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**THE JURIDIFICATION AND JUSTICIABILITY  
OF AN ADEQUATE LEVEL OF LIVING IN GERMANY.**

**WORK IN PROGRESS – PLEASE DO NOT QUOTE WITHOUT AUTHOR’S PERMISSION.**

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**Abstract** — Research which I carried out in the early 1990s in the ten countries around the world which at that time appeared to have governmental minimum income standards (used for various purposes associated with poverty and income maintenance policies) suggested that only two, Germany and Sweden, juridified the right to an adequate level of living and made it justiciable. In Germany the level of living offered by social assistance benefits has to respect human dignity, while in Sweden it has to be reasonable. The paper reports on research carried out in 2008 in Germany into problems around the current understanding of the meanings of human dignity and of reasonableness in the social assistance legislation, administrative practices, juridical interpretations and popular responses to neoliberal reforms which have restricted the provisions of the previous decade. It tries to outline the German way of thinking about a principle and its coherence in implementation, and to explain this to a UK audience whose assumptions and ways of thinking about this social science field are in important ways different from those in Germany.

Juridification — passing something into law.

Justiciability — making something subject to legal review and appeal.

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***Introduction and acknowledgements.***

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The paper is based on fieldwork carried out in the second quarter of 2008, in the form of recorded interviews and informal conversations as well as correspondence with people closely involved with the current social assistance provisions as policy makers, implementers, observers, advisers and claimants, and on printed material and published sources. Conditions may now be different. Virtually all tangible material is in German or Swedish, and some interviews were conducted partially or wholly in those languages which I can read and understand fairly well. The translations are my own and so are misunderstandings and mistakes. Germans use a lot of acronyms; versions are used in the text.

A brief paper cannot do justice to the discussion of the subject of the place of human dignity in German law and poverty practice, which has been both voluminous and animated for decades. It therefore aims to do no more than outline a few of the issues reported in Germany, and comments on some from a British social policy perspective. Because of length restrictions and abridgement of the argument not all accessible factual, legal and internet sources are referenced; commentaries are, but I apologise for oversights. This may not meet normal scholarly criteria but aims only to stimulate discussion to improve the argument. As this is work in progress, I’d prefer it not to be quoted or published in this raw draft form, please.

### **The structure of the paper.**

The next two sections outline the research problem and the statutory representation of human dignity in German social assistance. The paper then reports briefly on the methods used since 1961 to identify the levels of living used as the basis of Federal government recommendations for social assistance scale rates and some critiques which led to changes. Finally, it reviews some of the legal arguments and other commentaries on the place of human dignity in German social assistance practice.

### **BACKGROUND: THE RESEARCH PROBLEM.**

The background to this project lies in two distinct but related fields, too rarely linked to each other. One, expressed in many international conventions and declarations, is the human right to a decent and dignified level of living which enables participation in society, social inclusion in its fullest sense (not just in the labour market, as 'inclusion' is often understood in Europe) and overcomes those social exclusions which derive from inadequate resources for inclusive lifestyles. The other is the question of how governments decide on the standards and the benefit levels of their various forms of what are widely known as minimum income schemes or social assistance, usually meaning the residual non-contributory and means- or income-tested provisions. The literatures on these subjects are global but the focus here is nationally specific.

Other than in the UK, very little if any empirical research seems to have been done to find out *what populations themselves* consider would be the components of the lowest decent inclusive level of living according to the standards of that society, and then by pricing them (the budget or basket of goods approach) to arrive at estimates of the minimum net incomes needed to support that empirical standard. How else can one tell what a society's standards are, as opposed to those of the ruling elites?<sup>1</sup> This statement is not negated by the fact that there are many prescriptive budgets where elites and their experts of various kinds tell other people what the minimum acceptable standards or its components shall be. Nor does the fact that the introduction of minimum income schemes is discussed in the EU. Although such proposals often argue for income adequacy for participation, they remain proposals; there is no empirical evidence of the income levels needed.

Most of the existing literature reports at best on the degree to which income maintenance systems on average reduce the poverty gap between low household incomes and the arbitrary European and OECD measure of income inequality or low income which is misleadingly described as poverty but is widely taken as a proxy for poverty in cross-national and temporal comparisons. The measure counts people as being in poverty if they live in households with incomes falling on average at or below 60% of median household incomes, before or after housing costs are allowed for. It is well known that this measure of household income inequality, whatever its value as a standard of national comparison of aggregates, was a political compromise and conveys no information whatever about the level of average income needed in any place or time at which individuals can attain the rights to a decent participatory level of living asserted by several international conventions. Since this extensive literature does not illuminate the current project I have not cited it here, but have previously suggested some relevant implications (Veit-Wilson 2006; 2007). Some European governments use or used some sort of independent and politically credible standards for the incomes which they assumed gave access to the minimum acceptable standards of living in their countries. I have described these as governmental minimum income standards, and reported the situation as it was in the early 1990s (Veit-Wilson 1998). The situation may have changed in various ways since then. Among the findings of that research project was that only two countries, Germany and Sweden, had embodied the right to an *adequate* level of living in statute and made it justiciable. This is very important. While many countries, including the UK, make the right to receive what the law allows a matter for judicial oversight through the appeals system etc, the law does not generally concern itself with adequacy standards *as such*. But in these two countries the law itself starts from statements of the broad principles of the minimum living standards to be achieved, and aggrieved claimants who believe that

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<sup>1</sup> For argument, see the JRF/MIS Report 2008.

social assistance payments do not enable them to reach those standards can appeal on the grounds that their benefits according to the scale rates<sup>2</sup> are not enough to achieve the statutory standards of living.

A further corollary in these two countries<sup>3</sup> is that the income level which is associated with these minimum standards of living is held to be irreducible, which means that following the taxability principle laid down by Adam Smith<sup>4</sup>, income taxes cannot be levied on it. It therefore forms the income tax free personal allowance, setting the tax threshold, and in principle court orders for maintenance and debt can also not be executed on individuals with lower incomes. I did not study the precise implementation of this provision in either country. In Germany it is described as the *Pfändungsfreiheitsgrenze*, the ‘attachment-free threshold’, and is much discussed.

The research question therefore was, how is the right to a dignified (participatory) level of living understood in Germany and Sweden, and how do their governments implement their statutory duties in reality? The study focused solely on enquiry into the meanings attached to the statutory principles of *Menschenwürde*, usually translated as human dignity in Germany (referred to here as HD), and of *skälighet*, reasonableness being neither too sparse nor too luxurious, in Sweden, and how they were interpreted and implemented in practice. Except where relevant, it did not collect data on numbers and categories of social assistance claimants or the details of cash benefits or other provisions for the many human conditions falling under the general headings of poverty, unemployment, lone parenthood, illness and disability or old age. Instead, **this paper tries to outline the German way of thinking about a principle and its coherence in implementation, and to explain this to a UK audience whose assumptions and ways of thinking about this social science field are in important ways different from those in Germany.** For people who assume that if quantitative cross national data are comparable, the qualitative assumptions from which they derive in different countries are equally similar, it may come as a surprise to find how very different German assumptions were, even among globe-trotting academics. Johan Galtung’s paper on “Structure, culture and intellectual style” (1981) is very helpful in explaining the difference between British and German approaches to these issues, both in style and content.<sup>5</sup>

#### **JURIDIFICATION: THE STATUTORY FOUNDATIONS IN GERMANY.**

A government concern with poverty in some of its forms has a long history in German states but government responses to it have changed over the years (Leisering and Leibfried 1999). By the late 19<sup>th</sup> century the chief Imperial government preoccupation was prevention of industrial unrest, pre-emption of social democratic pressure (von Bülow 1914) and the promotion of social integration into an orderly stratified class society. In such a society, the ideal model of which stretches back into feudal times, everyone knows their allocated place in the fixed hierarchy of rank and class, and in this hierarchy of mutual reciprocal rights and responsibilities everyone has a responsibility to do their duty upwards to their ruler and downwards to their dependents (the meaning of subsidiarity). For the mass of the population, that means working for pay to earn a living and maintain dependents.

