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Review paper

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THE RIGHT TO MINIMUM INCOME: GERMAN AND ECHR MODELS OF ITS JUDICIAL PROTECTION

ABSTRACT

This article delves into the German model and the ECHR model of judicial protection concerning the right to a minimum income, exploring their implications for minimum income policies. The German Federal Constitutional Court's "Hartz IV" judgment establishes a fundamental right to a subsistence minimum, emphasizing human dignity and imposing constraints on legislative actions in social protection. In contrast, the ECHR model evolves from the prohibition of degrading treatment to defending the right to private property, offering a potential avenue for safeguarding individuals against legislative regressions in social policy. The objective of this analysis is to assess the interplay between constitutional principles and social policy objectives in the context of minimum income schemes, considering the implications of these judicial models on the constitutionality and effectiveness of social legislation. By synthesizing insights from both models, this article contributes to the discourse on a rights-based approach to minimum income policies, highlighting the complexities and considerations involved in balancing individual rights with state obligations in the realm of social protection. While the Hartz IV model offers a robust framework for scrutinizing social policy decisions, its exportability to supranational courts requires careful consideration to ensure alignment with the principle of subsidiarity and respect for national legal systems' autonomy.

Keywords: *Minimum income, human dignity, social policy, judicial review, legislative regression.*

1. INTRODUCTION

The fact that the right to a minimum income¹ is not a recurrent object of study from a constitutional perspective should not surprise us if we take into account that it is rare in European constitutions to find an express recognition of this right. Despite this, the evolution of social rights and the transformation of the social state has led us to a situation in which it is increasingly common to find references to a constitutional right to have the minimum resources for subsistence guaranteed. However, the definition of its content is far from

¹ In this article, the terms “minimum income” and “subsistence minimum” will be used indistinctly.

peaceful.² For example, Jimena Quesada refers to the "right to guaranteed minimum resources" to refer to the provision by the State of the most basic needs: food, housing and clothing³, although in later works, when he refers to this right, he also refers to the basic needs of health and culture.⁴ A broader definition is provided by Vaquer who, in reference to the right to a vital minimum, defines it as the "right to minimum socio-economic and environmental conditions of subsistence without which they cannot enjoy their dignity or develop their personality".⁵ However, this broad conception runs the risk of overlapping with other social rights with a longer constitutional history, such as the right to housing, health protection or education. Therefore, in order to refer to this as an autonomous right, it will be convenient to refer to the definition of this right by Carmona Cuenca, who refers to this right as the "free disposal of minimum economic resources to meet the most pressing needs of human beings".⁶ In this sense, citizens can generally obtain these minimum necessary resources mainly in three ways: through the use of their own assets, through a salary or through state benefits.⁷ However, the usefulness of the right to the minimum subsistence as an autonomous right is most relevant in relation to the third manifestation of this phenomenon, that is, when the possibility of having minimum economic resources depends on the existence of public social benefits, due to the lack of assets or employment to cover them. The reason behind this is that the satisfaction of vital needs through one's own assets is already protected by the right to private property and such satisfaction through work is protected by the right to sufficient remuneration. The right to a subsistence minimum tries to respond to the "third way" of social benefits, in the absence of the vital needs being covered by the first two.

This article explores the way in which this idea of a subsistence minimum has been defended judicially against legislative decisions. The judicial protection of the right to minimum subsistence is understood in this article as the judicial review exercised by the judiciary on legislative decisions, with the aim of preventing these decisions from depriving the individuals from access to the minimum economic resources to meet their basic human needs. With that end,

² Carmona, E., *El derecho a un mínimo vital*, Derechos sociales y tutela antidiscriminatoria, Thomson Reuters Aranzadi, 2012, p. 1577.

³ Jimena, L., *La Europa social y democrática de derecho*, Dykinson, 1997, p. 277.

⁴ Jimena, L., *El Ingreso Mínimo Vital como derecho fundamental social de nueva generación*, Igualdad ES, 8, 2023, p. 215.

⁵ Vaquer, M., *El Ingreso Mínimo Vital desde la óptica del derecho público: sus aportaciones al debate sobre el Estado social y autonómico*, Revista de Derecho Público, Teoría y Método, 5, 2022, p.117.

⁶ Carmona, E., *El derecho a un mínimo vital y el derecho a la renta básica*, Anuario de Derechos Humanos, 2017, p. 201.

⁷ *Loc cit.*

when a court, generally a constitutional court, exercises this judicial protection of the subsistence minimum, it establishes limitations on the freedom of the legislature in shaping social policy. These limitations can take the form of declaring legislative regressions as unconstitutional or mandating positive actions to the legislature.

