrimination perspective, the fundamental right to the guarantee of an existential minimum in line with human dignity is not only a matter of securing people's livelihoods, but also raises the question of *how* benefits are granted—as Fraser has put it and what Ganty and Ringelheim call recognition harm. Despite the strong reference to human dignity in the judgments of the Federal Constitutional Court but due to its individualizing approach to poverty, the social law principle that welfare benefits are granted in cash—and not as benefits in kind—is not constitutionally guaranteed. Benefits in cash secure that benefit recipients can lead a self-determined life. In a money-based society, vouchers and benefits in kind are potentially stigmatizing and punitive substitutes for money. They are based on the hierarchizing stereotype that people in need are not able to lead a responsible life because in the liberal, individualizing view not having enough ressources to take care of oneself is a sign of the individual's failure in the market and not a structural problem of capitalist society.[108] In the current German debate on basic social security for children (*Kindergrundsicherung*) the narrative is strong that parents who are beneficiaries of social assistance would use higher, poverty-proof social assistance benefits for alcohol and cigarettes and not for their children.[109] Empirical studies do not substantiate that narrative.[110] However, these stigmatizing images of families in need legitimize insufficient standard rates of social assistance for children and child poverty in Germany.

The problem of stigmatization also arises regarding the legal possibility of imposing welfare sanctions on benefit recipients in case of noncompliance. Sanctions in social assistance law are, like benefits in kind, based on derogatory stereotypes according to which job-seekers and the working poor require negative incentives to overcome their reliance on welfare benefits. In the decision of 2019, the Federal Constitutional Court found sanctions that amount to more than 30 percent of the standard benefit unconstitutional, especially because there is no empirical evidence that sanctions are a reasonable and proportional means to integrate people into the labor market. However, the Court did not pursue a standard of review that focuses on stigmatizing effects and stereotypes and thus takes the perspective of the 'others' into account.[111] With such a

[106]For such an approach under the ECHR, see Sarah Ganty, *The Double-Edged ECtHR Lăcătuș Judgment on Criminalisation of Begging: Da Mihi Elimo Sinam Propter Amorem Dei,* 3 Eur. Convention on Hum. Rts. L. Rev. 393 (2021); Sarah Ganty, *Socioeconomic Precariousness in times of COVID-19: A Human Rights Quandary under the ECHR,* XL Polish Yearbook of Int'l L. 165 (2020); Sarah Ganty, *Poverty in Judgecraft: New Narratives through the Language of Discrimination Law,* 26 German L.J. 170 (2025) (in this same Special Issue). For German constitutional law, see Cara Röhner, Constitutions and Inequality. A Relational Analysis of Law 21–204 (2024).

[107]*See e.g.,* C. B. Macpherson, *The Political Theory of Possessive Individualism: Hobbes to Locke*, *in* The Oxford Handbook of Classics in Contemporary Political Theory (Jacob T. Levy ed., 1962).

[108]Cara Röhner, Constitutions and Inequality. A Relational Analysis of Law 21–125 (2024).

[109]*See* ZEW, Kommt das Geld bei den Kindern an?, Bertelsmann Stiftung 6 (2018) (presenting the forward to the book).

[110]*See e.g., id.;* Irene Becker, Berechnung von angemessenen Beträgen einer Kindergrundsicherung, WSI Study (2024); Irene Becker, *Kindergrundsicherung*, 48 Sozial Extra 105 (2024).

[111]Bundesverfassungsgericht [BVerfG], 1 BvL 7/16, Nov. 5, 2019, Judgment of 5.11.2019, on *welfare sanctions* (Ger.).

line of reasoning, also sanctions up to 30 per cent would be subject to a stricter standard of scrutiny by posing a different question: from an antidiscrimination perspective and from the point of view of those affected, one could ask whether such sanctions are based on discriminatory stereotypes about persons in need and what a 30 percent cut in benefits actually means for the affected beneficiaries. A stricter standard could lead to the unconstitutionality of sanctions in general, thus also to the unconstitutionality of sanctions up to 30 per cent of the benefits.