From this view of society, the social problem was seen as pauperism<sup>6</sup> and not poverty as such, and there is a traditional pillar of German social thought which considers some forms of ‘ordinary’ material poverty to be perfectly consistent with HD in an integrated hierarchical society (Simmel,

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<sup>2</sup> The phrase was conventionally used for Assistance benefit levels in the UK and refers to the entire tariff for individuals and households of varying age and status, including the levels of benefits for an individual or household and the equivalence scales applied from which other benefits are calculated. The German term is *Regelsatz*; it is a central feature of the subject of this paper.

<sup>3</sup> And in one or two others, I believe.

<sup>4</sup> British social policy students are familiar with Adam Smith’s statement of necessities (the famous linen shirt) but not a lot of people know that his reason for discussing the question was not sociological curiosity but economic, in the context of the capacity of individuals to pay taxes, which should not be levied on incomes inadequate for such social necessities. Nevertheless, the discussion of leather shoes which follows the linen shirt does show how aware he was of the national cultural relativity of such necessities. Regrettably for a country so devoted to liberal economics, the UK tax threshold still bears no relationship to any such principle (Veit-Wilson 1999).

<sup>5</sup> I am grateful to Andreas Busch for offering Galtung as the answer to my puzzled queries. Galtung’s paper is not only sharply perceptive but also witty and fun to read, which is more than can be said for much of the scholarly material I had to plough through.

<sup>6</sup> Application for and receipt of Poor Law Relief; poverty by contrast is lacking the resources needed for respected social participation in society, whether or not Poor Law Relief had been applied for or received.

1968, is still often cited as referring to poverty as a relationship and not just material deprivation; this view is widely expressed and is similar to current social exclusion usage).<sup>7</sup> Economic position as such is not identified as a problem; damaged social status, for example through unemployment or other forms of non-integration, is. Indeed, several informants rightly insisted that HD is far more than not being poor (e.g. Bronke<sup>8</sup>), since it is *a priori* held to apply to every human being whatever their social or economic position. But in the context of the right to HD in the social assistance scheme, the question remains, what minimum levels of disposable cash or other economic resources are needed to enable people to enjoy their HD in the commercialised, marketised, consumerised society in which we live? Although, as Reidegeld (1988 pp 300-301) put it in a paper on the relations between needs measurement, benefit levels and HD, "... it is obvious that HD cannot be calculated objectively because it is a matter of political argument and ethical assumptions hiding behind statistical procedures", this does not prevent empirical study of the levels of income at which *people themselves* feel able to participate in society and experience their HD. But I have not heard this idea expressed in Germany as it is in the poverty research community in the UK, nor studied further since the deprivation indicator research of Andreß and his colleagues (1996) some years ago.<sup>9</sup>

In German poor law history, just as in the UK, paupers did not have rights to benefit; rather, it was the community which had the right to demand that poverty be relieved (Bangert 1964 p 4; c f Marshall 1965 pp 262-263). In the UK this community was the ratepayers, while in Germany it was 'the state'. It took a decision by the German Federal Constitutional Court (*Bundesverfassungsgericht*, BVerfGE) in 1954 to establish that the individual was to be treated not as a vassal but as a citizen, as a moral person bearing rights and duties, a subject instead of the mere object of paternalistic control (Heinig 2008). This terminology of subject/object commonly used in Germany may be confusing to English readers familiar with the distinction between the subjects of a ruler and the autonomous citizens who could remove the ruler if they wished. But German discourse assumes 'the state' is always there as ruler (irrespective of whether it is a monarchy or republic), an active entity distinct from the people under its rule who are inevitably subjects if they are not simply treated as objects. Thus it often contrasts people being treated by 'the state' as *objects*, as things, with being treated as autonomous *subjects* endowed with rights (Eichenhofer; Höland; Kronauer; Bieritz-Harder 2001; Neumann 1994; Wetz 2005). However, I leave that large subject to the political and legal philosophers; the saxonian approach (in Galtung's sense, 1981) usually refers to citizens and their governments.<sup>10</sup>

However, the deep-seated modes of paternalistic thinking by political and intellectual elites about people in poverty which such articulated conceptions reflect are still powerful in Germany (Höland), and my impression is that they still colour the current debate about HD and are sometimes even explicitly expressed in the current workfare debate. Some of the political language used in Germany to justify the legislative introduction in 2005 of *Arbeitslosengeld 2* (ALG2), unemployment assistance<sup>11</sup> (with strict workfare conditions) and its administration reflects a poor law conception of the rights of the state against the pauper. Interestingly, in this neoliberal rhetoric the 'freedom' of the workfare contract is held up as treating the unemployed person as an autonomous individual subject freely able to find adequately paid work in a free labour market<sup>12</sup> and not as a pauperised object, though the workfare sanctions are themselves analogous to the UK's Poor Law workhouse test. Less

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<sup>7</sup> German scholars often like to give literary and philosophical foundations to their arguments, and I twice came across use of an epigram by the revered poet Schiller saying in effect, 'don't talk to me about human dignity, please! Give him food and drink, and if you've covered his nakedness, human dignity will come by itself'. This did not seem to be ironical (uncommon in German scholarship), but I may have missed or misunderstood the unvoiced connotations of the use of the epigram.

<sup>8</sup> Names without dates refer to personal communications and interviews, not publications.

<sup>9</sup> I am grateful to Hans-Jürgen Andreß for confirming this.

<sup>10</sup> This matter is similar to issues raised in welfare state discourse which assumes an invariable actively reflexive entity, 'the welfare state', distinguishable from its changing governments, its operators and elites (to whom it provides welfare) and even more volatile electorates (to all of whom it does not necessarily provide welfare). This taken-for-granted assumption in Germany is sometimes treated as more problematic in the UK.

<sup>11</sup> I use this term for ALG2 to distinguish it from contributory earnings-related unemployment insurance (ALG1) and from generic unemployment benefits under the previous legislation, and to emphasise its similarity to the means-tested unemployment assistance introduced in the UK in 1935.

<sup>12</sup> Curiously, at a time of serious deficit in labour market demand, especially in the former East. The public is aware of unemployment; it does not see the absence of labour market demand to absorb the unemployment.

eligibility has always been explicit in the form of the *Lohnabstandsgebot*, the prohibition on gross benefits for a couple with three children equalling the monthly net income (including child and housing benefits) of a similar household with a single full time low paid breadwinner. Unlike the UK wage stop, this is applied on a standard basis so that the scale rates themselves and not just the individual household benefit payments must not exceed the average low household incomes taken as comparator. The draconian benefit withdrawal sanctions under the 2005 workfare quasi-contract have been described by at least one human rights philosopher as a massive withdrawal of human rights because (inherent) basic rights to resources sufficient for HD are supplanted by (conditional) exchange relationships lacking any such guarantee (Segbers 2009 p 106).

Since the foundation of the Federal republic in 1949, the image of poverty has changed (Leisering and Leibfried 1999). In the 1950s the problem was seen as one of deprivations affecting large parts of the population, followed by a period of latency during the German economic miracle; the ‘rediscovery’ of social exclusion forms of poverty came in the 1970s, as the condition of the sections of the population who had not benefited from the new affluence, leading to the ‘new poverty’ of the long term unemployed in the 1980s and a more differentiated approach stressing inclusion, family poverty, and active social work and other interventions, in short, a largely individualised behavioural approach. Thus throughout this history of German ideas about society and the role of the state, structural explanations of poverty and the general levels of income needed to achieve HD or to avoid or escape poverty have not been seen as significant issues, and governments repeatedly tried to deny the existence of poverty and suppress references to it.<sup>13</sup> This may be some explanation why there is so little research into it, by contrast with the UK (Buhr, and Buhr 2008).