This article will explore two models of judicial defense of the subsistence minimum, with the intention of highlighting the consequences deriving from these models. Firstly, the German model will be analyzed, focusing on the “Hartz IV” judgment of 9 February 2010. This model establishes a complex methodology of assessment of legislative decisions in order to determine the constitutionality of a reform of the German social protection system that established a subsistence minimum subsidy. This model, characterized by an exam of adequacy and consistency of the policy decisions and the mandate of positive obligations to the legislative, has been praised as a model deserving being exported⁸. For that reason, it is considered fundamental to explore its intrinsic implications.

The second model explored in this article will be the model followed by the European Court of Human Rights, exposing how, after showing signs of possible protection of the subsistence minimum based on the prohibition of degrading treatment (art. 3 ECHR), it has shaped a model of protection against legislative regressions on social policy, based on the right to private poverty (art. 1 P1 ECHR). The court has shaped a model that allows it to declare as contrary to the Convention legislative decisions that take away subsidies on which the satisfaction of basic human needs are dependent on.

Both models will be explored with the intention of establishing possible ways of judicial defense of the subsistence minimum that could be applied in European countries, analysing the implications that these models may imply.

2. THE GERMAN MODEL OF JUDICIAL DEFENSE OF THE SUBSISTENCE MINIMUM

The analysis of the German model requires a deep assessment of the judgment of the German Federal Constitutional Court of 9 February 2010, known as “Hartz

⁸ Leijten, I., *The German Right to an Existenzminimum, Human Dignity, and the Possibility of Minimum Core Socioeconomic Rights Protection*, German Law Journal, vol. 16, issue 1, 2015., p. 23-48.

IV”.⁹ The factual background to the judgment relates to a reform of the German social protection system which involved the creation of a social benefit which merged two previous benefits and became the new safety net for those in need, unable to obtain any other benefit and capable of entering the labor market. In response to this reform, two courts raised questions of constitutionality before the Federal Constitutional Court on the grounds that the amount was insufficient, and therefore, unconstitutional. The Court ruled by declaring the existence of a tacit fundamental right to the subsistence minimum and deriving from this a complex two-phase mechanism to control the constitutionality of the reform, the application of which implied the unconstitutionality of certain provisions on welfare benefits, considering them incompatible with articles 1.1, which enshrines the principle of human dignity, and 20.1, which declares the social state, of the Grundgesetz. Consequently, it ordered the legislator to enact new provisions respectful of human dignity, maintaining the applicability of the questioned provisions until the new legislation was adopted.

2.1. The jurisprudential enshrinement of a right to the subsistence minimum

The most relevant aspect of this judgment is the Court's conclusion that the guarantee of a "subsistence minimum"¹⁰ can be derived from the principles of human dignity (art. 1.1) and of the democratic and social state (art. 20.1). This decision represents the enshrinement in the German legal system of a genuine enforceable right to benefits that guarantee a minimum of dignified subsistence. This opens the door to controlling the constitutionality of the legislator's actions in the light of this fundamental right. This decision represents an innovation in German constitutional jurisprudence, which broadens the practical applicability of the concept of human dignity. Dignity had already been related to the subsistence minimum in jurisprudence¹¹, but the great difference brought about by *Hartz IV* is that there is a transformation of the guarantee of human dignity, which can now operate as a fundamental socio-economic right that guarantees people in a state of need the provision¹², by means of a legal norm, of the means

⁹ BVerfG, Judgment of the First Senate of 9 February 2010 - 1 BvL 1/09.

¹⁰ *Ibid.*, para 13.3.

¹¹ Alexy considered, as soon as in 1993, that the existence of the fundamental right to the minimum subsistence minimum could already be deduced from the case law. Alexy, R., *Teoría de los derechos fundamentales*, Centro de Estudios Constitucionales, Madrid, 1993, p. 422.

¹² While it is true that the linking of the subsistence minimum to the concept of human dignity is not entirely new in German jurisprudence, it is also true that it had explicitly denied the consideration of the right to minimum resources as a fundamental right. On this topic, Carro, J.L., *Mínimo existencial y jurisprudencia. Hacia la construcción*

to achieve the indispensable material conditions for physical existence and for a minimum of social, political and cultural participation.¹³

2.2. The application of the right to a subsistence minimum in *Hartz IV*

The transformation brought about by this extension of the effectiveness of the concept of human dignity in the field of social welfare is concretely embodied in the *Hartz IV* judgment, which introduces an innovative way of constitutionally controlling changes in the social protection system. As indicated above, in the face of the reform of the system, and once the existence of a fundamental right able to justify the exercise of the constitutionality review had been recognized, the Court established a mechanism that operated in two phases.