Exclusive stereotypes are racialized when it comes to benefits for asylum-seekers. In Germany, since the beginning of 2024, special stored-value cards have been introduced as a new tool to provide benefits for refugees, instead of cash payouts or bank transfers. These special "social cards" mark the cardholder as a beneficiary of the Asylum Seekers Benefits Act and comprise certain restrictions for a self-determined way of life, especially by limiting the withdrawal of cash and by limiting the ways in which the cash value on the card can be used.[112] The card is introduced as an instrument to restrict the freedoms of asylum-seekers and are justified with the non-empirical and exclusionary narratives about that group. According to these narratives, refugees use social assistance to pay off smugglers and to send remittances to their country of origin; however, there is no empirical evidence to substantiate them.[113]

A stereotype- and stigmatization-sensitive interpretation of the fundamental right to the guarantee of an existential minimum in accordance with human dignity or of the general principle of equality as a protection against discrimination on grounds of socio-economic status can strengthen the perspective of the "others" and lead to stricter standards of review by requiring non-discriminatory social law provisions.

III. In Conclusion: Social Constitutionalism in Times of Multiple Crises

In its jurisprudence of the Federal Constitutional Court has set constitutional limits to the broad margin of appreciation of the legislature in the field of social welfare law. It has defined limits regarding the legal treatment of people in need, asylum-seekers and refugee parents. In these cases, the Federal Constitutional Court has used human dignity and social equality doctrines to address poverty and social exclusion based on socio-economic status—that is, the statuses of being a benefit recipient, of not being gainful employed, of being a mother of a young child and of having a certain residence title—as constitutional issues.

This case law on the social protection of people in need and unequal treatment of refugee parents must be understood as a direct reaction to exclusionary neoliberal and anti-migration social policy reforms as pressing issues of distributive justice. For example, it is no coincidence that although the subjective right to social assistance under statutory law has been acknowledged since the 1950s,[114] it was only in 2010 that the Federal Constitutional Court confirmed its existence under constitutional law. In times of austerity and right-wing exclusionary politics, it is the new role of the Federal Constitutional Court to set boundaries in the way the legislature shapes social and social assistance law and treats people in need whether they be Germans or foreign nationals.

[112]Gesetz zur Anpassung von Datenübermittlungsvorschriften im Ausländer- und Sozialrecht (DÜV-AnpassG) [Law on the Adaption of Data Transmission Regulations in Foreigners and Social Law (DÜV-AnpassG)], May 8, 2024, Bundesgesetzblatt, Teil I [BGBl I] Nr. 152, at 29 (Ger.). For a fundamental rights perspective on the social card, see Gesellschaft für Freiheitsrechte, Schriftliche Stellungnahme, Ausschussdrucksache 20(11)465 (2024). In a summary proceedings, the first Social Court found the social card's restriction of cash to be unlawful because it might lead to the situation in which the person could not cover their existential needs. *See* Social Court of Hamburg, Order of July 18, 2024, S 7 AY 410/24 ER (Ger.).

[113]*See* Herbert Brücker, Wissenschaftliche Einschätzung der Bezahlkarte für Geflüchtete [Staement: Scientific assessment of the payment card for refugees], Deutsches Zentrum für Integrations- und Migrationsforschung (Apr. 8, 2024), https://www.dezim-institut.de/publikationen/publikation-detail/stellungnahme-wissenschaftliche-einschaetzung-der-bezahlkarte-fuer-gefluechtete/.

[114]*See* Bundesverwaltungsgericht [BVerwG] [Federal Administrative Court], June 24, 1954, V C 78.54 (Ger.).

As we face multiple crises, such as climate change, threats to democracies, right-wing populism and rising fascism, distributive conflicts will become more pressing in the future and pose a challenge to the established standards of review under constitutional law. The democratic political processes in Germany do not secure a sufficient standard of social protection for people in need anymore. It is necessary for apex courts to intervene to protect and defend even the minimum social protection and social inclusion. Social rights are essential for the future of democracy. That is why apex courts should strengthen their standards of review regarding exclusionary social policies as practices of social constitutionalism in times of multiple distributive crises.

For that, I argued that a relational methodology is necessary that focuses on social context, the perspective of perspective of welfare beneficiaries, hegemonic norms and stereotypes. It introduces an empirical account of poverty and a low socio-economic status and rejects exclusionary social policies that are based on discriminatory anti-poverty and anti-migrations narratives. Such an approach to human dignity and the principle of equality could foster social inclusion, social security and social equality and has the potential to contribute to transform persisting inequalities as relations of exclusion into relations of inclusion.[115] In doing that, practices of social constitutionalism that give apex courts the powert to review and strengthen social rights and social equality under constitutional law, cann foster social justice as a future foundation of democracy.

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[115]Catherine O'Regan, *The Long Legacy of Aparthheid Geography and the Limited Reach of the South African Constitution's Equality Clause,* 26 GERMAN L.J. 198 (2025) (in this same Special Issue). (presenting skepticism for the South African context because of deeply entrenched spatial inequalities)

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