### **Human dignity in German law.**

For good historical reasons traced back by German legal philosophers to Kant and the Enlightenment and even earlier, but rather more immediately to counter the Nazi ideology (Wetz 2005; Höland), the 1949 Federal Constitution emphasised that it treated *Menschenwürde* (literally inherent human worth, commonly translated as human dignity) as its fundamental principle, albeit in a rather unarticulated and taken-for-granted manner. The framing of the Basic Law (*Grundgesetz*, GG, also taken as synonymous with the Constitution, *Verfassung*) was subject to a great deal of argument about wording, and while the idea of HD was uncontentious, how it was to be referred to in the opening paragraphs was subject to much redrafting. The final version opens with Section 1 (Basic Rights), Article 1 §1 stating “Human dignity is inviolable. Its promotion and protection is the duty of all state power”, while §2 continues with affirmation of human rights as the basis of all human societies, freedom and justice. These ‘portal paragraphs’ remain the fundamental principle to which arguments about the adequacy of social assistance benefit rates refer, which is why appeals against the benefit system end at the Federal constitutional court (*Bundesverfassungsgericht*, BVerfG) as the court of last instance.

Article 20 of the Constitution also states that the Federal Republic is ‘a democratic and social state’, where the word ‘social’ implies a commitment to social protection for all in the sense in which the welfare state is properly understood. Thus when the social assistance laws were embodied in new legislation in 1961 (*Bundessozialhilfegesetz*, BSHG), these constitutional provisions were explicitly replicated in its Section 1§1 which opens with the statements that social assistance covers both regular living needs and special circumstances, and that “the purpose of social assistance is to enable the recipient to lead a life that is in keeping with human dignity”, and that it should enable him (sic) to become independent as far as possible, to which he must contribute so far as he can (as Whittle translated this clause for the DHSS in 1977).

From 1961 onwards, the statutory embodiment of the dignified level of living was contained in the idea of the *soziokulturelle Existenzminimum*, the socio-cultural existence minimum standard (referred to here as Exmin) which is embodied in a construct (discussed below) which can be costed and forms the basis of the Federal recommendations for the social assistance benefit scales. Statute lays down that the benefit scales cover not only the conventional physical and material needs as

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<sup>13</sup> And their expert advisers. In 1966, the then doyen of German social policy professors in the 1950s and 1960s, Hans Achinger, head of the German Association for Public and Private Welfare, emphasised to me that there was *no* poverty in Germany.

experienced in daily life (listed as food, clothing, personal hygiene, household equipment, household fuel<sup>14</sup> and ‘the needs of daily life’) but also ‘a reasonable interaction with the world around and participation in cultural life’, including the special needs of children. It must be noted that this explicitly relativistic participatory social standard does not mean as little as ‘subsistence minimum’ in English, which has rarely if ever been construed to include relativistic social needs and the costs of participation and is usually taken to exclude everything except what are assumed to be merely unchanging physiological needs.<sup>15</sup> Social assistance comes in two forms – the scale rates for regular living expenses, and the provision for additional or exceptional needs according to individual circumstances.<sup>16</sup>

It should also be noted that although laws are quoted by their titles and sections, German social law is codified in the *Sozialgesetzbuch* (SGB), periodically updated as statute changes, and statutory provisions are also commonly known by the section of the SGB in which they appear. The first, general, section SGB1, opens with §1(1) which states that law in the social code aims at “the realisation of social justice and social security by the formation of social services including social and educational help” and “it should contribute to ensuring an existence in human dignity”. The two subsequent sections of interest to this project are SGB2 (unemployment assistance for the economically active, now including some lone parents) and SGB12 (social assistance for people not in the labour market), and that is how they are generally referred to.

While these constitutional aims remain in force, as do the social assistance provisions for those outside the labour market (SGB12), the provisions for long-term unemployed people (SGB2) were radically changed by the so-called *Hartz IV* changes (H4, named after the head of the commission<sup>17</sup> which recommended the large neoliberal economic reform package in four parts) which came into force at the beginning of 2005. This is not the place for discussion of the full ramifications of the changes; what is relevant here is that the previously earnings-related unemployment benefits which followed expiry of contributory earnings-related insurance benefits have been replaced by a much stricter means- and work-test based benefit based on a flat rate formula without extra allowances for special conditions or needs, supplemented by dependants’ allowances based on equivalence scales which have been subject to strong criticism and may be changed.<sup>18</sup>

Furthermore, while previously all social assistance claimants’ rights were to incomes which met HD, this aspect has now been removed from the entitlement of people claiming ALG2 when contributory earnings-related ALG1 has been exhausted). The opening clauses of SGB12§1(1) state that the purpose of social assistance is to enable entitled persons to pursue an HD life by means of benefit scales (at Exmin levels) laid down in regulations. By contrast, the new SGB2 gives no entitlement to HD but simply refers to the flat rate benefits, and the statutory entitlement is to enter a ‘voluntary’ legal contract to work —

In order to receive payments, claimants have to agree to a contract subject to public law. This contract outlines what they are specifically obliged to do in order to improve their job situation and when the state is obliged to help. Unemployed persons can be forced to accept any kind of legal job. This compulsion is restricted by constitutional rights, like freedom of movement, freedom of family, marriage and ‘human dignity’. If taking on a specific placement is deemed reasonable by the responsible agency, not applying will result in a reduction of the appropriate payment.<sup>19</sup>

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<sup>14</sup> Other than central heating costs which are paid with the housing costs, ‘if reasonable’, because in apartment blocks both are usually payable to the landlord.

<sup>15</sup> The distinction is similar to that between Seebohm Rowntree’s primary poverty budgets (subsistence) and his Human Needs of Labour estimates (c f Exmin; for discussion, see Veit-Wilson 1986).

<sup>16</sup> What in UK social assistance terms were known as Discretionary Allowances and Exceptional Needs Payments.

<sup>17</sup> Peter Hartz was personnel director at VW (20% owned by Lower Saxony) and became widely known as adviser to German chancellor (and former head of Lower Saxony) Gerhard Schröder, for whom Hartz developed the so called *Hartz-reforms* of the German labour market and employment agencies. He was later convicted on corruption charges (information from Wikipedia). His labour market analysis and proposals resemble David Freud’s in the UK.

<sup>18</sup> Or the benefit levels may change, which can affect the equivalence scales.

<sup>19</sup> As Wikipedia puts it in English, quoted verbatim because otherwise I have to translate a German paraphrase.

The much-used German phrase for the thrust of this ‘social contract’ field of workfare policy is “*fördern und fordern*”, ‘furthering and demanding’, implying (as in the UK) a reciprocal contractual agreement that in return for benefits the government will offer all the support needed to enable individual unemployed people to achieve the skills and acquire the other social capital needed for employment. The government presentation of the case in both countries presents the offer of support as an endorsement of HD, helping people back into the labour market to achieve their HD in work. Much is made of the role of supportive casework and how effective it can be, which is doubtless true in individual cases but questionable in the absence of labour market demand. But commentators suggest that unemployed people on ALG2 have lost their HD not only in the compulsion to accept any kind of work, even in ‘one-euro jobs’<sup>20</sup>, but in abolition of the statutory obligation for the new benefit rates (and what they allow for dependents) to offer an HD level of living.<sup>21</sup>

H4 also imposed the household means test for the flat rate benefit on ALG2 claimants, where previously their entitlement had been to a household means tested reduced rate of earnings-related unemployment benefit. Some commentators see this as raising issues about the HD not only of unemployed claimants but the other members of their households dependent on benefits in their own right, which now have to be taken into account.

Thus what I studied in 1993 as social assistance with HD as its aim has been massively changed, so that some parts no longer aim to implement it, a conflict with the constitution which is currently attracting legal as well as political attention. I have tried to study the relationship between ideas of HD, Exmin and the bases of the scale rates in the social assistance benefits system, as well as appeals against the H4/ALG2/SGB2<sup>22</sup> benefits on the grounds that they do not meet HD. The system is enormously complex both in conception and in implementation, and this paper is not concerned with examining all of that except insofar as it is relevant to the idea of HD or of a poverty which is inconsistent with HD.

