HUMAN DIGNITY, SOCIAL SECURITY AND MINIMUM LIVING WAGE: THE DECISION OF THE BUNDESVERFASSUNGSGERICHT THAT DECLARED THE UNCONSTITUTIONALITY OF THE BENEFIT AMOUNT PAID TO ASYLUM SEEKERS

// DIGNIDADE HUMANA, ASSISTÊNCIA SOCIAL E MÍNIMO EXISTENCIAL: A DECISÃO DO BUNDESVERFASSUNGSGERICHT QUE DECLAROU A INCONSTITUCIONALIDADE DO VALOR DO BENEFÍCIO PAGO AOS ESTRANGEIROS ASPIRANTES A ASILO

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>> ABSTRACT // RESUMO

This text analyses the recent decision of the Federal Constitutional Court of Germany that declared the unconstitutionality of the amount paid to asylum seekers (*Asylbewerber*). The decision reaffirmed and consolidated some views of the Court on the living wage (*Existenzminimum*). Furthermore, instead of simply declaring the unconstitutional act void, the Court established a transition rule (*Übergangsregelung*), which involved assigning prospective and retroactive effects to the ruling. // O presente texto analisa a recente decisão do Tribunal Constitucional Federal alemão que declarou a inconstitucionalidade do valor do benefício pago aos aspirantes a asilo (*Asylbewerber*). A decisão reafirmou e consolidou algumas das posições da Corte sobre o mínimo existencial ou mínimo de existência (*Existenzminimum*). Ademais, em vez de simplesmente declarar a nulidade da lei inconstitucional, a Corte estabeleceu um regramento de transição (*Übergangsregelung*), que envolveu conceder, simultaneamente, efeitos prospectivos e retroativos ao julgado.

>> KEYWORDS // PALAVRAS-CHAVE

human dignity (*menschenwürde*); social security; living wage (*existenzminimum*); federal constitutional court of germany (*bundesverfassungsgericht*) // **dignidade humana (*menschenwürde*); seguridade social; mínimo existencial ou mínimo de existência (*existenzminimum*); tribunal constitucional federal alemão (*bundesverfassungsgericht*)**

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1. INTRODUCTION

On July 18th 2012, the First Chamber (*erster Senat*) of the Federal Constitutional Court of Germany (*Bundesverfassungsgericht*) went public with one of the most important decisions of 2012. The controversy was submitted to the Higher Social Court of North Rhine-Westphalia, Germany (*Landessozialgericht Nordrhein-Westfalen*)[1], in a concrete review of statutes (*konkretes Normenkontrollverfahren*).[2]

The issue arose from two lawsuits which were ruled together: the first was taken to Court by an Iraqi citizen of Kurdish descent, born in 1977, who travelled to Germany in 2003 and applied for political asylum, which was denied. On humanitarian grounds, his residence in that country has been tolerated (*geduldet*) since then[3]; the second was made by a child, represented by his mother, who fled Liberia for Germany. Since 2010, the child, born in 2002, has been granted German citizenship. Before that, the mother filed a suit, in order to question the value of the benefit paid to them during a few months of 2007.[4]

In both cases, the Courts that first examined the controversies understood that the claims should be rejected in light of the sub-constitutional or ordinary law. From the constitutional point of view, it was for the *Bundesverfassungsgericht* to determine the final solution.

The decision proves to be relevant in at least two perspectives. On one side, it consolidates and confirms some of the *Bundesverfassungsgericht*'s decisions in regard to human dignity and minimum living wage (*Existenzminimum*). On the other side, the Court used a type of prospective overruling to postpone the consequences of the declaration of unconstitutionality, in order to give the legislator time to adjust the sub-constitutional or ordinary legislation to the Basic Law. This also meant assigning both prospective and retrospective effects to the decision, through the creation of a transition rule (*Übergangsregelung*) that enforces another legal Act by analogy. We sought to elucidate this point in part six (6) of this text.

The trial was the subject of extensive publicity in the press; articles have been published regarding this matter across several media vehicles in Germany, including websites of *Stern* magazine, *Süddeutsche Zeitung* and *Frankfurter Allgemeine Zeitung* newspaper.

The purpose of this article is to explain the relevant points of the decision and clarify some of the legal theories which underlie it. The text was written to be read in its entirety. However, if the reader wants to take cognizance only of the main aspects of the recent decision, without distressing about other issues, though relevant for a more insightful understanding of the topic, it is suggested reading only the parts 3 and 6 of this article.

2. BRIEF OVERVIEW

Before we analyze the decision itself, it is important to make a slight digression in order to understand the *Bundesverfassungsgericht*'s position regarding the minimum living wage.

The State respects human dignity through abstention. In this dimension, dignity imposes defense rights against the Government (*Abwehrrechte*), which means that the citizen has the right not to be pestered by State interventions (*Eingriffe*).

The rule when the constitution guarantees human dignity, although there are exceptions, is that any individual has the right to self-determination and self-development without the State's interference.

From another point of view, human dignity, if concretely protected, entails rights to demand provisions from the State (*Leistungsrechte*), as occurs, for example, with the insurance of a minimum living wage (*Existenzminimum*), which serves to safeguard the minimum material preconditions of individual autonomy. [5] [6] The capitalist paradigm that all are free, *de plano*, i.e., despite empirical circumstances – because such freedom would arise from the rationality and the faculty to chose –, does not ponder adequately factual situations that hamper and tarnish consent.

An individual who is devoid from all material means, namely, someone affected by a serious state of economic and material negligence, has her autonomy truly violated, since her scope of action (*Spielraum*) tends to zero. The State should, through actions, protect the factual prerequisites of autonomy, at risk of threatening human dignity. In this scenario, social security is a powerful tool for effecting the factual dimension of human dignity.

For the *Bundesverfassungsgericht*, human dignity (*Menschenwürde*) implies the right of the individual, '(...) in freedom, to determine and develop him/herself' (*in Freiheit, sich selbst zu bestimmen und sich zu entfalten*).[7] The individual should be understood as someone who lives in society and thus is subject to some limits, although maintaining the guarantee of independence (*doch muss die Eigenständigkeit der Person gewahrt bleiben*). One should be recognized as a member of society endowed with intrinsic value, on equal terms and with equal rights (*als gleichberechtigtes Glied mit Eigenwert anerkannt werden muss*). Making human beings mere object of the State is contrary to human dignity (*Es widerspricht daher der menschlichen Würde, den Menschen zum bloßen Objekt im Staate zu machen*). [8]

It is important to notice that the individual who does not possess the minimum material conditions necessary for a dignified life holds no factual or effective autonomy. He lacks autonomy because the sword of Damocles[9] hangs over him everyday, as he struggles to maintain his survival. And from that perspective, the scope of his choice is reduced in such a way that the exercise of autonomy is severely restricted or prevented by circumstances. Indeed, one may affirm that the excessive restriction of autonomy or the inability to exercise it violates the dignity of the individual. The

illegitimate suppression of freedom and the disrespect of physical and moral well-being make citizens unfit for self-determination.[10]

Not only in Germany but also in other countries, human dignity is a constitutional concept associated with the idea of autonomy. It is, in our times, one of the most pervasive concepts in constitutional law in the world.

