

CONSTITUTIONALITY OF BASIC INCOME IN GERMANY

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Abstract: *At present, the precarious jobs do not assure the subsistence level, and the future forecasts “the end of work”. In addition, because of the defects and limits of the welfare systems, a rethinking of the social protection system is necessary: universal basic income seems to be the most popular option. However, basic income may represent a break with the traditional market rules: the model is inverted and the citizen gains “freedom from work”, and not “through work”. This paradigm shift may represent a challenge for today’s model of social state based on the work ethic. Although the basic income is usually based on the idea of social reform, the perception of this study is that its implementation should be guided by a policy of small advances, which ultimately make possible a partial reform of the Social Security system, not its dismantling. This work shows that the German labour market, the Constitution, and the social state are not currently prepared for or in need of a universal Basic Income.*

Keywords: *United Nations, Inequality, Precariousness.*

1. CALL FOR THE INTRODUCTION OF A BASIC INCOME AGAINST INEQUALITY

A recent report by the UN Food and Agriculture Organisation reveals the increase in global hunger.² What is also alarming is that not European welfare states have escaped the tendency towards growing inequality between rich and poor.³ Moreover, the COVID-19 pandemic is now proving to be an economic disaster for a lot of people. As a consequence, the UN is calling to provide citizens with a universal basic income, to help against inequality.⁴

In this context a debate has begun as to whether citizens have the right to a minimum existence level that guarantees subsistence,⁵ which was traditionally possible by means of employment. Thus, during the 20th century, with social protection based on an industrial based employment model, a good balance was achieved. It is a well-known fact that the welfare state of the day sought to reduce certain risks of contingencies (such as illness, work-related accidents, disability, unemployment) with contributory protection schemes. The fact that these risks could be statistically estimated made it possible to construct a social security system that worked reasonably well for the majority of people.⁶

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² Hunger in the world continues to rise, affecting a little over 820 million people in 2019. *Vid.* Report by the UN Food and Agriculture Organisation on the *State of food security and nutrition in the world 2019*, <http://www.fao.org> (20.9.2020).

³ In 2017 there were 112,8 million people at risk of poverty. EUROSTAT Database, <http://ec.europa.eu/Eurostat>, (29.9.2020).

⁴ Senior UN Official Calls for universal basic Income to tackle growing inequality: “The spread of COVID-19 has fundamentally shaken economies, and people are beginning to question existing economic models: this pandemic has really thrown up the existing levels of both injustice and inequality worldwide. So bolder ideas are needed, including some, that previously, were pushed aside.” <https://news.un.org/en/story/2020/05/1063312> (6.5.2020).

⁵ Carmona Cuenca, Encarna (2010). El Derecho a un mínimo vital, los Estatutos de Autonomía y las rentas mínimas de inserción. In Terol, Becerra, Manuel José. *El Estado Social y sus exigencias Constitucionales*, Valencia, Tirant lo Blanch.

⁶ Standing, Guy (2018). *La Renta básica. Un derecho para todos y para siempre*, Barcelona, Pasado & Pre-

Today, the social reality has changed and assuming that “full employment” has never truly existed, why are we now so concerned that there are calls for the introduction of a basic income? Owing to the changes in the late 20th and early 21st centuries, the income distribution system collapsed and employment is no longer a guarantee of a sufficient salary. So, the expression “work dignifies” has become obsolete for much of the population, especially the young.

The following pages will attempt to pinpoint and redefine a model of basic income that could be integrated within the model of social state established by the German Constitution.

2. DEFINITION AND CHARACTERISTICS OF THE BASIC INCOME

This is an instrument that guarantees basic incomes, which has been given many different names over the years. The following formulae are currently employed to refer to the same concept: subsistence level income, basic income, universal basic income, unconditional basic income, guaranteed income, basic citizen’s income and guaranteed universal subsidy.⁷ This work has opted for the term basic income, on account of its simplicity.

Before beginning to study the model of basic income compatible with the existing German social state, it is appropriate to define a basic income. Although many variations exist, a basic income can be defined as a modest pecuniary quantity payable without any conditions to all individuals on a regular basis,⁸ irrespective of their family or economic circumstances.