#### **THE BASIS OF THE EXMIN MEASURES USED TO RATIONALISE THE BENEFIT SCALES.**

This section touches on the HD aspects in the structure of the measures used by the Federal government since the 1960s for its recommendations to the Federal Länder governments (autonomous self-governing states responsible for deciding on social assistance benefit levels and administration). This is another very complicated subject with its own gigantic literature covering everything from the inherent concepts and measures of some sorts of poverty through to the statistics of benefits and claimants, though here the focus is only on ideas of adequacy and how they were identified and dealt with – or not.

Three methods have been in use by government claiming they represent Exmin since BSHG was introduced in 1961 —

1. The *Warenkorb* (basket of goods, WK), the normative budget methods used to represent the Exmin until 1990;
2. The *Statistikmodell* (statistical model, Statmod) based on statistical analysis of selected lowest income quintile household consumption patterns reported by the *Einkommen- und Verbrauchsstichprobe* (EVS), the official national income and expenditure sample survey, from 1990, excluding social assistance claimants;
3. The unexplained basis of the ALG2 flat rate tariff for unemployed claimants since 2005.

Argument also continues about the basis of the equivalence scales used for dependent children, and about the weighting of the components of the consumption categories in the ostensible costings of the Statmod. It seems that the equivalence scales are based on arbitrary judgement and fiscal expediency; no one suggested to me that there can be any empirical justification for their levels

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<sup>20</sup> Compulsory work paying one euro per hour above benefit rates.

<sup>21</sup> It should also be noted that different statutory provisions were introduced for ‘asylum seekers’ in 1993 with lower benefits, which I have not studied.

<sup>22</sup> These terms seem to be used interchangeably in ordinary talk.

or the ways in which they have been periodically changed apparently in response to Federal budget and other political exigencies.

### **1. The 'basket of goods' budget approach ('Warenkorb'), 1961-1990.**

From 1961 the Exmin was operationalised in the form of normative budgets for a shopping basket of basic goods and services comprising lowest price quartile costings around the country of the large number of individual items falling under the headings listed in BSHG §12 (e.g. food, clothing, participation etc). The standard to be observed in the choice of components was to be based on 'the average needs of a consumer living in simple conditions or modest circumstances' (Bangert 1964 p 13; Hauser 1989 p 33). In the absence of any clear definition of what HD required, the judgements about what were essential or modest needs were based on "consumer statistics, expert opinions and plausible theoretical assumptions" (Großjohann and Hartmann 1986 quoted by Reidegeld 1988 p 301).

These budget studies were carried out and rebased quinquennially from 1955 to 1980 by the experts of the German Association for Public and Private Welfare (*Deutscher Verein für öffentliche und private Fürsorge*, DV), the influential corporatist NGO founded in 1880 which functions as a multipurpose welfare coordinating body between the various sectors. This corporatist element is important for understanding German social policy. The DV and many other national NGO welfare organisations which administer large parts of the social services as government collaborators within the subsidiary system are also treated as representatives and consultants for the needs of their client groups, and this role ambiguity helps to reinforce the traditional hierarchical class assumptions behind the everyday implementation of deep-seated German inegalitarian values.<sup>23</sup>

The DV budget studies for what its experts considered to be the Exmin standard of living were accepted and used by the Federal government as the basis of its recommendations to the Federal Länder for the social assistance benefit scales which the Länder determine and administer. The Länder set their own scales within about 5% of the Federal recommendations, but some allow further variation between the local authorities which actually administer the social assistance system.

The WK method did try to apply some sort of conception of adequacy for minimal participation, but it was criticised over many years (Hanesch 1992). Social science experts did not like its emphasis on subsistence needs at the expense of participation expenses. The national NGO welfare organisations did not like the transparency of the method because it allowed too much argument about component items. Local government always complained about costs. With rapidly growing affluence in Germany during the period of its economic miracle, the number and variety of elements taken into account by the DV experts, even at what were assumed to be minimum levels in stratified society, meant that the costs of social assistance were rising rapidly for the Länder. Thus the scheduled quinquennial rebasing of the WK in 1980 was suspended for financial reasons, and after that the upratings seem to have taken place only on a politically expedient basis (Hauser 1989). One of the chief architects of the change which was carried out in steps 1990-93 (Hartmann) was clear that the objective was to reduce public expenditure; Länder demands for control of the costs which fell on them led to conferences and consultations from the mid-1980s onwards (e.g. ISG 1992) leading to the basis of the Federal recommendations being changed from the WK to the Statmod.

### **2. The 'statistical model' (Statmod) based on the Income and Expenditure Sample Survey (EVS), 1990 onwards.**

The Statmod has no explicit criteria of needs or adequacy for HD. Instead, it is in principle based on the assumption that the population's living standards and ideas of necessities are reflected in statistics of its expenditure patterns, and "it follows that the living and consumption patterns of single

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<sup>23</sup> Indeed, several of the national denominational NGOs profit from employing ALG2 claimants on '€1 jobs', which is in conflict with their role as advocates against the workfare system and its poverty pay rates (Tänzer, welfare rights lawyer). Although they are necessarily represented on the National Poverty Conference of EAPN, by far the most active in reflecting grassroots opinion and researching alternative approaches to poverty policy seems to be the *Paritätische Gesamtverband*, the national mutual federation of local community and claimants' groups and other kinds of welfare-oriented organisations which is neither denominational nor ideologically coherent, except perhaps in its commitment to mutuality and cooperative working. Many of its local member groups do of course have such allegiances, but unlike the churches' and trade unions' national NGOs they are not 'incorporated' into the ruling structures in society.

and multi-person households<sup>24</sup> in lower income groups can be used as a comparator of living standards which cover essential needs corresponding to human dignity” (Großjohann and Hartmann 1986 quoted by Reidegeld 1988 p 301). Assumptions were made about which of the consumption and expenditure items were necessary for social assistance claimants, and the resulting data formed the basis of the new scale rates.

In the event, after agreement on a new Statmod was reached with difficulty in the late 1980s and it was being introduced in stages, the economic crisis following reunification in 1991 led to suspension of some of its most important elements including indexation for uprating, and the result is that it is now ostensibly based on the expenditure patterns of only single person households in the lowest income quintile, excluding social assistance claimants. There has commonly been a delay of some years between survey data collection and the construction of the Statmod; apparently current rates are still based on the 1998 EVS. The social assistance scale rates are set just below the norm which this statistical procedure produces. Upratings have been by movements in pensions and it is likely (there may be figures but I don’t have them) that the real level of living which Statmod is meant to reflect has fallen over the two decades. In 1993 scale rates were not raised by inflation rates and children’s rates fell, justified on the grounds that falling wage rates affected the standard wage stop on families.

This procedure has attracted a volume of both sociological and methodological criticisms from many directions (e g among many, Hanesch 1992) and continues to do so. Among them are that the households in the lowest income quintile excluding claimants are mainly very low paid or retired, and that their levels of living are hardly typical of or applicable to, for example, families with children, and are not necessarily adequate in the first place (Hartmann). Further, the scale rates for dependent adults and children are percentages of the single person rate based on this small and untypical section of the population, and the equivalence scales used are empirically indefensible and hotly contested, as are the weights attached to the balance of the consumption items in the analysis. Even before the system was introduced, Hauser, another leading player in the introduction of this and the subsequent system, listed the deliberate substitution of political for socio-statistical decisions (Hauser 1989). Becker (2006) pointed out that since Exmin is a value concept, Statmod cannot be objective or value free as its proponents claimed and queried the value laden choice of one person households instead of two. She also noted that because the social assistance eligible takeup rate is only about half to three-fifths, the level of living of the non-claiming households in hidden poverty which falls among those in the lowest income quintile would have been higher, and although they would have been removed from the Statmod comparators, those who remained might not have been dragged down so far by the inclusion of those in hidden poverty.