In addition to being inscribed under the term 'dignity' in the preamble of the United Nations Charter and the Universal Declaration of Human Rights, human dignity is expressly enshrined in many constitutions, such as: Brazilian (art. 1, III), German (art. 1), Portuguese (art. 1), Irish (preamble), Greek (art. 2), Spanish (art. 10), Italian (art. 41), Turkish (art. 17), Swedish (art. 2), Finnish (art. 1), Swiss (art. 7), Montenegrin (art. 20), Polish (art. 30), Romanian (art. 1), Russian (art. 7), Serbian (art. 18th) and others. It should also be noted that human dignity has a prominent place in the Charter of Fundamental Rights of the European Union, proclaimed by the European Parliament in 2000 and made legally binding in most of the European Union in 2009, by the Treaty of Lisbon.[11]

It is worth mentioning that in France, for instance, the dignity of the human person (*dignité de la personne humaine*) is closely linked to the idea of non-degradation of the human being and to the eradication of practices that, although consensual, are the result of a tainted or limited consent. The dignity of the human being is not explicitly prescribed in the 1958 Constitution of the Fifth Republic (*Cinquième Republique*). As it is known, in France, civil liberties and fundamental rights (*Droits de l'homme et libertés fondamentales*) are not in the Constitution itself, but in other parts of the French block of constitutionality (*bloc de constitutionnalité*).[12]

A decision delivered by the *Conseil constitutionnel* in 1971 (*Décision n° 71-44 DC du 16 juillet 1971*) recognizes the constitutional nature of the articles of the 1789 Declaration of the Rights of Man and of the Citizen (*Déclaration des droits de l'homme et du citoyen*) and of the preamble to the 1946 Constitution – the latter is very important when it comes to social rights –, because they have been mentioned in the preamble of the current Constitution, enacted in 1958. One should also mention that the recent introduction, with the force of a constitutional amendment by the *pouvoir constitué*, of the Environment Charter of 2004 (*Charte de l'environnement*) also represents an expansion of the French Constitution.[13]

Human dignity was recognized in France as an implicit corollary of the Declaration of the Rights of Man and of the Citizen and of the preamble text of the 1946 Constitution[14], which, as aforementioned, have constitutional status.

> *2. Considérant que le Préambule de la Constitution de 1946 a réaffirmé et proclamé des droits, libertés et principes constitutionnels en soulignant d'emblée que: "Au lendemain de la victoire remportée par les peuples libres sur les régimes qui ont tenté d'asservir et de dégrader la personne humaine, le peuple français proclame à nouveau que tout être humain, sans distinction de race, de religion ni de croyance, possède des droits inaliénables et sacrés"; qu'il en ressort que la sauvegarde de*

> *la dignité de la personne humaine contre toute forme d'asservissement et de dégradation est un principe à valeur constitutionnelle;*
> *3. Considérant que la liberté individuelle est proclamée par les articles 1, 2 et 4 de la Déclaration des droits de l'homme et du citoyen; qu'elle doit toutefois être conciliée avec les autres principes de valeur constitutionnelle;*
> *4. Considérant qu'aux termes du dixième alinéa du Préambule de la Constitution de 1946 : "La nation assure à l'individu et à la famille les conditions nécessaires à leur développement" et qu'aux termes de son onzième alinéa : "Elle garantit à tous, notamment à l'enfant, à la mère..., la protection de la santé"; (my emphasis)*

Having outlined a brief initial overview, the study itself will be presented next. Among the various decisions worldwide, which interpret and apply the concept of human dignity, the recent decision of the *Bundesverfassungsgericht* is undoubtedly paradigmatic.

3. THE DECISION

According to the decision in question, the benefit paid to asylum seekers (*Asylbewerber*) is incompatible with the *Grundgesetz*, the German Basic Law. The term *Asylbewerber* literally means 'asylum applicant' or 'asylum seeker'. In our language, one can use the term 'supplicant'. This word, though seldom used in contemporary language, represents exactly the idea of the German term. It is no coincidence that the famous play by Greek tragedian Aeschylus was named 'The Suppliants', a title that translates the expression *Hiketides* in ancient Greek.[16] Supplicant, in this sense, is one who pursuits, who requires, who asks.

The legal concept of 'applicant or asylum seeker' is referred to in §1 (1), 1-7, of the 'Act of the Asylum Seekers' Benefits' (*Asylbewerberleistungsgesetz*). All the seven (7) cases stipulated by this Act, which conceptualize what is legally an *Asylbewerber*, refer to non-German nationals. The legal provisions cover numerous types of foreigners, including refugees (*Flüchtlinge*) who managed to travel to Germany and, for various reasons, could not return to their country of origin, although they did not have authorization to permanently stay in German territory.

As the *Bundesverfassungsgericht* stated in its decision, in 1993, when the Act was enacted, the benefit paid to asylum seekers was very limited. According to the original provisions of the Act, the benefit should be paid only to the foreigners who remained more than six (6) months in Germany. On May 26th 1997 and on August 5th 1997, the Act was substantially amended, having its scope considerably extended, which led to the payment of benefits to more individuals.[17] The Court states that, since then, the enforcement of the Act was fundamentally expanded to all foreign nationals who stayed temporarily, without a determined residence status (*grundsätzlich alle Ausländerinnen und Ausländer erfassen, die sich typischerweise vorübergehend, also ohne verfestigten ausländerrechtlichen Status,*

in Deutschland aufhalten).[18] During this second stage, the required time period of stay in Germany was lower than before. The Act was amended again in at least three other occasions – 2004, 2007 and 2011 – in order to adapt to the European Union standards, further increasing the number of foreigners which benefited from it.

Indeed, by current rule, the foreigners who are essentially contemplated in the Act are those who do not have the right of residence or the permanent residence permit (*Aufenthaltsrecht*), albeit they also cannot be deported from Germany. The main reason why this situation occurs is compliance with international law regarding the principle of *non-refoulement*.

This principle prevents countries to return, by deportation, expulsion or extradition, a person who can be subjected to torture, risk of death or other violations and threats of this sort.[19] It is noteworthy that the *non-refoulement* principle is understood as *ius cogens*. In other words, it is a peremptory norm of public international law, which, besides being expressly stated in art. 6 of the United Nations Convention relating to the Status of Refugees, was, before that, a binding and immemorial practice of civilized countries. As a result, this principle is a primary source of public international law.

The foreign literature on the issue indicates that, in many cases, the principle of *non-refoulement* creates a delicate issue, namely, foreigners cannot be sent back to their country of origin, but neither can stay permanently in the country where they reside now.[20] The decision of the *Bundesverfassungsgericht* reaches mainly foreigners in this situation. According to the German Court, Government data illustrates that more than 50,000 *Asylbewerber* fled to Germany because of wars or conflicts in their countries of origin.[21]

An example of this is the case of Asghar Bazarganipour, an Iranian citizen who fled political persecution in his home country and lives in Germany since 1998. Nonetheless, he was denied the right to stay in Germany and since he could not be sent back, because he was subject to persecution and could not be sent to any other country, he remained in Germany. He, like many others, resides in a cubicle of twelve square meters, located in a shelter for foreigners and refugees. Mr. Bazarganipour is forbidden to work or leave the vicinity of the shelter. The lack of permission to stay in Germany on a permanent or quasi-permanent basis implies that he is forbidden to work or to come and go within the German territory.[22]

There are many cases of foreigners in these conditions, and the benefit in question, object of the decision by the *Bundesverfassungsgericht*, is paid to these people. More recently, it is also destined to foreigners in precarious situations, who hope to live and work in Germany. An estimated 130,000 individuals who live in Germany are affected by the decision of the *Bundesverfassungsgericht*,[23] although Government data indicates that this number may be greater than 150,000.[24]

Ghassan Kanoun, a Syrian national, is also in the same described condition. He fled his country to Germany six years ago, and continues in the same situation: refugee without permission to stay.[25]

The benefit usually perceived by the *Asylbewerber* is of only 224.97 Euros.[26] In fact, payments are made depending on the situation of the foreign national. The values provided by the Act, after converted into Euros, are in fact €184.07, €112.48, € 158.50, €20.45 and €40.90, which can (and usually are) summed in order to reach a final value.[27] Overall, the most common value is € 224.97. Even the greatest possible benefit, according to the parameters outlined by the law, appears to be completely insufficient.