The first phase is a *prima facie* adequacy test, which allows the Court to declare the amount unconstitutional in case of an “evidently insufficient” benefit to guarantee subsistence.¹⁴ The Court recognized that this control had to be applied with self-restraint, as it considered that the amount, being a political matter, must be fixed by the legislator.¹⁵ The second phase consists of an assessment of the “procedure to ascertain the subsistence minimum”.¹⁶ This test, in my opinion, becomes a complex and demanding test of reasonableness and non-arbitrariness, that aims to assess whether the legislative body, when setting the amount, has followed a transparent and appropriate procedure that responds to the real needs of individuals. It performs this control through four steps consisting of: (i) examining whether the legislative body has considered and described the objective of securing a dignified existence¹⁷; (ii) examining if it has chosen an appropriate method of calculation¹⁸; (iii) examining if it has used adequate and correct data for the calculation¹⁹; and (iv) controlling whether the chosen method of calculation has been applied consistently in all stages of the calculation.²⁰ As can be deduced from the characteristics of this test, it also imposes an obligation of transparency on the legislator.²¹ This is clear as the application of this test requires the legislative body to make public the method of calculating the

jurisprudencial de un derecho fundamental, Administración y justicia: un análisis jurisprudencial: liber amicorum Tomás-Ramón Fernández, Civitas, 2012, p. 3838.

¹³ BVerfG, Judgment of the First Senate of 9 February 2010 - 1 BvL 1/09, paras.134-135.

¹⁴ *Ibid.*, para. 141.

¹⁵ *Loc cit.*

¹⁶ *Ibid.*, para. 142.

¹⁷ *Ibid.*, para. 143.

¹⁸ *Ibid.*, para. 142.

¹⁹ *Ibid.*, paras. 143, 167.

²⁰ *Ibid.*, para. 143.

²¹ *Ibid.*, para. 144.

amount of the benefit and to justify its application. This becomes a requirement of rationality and transparency in policymaking.

Applying this test to the specific case, the Court considered that the first three steps were satisfactorily fulfilled. The legislator intended to cover the needs of individuals for a dignified existence²² and had devised a method of calculation that met the requirements of the second step of the test.²³ This method consisted of resorting to statistical data on the spending patterns of the lowest income quintile of the population, with the aim of setting the amount of the benefit as a percentage of the expenditure of this sector of the population.²⁴ This percentage would be determined by subtracting from the expenditure of this demographic group those expenditures that were not considered necessary to meet the minimum needs for a decent life.²⁵ However, the fourth step of the test, known in the literature as the consistency requirement,²⁶ required that, when using this method, it shall be applied consistently and rationally, so that the determination of which expenses would be covered by the benefit and which would not, must be adequately justified in all steps of the calculation. This means that it is unconstitutional, at any stage of the calculation of the amount, to establish a percentage that is either a flat rate or not adequately justified by the method and the data that the legislator had decided to take into consideration.²⁷ The application of this step of the test, caused the declaration of unconstitutionality.

This examination was thoroughly carried out. It is illustrative of this point that the Court noted that the legislator's decision to only cover 89% of the clothing expenditure of the lowest income quintile of the population did not meet the consistency test.²⁸ This was on the grounds that the legislator's choice of such a percentage was justified by the intention to leave luxury items out of the coverage, without being able to verify that the lowest quintile of the population was, as a matter of fact, spending on clothing of this nature. This and other unjustified inconsistencies in the calculation led the Court to conclude that the amount had not been determined in line with the control parameter. It therefore gave the legislator until December 31st of the same year to amend the legislation, in order to bring the amount of the benefit into line with the

²² *Ibid.*, para. 147.

²³ *Ibid.*, para. 162.

²⁴ *Ibid.*, paras. 163-168.

²⁵ *Ibid.*, para. 171.

²⁶ Bittner, C., *Human Dignity as a Matter of Legislative Consistency in an Ideal World: The Fundamental Right to Guarantee a Subsistence Minimum in the German Federal Constitutional Court's Judgment of 9 February 2010*, German Law Journal, 12(11), 2011, p. 1948.

²⁷ BVerfG, Judgment of the First Senate of 9 February 2010 - 1 BvL 1/09, para. 171.

²⁸ *Ibid.*, para. 175.

requirements of the test.²⁹ Until then, it stated that the legislation would remain applicable.³⁰ In response, the legislator amended (albeit out of time) the amount, raising it moderately in line with the Court's indications.

2.3. The relevance of the judgment for the judicial protection of the right to minimum subsistence

These broad brushstrokes on the content of the *Hartz IV* judgment provide the necessary context to analyze the value of its argumentative construction as a model of judicial protection of the right to the minimum subsistence minimum. The judgment articulates a guarantee of the right anchored in the legal concept of human dignity in conjunction with the principle of the social state. This guarantee is characterized by the imposition of two parameters of constitutionality applicable to social welfare legislation, one of sufficiency, to be applied only in obvious cases, and a second one of rationality and non-arbitrariness, which in turn implies an obligation of transparency and consistency.

The second one operates as a quality requirement in policymaking, based on the statistical data used in the policy formulation and assessing the methodology followed. It intends to allow the legislator to maintain its political discretion in setting the level of protection, as long as it adequately justifies its decision. The legislature is then bound by the obligation to take into consideration the concrete needs of the individual, avoiding leaving the protection of this right entirely at the mercy of the legislator. This mechanism for the protection of the right to a minimum income has been suggested as a model to be exported.³¹ However, the application of this model implies certain conditions for the formulation of minimum income policies which will determine their constitutionality. The most relevant conditions that I believe can be extracted from the *Hartz IV* model are now exposed.