But the most serious criticism relevant here is what several informants described to me as the *Zirkelschluss*, the closed circle or tautology involved in taking the level of living of the poorest non-claimants as the criterion or comparator for the adequacy of the incomes of claimants. There is empirical evidence that low earners in this quintile are in poverty. The ‘working poor’ were acknowledged later in Germany than in, e g, USA, but the scale seems to have increased, especially in the former east. Andreß and Seeck (2007) report a number of recent studies of in-work poverty using standard inequality measures, as well as their own research. But the tautology criticism misses the point about the basis of the German conception of HD. This procedure is an example of Simmel’s observation that the ‘ordinary’ poverty of the lowest paid workers or ‘respectable’ pensioners is not perceived by the dominant classes as excluding or humiliating. They do not see it as problematic; they believe that people in this kind of ‘included’ poverty already have their HD, and what would be humiliating is not their low level of living but being a claimant. So if the poorest non-claimants, workers and pensioners, are ascribed with their dignity as members of included society, albeit in poverty, then paying social assistance benefits at only just below this level must offer a dignified standard of living – QED as far as the government is concerned. Rűfner (1998 p 27) concurred: the comparator level of living was normatively justified and its components were rightly taken as the commodities and services to be included; the only question was which of these already limited goods and services were to be included among Exmin items in Statmod and which were superfluous.

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<sup>24</sup> Private households in EVS sample.

Nevertheless, the increasing income inequality and precariousness of the employment conditions of the people in the lowest quintile makes them decreasingly relevant as comparators in this way.

The Statmod version of Exmin continues to be the rationale of the SGB12 social assistance for people not in the labour market, and in theory it affects only the scale rates for the monthly payments of benefit to cover regular expenses, not the significant element of social assistance for special circumstances, lumpy purchases and the like. But because the costs of this also continued to preoccupy government at various levels, the H4 reform tried to kill both birds, social assistance costs to government and less-eligibility for unemployed claimants, by changing the ALG2 benefits to a flat rate basis from 2005.

### **3. Hartz IV (H4) and the Flat Rate formula for ALG2 (unemployment assistance).**

The principal difference between the SGB12 social assistance benefits for claimants not in the labour market and ALG2 claimants who are, is that SGB12 claimants are entitled to both regular living benefits and grants for extra costs, while ALG2 claimants get a single fixed monthly amount which is intended to cover both elements of social assistance and they are not eligible to claim anything extra for themselves or their dependents. Whether or not it does is naturally a matter of enormous dispute, and thus there have been many appeals, to be touched on below.

The account which Buhr (2008 p 10) gives of the basis of the contentious unemployment assistance flat rate (now around €351 a month) suggests that it is the outcome of calculations based on the 1998 EVS for the regular social assistance scale rates, plus a standard 15% to cover all the variable additional costs which used to be covered by single payments (claimants are meant to save up for them). The dates themselves give some idea of how far practice has fallen behind the original Statmod reform assumptions of the late 1980s. But informants generally reported that the H4 scale rates were based on a purely political fix driven by fiscal concerns, so it is pointless to look for any kind of social or methodological justification for the level of living which can be supported, other than less-eligibility in a period of falling real earnings.

#### **HD and the scale rates.**

The point here is not the numbers but the slide from the Exmin ideas of needs (WK), via comparisons of status (Statmod) to flat rate benefits which no longer have any discernible relationship to the HD needs of individual unemployed claimants, and especially not to those of their dependent children. The effect this has had on their levels of living has been examined by Christoph (2008) analysing panel survey data from 2006/7 of households with one ALG2 claimant. Using 26 items as potential deprivation indicators, he found that similar items were identified as social necessities in Germany as in the UK<sup>25</sup>, though with the addition of the essential payment of prescription charges (see legal issues below). Christoph found that many ALG2 claimants were far more deprived than the general population (though it was unclear if they had been before becoming unemployed), to the extent of not affording a warm meal daily but especially in terms of social participation indicators. Four out of five could not save for lumpy needs for which payments are no longer made; the fact that they are told they should have saved for them out of the flat rate benefits may be an HD issue in itself. While their general levels of living barely reached material subsistence levels and certainly did not allow social participation, Christoph nevertheless seems to evaluate this as acceptable and treats social participation as an extra. His conclusion, in keeping with common establishment attitudes, was not that benefits are too low but that the worst placed groups, especially single mothers, need more casework.

There is no empirical evidence that the scale rates are adequate for social participation, most informants reported, so the question of the experienced HD of claimants (both H4/SGB2/ALG2 and SGB12) is problematic. The budget studies based on normative judgements about Exmin made by *Paritätische*, the national mutual NGO (Martens 2004; 2006) suggested that the ALG2 scale rate was only about four-fifths of what would be needed for minimal social participation.

The incorporation of the major welfare NGOs, together with academic silo thinking and limited interaction with politics and government action, led one NGO policy official to suggest that

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<sup>25</sup> Though strikingly none of the previous relevant work in the UK was cited.

the appeals system has done more for people in poverty than have all the NGOs.<sup>26</sup> Trying to report the significance of German legal decisions for HD is, for me, an interpretatively difficult and risky business, but the following section reports some relevant issues in a number of cases which raised HD issues in recent years, to suggest how judges have seen the constitutional right to an HD life.

### **JUSTICIABILITY.**

#### ***The system of appeals against decisions on the adequacy of benefit payments for HD.***

Unemployment benefits used to be the responsibility of the Federal government, but under H4 the means-tested SGB2 benefit ALG2 is now administered by the local authorities who have always been responsible for social assistance and social work. Similarly, the appeals system which previously was split between the administrative (*Verwaltung*) and social courts at local, Land and Federal tiers are now subject to the social courts, *Sozialgerichte*. A claimant who is dissatisfied with an official decision about unemployment or social assistance payments can appeal to the local authority office administering the benefit, and this has to be formally answered by that office within a given period. If the claimant continues to be dissatisfied with the answer, an appeal can be made to the local authority social court (*Kommunalsozialgericht*), and from that to the Land Social Court (*Landessozialgericht*, LSG) since each Land is responsible for administering its own social assistance system, and then the Federal Social Court (*Bundessozialgericht*, BSG), which is the court of highest instance on substantive benefit matters. Appeals on matters of constitutional law raised by benefit appeals can be taken from the BSG to the Federal Constitutional Court (*Bundesverfassungsgericht*, BVG). It may be there is some ambiguous tension between the Federal highest tier of the social courts, the *Bundessozialgericht* (BSG) in adjudicating claims that the levels of benefit or additional needs payments do not meet Exmin and thus HD and are thus unlawful under SGB12 and still unconstitutional under SGB2, and the BVG which considers only if the failure is unconstitutional. An issue in these arguments is the applicability of the legal doctrine of *Drittwirkung*, which is defined by Wikipedia as —

a legal concept originally developed in German courts that presumes that an individual plaintiff can rely on a national bill of rights to sue ... the government for the violation of those rights. It was originally developed in the 1950s, but has gained traction in various other national legal systems in Europe as well as the jurisprudence of the European Court of Human Rights.

Over the four decades since the BSHG 1961, the culture of the courts in dealing with HD questions has undergone change (Höland). In the early days of social assistance they were establishing the norms and parameter of interpretation, but these became ‘domesticated’<sup>27</sup> and thus became less high profile in judgements. This has become more pronounced since the introduction of H4, so that concerns about HD as such have diminished with the increased distance from the events which originally led to the emphasis on HD. There has always been a repressive or control element in German social assistance, so at the level of values the move from ostensible rights to social contract in H4 is not surprising. Indeed, Richard Hauser, one of the most senior establishment academics involved with government in social assistance policy for decades, told me (2008) that “Germans have forgotten the concept of human dignity”.