Some authors stress that the basic income is paid with the primary objective of increasing the individual’s “freedom”.⁹ Thus the basic income would make it possible for autonomous and responsible people, freed of the obligation to work, to fulfil themselves,¹⁰ or increase their income by freely choosing to work.¹¹ At the same time, the stigmatisation of unemployment is eliminated, salaries for badly-paid jobs increase, government bureaucracy is reduced, and there is greater innovation in society.¹²

A particular feature of the basic income is its *universality*. That means that basic income would be paid to each habitual resident of a specific region or country.¹³ In other words, beneficiaries would have to be members of a particular community, according to the principle of territoriality.

Without a doubt, this should be an *individual* income. It would thus be paid to each individual, regardless of marital, family or domestic status. Unlike many other contemporary allowances, it

sente, p. 77.

⁷ Van Parijs,, Philippe & Vanderborght, Yannick (2017). *Ingreso Básico. Una propuesta radical para una sociedad libre y una economía sensata*, Mexico City, Libros Grano de Sal, S.A. pp. 22-23; Standing, G. *La renta...*, *op.cit.* p. 26; Rallo, Juan Ramón (2015). *Contra la renta básica. Por qué la redistribución de la renta restringe nuestras libertades y nos empobrece a todos*, Barcelona, Deusto Editions Book Center PAPP S.L.U. pp. 415-424.

⁸ Standing, G. *La renta...*, *op.cit.* p. 13.

⁹ Van Parijs,, P. & Vanderborght, Y. *Ingreso...*, *op.cit.* p. 17.

¹⁰ Holzner, Thomas (2015). Bedingungsloses Grundeinkommen im Lichte des deutschen Staats- und Verfassungsrechts. *Zeitschrift für Politik*, 7, p. 186; Götz, Werner. (In Press) Hartz IV löst nur leid aus. *Tagesszeitung*, <http://www.taz.de> (27.11.2006).

¹¹ The results would vary depending on the design model of the basic income. Holzner, T. Bedingungsloses..., *op.cit.* p. 186

¹² Götz, W. Hartz IV..., *op.cit.* p. 80 and ff.

¹³ Van Parijs, P. & Vanderborght, Y. *Ingreso...*, *op.cit.* pp. 32-38

would not be one income per family. If the basic income were paid to the family as a whole, one of the members could control and distribute it at will, subjecting the others to their control.¹⁴ The basic income would thus break with the presumption of automatic distribution of income within the household. It would be paid equally to each adult, whatever their circumstances. Most advocates of the income argue that a lesser amount should be paid to children.¹⁵

Assignment of the basic income should be *regular*, for example, on a monthly basis. Unlike most public benefits, the basic income would be guaranteed and pre-established on a long-term basis. This predictability is a fundamental element of security and subsistence.¹⁶

The income would be payable in *cash*. Citizens have to be trusted to manage their domestic economy. It has been demonstrated that efficient economic distribution requires far less bureaucracy than the distribution of food, clothing and housing. An obvious example of basic income provided in kind is for employed in prisons,¹⁷ which is not a desirable model.

All its advocates agree that the benefit should be paid in *the absence of any kind of condition*. Consequently, being unconditional, the basic income would be paid to every individual resident in a specific territory. The amount of work and cost involved in confirming fulfilment or not of conditions established by government agencies is common knowledge. In the first place, there would be no checking of resources and income. Secondly, the basic income would be paid without restrictions or control of how and when the allowance is spent. Thirdly and lastly, there would be no conditions related to conduct or acceptance of specific jobs.¹⁸ In simple terms, and to differentiate it from other welfare benefits, in order to receive the basic income it is not necessary to demonstrate a state of need, or to have contributed to a state insurance scheme, or to be unemployed. This characteristic is what differentiates the basic income from other state programmes like integration minimum incomes.¹⁹

3. THE UNCONSTITUTIONALITY OF THE IMPLANTATION OF A UNIVERSAL BASIC INCOME IN GERMANY

Although the concept of the Basic Income has enjoyed considerable support in many sectors of society in recent years, there are still a number of objections. In the particular case of a basic income, the following arguments are usual:²⁰ its financing would not be viable, it is a utopia, it will encourage parasitism, conditional subsidies intended for those in a state of need are preferable, it would lead to the dismantling of the welfare state, it would break with the policy of full employment, increase the number of people out of work, it would lower salaries, it would be inflationary and would stimulate immigration.