2.3.1. Conditions derived from the consideration of the right to minimum income as a fundamental right

The Court ruled that, as the right to a minimum income shall be considered a fundamental right, subsistence needs must be met at every time of the lives of the

²⁹ *Ibid.*, para. 216.

³⁰ *Ibid.*, para. 212.

³¹ Leijten, *op. cit.* note 8.

individuals.³² This conclusion has a series of consequences. Firstly, at the abstract level, this implies that something as common in compared social protection policy as a limitation on the number of years of entitlement would be contrary to this right and therefore unconstitutional.³³

Secondly, in Hartz IV, the Court established a positive obligation on the legislator, mandating the addition to the examined legislation of a clause ensuring that exceptional needs not foreseen in the calculation of the benefit would also be covered by the state. This implied that, until the legislative amendment mandated by the Court occurred, individuals were entitled to judicially claim state benefits, either in kind or in cash, to cover these special needs not covered by the social protection system.³⁴ This argument, taken to the abstract level, would mean that any legislative defect implying the lack of coverage of vital needs by the benefits established by a social protection system would allow the judicial claim of a benefit in order to cover these needs, without requiring prior corrective action by the legislator. In consequence, the judiciary is allocated a relevant role in filling the gaps of a social protection system, with potential budgetary consequences.

Thirdly, this conception questions the conditionality of minimum income policies. It is common in social welfare systems that include a subsistence minimum benefit, to condition the award of the amount to the active seek of employment or, at least, to the compromise of the individual to not turn down job offers. These configurations are hardly compatible with a fundamental right to this vital minimum that must be always satisfied, as the non-satisfaction of this conditions usually involves the withdrawal of the benefit. Consequently, following this model, any conditional minimum income scheme could be considered unconstitutional.

2.3.2. Impact on the policy-making process

The level of scrutiny exercised by the Court reduces the scope of the changes that a proposal for reform of the social protection system can experience as a result of parliamentary debate. The complexity of the standard required by this model of judicial protection in the definition of the minimum income amount imposes a big effort in the drafting of the piece of legislation at the ministerial level. Only a well-thought calculation methodology would be able to respect the degree of judicial scrutiny imposed by the Hartz IV model. Therefore, the

³² BVerfG, Judgment of the First Senate of 9 February 2010 - 1 BvL 1/09, para. 140.

³³ Bittner, *op. cit.* note 26, p. 1955.

³⁴ BVerfG, Judgment of the First Senate of 9 February 2010 - 1 BvL 1/09, para. 220.

incorporation of parliamentary amendments that damage the consistency of legislation may endanger its constitutionality. This becomes relevant if one considers that in the parliamentary debate, political compromise agreements of transactional nature are reached. These that can alter the content of a rule with the intention of achieving the necessary support for its approval, without any guarantee that these amendments will be able to improve, not even maintain, its consistency. Furthermore, it reduces the speed with which a reform of the social assistance system can take place in cases of economic crisis. A sudden reduction of these benefits as an austerity measure would risk the constitutionality of the measure because the requirement for transparency and statistical justification of the determination of the amount requires significant work at ministerial level. Moreover, this work will have to justify how a reduction driven by budgetary concerns is still guided by the real subsistence needs of individuals.

2.3.3. Conditions imposed on the development of social policy

The Court emphasized that the right to a subsistence minimum is a dynamic right, since the minimum level necessary for subsistence will depend on the socio-economic conditions of the moment. This implies an obligation to update the amount in accordance with these conditions, and implies, as occurred in a later judgement in 2012³⁵, the unconstitutionality of legislation by omission if the amount is not reasonably updated. Moreover, the dynamic character of the law is not only manifested in time, but if it is to meet concrete and changing needs, a necessary geographical dynamism also follows. It is difficult to justify that, in the face of compelling empirical findings proving substantial differences in the cost of living between regions, it is reasonable to set the same single existential minimum for the whole country. This criticism could be overcome by maintaining a uniform figure throughout the State if the amount was at least equivalent to the existential minimum that would be required in the region with the highest cost of living. Otherwise, the dignity of citizens living in that region would be violated. However, this could lead to problems in relation to the principle of equality by ensuring a better quality of life in those areas where the cost of living is cheaper.

2.4. A partial conclusion

Thus, we have seen the practical consequences of adopting an approach to the

³⁵ BVerfG, Judgment of the First Senate of 18 July 2012 - 1 BvL 10/10.

right to the subsistence minimum as a fundamental right anchored in human dignity. Far from being trivial, accepting the model proposed by the German Federal Constitutional Court means incorporating, at the level of the parameter of constitutionality, a series of requirements that limit the legislator's scope of action in the field of social protection. While the virtues of the Hartz IV model are undoubted, it is also true that it ties the hands of the legislator and imposes obligations whose impact on social policy will have to be assessed in relation to each of the legal systems to which it is to be imported. This, as will be later discussed, is relevant when we refer to the exportability of this model to a different legal context.