The judges in the various levels of the appeal courts have not, however, been allowed to forget the concept, as renewed generations of claimants find their HD fails to be met by benefits. This project made no systematic attempt to collect statistical data about appeals, though it is widely reported that there has been an enormous increase since H4 was introduced. It is also noteworthy that judges publish their personal opinions and write commentaries on issues raised by both legislation and appeals in the established jurisprudential journals and other forums, so there is a large corpus of available informed opinion, far more in fact than I could analyse. Even before the H4 legislation was

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<sup>26</sup> He found this paradoxical but it fits with the German paternalistic perception of poverty policy.

<sup>27</sup> Incorporated into everyday thinking so that one becomes unconscious of their influence.

introduced in 2005, at least one BVG judge wrote that the proposed workfare contract offends against the constitution's guarantee of freedom of contract and of freedom of choice of work.<sup>28</sup>

Analysing the contents of appeals demands a study in its own right which I could not do. Instead, several of my informants referred me to cases in which HD was raised as an issue, as it often is because the inadequacy of benefits in itself is not grounds for appeal but putting constitutional rights to HD into jeopardy is. I also looked at some claimants' and welfare rights organisations websites to see what issues they raised. The following is simply an attempt to give an impression of, first, the kinds of issues raised by appeals (whether granted or rejected), and second, commentaries by people working in or close to the judicial field.

### **Decisions on HD issues.**

The operation of the household means test has generated much concern. A BSG judge (Roos 2008) commenting on a number of cases raised the question whether the household, the 'needs community' (*Bedarfsgemeinschaft*) which is taken as an economic unit, is thereby to be understood as a juridical person simply because "what defines a household under SGB2 is simply that one of its members is available for work for at least three hours a day" and has claimed ALG2. The BSG has asked for this to be reviewed and that for a limited period cases should be subject to a better-off test by being treated as independent claimants or as a joint household. In another case mentioned, an appeal for travel expenses for an absent father with access rights to his daughters, where H4/SGB2/ALG2 forbids the extra payments which SGB12 would allow, but the constitution lays down the inviolability of family, the judicial device suggested was to create a 'new household' each time the father has access, with a means test to include the children.

An early BSG judgement (23.11.06) was that "in setting the scale rates in SGB2 the legislator has not exceeded the permitted scope of his judgement". This was an appeal by the disabled wife (who applied for ALG2 on the grounds that she was capable of more than three hours' employment a day) of a disabled pensioner against the effects of the household means test which threatened the HD of them both. She quoted expert opinion that the scale rates were some 10-20% too low for Exmin. The BSG ruled that because the wording of applicable laws lays down that the state guarantees not only physical subsistence but also Exmin and protection against stigmatisation and social exclusion, by referring to these issues the H4 legislation had taken them into consideration. In other words, because the legislature had *considered* the matter, its decision could not be appealed on the grounds that it had not taken Exmin into account. I was told this decision has been appealed to the BVG and is awaiting judgement. Similar judgements rule that since setting the scale rates falls within the broad competence and discretion of the legislature, and if – as is the case – the legislature can show that it had taken regard of the demands of HD and Exmin, then the court cannot interfere. If the decision is procedurally correct, the substantive question of whether the actual levels of scale rates meet Exmin demands does not seem to be considered.

A listing of recent appeals against H4/SGB2 and SGB12 decisions in the Land social court (LSG) Stuttgart (13.7.06) gave a very wide variety of subjects, but the general content is suggested by this list, which would probably resemble one in the UK —

The household means test – does it include a stepfather? cohabitation; access costs to children; educational costs such as school outings and materials; clothes (including a safety helmet) and luggage for mother and children prescribed a convalescent holiday; 'reasonable' accommodation; medical treatment travel costs; teeth and glasses; fuel costs and debts; a 17-year-old as householder because of family strife; income needs of owner of illiquid assets.

Many of these appeals refer to additional needs. An internet search for appeal judgements containing the keyword *Menschenwürde* (HD)<sup>29</sup> during the period September 2006 to April 2008 threw up twelve, most of which covered similar aspects of life in poverty. References were often to jeopardising or injuring dignity. Some were straightforwardly that the scale rates did not allow a

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<sup>28</sup> A website commented that its unconstitutionality was subject to appeal in the BVG but I do not have more information.

<sup>29</sup> I am particularly grateful to Benedikt Buchner for giving me this and commenting on many of these examples for me. The search did not use the keyword as an adjective, which would certainly have produced more cases than the noun alone.

dignified life because, for instance, they were insufficient for food and fuel when prices had risen so much but rates had not. Other were more complex. An appellant wanted costs for alternative therapy because of a well-justified fear of the side effects of conventional chemotherapy for her cancer (medical care is not free). An appellant did not have his HD injured by not being paid one kind of benefit for blind people since he was eligible to claim another. The household means test was raised by a tax threshold appeal where being forced to re-allocate joint resources must not bring the non-claimant partner below the tax threshold. In two different cases in which the wording was identical, the courts had judged that the scale rates did meet Exmin and thus were compatible with HD precisely because the comparator chosen by the government was other low income groups who lived in similar circumstances, and rights to individual needs were not vitiated by a scale rate applicable to all. Other appeals have been against the refusal to cover the copayments for prescriptions which were imposed on claimants in 2004. Claims that paying substantial sums for essential treatment reduced income available for Exmin were rejected by BSG and other courts on the grounds that the legislature had broad discretion to decide on what was necessary for Exmin.

However, the idea of minimum income adequacy standards is now receiving political and judicial consideration as serious doubts about H4 adequacy are being voiced more widely not only by grass roots but elites (Davy). The Green and Left Parties tabled a number of motions, and an appeal to the BSG led to its judgement in January this year that the 60% equivalence scale used for dependent children below 15 is not constitutional. It based this on three arguments – (1) that children’s needs have not been identified in such a way as to justify setting them 40% below those of adults; (2) that benefits for children can be supplemented to meet individual needs under two-part SGB12 but not flat-rate SGB2/ALG2; (3) that no other age ranges have been considered beside the single equivalence scale of 60% for all children below 15 (BSG press release 3/09). This has now been referred to the BVG for judgement. The BSG judgement states that assuring the Exmin needs of children are met means that the legislature must carry out “a detailed normative evaluation of the needs of children and young people”, and that only this would enable the court to decide if the scale rates were set within the lawful scope of the legislature’s judgement.

Once again, then, we see the constitutional issue packaged as being procedural rather than substantive: the constitutional issue is not that the scale rates are too low but that a flat rate has been imposed on children without the information to enable the legislature to set them within the scope of its competence. The government response so far has been to offer to publish the 2008 rebasing of Statmod in 2011 and to raise the 6-13 age range by 10%, but it has so far offered no empirical rationale, and welfare NGO response has been to demand that Statmod ceases to use low-paid single person households as its base but uses families instead, and takes children’s Exmin needs into account since many costs cannot be covered by flat rate responses such as 10% (Martens).

HD issues are of course raised not only by inadequate benefits but by improper procedures, such as delay and discourtesy. A welfare rights lawyer reported<sup>30</sup> that current advice to JobCenter<sup>31</sup> case managers trying to reduce the rates of successful appeals against their ALG2 decisions (running at some 50-60% and even up to 70-80% when agencies judge they would lose anyway) is to call appellants in and try to influence them to withdraw written appeals by arguments that there are no legal grounds for their appeal. Written appeals must be answered within three months, but withdrawal avoids opening case records and bad statistics. As in the UK, too few experienced case managers are being employed, but instead of improving the quality of case management the official advice is to offer what Unkelbach calls ‘talk therapy’.

### ***Some legal reflections on these issues.***

“Lawyers love abstract arguments” about these topics, an NGO research official commented (Martens), and a great many have been published over the years; those cited here are among the few more concrete and less abstractly longwinded that I saw. Long before Hartz IV, a lecture on “Human Dignity and Existenzminimum” cited the BVG’s distinction between the concepts. The right to HD implies the state’s responsibility to protect the individual against humiliation, stigmatisation, ostracism and persecution, but the guarantee of a minimum level of living, Exmin, is a matter for the

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<sup>30</sup> A Unkelbach (26.11.08 on *Tacheles*, an internet helpsite), advising appellants not to withdraw appeals but to pursue them.