Since 1993, the benefit in question was never adjusted. Some foreigners even have to use their benefit (224.97 Euros) to pay fines charged by the German Government as penalty for administrative violations (*Ordnungswidrigkeiten*). This is what happened with the Afghan national, Abdullah Obaid. He was charged 10 Euros a month during several months because he travelled to Germany without any visa or permit. Although he was already offered two job vacancies, he is not allowed to work, because he remains in German territory with a precarious residence permit, which prevents him from leaving the shelter where he lives.[28]

This case is not very different from others. Special reports issued by the German newspaper *Süddeutsche Zeitung* described, in an individualized way and based on interviews and photos, the situation of ten (10) different *Asylbewerber* who presently live in different parts of Germany.

Acknowledging this reality, the *Bundesverfassungsgericht*[29] decided that the value of the benefit paid to this group of people is unconstitutional. For the Court, this amount is evidently insufficient (*evident unzureichend*) and inadequate in light of reality, since it has not been changed since 1993 (*seit 1993 nicht verändert worden ist*)[30] and the cost of living in Germany grew over 30% during this period.[31] It was said that human dignity – in accordance with art. 1, paragraph 1 of the *Grundgesetz* (GG) – combined with the principle of social welfare state (*Sozialstaatsprinzip*) – referred to in art. 20, paragraph 1 GG – safeguards a fundamental right which guarantees a humanly dignified minimum living wage (*Grundrecht auf Gewährleistung eines menschenwürdigen Existenzminimums*).[32] For the Court, it was very clear that the benefit, object of this decision, has the goal of regulating and disciplining, by means of the scope of its application, the security of one's existence (*Das Asylbewerberleistungsgesetz regelt in seinem Anwendungsbereich Leistungen zur Sicherung der Existenz*)[33]. The legislators, however, when establishing the amount of the benefit, did not avail themselves of appropriate, consistent and transparent means.[34]

The idea that such fundamental right covers not only the essential values to a physical and physiological existence, but also the protection and provision of a minimum measure of participation in a political, social and cultural life was thus reinforced. One must ensure the individual's possibility to maintain social and inter-human relationships (*zwischenmenschliche Beziehungen*).

Furthermore, the *BVerfG* reached the conclusion that the fundamental right was to be extended to Germans and foreigners who reside in Germany, on equal value. It was observed that the legislator must consider, when establishing the amount of the benefit, that the minimum living wage configures a human right (*Menschenrecht*). Therefore,

when determining its value, it is not plausible to distinguish foreigners from Germans, based on their residence status in German territory. In other words: the mere fact that the *Asylbewerber* are in precarious conditions in Germany and do not have permission to stay in the country does not mean they have a lower right to human dignity, which is indistinct for everyone.[35]

The Court determined that the only permissible instance of distinction of the value of the benefit lies in the possibility of adapting the amount to the specific needs of a person or family (the number of family members or children of a given family group, e.g.).

In analyzing more thoroughly the benefit paid to the *Asylbewerber*, it was noted that the criteria used were much less detailed than those relating to healthcare law (*Fürsorgerecht*) as a whole. A comparison between the Act whose provisions were declared unconstitutional and the SGB XII[36], the main legal source of German social assistance, demonstrated that the criteria were very different.[37]

The SGB XII takes into account various circumstances of the beneficiaries; children in different age groups, for example, cause changes in the amounts paid. Health conditions of the beneficiaries can also influence the values of the benefit, assuming that the patient needs to acquire drugs and thus requires more money. As a result, a sick person will be supplied with a greater amount than someone who is not in such a situation.

The Federal Government of Germany (*Bundesregierung*) argued, in defense of the contested Act, that the differences were within the scope of the legislator's social-political discretion (*im sozialpolitischen Ermessen des Gesetzgebers*). Under this perspective, it would be allowed to differentiate foreigners with an uncertain residence status (*Ausländer mit ungesichertem Aufenthaltsstatuts*).[38] In a diametrically opposite direction was the opinion of the United Nations High Commissioner for Refugees (UNHCR) about the case, which argued that the German legislature had violated several commandments of international conventions and that the benefit paid was lower than the minimum living wage to be guaranteed based on international law (*eine Unterschreitung des völkerrechtlich zu gewährenden Minimums an Sozialhilfe*).[39] Many entities of all kinds, some German and other international, expressed their thoughts on the case. The contributions of these *amici curiae* are reported in the final decision of the Court.[40]

For the *BVerfG*, everyone is entitled to the minimum living wage, which should be assessed according to the necessity of each individual. It can be concluded that the benefit should have variations, since each individual has specific needs. In Germany, as in Brazil, the benefit that safeguards the minimum living wage is part of social assistance (*Sozialhilfe*) and therefore does not serve, as social insurance, to retribute individuals for previous contributions.[41] In Germany, the benefit is called 'aid to subsistence' (*Hilfe zum Lebensunterhalt*), precisely because any person who fulfills the conditions as described by law is entitled to the benefit.

There are no preconditions (*Vorbedingungen*), in the insurance meaning of that word, to grant the benefit. Therefore, no prior contribution is required. It should also be stressed that the act of concession is legally bound and thus is not subject to the margin of appreciation or convenience of the public administration.

In analyzing the constitutionality of the benefit amount, the *BVerfG* noticed that there were attempts to make the amount paid to *Asylbewerber* more consistent with reality. Therefore, the legislator allowed an adjustment of the figures to be made by regulation or decree (*Verordnung*), so that the benefit could follow the development of living costs. However, in addition to the fact that this project was nothing but an unfulfilled desire,[42] the large increase of prices (*erhebliche Preissteigerungen*) was never used as a parameter to put into effect an increase in the value of the benefit (*Der Gesetzgeber hat bereits in das Asylbewerberleistungsgesetz 1993 eine bis heute geltende Verordnungsermächtigung zur Anpassung der Leistungen an die Entwicklung der tatsächlichen Lebenshaltungskosten aufgenommen, von der jedoch trotz der seither erheblichen Preissteigerungen nie Gebrauch gemacht wurde*).

The *BVerfG* decided that the sub-constitutional or ordinary legislator is obliged to undertake a constant update (*stetige Aktualisierung*), so that the amount of the benefit paid as minimum living wage does not become insufficient to ensure both the physical survival of the individual and a minimum measure of participation in social, political and cultural life (*Mindestmaß an Teilhabe am gesellschaftlichen, kulturellen und politischen Leben*), to which he is entitled, under penalty of violating the fundamental right, which guarantees a humanly dignified minimum living wage (*Grundrecht auf Gewährleistung eines menschenwürdigen Existenzminimums*).[43]

The difference between the benefit paid and the actual cost of living in Germany made the *BVerfG* declare that the situation was clearly beyond the scope of the discretion of the legislator. It was not denied that the discretion of the arrangements (*Gestaltungsspielraum*) regarding the benefit's payments (*Leistungen*) should be mostly left to the legislator.[44] However, the situation examined was beyond the borders of the legislator's legitimate discretion, making it inevitable to declare unconstitutional the provisions of the contested Act, which included, most notably, the amount of the benefit.

Each individual is obligated to provide for himself. However, when he cannot do it, nor has anyone to do it for him, that duty is passed on to the State. The legislator has the responsibility to implement a rule which explains how the State will fulfill this function. And, in this regard, the State has a wide margin of appreciation. Many different possibilities fall within the legislator's zone of proportionality. However, by acting in a deficient and inconsistent manner, the legislator does not act satisfactorily from the constitutional point of view. Thus, he violates the constitutional obligation to determine sufficient parameters to protect the minimum living wage, in which case the sub-constitutional or ordinary law that fails to fulfill his constitutional duty must

be considered unconstitutional (*Wenn der Gesetzgeber seiner verfassungsmäßigen Pflicht zur Bestimmung des Existenzminimums nicht hinreichend nachkommt, ist das einfache Recht im Umfang seiner defizitären Gestaltung verfassungswidrig.*). [45]

One may observe that the benefits paid to *Asylbewerber* are, as a rule, clearly lower than those paid according to Books II and XII of the German Social Security Code (*Die Leistungen nach dem Asylbewerberleistungsgesetz sind – hinsichtlich des dem Regelbedarf vergleichbaren Bedarfs – in der Regel deutlich niedriger als diejenigen nach dem sonstigen Fürsorgerecht des Zweiten und des Zwölften Buches Sozialgesetzbuch*).