¹⁴ Rallo, J.R. *Contra...*, *op.cit.* pp. 22-23.

¹⁵ Standing, G. *La renta...*, *op.cit.* p. 15; Van Parijs,, P. & Vanderborght, Y. *Ingreso...*, *op.cit.* p. 29.

¹⁶ Standing, G. *La renta...*, *op.cit.* p. 16.

¹⁷ Van Parijs,, P. & Vanderborght, Y. *Ingreso...*, *op.cit.* p. 27-29.

¹⁸ Standing, G. *La renta...*, *op.cit.* pp. 15-16.

¹⁹ Rallo, J.R. *Contra...*, *op.cit.* p. 23.

²⁰ Bertomeu, María Julia & Raventós, Daniel (2006). El Derecho de existencia y la renta básica de ciudadanía: una justificación republicana. In Pisarello, Gerardo & De Cabo de da Vega, Antonio (Ed.), *La renta básica como nuevo derecho ciudadano*, Madrid, Estructuras y procesos serie derecho colección, Editorial Trotta S.A, pp. 22-27; Standing, G. *La renta...*, *op.cit.* pp. 93-105.

Nobody questions the fact that the allowance should guarantee the minimum subsistence level of the individual recipient. However, what is meant by minimum level? According to German Constitutional Court case law the quantity payable should be guided by the principle of human dignity (art. 1 Basic Law of Bonn, GG) and the social state (art. 18 GG and art. 20 GG).²¹ As a result, the state should provide the minimum conditions necessary to ensure that all members of society enjoy a dignified existence.²² This should prevent people from living in insufficient economic circumstances. In this context it guarantees what is sufficient for a minimum material existence,²³ so will only provide physical necessities;²⁴ clothing, food, accommodation, heating and health care.²⁵ However, as the Constitution does not specify the obligatory level of the allowance, the German Constitutional Court prescribes the indicative reference of social welfare aid (*Sozialhilfe*), which equates to an integration minimum income. Therefore, the legal system follows the reference of the social assistance²⁶ established by²⁷ the legislator in accordance with the principle of human dignity.²⁸ In this sense, the legislator should take into account the social consensus of the moment which expects a minimum subsistence level that allows for socio-cultural participation.²⁹

So, the basic income, which follows the reference of social aid (*Sozialhilfe*), will be governed by the *principle of the state of need*,³⁰ which is covered by the minimum amount of the social aid. Other additional special needs would be investigated and covered in each individual case according to the principle of individualization.³¹ However, as with the basic income there are neither conditions nor proof of individual need, on occasions its amount falls below what is required by the Constitution.³² Ultimately, one can say that the amount of the basic income would not guarantee the minimum subsistence level provided for in the Constitution; given that as it is an unconditional and universal benefit, the *principle of individualization* is disregarded.

A basic income that ensured a minimum subsistence level could have two effects. On the one hand, the possibility of freely choosing a job without any kind of economic pressure.³³ In this case, the image of the individual in the Constitution (*Menschenbild*)³⁴ would be respected. On

²¹ Holzner, T. *Bedingungsloses...*, *op.cit.* p. 186.

²² BVerfGE, 121 (133); 44, 353 (375); 48, 346 (361); 82, 60 (80, 85); 84, 133 ff.; 89, 346 (353); 125, 175 (222); 132, 134 (159 margin n^o. 62 ff); Herdegen, Matthias, (2010). Art. 1 margin n^o. 121. In Maunz, Theodor/Dürig, Günter, *Grundgesetz*, Munich, C.h.beck. Sartorius, Ulrich, (2000). *Das Existenzminimum im Recht*, Baden-Baden, Springer.