<sup>31</sup> As they are called, or ARGE (*Arbeitsgemeinschaft*), offices of the Federal Employment Agency.

welfare state. The right to social assistance benefits is no more than to put people into a position in which they can pursue a life corresponding to HD, not to overcome poverty but to a position comparable with those whose HD is recognised (Neumann 1994; c f Simmel 1968). But Neumann emphasised not only the responsibility to work but the freedom to choose it as essential to HD, and cited a court judgement that work conditions cannot be imposed if they cannot be implemented. Perhaps H4 workfare and its ‘free contract’ are now taken as overcoming those objections; some commentators strongly disagree (e g Segbers 2009).

A much-cited lecture on ‘the dogmatics of the right to the security of the Exmin’ by a Land social court judge (Wallerath 2008) asserts that the centre of the social state is solidarity with the lowest placed and that its obligations amount to more than subsistence, but argues that earlier judgements decided that HD does not involve income needs but human respect. The problem is that the obligation is abstract; there is no constitutional right to material help which is only a means towards an HD life, and since HD was not precisely defined it was never intended to be an independent right but only ‘a right to a right’. Meeting that right must be subject to ‘social realities’ and ‘available resources’ (the government decides adequacy and fiscal capacity), and HD does not imply an unconditional right to benefits in the absence of reciprocal obligations. In short, refuse the workfare contract and you have resigned your rights to HD.

Other commentators use similar language such as “The Basic Law does not guarantee a decent life” (Hinrichs 2006), but they do not all tend to similar conclusions. “Equality of worth, like equality of freedom, does not require precisely similar levels of living. Rather, the dignity clause underpins universal social minimum standards” (Heinig 2008 p 348). But it doesn’t seem to do that very firmly, since commentators seem to agree that it is very difficult to move from the right to respect for dignity to a minimum income standard. But Heinig is not convinced by the use of the lowest income groups as comparators for Exmin, and argues that scale rates based on in-work poverty cannot be constitutionally secure, nor can HD be based on what is fiscally feasible; in effect there is a categorical imperative that ‘money must be found’ (ibid pp 354-355).

Technical aspects of the theoretical basis and operationalisation of the Exmin level of living and thus its legal justification exercise many of the legal commentators, because of the problem of deciding whose normative judgements are to be applied. It is striking that expert technical advisers reviewing the Exmin needs basis of the scale rates given to the Federal government’s health department in 1999 appeared to be unaware of previous relevant work. US budget work in the 1940s was mentioned but not Orshansky’s celebrated work in the 1960s. The only reference to relevant British empirical work on deprivation indicators was a paragraph on Townsend’s *Poverty in the United Kingdom* (1979) unrelated to the rest of the argument, perhaps because having decided that poverty is more than money they concluded that poverty cannot be measured or standards found for avoiding it (Christa and Schäfer 1999). Indeed, in a lecture on constitutional aspects of social equality, Davy (2008) argues that while levels of living falling below Exmin remain constitutionally problematic, there is no agreement among lawyers even on the right to Exmin (‘where is it in statute?’), let alone any consensus on the basis of Exmin. But the dynamic character of HD is widely understood, even if narrowly applied by government (on health inequalities, “you shouldn’t be able to recognise claimants by their teeth”).

“Many small steps are leading to great changes in the German welfare state”, not only by abandoning the aim of ensuring a dignified life but by the steady departure from the principles of meeting need and the right to freedom of choice of occupation (Spindler 2008). But the social state’s ideals are themselves reactions to an authoritarianism which stretches back into feudal times and remains deep-seated in the acceptance of a hierarchical stratified class society. Feudal society was based upon reciprocities just as contract is, but individualised contract and the rights of equal and decent treatment which accompany that Enlightenment view are modern, and many legal commentators argue that HD is a feudal status responsibility and does not correspond to the human right to a minimum income for participation. This is rejuvenating the social state debate (Höland). But at the popular level the articulated concerns in a period of growing inequalities are by and about the precarious polarised middle classes, not those in poverty. Indeed, empirical evidence seems to confirm the Simmel assertion that most Germans prefer the inclusive economic status of working for poverty wages than the excluded social status of being an unemployed claimant. But German social

policy may be on a long trend from Bismarckian status protected earnings-related benefits to Beveridgean minimum incomes (Kronauer).

### **CONCLUSIONS.**

So have the Germans ‘forgotten the concept of human dignity’? A survey of public attitudes to social assistance carried out in 2004 (before H4 was introduced) found that “on average the German population supports the state responsibility for reducing poverty” and “thinks benefits granted through social assistance are too low”. But the moral economy of reciprocity and subsidiarity is strongly supported; willingness to work is crucial, and the belief in self-help requires active cooperation in job search (Sachwey et al 2007 pp 131-135). This suggests that workfare as such does not conflict with German basic values. Indeed, being in paid work is seen by many as an essential aspect of HD.

For the purposes of this paper the point is the implications for the original research problem. I did not study this subject in order to be able only to describe it to academics, but to see what the German (and Swedish) experience can tell us, and policy makers in Europe more generally, about the conditions under which people in poverty can get the higher incomes at which they can participate in society, be included and have their HD respected. Who is Europe for if it is not *all* the people in it?

I had hoped that the German constitutional right to a dignified standard of living might point the way to Human Rights and justice through juridification and justiciability, but what it suggests is that there are certain prerequisites which have not yet been met in Germany. These include a society in which it is not politically taken for granted that if economic belts have to be tightened it is those with the thinnest waists who should have their belts pulled hardest first for the benefit of those who are fatter. Nevertheless, what is incontrovertible is the fact that the right to experience a human value, dignity, is embedded in the German constitution, and this does allow and even encourage serious argument about what it means in practice. Implementation of the right has long been debated at many levels from the legal and philosophical, through the methodological and political, to the welfare rights of people in poverty appealing for their rights in the social courts.

At a more detailed level, an indispensable prerequisite is the specification of the level of living which the constitution refers to as dignified. In a democratic society that requires not the normative judgement of jurists, politicians or statisticians but the work of social researchers to survey the population as a whole to find out what it considers to be a dignified level of living, and of people in poverty to make it clear what is not, and what needs to be changed. That is a MIS project, but beyond it lies the implementation of its conclusions, not only in the residual benefits system but also in collective social provision for the whole population. Human dignity is a collective interactive experience; neoliberal individualistic economism cannot account for it or meet it.

The German experience shows that juridification and justiciability of the right to an adequate income are necessary conditions but on their own without socially-defensible and quantifiable adequacy standards they are by no means sufficient to overcome poverty. At the next stage of this study I hope to analyse and write about the Swedish experience at a time of similar change. Sweden is a country with a population about one tenth of Germany, and with a traditionally less hierarchical and more egalitarian underlying social value system. Its official quantification of income adequacy is more sophisticated and socially defensible than that of Germany, but it is questionable if it has been implemented in a more effective manner than that of Germany.

As research papers usually conclude, more research remains to be done. But action needs not wait on research. In Germany as in the UK, the existing evidence suggests that the wages of the lowest earners, and with them the social assistance benefits system, need to be raised to levels at which no one in their households is poor by the HBAI inequality measures. The question of the relations between 60% of median or adequacy at MIS/HD levels can then be dealt with separately. The UK evidence (JRF/MIS 2008; revisions forthcoming) suggests that HBAI is too low to meet adequacy standards, but the UK offers neither juridified nor justiciable human rights to them. If only Germany and the UK could learn from each other!

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### REFERENCES.