A beneficiary of the regular social security system receives, since January 2012, at least € 346.59 for his/hers most basic maintenance.[46] It is noteworthy that this value is intended for a single person, with no children and family, and with no exceptional expenditure under SGB XII. In contrast, one *Asylbewerber*, in the same situation, earns € 224.97. The discrepancy of approximately 35% (thirty five percent) was widely criticized by the *BVerfG*.[47] With regard to the additional amount paid for each child per family, a chart inserted in the decision proves that the discrepancy, depending on the age group, varies between 27% and 54%. Under any circumstances, the additional amount of the *Asylbewerber* Act is always lower than those of the regular social security system.

This implies not only that all German nationals are privileged by the regular social security system and are entitled to better benefits, but also that foreigners with permanent right of residence receive a far better treatment than the *Asylbewerber*. Thus, one may easily perceive the clear discrimination between Germans and foreigners with permanent residence permit, on one side, and those who are in Germany through a precarious and partial authorization, as seen above, particularly the *Asylbewerber*, on the other side. With the advent of the decision, the situation should change.

Facing this question, the Court understood that the German Government cannot lower the benefits' amount for foreigners with a diverse residence status, not even to inhibit or discourage immigration. According to the decision, human dignity, guaranteed in the *Grundgesetz*, should not be relativized because of migration policies (*Die in Art. 1 Abs. 1 GG garantierte Menschenwürde ist migrationspolitisch nicht zu relativieren.*). [48]

Because it is a fundamental human right, which aims at safeguarding the minimum living wage inherent to every person, the Court had to declare that the parameters used by the legislator were incompatible and inconsistent with the Basic Law.

The *BVerfG* declared the respective provisions of the aforesaid benefit unconstitutional. However, noting the impossibility of using the so-called interpretation in conformity with the Constitution (*verfassungskonforme Auslegung*)[49] or a similar method, the Court created a transition rule (*Übergangsregelung*), which is the subject of explanation in the sixth (6th) part of this text.[50]

4. THE RELEVANCE OF THE GERMAN DECISION TO SOME RECENT DECISIONS MADE BY THE BRAZILIAN SUPREME FEDERAL COURT (STF)

Not only the legal arguments invoked by the German Court are important, but also the possibility of, once accepting the plausibility of such arguments, using them in Brazil. In this perspective, the German decision is even more important when one recalls that the Brazilian Supreme Federal Court (STF), in a decision issued on June 4th 2009, recognized the general repercussion[51] of the extraordinary appeal number 587970, whose origin is São Paulo.[52] The appeal was brought by the National Institute of Social Security (INSS) against the judgment issued by the First Chamber of the Special Federal Courts of Appeals of the Circuit of the State of São Paulo, Brazil (*1ª Turma Recursal dos Juizados Especiais Federais do Estado de São Paulo*).

The judgment under appeal, on the merits, upheld the conviction of the National Institute of Social Security (INSS), in order to grant the plaintiff, a foreign resident in Brazil, the *Benefício de Prestação Continuada* (BPC), a social assistance benefit for poor people, referred to in art. 20 of the Organic Law of Social Welfare (LOAS – Federal Act No. 8.742/93).

One of the arguments raised in the First Chamber's decision was, specifically, that the welfare benefit, whose fundamental basis lies in the Brazilian Federal Constitution (art. 203, item V), consists in '(...) a guarantee of minimum wage benefits paid monthly to disabled and elderly people who prove to not have the means to provide for their own maintenance or have it provided by their family, according to the law.'

The provision refers to people as a whole, not only Brazilians. The aspect of nationality is completely dispensable, if one accepts that the provisions stated in the Constitution safeguard the goal of minimum living wage.[53]

Hence, it is stated that the fundamental right is extendable to all. In Germany, a concise term that epitomized this idea was created: *Jedermannsrecht*. Within this context, there are the fundamental rights of anyone or a right of any person (*Jedermannsrecht*), that is, of every human being. Unlike most political rights, which, as a rule, are typical of citizens of a given country, *Jedermannsrechte* are fundamental rights which include, without distinction, all human beings, citizens or not.

In Brazil, it is true that the Constitution stipulates certain objective requirements, such as advanced age or disability, as well as the condition of misery (currently, a family income per capita equivalent to or less than one fourth of the current labor's minimum wage, that is, the lowest possible income a worker can earn monthly in Brazil), which affects the concession of the *Benefício de Prestação Continuada* (BPC). But it must be noted that, once these requirements, which are explicitly provided by the Constitution, are fulfilled, any further distinction is capricious and arbitrary, especially if it creates a distinction based on nationality.

The thesis that there are fundamental rights placed in other parts of the Brazilian Constitution, further than those enrolled in its art. 5, has been recognized for a very long time. If this is true, it seems that the

legal provision contained in the art. 203, item V, which establishes the BPC, is one of these rights. In particular, because it establishes a justiciable public right, implementing principles of the Constitution, such as human dignity and protection of life, liberty and equality.

The German decision is also relevant, if one recalls that the Brazilian Supreme Federal Court concluded the jointly trial of the extraordinary appeals No. 567985 and 580963. The case had been suspended by request of Justice Luiz Fux on June 6th 2012. At the end, the Brazilian Court declared the unconstitutionality of art. 20, paragraph 3, of the Organic Law of Social Welfare (LOAS – Federal Act No. 8.742/93), which required disabled and elderly people to prove that their familiar income was equivalent to or less than one fourth of the current labor's minimum wage, that is, the lowest possible income a worker can earn monthly in Brazil, before they could receive Government assistance and benefits.

The Brazilian Supreme Court said that this amount, used to assess one's necessity, was completely outdated in light of the relevant constitutional provisions, especially art. 203, item V, of the Brazilian Federal Constitution. The first paragraph of article 34 of the Federal Act No. 10.471/2003 (Act for the Protection of the Elderly Person) was also declared unconstitutional.

During the judgment, Justice Gilmar Ferreira Mendes, *rapporteur* of one of the extraordinary appeals, suggested that the unconstitutional provisions remain valid until December 31st 2015, in order that the Brazilian Parliament created new rules. Five Justices, out of eleven, accepted his proposal, but, according to Brazilian law, prospective overruling is only admissible if eight judges agree upon it. Thus, the contested provisions were all declared unconstitutional and void.

5. HUMAN DIGNITY: OTHER DECISIONS MADE BY THE *BUNDESVERFASSUNGSGERICHT*

The decision issued on July 18th 2012 was one of many handed down by the *BVerfG*, which gave consistency and effectiveness to the concept of human dignity.

On February 9th 2010, for example, the *BVerfG* ruled unconstitutional the law that created the program of social security reform, called 'Hartz IV', which altered the rules of the 'unemployment assistance II' (*Arbeitslosenhilfe II*). On this occasion, the Court again manifested itself on the concept of minimum living wage, and prospectively declared some sub-constitutional or ordinary provisions unconstitutional, setting the effects of the decision into the future.[54] It was determined that, among others, the Basic Law compels the State to guarantee, for everyone, the material requirements of a dignified physical existence and a minimum participation in social, cultural and political community.[55] This means not only that the State should refrain from taxing the goods of those who have only the minimum living wage, but also that it is obliged to give conditions, considered minimal, for the free development of the personality among those who lack them.[56] [57] [58]

The decision of 2010, on the Hartz IV, was specifically mentioned by the Court in its ruling on the asylum seekers. It was also invoked, in the lower courts, by litigants whose demands originated the asylum seekers decision.[59]