3. THE MODEL OF THE EUROPEAN COURT OF HUMAN RIGHT

A model for judicial defense of the subsistence minimum can also be extracted from the case-law of the European Court of Human Rights. In this section, I will address firstly the unsuccessful pathway of the judicial defense based on the prohibition of degrading treatment. Then, I will describe the model based on the defense of the right to private property, ensuring respect for minimum income through a broad interpretation of the concept of private property.

3.1. Protection of the right to minimum income through the prohibition of degrading treatment

In the inadmissibility decision in *Laroshina v. Russia*³⁶, the European Court of Human Rights stated that a complaint concerning the insufficient amount of a pension could raise an issue falling under Article 3 of the Convention, which prohibits degrading treatment: "The Court considers that a complaint about a wholly insufficient amount of pension and the other social benefits may, in principle, raise an issue under Article 3 of the Convention which prohibits inhuman or degrading treatment."³⁷ In this way, the Court has already established what a possible legal basis of such a right would be. However, in that case, it decided to reject the application, not because poverty was not protected under the umbrella of the ECHR, but because it considered that the financial resources available to the applicant placed her above the poverty threshold that would mark the limit of inhuman or degrading treatment.³⁸ Despite this, the Court did accept

³⁶ *Laroshina v. Russia* (Dec.), App. No. 56869/00 (ECtHR, 23 April 2002)

³⁷ *Ibid.*, para. 3.

³⁸ *Loc. cit.*

that truly extreme poverty could amount to a breach of the Convention if States did not comply with their obligation to remedy such poverty.

This case can be considered a milestone, particularly if we bear in mind that the ECHR does not contain social rights but civil and political rights instead. This reasoning is therefore relevant to the idea of the configuration of protection from poverty as a right of this nature, or at least susceptible of being protected by these rights. In addition to this idea, a second relevant idea to be drawn from the case law is that the authorities may infringe the prohibition of inhuman or degrading treatment, established by Article 3 of the ECHR, by omission. This reinforces the idea that the civil and political rights recognized by the Convention also give rise to positive obligations. Such a position of the Court has been followed in the subsequent cases of *Budina v. Russia* (2009)³⁹, although still without any condemnatory sentence that permits the confirmation of the doctrine. Despite this, it does appear that the Court considers that there is an obligation on states to guarantee the subsistence of those citizens who are incapable of securing it by their own means.

Even if we cannot find subsequent case-law that uses the prohibition of degrading treatment to articulate a model of judicial defense of a subsistence minimum, the ideas that lie at the essence of the reasoning exposed in these cases, also sustain the posterior line of reasoning that has allowed the Court to establish clear limits to legislative bodies in their decisions regarding social protection systems. This line of reasoning, based on the right to private property, will be described in the following sub-section.

3.2. Protection of the right to minimum income through the right to private property

3.2.1. Social benefits and property rights.

Article 1 of Additional Protocol 1 (hereinafter, art. 1 P1) is the only provision of the European Convention on Human Rights that recognizes a right of an economic nature.⁴⁰ This article recognizes that “every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions

³⁹ *Budina v. Russia*, App. No. 45603/05 (ECtHR, 18 June 2009), para. 3.

⁴⁰ Aguilera, M., *El reconocimiento del derecho a la propiedad privada y los límites a su regulación* (art. 1 P1), La Europa de los Derechos. El Convenio Europeo de Derechos Humanos, Centro de Estudios Políticos y Constitucionales, 2014.

provided for by law and by the general principles of international law”.

The controversial nature of this right was concretized by the Court in 1979 in the *Marcks v. Belgium* case⁴¹, when it recognized for the first time that it was a true property right.⁴² It thus expressly established that this article guaranteed a property right.⁴³ The basic doctrine for determining the legal regime of the right to property recognized by this article came in 1982, with the case of *Sporrong and Lönnroth v. Sweden*.⁴⁴ The jurisprudential development of the concept of property recognized in Art. 1 P1 has characterized it as an autonomous concept, in the sense that it does not depend on the classification of possession and ownership elaborated by national law.⁴⁵ This is how the ECtHR ruled in the *Depalle v. France* case, which recognizes that "the fact that the domestic laws of a State do not recognize a particular interest as a 'right' or even a 'property right' does not necessarily prevent the interest in question, in some circumstances, from being regarded as a 'possession' within the meaning of Article 1 of Protocol No. 1."⁴⁶ In exercising the power to define this autonomous concept, the Court has expanded it to include not only possessions held by the individual, but also "legitimate expectations" of obtaining the enjoyment of a possession. This expectation must be based on a present and currently existing capacity to claim, and not on the hope of future recognition of a hypothetical property right. Thus, for an expectation to be legitimate, it must be based on a legal provision or a judicial decision on the property in question.⁴⁷ In this way, the case law of the ECtHR has been constructing the content of the right to property in a very broad manner, including credits, securities, stock market shares, economic interests or even the patrimonial result of an arbitration decision.⁴⁸ This broad construction has allowed it to include, as a legitimate expectation, the expectation to receive social security pensions, which could be considered as property protected by the provision. While initially the case law limited this recognition to cases where there was a direct connection between what was paid by the contributor and the pension granted⁴⁹, subsequent ECtHR decisions recognized the applicability of this right also to non-contributory pensions, although without any clear and