- Andreß, H.-J., Burkatzki, E., Lipsmeier, G., Salentin, K., Schulte, K., & Strengmann-Kuhn, W. (1996). *Leben in Armut: Analysen der Verhaltensweisen armer Haushalte mit Umfragedaten*. Bielefeld: University of Bielefeld.
- Andreß, H.-J., & Seeck, T. (2007). "Ist das normalarbeitsverhältnis noch armutsvermeidend? Erwerbstätigkeit in Zeiten deregulierter Arbeitsmärkte und des Umbaus sozialer Sicherungssysteme". *Kölner Zeitschrift für Soziologie und Sozialpsychologie*, vol 59, no. 3, pp 459-492.
- Bangert, W. (1964). *Die Sozialhilfe*. Stuttgart: W Kohlhammer Verlag.
- Becker, I. (2006). "Bedarfsgerechtigkeit und sozio-kulturelles Existenzminimum. Der gegenwärtige Eckregelsatz vor dem Hintergrund aktueller Daten", *J W Goethe University Frankfurt am Main, Social Justice Project Working Paper 1*.
- Bieritz-Harder, R. (2001). *Menschenwürdig leben. Ein Beitrag zum Lohnabstandsgebot des Bundessozialhilfegesetzes, seiner Geschichte und verfassungsrechtlichen Problematik*. Berlin: Berlin Verlag Arno Spitz GmbH.
- Buhr, P. (2008). "Die Sozialhilfe in Deutschland – bundespolitische Reformen 1990-2005". pp. 21: University of Bremen.
- Christa, H., & Schäfer, D. (1999). "Theoretische Reflexion des Bedarfsbegriffs. Gutachten im Auftrag des Bundesministeriums für Gesundheit", *Gutachten zur Vorbereitung der Diskussion über die Neubestimmung der Regelsätze nach §22 BSHG*.
- Christoph, B. (2008). "Was fehlt bei Hartz IV? Zum Lebensstandard der Empfänger von Leistungen nach SGB II". *Informationsdienst Soziale Indikatoren*, no. 40, pp 7-10.
- Davy, U. (2008). "Soziale Gleichheit: Voraussetzung oder Aufgabe der Verfassung?" *Staatsrechtslehrertagung*. Erlangen.
- Galtung, J. (1981). "Structure, culture, and intellectual style: An essay comparing saxon, gallic and nipponic approaches". *Social Science Information*, vol 20, no. 6, pp 817-856.
- Großjohann, K., & Hartmann, H. (1986). "Auf dem Wege zur Neufestsetzung der Sozialhilfe-Regelsätze". *Theorie und Praxis der Sozialen Arbeit*, vol 37, no. 11, pp 362-369.

- Hanesch, W. (1992). "Ist Armut messbar? Bedarfsmessung und Grundsicherung", *Das Bundessozialhilfegesetz in der sozialpolitischen Praxis. Eine Zwischenbilanz nach 30 Jahren*. Bremen: Der Senator für Gesundheit, Jugend und Soziales. pp. 54-64.
- Hauser, R. (1989). "Memorandum submitted by Professor Richard Hauser, Universität Frankfurt". In House of Commons Social Services Committee (ed.), *Minimum Incomes. Memoranda laid before the Committee. House of Commons Paper 579*. London: HMSO. pp. 33-35.
- Heinig, H. M. (2008). *Der Sozialstaat im Dienst der Freiheit. Zur Formel vom 'sozialen' Staat in Art. 20 Abs. 1 GG*. Tübingen: Mohr Siebeck.
- Hinrichs, K. (2006). "Leistungen und Sanktionen: zur Neudefinition der Menschenwürde durch die 'Hartz IV Gesetze'". *Kritische Justiz: Vierteljahresschrift*, vol 39, no. 2, pp 195-208.
- ISG (1992). *Symposium zur BSHG-Novellierung: Proceedings of a Federal and local government conference in Bonn on 2 June 1992 to consider urgent amendments to the Federal Law on Social Assistance*, organised, edited and published by the *Institut für Sozialforschung und Gesellschaftspolitik* (Institute for Social Research and Public Policy), Köln.
- JRF/MIS (2008). "A Minimum Income Standard for Britain". Joseph Rowntree Foundation.
- Leisering, L., & Leibfried, S. (1999). *Time and Poverty in Western Welfare States: United Germany in Perspective*. Cambridge: Cambridge University Press.
- Marshall, T. H. (1965). "The Right to Welfare". *Sociological Review*, vol 13, no. 3, pp 261-272.
- Martens, R. (2004). "Zum Leben zu wenig." *Für eine offene Diskussion über das Existenzminimum beim Arbeitslosengeld II und in der Sozialhilfe*. Berlin: Der Paritätische Wohlfahrtsverband.
- Martens, R. (2006). "Zum Leben zu wenig." *Für eine offene Diskussion über das Existenzminimum beim Arbeitslosengeld II und in der Sozialhilfe. Neue Regelsatzberechnung 2006*. Berlin: Der Paritätische Wohlfahrtsverband.
- Neumann, V. (1994). "Menschenwürde und Existenzminimum", *Inaugural lecture, 19 May 1994*. Faculty of Law: Humboldt University Berlin.
- Reidegeld, E. (1988). "Bedarfsmessungssysteme, Regelsätze und Menschenwürde". *Zeitschrift für Soziologie*, no. 10, pp 299-305.
- Roos, E. (2008). "Entscheidungen zum SGB II -- Zur aktuellen Rechtsprechung des Bundessozialgerichts". *Neue Zeitschrift für Sozialrecht*, no. 3, pp 119-125.
- Rüfner, W. (1998). "Analyse der Rechtsprechung zur Bemessung der Regelsätze. Rechtsgutachten dem Bundesministerium für Gesundheit erstattet von Dr jur Wolfgang Rüfner Universitätsprofessor", *Gutachten zur Vorbereitung der Diskussion über die Neubestimmung der Regelsätze nach §22 BSHG*.
- Sachwey, P., Ullrich, C. G., & Christoph, B. (2007). "The Moral Economy of Poverty -- on the conditionality of public support for social assistance schemes". In S. Mau & B. Veghte (eds.), *Social Justice, Legitimacy and the Welfare State*. Aldershot: Ashgate. pp. 123-142.
- Segbers, F. (2009). "Hartz IV und die Menschenrechte: Fünf Jahre 'Fördern und Fordern'". *Blätter für deutsche und internationale Politik*, vol 54, no. 2, pp 102-109.
- Simmel, G. (1968). *Soziologie (5th edition)*. Berlin: Duncker und Humblot.
- Spindler, H. (2008). "Viele kleine Schritte verändern den Sozialstaat". *Neue Caritas*, no. 7, pp 9-12.
- Veit-Wilson, J. (1986). "Paradigms of Poverty: A Rehabilitation of B. S. Rowntree". *Journal of Social Policy*, vol 15, no. 1, pp 69-99.
- Veit-Wilson, J. (1998). *Setting Adequacy Standards: how governments define minimum incomes*. Bristol: The Policy Press.
- Veit-Wilson, J. (1999). "The Tax Threshold: Policy, Principles and Poverty". *Twentieth Century British History*, vol 10, no. 2, pp 218-234.
- Veit-Wilson, J. (2006). "No rights without remedies: necessary conditions for abolishing child poverty". *European Journal of Social Security*, vol 8, no. 3, pp 317-337.
- Veit-Wilson, J. (2007). "Some social policy implications of a right to social security". In J. Van Langendonck (ed.), *The Right to Social Security*. Antwerp: Intersentia. pp. 57-83
- von Bülow, B. (1914). *Imperial Germany*. London: Cassell & Co Ltd.
- Wallerath, M. (2008). "Zur Dogmatik eines Rechts auf Sicherung des Existenzminimums. Ein Beitrag zur Schutzdimension des Art. 1 Abs. 1 Satz 2 GG". *Juristen Zeitung*, vol 63, no. 4, pp 157-168.
- Wetz, F. J. (2005). *Illusion Menschenwürde: Aufstieg und Fall eines Grundwerts*. Stuttgart: Klett-Cotta.
- Whittle, C. (1977). "Social Assistance in the Federal Republic of Germany". London: Department of Health and Social Security.