Since 1951, the *BVerfG* understands that there is, 'evidently', a close link between the minimum living wage and human dignity.[60] In his famous article on human dignity, published in 1956, which represented a landmark in the study of the subject in Germany, Günter Dürig mentioned the protective order against an attachment or seizure of property (*Pfändungsschutz*), which allows a debtor to keep those items that are necessary for his life (*lebensnotwendige Sachen*) and his labor wages (*Arbeitseinkommen*), provided, respectively, in §§ 811 and 850 of the German code of civil procedure (ZPO), as sub-constitutional standards of fulfillment of the constitutional right to human dignity.[61] [62] [63]

As Volker Neumann explains, the minimum living wage covers both the physical existence of the human being (food, clothing, household utensils, housing, heating, hygiene and health), as well as the maintenance of relations between people (*zwischenmenschliche Beziehungen*) and a minimum participation in social, cultural and political life (*Das Existenzminimum umfasst sowohl die physische Existenz des Menschen (Nahrung, Kleidung, Hausrat, Unterkunft, Heizung, Hygiene und Gesundheit) als auch die Pflege zwischenmenschlicher Beziehungen und ein Mindestmaß an Teilhabe am gesellschaftlichen, kulturellen und politischen Leben*). [64]

This minimum participation is not measured *sub specie aeternitatis*; in fact, it varies according to the living costs in a given society and the specific needs of one or more individuals. [65]

The costs which are considered essential are, first, the expenses that affect survival itself. Thus, the value of the minimum living wage will depend on the costs of food, housing, clothing and others, all at a level that ensures the physical subsistence of the individual. It is also essential that the costs of a small participation, though not overly incipient, in political, social and cultural life be taken into account. Otherwise, the guarantee of the material requirements of a dignified human existence would be ignored (*Pflicht zur Sicherung der Mindestvoraussetzungen für ein menschenwürdiges Dasein*).

In the *BVerfG* decision on Hartz IV[66], according to the remarks made by Volker Neumann, protection was granted to, on one side, the physical or physiological minimum living wage, and, on the other, to the sociocultural minimum living wage (*Gewährleistet ist einerseits das physische oder physiologische Existenzminimum, andererseits das soziokulturelle Existenzminimum*).[67]

While a value that corresponds to the concrete minimum living wage has not been established, which led some to criticize the decision[68], one notices that the criteria that should be used by the legislator when setting a specific value were clearly outlined. Moreover, the possibility of a constitutional court to declare unconstitutional the rule which stipulates the minimum living wage in a non-transparent (*nicht offenkundig*) manner was explicitly recognized. In other words, when

legal prescriptions concerning the minimum living wage lack the consistency (*Folgerichtigkeit*) required by the constitutional requirement of equality, then they are unconstitutional.

This is particularly important if one takes into account that, in Germany, it is common to say that the social network (*soziales Netz*) takes care of everyone, literally, from the cradle to the coffin (*von der Wiege bis zur Bahre*), that is, from birth to funeral expenses, if necessary.

The German legal literature defends the so-called principle of individuation (*Grundsatz der Individualisierung*), which consists in harmonizing the needs of the person or family benefited and the value of the corresponding benefit.[69]

One cannot grant material support to those who are eligible to work and are able to earn their own income by labor force. Raimund Waltermann explains that the 'aid to subsistence' benefit (*Hilfe zum Lebensunterhalt*) should also not be given to those who, although not being able to work, have the means to provide for their needs; who, therefore, should not be considered to be, according to legal parameters, in a condition of immediate need (*Bedürftigkeit*), at the risk of breaching the subsidiarity precept (*Grundsatz der Subsidiariät*).[70] After all, the individuals have, in principle, self-responsibility (*Eigenverantwortung*) for their subsistence, and it is the State's responsibility to provide it only in situations of actual indispensability.[71]

The benefit, which aims at ensuring the minimum living wage, must always entail a value which is considerably lower than the monetary importance that the beneficiaries could earn in the labor market, if they were able to work.

In short, this means that the value of the benefit must not be so high that it encourages full idleness or discourages a possible resumption of work activities. It aims at keeping alive the possibility of the beneficiary to return to work. In order for this to happen, Peters affirms that the amount paid must maintain this possibility attractive, which implies preserving a distance or gap between what is paid and what that person would win if he/her were economically active, receiving labor income (*Einkommen*).[72]

Ri'in Karen Peters says that, in practical terms, this means the following: if a given couple with three children receives the 'aid to subsistence' benefit, it should not pay more than the income earned by an analogous family (*vergleichbare Familie*), whose economically active members work normally. This difference should be enough to function as an incentive to work.[73]

It is important to point out that, until December 31st 2010, there was a legal prescription[74] which expressly envisaged the precept of the distance or gap between the value of the benefit and what the beneficiary would receive in the labor market. The repeal of the prescription, effective since January 1st 2011, does not change the need to observe this distance or gap.

Furthermore, for the *BVerfG*, the minimum living wage guarantee also implies in a ecological minimum to live (*ökologisches Existenzminimum*), to be precise, the minimum ecological requirements for survival on Earth.[75] [76]

It is possible to conclude, all things considered, that the minimum living wage originates from a protection of individual freedom. The social dimension of the State is, at heart, liberal, but not in the commonly used sense of the term, but rather in the sense of factual autonomy.

In this perspective, it seems that Hans-Jürgen Papier, former President of the *BVerfG*, was right when he declared, in the *Karlsruher Verfassungsdialog*, that the ultimate evaluation of democracy is freedom. In this sense, equality serves to safeguard that such freedom is exercised in equal measure and thus the welfare state, rather than oppose liberalism, embodies it. There is a shift from a defective liberalism, founded on a formal concept of freedom, to one based on a factual-material-effective concept of freedom.[77]

In Germany, for example, the 'unemployment benefit' is due while the insured is unemployed. With the new reforms implemented by the Hartz-IV program, one can receive the 'unemployment benefit I' during a period of time and subsequently, if the individual remains unemployed, he/her can receive the 'unemployment benefit II', which involves the payment of a lower amount of money. To a certain extent, the idea is to encourage the individual to seek work and facilitate the funding system. In any case, while continuing involuntarily unemployed, the individual is entitled to an unemployment benefit.[78]

It is acknowledged, therefore, that certain material conditions are essential to every human being, in order to maintain a minimally decent life.[79] This is one of the main conclusions that one can extract from the German social security system. On the other hand, it should be noted, also, that the *BVerfG* has delivered important decisions on that matter, which often gave new dimensions to the subject and to the effectiveness of the human dignity concept.

The decision of July 18th 2012 was no different. By stating that foreigners are also entitled to a benefit of greater value than the one that was in force and that distinctions between foreigners and Germans, in particular, are unjustified, because it is a fundamental human right, the German court, once again, changed the scenario prevailing until then.

6. THE PROSPECTIVE OVERRULING REGARDING THE DECLARATION OF UNCONSTITUTIONALITY

The effects of the decision rendered on July 18th 2012 are also noteworthy. Instead of using one of the traditional versions of prospective overruling, the *BVerfG* created a specific and appropriate transition rule for the case.[80]

In Germany, as in Brazil, an Act or statute that is unconstitutional is, as a rule, null and void. Therefore, its effects are also null and void. This means that the actions performed based on the unconstitutional law should all be undone, as if the law had never existed. After all, unconstitutional law is no law at all.

However, for a long time, the mitigation or modulation of the nullity or voidness has been admitted. In some cases, nullity has even been totally excluded, so that, in name of the rule of law, predictability and legal certainty, acts performed on the basis of an Act regarded as unconstitutional are entirely preserved as valid. Substantial arguments are used to defend this possibility, since the mere declaration of nullity or voidness, if carried out indiscriminately and thoughtlessly, can cause severe negative impact on the political, economic, legal, social or cultural *status quo*.

However, the decision which is now analyzed, went beyond what normally occurs in prospective overruling regarding the declaration of unconstitutionality of a given Act, because it not only procrastinated the effects of the declaration of unconstitutionality, but truly modulated or manipulated them, setting different rules according to the circumstances identified by the Court in the concrete case.