⁴¹ *Marckx v. Belgium*, App. No. 6833/74 (ECtHR, 13 June 1979).

⁴² Council of Europe, *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights*, March 2024, https://www.echr.coe.int/documents/d/echr/Guide_Art_1_Protocol_1_ENG, 4 April, 2024

⁴³ *Marckx v. Belgium*, para. 63.

⁴⁴ *Sporrong and Lönnroth v. Sweden*, App. Nos. 7151/75 and 7152/75 (ECtHR, 23 September 1982).

⁴⁵ Council of Europe, *op. cit.*, note 42.

⁴⁶ *Depalle v. France*, App. No. 34044/02 (ECtHR, 29 March 2010), para. 68.

⁴⁷ *Ibid.*, para. 63.

⁴⁸ *Aguilera, op. cit.* note 40.

⁴⁹ *Müller v. Austria*, App. No. 5849/72 (ECtHR, 16 December 1974).

consistent jurisprudential developments until the case of *Stec v. UK*.

3.2.2. The impact of *Stec v. UK*.

The *Stec v. UK* admissibility decision⁵⁰ was the first to state clearly that it was not justified to differentiate between contributory and non-contributory pensions when defining the content of Art. 1 P1. The Court had to decide on a case concerning the reduced income allowance and retirement benefit in the UK, both of which are financed by general taxation rather than by the National Insurance scheme. The complaint in this case concerned alleged discrimination. Ms Stec considered that she was worse off than men because, due to the higher retirement age for men, they would receive the more favorable benefit (which was the reduced earnings allowance) until the age of 65, rather than until the age of 60, which was the retirement age for women.

The relevance of the right to property in the case was instrumental to the review of the case under the non-discrimination clause of Article 14 of the ECHR. As the ECtHR itself established in the admissibility decision, Article 14 was understood as complementary, in the sense that it does not have an independent existence.⁵¹ Instead, it has effect in relation to other rights and freedoms. Thus, Article 14 only unfolds its effects and can only be violated when the facts of the case correspond to the subject matter of another fundamental right. This is why the court had to decide whether the applicant's right to property was being affected, which meant in the specific case, determining whether a non-contributory pension could be considered as property protected by Art. 1 P1.⁵² To this end, the ECtHR reviewed its previous case law to conclude that there are cases in which a distinction was apparently drawn whereby only contributory pensions were protected by Art. 1 P1. The case in which the ambiguity arises is *Gaygusuz v. Austria*, identifying thereafter two divergent lines of jurisprudence. The first involved a strict interpretation of the content of Art. 1 P1, limiting it to contributory pensions, and the second, a broad interpretation, including non-contributory pensions.⁵³

In the face of divergent jurisprudence, the Court established a clear position on the matter. In this respect, it presented an argument based on the diversity of social security schemes existing in the Contracting States, with different forms of

⁵⁰ *Stec and Others v. The United Kingdom* (Dec.), App. No. 65731/01 and 65900/01 (ECtHR, 6 July 2005).

⁵¹ *Ibid.*, para. 39.

⁵² *Ibid.*, para. 41.

⁵³ *Ibid.*, para. 46.

financing that are intertwined with each other, with contributory and non-contributory mechanisms in permanent relation. It is because of this strong connection between contributory and non-contributory pensions that the Court considers the distinction between them for the purposes of Art. 1 P1 to be artificial.⁵⁴ Furthermore, it held that, in the modern democratic state, many people are entirely dependent on social security and social benefits for their survival, so that they need a certain degree of security, developing a legitimate expectation of obtaining them if they fulfill the legal conditions for entitlement.⁵⁵ This expectation based on a right recognized by the legal system therefore fits in with the concept of legitimate expectation that the ECtHR has recognized as an integral part of the right to property in its jurisprudence.