The *BVerfG* recognized, as already stated, that the legislator was obliged to issue new Acts in order to adequate the value of the benefit paid to the asylum seekers to the demands of the *Grundgesetz*. On the other hand, for many years the benefit had been paid according to unconstitutional standards. This would, eventually, imply the payment of all monetary differences of what was paid and what should have been paid. For a long time, the benefit had been paid in violation of what the *BVerfG* had just decided. In some cases, the Constitution was not complied with or was insufficiently complied with. Hence, all that had been paid since the time the Act first came into effect, or at least since mid-2000, would have to be recalculated. This would be the obvious conclusion of the Court's finding, that € 224.97 Euros are not (and were not since a long time) enough to ensure the minimum living wage for an individual guaranteed by the German Basic Law.

Notwithstanding, the *BVerfG* also asserted that, although it was possible to notice that the Act was clearly unconstitutional, the Court was not responsible for correcting the amount of the benefit. This is, constitutionally, an obligation of the legislator, who, in possession of the technical minutiae and of the social and economic circumstances, is able to find and fix a value that corresponds to an adequate minimum living wage.[81]

There is, in this standard, several contingencies and technical data that must be analyzed within the Parliament discretion, under the scrutiny of the democratic debate.

Although several possibilities exist, it is certain that any choices made by the legislator must be compatible with what was established by the Court, with arguments and criteria defined by it. The benefits will diverge according to the specific and factual-empirical needs of each individual, transparently regulated by law[82], as well as being sufficient to meet the expenses provided by the *BVerfG* as essential to a decent life.[83] International conventions signed by the Federal Republic of Germany and mentioned by the Court in its decision should also be taken into consideration when fixing the *quantum* of the benefits, especially when referring to children.[84]

Within this scenario, there is no doubt that the mere statement of the Act as null and void would create a serious problem, because it would leave a legal vacuum. Nevertheless, if one recognizes a greater scope of legislative discretion within cases involving the fixation of benefits' amounts, one should also conclude that it is not the Court's responsibility to fill this vacuum. The greater the legislator's margin of appreciation, the more self-restrained should the *BVerfG*'s control be.

In order to continue within this self-restrained control (*zurückhaltende Kontrolle*), the Court stipulated a transition rule (*Übergangsregelung*), which implies the attribution of both prospective and retroactive effects to the decision.[85]

Firstly, the *BVerfG* refrained from declaring the nullity of the Act, although it acknowledged that this would have been the natural and logical effect of the declaration of unconstitutionality. As a result, an appeal or request was made to the legislator to properly adjust and replace the unconstitutional Act.[86] In this regard, the ruling has prospective effect.

However, if it had done only that, all those who claimed in the lower courts, that the benefit amount was negligible and, therefore, unconstitutional, would only receive fairer amounts after the enaction of the new Act, even if they had filed law suits before that. Moreover, it would take time to approve and enact the Act, meaning that, for some indefinite and unpredictable period of time (*nicht absehbar*), the *Asylbewerber* would continue to receive the same amount of benefit.[87]

In regard of the nurturing issue, which concerns the survival of the individual and the protection of his existence, the *BVerfG* considered that it should adopt a more suitable solution; especially because the amount that was being paid no longer seemed acceptable.

The *BVerfG* decided to implement the dispositions of the regular social security system, by analogy, arguing that, otherwise, what was constitutionally guaranteed – that is to say, the minimum living wage – would continue without guarantee (*da das grundrechtlich garantierte Existenzminimum sonst nicht gesichert ist*).[88] The SGB XII provides in section 28, that a federal statute stipulates, in a detailed and specific way, the amount of benefits as well as their criteria and variations. This statute is called the 'Statute for verification of the parameters of need according to paragraph 28 of the SGB XII' (*Gesetz zur Ermittlung der Regelbedarfe nach § 28 des Zwölften Buches Sozialgesetzbuch* – RBEG).

While the new Act, which will fix what was considered unconstitutional, is not enacted, the RBEG rules should be applied to the *Asylbewerber*. That decision only creates a transition rule, without replacing the legislator's decision.[89] In the transition period, some parts of the Act will remain in force. However, most parts of it – regarding the cost of clothes, food, etc. – will no longer be applied, in order to apply, by analogy, the RBEG rules.[90]

The transition rule virtually excludes the possibility of unequal treatment between Germans or foreigners who have residence permit and *Asylbewerber*.[91] The transition rule shall remain in force until a new rule is established by the legislator.[92] In the case of those who claimed in

court, if their decisions have not been judged as final, the transition rule will be applied in their cases retroactively, up until January 1st 2011.[93] The Act which will be enacted will only be effective in the future. [94]

No period prior to 2011 will be affected by the decision and unpaid installments before that year cannot be claimed based on the *BVerfG*'s decision. When it comes to a decision whose effects are delayed in time (*Dauerwirkung*), the Administration must undo all that was done on the basis of unconstitutional acts. Therefore, it would be obliged to reimburse the *Asylbewerber* for almost everything that was ever insufficiently paid, since the administrative acts that denied a greater payment are contrary to law (*rechtswidrige Verwaltungsakte*), because they are unconstitutional.[95]

However, in order to secure legal certainty, what has already been paid before 2011 will be maintained. Henceforth, the transition rule will be applied. Those, whose demands have not yet reached a final decision, may have the transition rule applied retroactively to January 2011 in order to receive the financial differences relating solely to this period. In the case of the mother who claimed in favor of her daughter, questioning amounts paid between January and November of 2007, it may be concluded that no differences are due to be paid, since the contested period is located before 2011. One should also indicate that, since 2010, the child in question is a German citizen and has not received the benefit paid to the *Asylbewerber* for a while. Nevertheless, for thousands of others, the decision not only will have a significant effect, as will change their lives substantially.

As described, the prospective overruling of the declaration of unconstitutionality undertaken in this case is hybrid. On the one hand, the decision is prospective, as it leaves with the legislator the task of editing laws in order to repair unconstitutional defects presented by the Court. But, while this assignment is not accomplished, the transition rule adopted by the *BVerfG* will persist. The regular social security rules will, therefore, be applied, by analogy, so that German citizens, foreigners with residence permit and *Asylbewerber* are all treated fairly. This transition rule will have retroactive effects for those who are still litigating in lower courts, up until January 2011. For anyone else, between now and the time the new Act is enacted by the legislator, the transition rule will be valid and will be used to solve the cases and controversies that arise.

7. FINAL COMMENTS

Given what has been described, especially in the third (3rd) part of this text, about the relevant points of the decision and the legal arguments underlying it, one may conclude that the unconstitutionality of the Act which establishes the benefit amount paid to foreigners seeking asylum, i.e. with no residence permit and who cannot be deported from Germany, is a consequence of the protection of human dignity, which entails the guarantee of a corresponding financial or monetary amount, capable of ensuring, effectively, the minimum living wage.

This is what ensures the effective legal and practical compliance with human dignity, in its factual and empirical dimension. On the other hand, considering what was described in the sixth (6th) part of this study, one observes that, in the decision analyzed, the prospective overruling regarding the declaration of unconstitutionality of the mentioned Act was truly and meticulously modulated or manipulated. After all, the German Court found a special and particular solution to solve the singular problems arising from this complex case. This involved the assignment of both prospective and retroactive effects to the decision.

>> ENDNOTES

[1] In Germany, there are several special courts, such as the Labour, Electoral and Military Jurisdiction in Brazil. The German legal system includes an Administrative Jurisdiction, a Social Security Jurisdiction, a Financial Jurisdiction and a Labour Jurisdiction. The Administrative Jurisdiction (*Verwaltungsgerichtsbarkeit*) decides, mainly, on matters that comprise judicial control of administrative acts – the French Administrative Jurisdiction, for instance, also includes, unlike the German legal system, the tort's liability of the State (Rosenberg/Schwab/Gottwald, 1991: 8). The Social Security Jurisdiction (*Sozialgerichtsbarkeit*) is responsible for the legal control of agencies responsible for social security in Germany. The German legal system also includes the Financial Jurisdiction (*Finanzgerichtsbarkeit*), for the control of acts of officials linked to taxation, and the Labour Jurisdiction (*Arbeitsgerichtsbarkeit*), for collective and individual conflicts between employees and employers.

[2] *BVerfG*, 1 BvL 10/10.

[3] *BVerfG*, 1 BvL 10/10 (60).

[4] *BVerfG*, 1 BvL 10/10 (66).

[5] Michael/Morlok, 2012: 255.

[6] Bumke/Voßkuhle, 2008: 56 f.

[7] BVerfGE 45, 187.

[8] BVerfGE 45, 187.

[9] See the *Tusculanae Disputationes* (Book V, 62), from Cicero: "*Satisne videtur declarasse Dionysius nihil esse ei beatum, cui semper aliqui terror impendeat?*" Unofficial translation by the author of this text: "Does not Dionysius seem to have made it sufficiently clear that there can be nothing happy for the person over whom some fear always looms?"

[10] Michael/Morlok, 2012: 103.

[11] The binding force of the Treaty of Lisbon regarding the Charter of Fundamental Rights of the European Union does not encompass the United Kingdom and Poland (Machado, 2010: 30).

[12] Robert/Duffar, 2009: 58, 258.

[13] Robert/Duffar, 2009: 388, 787.

[14] Israel, 1998: 338.

[15] Rousseau, 2010: 247.

[16] Euripedes, 1994.

[17] *BVerfG*, 1 BvL 10/10 (5-6).

[18] *BVerfG*, 1 BvL 10/10 (7).

[19] Crawford, 2012: 406,501.

[20] Crawford, 2012: 418.

[21] *BVerfG*, 1 BvL 10/10 (15).

[22] Wagner, 2012.

[23] Wagner, 2012.

[24] *BVerfG*, 1 BvL 10/10 (15).

[25] PREUß, 2012.

[26] The original provision included amounts in German Marks, which were converted, in this text and in the decision of the Federal Constitutional Court, into Euros. Note that inflation and the increase of living costs have made the values completely insufficient.

[27] *BVerfG*, 1 BvL 10/10 (45).

[28] PREUß, 2012.

[29] Hereinafter, *BVerfG*.

[30] *BVerfG*, 1 BvL 10/10 (106).

[31] *BVerfG*, 1 BvL 10/10 (109).
[32] *BVerfG*, 1 BvL 10/10 (107).
[33] *BVerfG*, 1 BvL 10/10 (17).
[34] *BVerfG*, 1 BvL 10/10 (116).
[35] *BVerfG*, 1 BvL 10/10 (99).
[36] Book XII of the German Social Security Code, the *Sozialgesetzbuch* (SGB).
[37] *BVerfG*, 1 BvL 10/10 (46-48).
[38] *BVerfG*, 1 BvL 10/10 (73).
[39] *BVerfG*, 1 BvL 10/10 (74).
[40] *BVerfG*, 1 BvL 10/10 (74-82).
[41] Waltermann, 2011: 231.
[42] *BVerfG*, 1 BvL 10/10 (111).
[43] *BVerfG*, 1 BvL 10/10 (88, 90).
[44] *BVerfG*, 1 BvL 10/10 (88-89).
[45] *BVerfG*, 1 BvL 10/10 (91).
[46] *BVerfG*, 1 BvL 10/10 (113).
[47] *BVerfG*, 1 BvL 10/10 (56).
[48] *BVerfG*, 1 BvL 10/10 (121).
[49] Through this method, the German Court can declare notional unconstitutionality, that is, that the statute is unconstitutional to the extent that it purports to do X, Y, and Z. In other words, the Act remains valid, but some interpretations of it are discarded as unconstitutional.
[50] *BVerfG*, 1 BvL 10/10 (65, 70).
[51] Acknowledging the general repercussion of a case or controversy is similar to granting the *writ of certiorari*. It involves a decision issued by the Brazilian Supreme Federal Court (STF), allowing an extraordinary appeal to be submitted to the Court. On the merits of extraordinary appeal No. 587970, STF has not reached a decision yet.
[52] STF, Full-bench decision, RE 587970/SP, *Rapporteur* Justice Marco Aurélio, judged on 25.VI.09, published in DJe on 2.X.09.
[53] Regarding the link between the minimum living wage and human dignity in Brazilian legal literature, see, among many others, Bitencourt Neto, 2010; Sarlet, 2011; Barcellos, 2008; Tavares, 2003.
[54] Bastide, 2010/2011.
[55] *BVerfG*, 1 BvL 1/09.
[56] In Brazil, such preconditions are tied to the so-called *Benefício de Prestação Continuada* (BPC), established by art. 203, item V, of the Brazilian Federal Constitution and by the Organic Law of Social Welfare (LOAS).
[57] Borges Silva, 2011/2012.
[58] See, as well, Worms, 2012.
[59] *BVerfG*, 1 BvL 10/10 (64).
[60] BVerfGE 1, 97.
[61] Dürig, 1984: 142.
[62] In this direction, see Badura, 2012: 136,353.
[63] On the obligation of the legislator not to tax wages that do not exceed the minimum living wage, see BVerfGE 82, 60/85.
[64] Neumann, 2010: 2.
[65] Neumann, 1995: 10.
[66] *BVerfG*, 1 BvL 1/09.
[67] Neumann, 2010: 2.

[68] Könemann, 2005: 116.
[69] Waltermann, 2011: 233.
[70] Waltermann, 2011: 236.
[71] Pattar, 2012: 144 f.
[72] Peters, 2012: 296.
[73] Peters, 2012: 296.
[74] § 28, (4), SGB XII, currently repealed.
[75] BVerfGE 39, 1.
[76] Stern, 2006: 53.
[77] The videos of the speech, in its entirety, are available in the following webpage: <http://www.youtube.com/watch?v=aM1oigyi6tE> Last visited on August 15th, 2012.
[78] Waltermann, 2011: 231.
[79] See, in this context, the already mentioned decision of the Federal Constitutional Court on the Hartz IV program: *BVerfG*, 1 BvL 1/09. The main statements of the ruling were epitomized, in English, in a report of the German Court, available at: <http://www.bundesverfassungsgericht.de/en/press/bvg10-005.html> Last visited on August 15th, 2012.
[80] On the various possibilities of prospective overruling while declaring the unconstitutionality of an Act or statute, see, among others, Blanco de Morais, 2011: 259 f.; Marinoni, 2012: 1045 f.; Mendes, 2010: 357 f.; Mendes, 2012: 510 f.
[81] *BVerfG*, 1 BvL 10/10 (92, 93).
[82] *BVerfG*, 1 BvL 10/10 (95).
[83] *BVerfG*, 1 BvL 10/10 (93).
[84] *BVerfG*, 1 BvL 10/10 (94).
[85] *BVerfG*, 1 BvL 10/10 (124).
[86] This type of exhortation to the legislator consists in an *Appellentscheidung*. Regarding this subject, see Yang, 2003; Urbano, 2012: 80 f.
[87] *BVerfG*, 1 BvL 10/10 (125).
[88] *BVerfG*, 1 BvL 10/10 (125).
[89] *BVerfG*, 1 BvL 10/10 (127).
[90] *BVerfG*, 1 BvL 10/10 (130).
[91] *BVerfG*, 1 BvL 10/10 (132).
[92] *BVerfG*, 1 BvL 10/10 (136).
[93] *BVerfG*, 1 BvL 10/10 (139).
[94] *BVerfG*, 1 BvL 10/10 (137).
[95] *BVerfG*, 1 BvL 10/10 (139).

>> REFERENCES
BOOKS AND ARTICLES

Badura, Peter (2012). *Staatsrecht: Systematische Erläuterung des Grundgesetzes für die Bundesrepublik Deutschland*. München: C.H. Beck.

Barcellos, Ana Paula (2008). *A eficácia jurídica dos princípios constitucionais: o princípio da dignidade da pessoa humana*. Rio de Janeiro: Renovar.