Having concluded the inclusion of non-contributory pensions in the object of the right, the ECtHR qualifies the associated effect. It emphasizes that Art. 1 P1 does not create a right to acquire property, nor does it imply the existence of an imposition on States to establish a specific form of non-contributory pension in their social security schemes.⁵⁶ However, the inclusion of all types of social security benefits in the content of the right implies that, if a State creates a benefit scheme, whether contributory or non-contributory, it must do so in conformity with the rights recognized in the ECHR. It therefore considers that the case is admissible, which it will resolve the following year in its judgment of 12 April 2006, ruling that the alleged discrimination does not violate Art. 14 as it falls within the margin of appreciation of the Contracting States.⁵⁷

3.2.3. The development of the minimum income jurisprudence after *Stec v UK*.

The inclusion of all types of benefits in the subject matter of the right to property has led to the development of the ECtHR's social security jurisprudence.⁵⁸ Overcoming this distinction has allowed the Court to establish jurisprudential guidelines applicable to the social security systems of the 47 Member States, since if all benefits are covered by Art. 1 P1, the Court can grant the same degree of protection in all systems, creating a true European standard for the respect of human rights in relation to social security. The main jurisprudential development in this regard is the requirement that when a pension is suspended, reduced or

⁵⁴ *Ibid.*, para. 50.

⁵⁵ *Ibid.*, para. 51.

⁵⁶ *Ibid.*, para. 54.

⁵⁷ *Stec and Others v. The United Kingdom*, App. Nos. 65731/01 and 65900/01 (ECtHR, 12 April 2006),

⁵⁸ Leijten, I., *Social Security as a Human Rights Issue in Europe – Ramaer and Van Willigen and the Development of Property Protection and Non-Discrimination under the ECHR*, Heidelberg Journal of International Law, 73(2), 2013, p. 177-208.

withdrawn, there is an interference with the right which will require justification and compliance with the requirement of proportionality. This requirement, which the Court first introduced in *Kjartan Asmundsson v. Iceland*⁵⁹, has become more relevant after the expansion of the subject matter brought about by the *Stec* case, applying now to the integrity of social security benefits. Following this requirement, the Court has stated the high likelihood of a finding of a violation of the right in cases of complete withdrawal of a benefit, because of a serious impairment of the individual's living conditions.

The Stefanetti v. Italy case⁶⁰ is relevant in this respect. The applicants, Italian nationals, were affected by a legislative change concerning the method of calculating their pension rights which had the effect of reducing their retirement pensions by two thirds. The Court gave legal significance to the amount of the reduction in pension, which it considered to be excessive, without finding an objective justification of such a scale.⁶¹ In this analysis of proportionality and justification on a case-by-case basis, the ECtHR uses different criteria. One of the criteria used in this case, in addition to the magnitude of the reduction, is the fact that we are dealing with a contributory benefit. Although the judgment refers to the *Stec* case to recognize that the Court no longer distinguishes between contributory and non-contributory pensions, it proceeds to consider that, in determining the proportionality of a reduction, the level of contributions made by the beneficiary is relevant.⁶² It is worth stressing the problematic nature of this argumentation, since denying the differentiation between pensions in *Stec* and then recognizing that both types have different effects, grants differentiated protection to both types of benefits, without having clarified the borderline between the two and the effects derived from it, with perverse effects on legal security.

The lack of a clear boundary when entering the field of proportionality analysis is particularly worrying in a context where the Court is increasingly setting jurisprudential standards in the field of social security. The ECtHR is introducing the effect on the living conditions of the beneficiary into the proportionality test. In its guide to the interpretation of Art. 1 P1, it indicates that it follows from its case law the relevance of considering whether the withdrawal of the pension leaves the individual without other means of subsistence.⁶³ In *Fábian v.*

⁵⁹ *Kjartan Ásmundsson v. Iceland*, App No. 60669/00 (ECtHR, 12 October 2004), para. 40.

⁶⁰ *Stefanetti and Others v. Italy*, App Nos. 21838/10, 21849/10, 21852/10, 21855/10, 21860/10, 21863/10, 21869/10 and 21870/10 (ECtHR 15 April 2004).

⁶¹ *Ibid.*, para. 66.

⁶² *Ibid.*, para. 63.

⁶³ Council of Europe, *op. cit.* note 42.

Hungary, the Court recognized the importance of this factor, using it in the specific case to determine the proportionality of the suspension of a retirement pension as a consequence of the applicant's earning a salary for his work. The Court concluded that, as he still had sufficient means to subsist, there was no violation of Art. 1 P1.⁶⁴

In *Bélané Nagy v. Hungary*, the Court ruled in the opposite way using the same reasoning. The applicant loses his disability pension following a legislative change imposing new criteria excluding him from eligibility. The Court relies exclusively on the absence of any other source of income and his difficulties in obtaining this income, given his disability, to determine the proportionality of the withdrawal of the pension.⁶⁵ In this case, the legislator is precluded from establishing certain conditions for access to disability pensions, based on the situation of need in which the claimant finds himself. This argumentation imposes *de facto* certain minimum protection requirements on the social security system.⁶⁶ Even more so if one takes into account that the Court's argumentation to defend the applicability of Art. 1 P1 is based on the existence of a legitimate expectation of obtaining the pension, derived from the legislation in force before the legislative change. This legitimate expectation operates as a limit to less favorable legislative changes.

Consequently, it can be argued that it follows from the Court's judgment that a state cannot take steps backwards when it decides to establish a minimum safety net for individuals in need who have no alternative income. This has led some authors to argue that the Court is using a right of a civil nature, such as the right to property, to protect a socio-economic right, and therefore not protected by the ECHR, such as the right to social security.⁶⁷ This interference by the ECtHR in matters pertaining to social rights is reflected in the reference in its judgments to instruments designed to protect social rights, such as the reference in the *Bélané Nagy* case to the European Code of Social Security and ILO Conventions 102 and 108 to justify the applicant's right to obtain a benefit.⁶⁸

⁶⁴ *Fábian v. Hungary*, App. No. 78117/13 (ECtHR 5 September 2017), paras. 78-82.

⁶⁵ *Bélané Nagy v. Hungary*, App No. 53080/13 (ECtHR, 13 December 2016), paras. 123-126

⁶⁶ Leijten, I., *The right to minimum subsistence and property protection under the ECHR: Never the twain shall meet?*, European Journal of Social Security, 21(4), 2019, p. 307-325.

⁶⁷ Tsetoura, A., *Property protection as limit to deteriorating social security protection*, European Journal of Social Security, 15(1), 2013, p. 55-78.

⁶⁸ *Bélané Nagy v. Hungary*, para. 103.

3.3. Towards a European social security case law

The evolution in the interpretation of Art.1 P1 of the ECHR, expanding both the scope of its application and the effects of its application, with the introduction of a principle of proportionality of reductions, suppressions or suspensions of social benefits⁶⁹ which has served to place limits on the public authorities⁷⁰ when these measures have the effect of leaving the individual without alternative means of minimum subsistence. The doctrine of the ECtHR made explicit in *Moskal v. Poland* is that, while the Court has no jurisdiction to impose benefits, it does have jurisdiction to consider that a diminution of a benefit may interfere with the right to property.⁷¹ Clear evidence of this is the protection of the individual from a legislative change that deprived him of access to a benefit in *Bélané Nagy*. It is therefore not unreasonable to envisage a future expansion of the Court's intervention in this direction.⁷² It is worth noting, as stated before, that before the revolutionary effect of cases such as *Kjartan Asmundsson*, *Stec or Bélané Nagy*, the Court already recognised in the *Larioshina v. Russia* case, in which it declared an application admissible in 2002, that Article 3, which imposes a prohibition of degrading treatment, could justify a violation of Article 3 for a pension that is insufficient to ensure the physical and mental well-being of the applicant. This argument, together with the new doctrine developed by the Court, could eventually lead the Court to declare that an insufficient social benefit (or at least a reduction in it that would render it insufficient) would be contrary to both articles of the ECHR interpreted together. We will have to wait for new jurisprudential developments to determine whether we are on the way to a European right to a minimum subsistence income as proposed by some authors⁷³ and feared by others.⁷⁴

4. CONCLUSION

In conclusion, the exploration of the German model and the ECHR model of judicial protection of the right to a minimum income reveals a complex interplay between constitutional principles and rights and social policy objectives. The German Federal Constitutional Court's approach, exemplified in the "Hartz IV"

⁶⁹ In the *Kjartan Asmundsson* case.

⁷⁰ Including the legislator in the *Stefanetti* case.

⁷¹ *Moskal v. Poland*, App. No. 10373/05 (ECtHR, 15 September 2009), paras. 38-40.

⁷² Leijten, *op cit.* note 66.

⁷³ *Loc cit.*

⁷⁴ Bossuyt, M., *Should the Strasbourg Court Exercise More Self-Restraint? On the Extension of the Jurisdiction of the European Court of Human Rights to Social Security Regulations*, Human Rights Law Journal, 28, 2007, p. 321-332.

judgment, emphasizes the fundamental right to a subsistence minimum anchored in human dignity, imposing limitations and obligations on the legislative body in the realm of social protection. On the other hand, the ECHR model, evolving from the prohibition of degrading treatment to the defense of the right to private property, offers a potential avenue for safeguarding individuals against legislative regressions in social policy.

However, as the ECtHR is more and more likely to apply a model of judicial defense against the regression of minimum income schemes, the experience of the German model must be considered. Even though it offers a well-reasoned and argumentatively complex model that can serve as a good instrument to scrutinize social policy decisions, it imposes a series of conditions on social protection systems on which the constitutionality of the social legislation is made dependent. The direct application of the Hartz IV model by the ECtHR may not be desirable if we consider that, as pointed out in this article, the consequences are not minor. This is shown by the fact that the Hartz IV scheme has led to at least two more declarations of unconstitutionality of social policy legislation in Germany in 2012 and 2019. Therefore, though the Hartz IV model must be considered as an attractive benchmark, its exportability must be closely examined, specially in the context of supranational courts, whose self-restraint must be maximized in order to respect the subsidiarity principle that shall guide its action.

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