Bastide Horbach, Beatriz (2010/2011). "Benefícios sociais e a garantia do mínimo existencial: o caso Hartz IV." *Observatório da Jurisdição Constitucional*, Ano 4. Available at: <http://www.portaldeperiodicos.idp.edu.br/index.php/observatorio/article/viewFile/446/287> Last visited on August 25th, 2012.

Bitencourt Neto, Eurico (2010). *O direito ao mínimo para uma existência digna*. Porto Alegre, Livraria do Advogado.

Blanco de Morais, Carlos (2011). *Justiça Constitucional*. Coimbra: Coimbra Editora.

Borges Silva, Virgínia Xavier (2011/2012). "A dimensão prestacional social do mínimo de existência e a responsabilidade pelo provimento das prestações fáticas dos direitos sociais: uma análise do acórdão 509/02 (Tribunal Constitucional Português) e do Caso Hartz IV (Tribunal Constitucional Alemão)." *Observatório da Jurisdição Constitucional*, Ano 5, 2011/2012. Available at: <http://www.portaldeperiodicos.idp.edu.br/index.php/observatorio/article/view/593/397> Last visited on August 14th, 2012.

Bumke, Christian/ Voßkuhle, Andreas (2008). *Casebook Verfassungsrecht*. München: C.H. Beck.

Crawford, James (2012). *Brownlie's Principles of Public International Law*. Oxford: Oxford University Press.

Dürig, Günter (1984). "Der Grundsatz von der Menschenwürde. Entwurf eines praktikablen Wertsystems der Grundrechte aus Art. 1 Abs. 1 in Verbindung mit Art. 19 Abs. 2 des Grundgesetzes." *Gesammelte Schriften 1952-1983*. Berlin: Duncker & Humblot.

Euripedes (1994). *Fabulae: Cyclops, Alcestis, Medea, Heraclidae, Hippolytus, Andromacha, Hecuba*. Oxford: Oxford University Press.

Israel, Jean-Jacques (1998). *Manuel des Libertés Fondamentales*. Paris: L.G.D.J..

Könemann, Britta (2005). *Der verfassungsunmittelbare Anspruch auf das Existenzminimum: Zum Einfluss von Menschenwürde und Sozialstaatsprinzip auf die Sozialhilfe*. Hamburg: Verlag Dr. Kovac.

Machado, Jónatas E. M. (2010). *Direito da União Europeia*. Coimbra: Coimbra Editora.

Marinoni, Luiz Guilherme (2012). "Técnicas de Decisão." *In*: Ingo Wolfgang Sarlet, Luiz Guilherme Marinoni, Daniel Mitidiero. *Curso de Direito Constitucional*. São Paulo: Revista dos Tribunais.

Mendes, Gilmar Ferreira

(2012a). *Controle Abstrato de Constitucionalidade: ADI, ADC e ADO - Comentários à Lei n. 9.868/99*. São Paulo: Saraiva.

(2012b). "O Sistema Brasileiro de Controle de Constitucionalidade." *In*: Gilmar Ferreira Mendes, Ives Gandra Silva Martins, Carlos Valder do Nascimento. *Tratado de Direito Constitucional*. São Paulo: Saraiva.

Michael, Lothar/ Morlok, Martin (2012). *Grundrechte*. Baden-Baden: Nomos.

Muckel, Stefan/ Ogorek, Markus (2011). *Sozialrecht*. München: C.H. Beck.

Neumann, Volker

(2010). *Menschenwürde und Existenzminimum im Verfassungsrecht*. Available at: <http://www.fes.de/integration/pdf/100510_neumann.pdf> Last visited on August 14th, 2012.

(1995). "Menschenwürde und Existenzminimum." *Neue Zeitschrift für Verwaltungsrecht* (NVwZ), pp. 426-432; Available: <http://edoc.hu-berlin.de/humboldt-vl/neumann-volker/PDF/Neumann.pdf> Last visited on August 15th, 2012.

Ossenbühl, Fritz (1991). *Staatshaftungsrecht*. München: C.H. Beck.

Papier, Hans-Jürgen (2012). Karlsruher Verfassungsdialog. Available at: <http://www.youtube.com/watch?v=aM1oigyi6tE> Last visited on August 15th, 2012.

Pattar, Andreas Kurt (2012). "Grundsicherung für Arbeitssuchende." *In*: Roland Klinger, Peter-Christian Kunkel, Andreas Kurt Pattar, Ri'in Karen Peteres. *Existenzsicherungsrecht: SGB XII mit SGB II und AsylbLG*. Baden-Baden: Nomos.

Peters, Ri'in Karen (2012). "Hilfe zum Lebensunterhalt." *In*: Roland Klinger, Peter-Christian Kunkel, Andreas Kurt Pattar, Ri'in Karen Peters. *Existenzsicherungsrecht: SGB XII mit SGB II und AsylbLG*. Baden-Baden: Nomos.

Preuß, Roland

(2012a). "Flüchtlinge in Deutschland: 'Asylbewerberleistungsgesetz abschaffen'." *Süddeutsche Zeitung*, Munich, July 18th, 2012. Available at: <http://www.sueddeutsche.de/politik/fluechtlinge-in-deutschland-zu-wenig-geld-fuer-einen-apfel-am-tag-1.1415337-4> Last visited on August 12th, 2012.

(2012b). "Flüchtlinge in Deutschland: Zu wenig Geld für einen Apfel am Tag." *Süddeutsche Zeitung*, Munich, July 18th, 2012. Available at: < http://www.sueddeutsche.de/politik/fluechtlinge-in-deutschland-zu-wenig-geld-fuer-einen-apfel-am-tag-1.1415337> Last visited on August 12th, 2012.

Robert, Jacques/ Duffar, Jean (2009). *Droit de l'homme et libertés fondamentales*. Paris: Montchrestien.

Rosenberg, Leo/ Schwab, Karl Heinz/ Gottwald, Peter (2011). *Zivilprozessrecht*. München: C.H. Beck.

Rousseau, Dominique (2010). *Droit du contentieux constitutionnel*.Paris: Montchrestien.

Sarlet, Ingo (2011). *Dignidade da Pessoa Humana e Direitos Fundamentais na Constituição Federal de 1988*. Porto Alegre: Livraria do Advogado.

Stern, Klaus (2006). *Das Staatsrecht der Bundesrepublik Deutschland - Band IV/1: Die einzelnen Grundrechte*. München: C.H. Beck.

Tavares, Marcelo Leonardo (2003). *Previdência e Assistência Social: Legitimação e Fundamentação Constitucional Brasileira*. Rio de Janeiro: Lumen Juris.

Urbano, Maria Benedita (2012). *Curso de Justiça Constitucional*. Coimbra: Almedina.

Wagner, Anna-Lena

(2012a). "Erzählungen eines Flüchtlings: Leben am Existenzminium." *Stern*, Hamburg, July 1st 2012. Available at: <http://www.stern.de/panorama/erzaehlungen-eines-fluechtlings-leben-am-existenzminium-1860139.html> Last visited on August 12th, 2012.

(2012b). "Urteil des Bundesverfassungsgerichts: Asylbewerber müssen mehr Geld bekommen." *Stern*, Hamburg, July 18th, 2012. Available at: <http://www.stern.de/panorama/urteil-des-bundesverfassungsgerichts-asylbewerber-muessen-mehr-geld-bekommen-1859877.html> Last visited on August 12th, 2012.

Waltermann, Raimund (2011). *Sozialrecht*. München: C.F. Müller.

Worms, Christoph (2012). *Verwaltung der Grundsicherung für Arbeitsuchende: Aufgabenzuständigkeit und Verwaltungsverantwortung nach dem Grundgesetz und dem SGB II*. Berlin: Duncker & Humblot.

Yang, Tzu-hui (2003). *Die Appellentscheidungen des Bundesverfassungsgerichts*. Baden-Baden: Nomos.