²³ BVerwGE, 1, 159 (161 and ff.); 48, 237 (238 and ff.); 62, 261 (265 and ff.). Wallerath, Maximilian (2008). *Zur Dogmatik eines Rechts auf Sicherung des Existenzminimums*. *Juristenzeitung*, 63, pp. 157-168.

²⁴ BVerfGE 125, 175 (223); BVerwGE 35, 178 (180).

²⁵ BVerfGE 120, 125 (155 and ff.); 132, 134 (159 margin n^o. 64); BVerwGE 14, 294 (296 and ff.); 87, 212 (214).

²⁶ BVerfGE 99, 246 (259).

²⁷ Martínez Soria, José (2005). *Das Recht auf Sicherung des Existenzminimums*. *Juristenzeitung*, 13, pp. 644 and ff.

²⁸ BVerfGE 22, 180 (204); 125, 175 (224 and ff.); BSGE 97, 265 margin n^o.51; 100, 221 margin n^o.31.

²⁹ BVerfGE 125, 175 (223); 132, 134 (159 margin n^o.64, 66 and ff.); BVerwGE 14, 294 (296 and ff.); 25, 307 (317 and ff.); 107, 234 (234 (236); Herdegen, Matthias, Art. 1 margin..., en Maunz, T./Dürig, G, *op.cit.*; Starck, Christian (2010), Art. 1 I margin no. 24. In Mangoldt, Hermann/Klein, Friedrich/ Starck, Christian, *Grundgesetz*, Munich, C.H.Beck.

³⁰ BVerwGE 108, 47 (53).

³¹ BVerfGE 132, 134 (159 margin n^o. 62).

³² Holzner, T. *Bedingungsloses...*, *op.cit.* p. 188.

³³ Götz, W. Hartz I..., *op.cit.*

³⁴ Holzner, T. *Bedingungsloses...*, *op.cit.* p. 190.

the other hand, with no obligation or pressure to work, there would be a risk of the individual completely abandoning the labour market.³⁵ This would occur, above all, in cases in which the amount of the basic income exceeded income from work. As a result, the state would be responsible for discouraging people from working and creating dependence on welfare benefits.³⁶ Meaning the individual would move from dependence upon a job to dependence upon social security benefits.

The dignity of the individual (art. 1.1 GG) does not contemplate the obligation to work, but rather a person's inviolable right to a minimum subsistence level.³⁷ But, in this context, it should be borne in mind that associating art. 1.1 GG with other fundamental rights creates a specific image of a person (*Menschenbild*): that of the responsible and sovereign individual that develops their personality, and thereby achieves fulfilment.³⁸ An essential element of this life of autonomy, responsibility and self-fulfilment is the possibility of working. The understanding is that a job³⁹ provides independence via an economic foundation and social recognition.⁴⁰ This is made clear by the special protection of the right to work in art. 12 I GG.⁴¹

In this context, it should not be forgotten that the integrating function of work along with the subsidiarity of state benefits are not only essential for the individual, but also for society. Thus, the system of social protection is mainly based on the citizen's own sense of responsibility and production capacity, which will generate income to pay benefits. To this end, the social state requires each individual to cooperate in accordance with their possibilities and make a contribution to society.⁴² In this way, freedom is combined with responsibility. However, solidarity has to be subsidiary⁴³ and should help beneficiaries to escape from poverty by dint of their own efforts in order to reduce social costs as far as possible. But, the unconditionality of the basic income encourages the individual to retire at society's expense. This not only eliminates the integrating function of the social state,⁴⁴ but endangers its financing.⁴⁵

This dissociation from work⁴⁶ neither coincides with the notion of the person's right to dignity (art. 1.1 GG), nor represents the Constitution's image of humanity (*Menschenbild*), which is that of an individual related to and integrated within society through work.⁴⁷ In other words, the Constitution does not reflect the image of the isolated and independent individual promoted

³⁵ HORST, Siebert, (In Press). Gegen die bedingungslosen Grundeinkommen. *Frankfurter Allgemeine Zeitung*. <http://www.FAZ.de> (27.6.2007)

³⁶ Martínez Soria, J. Das Recht..., *op.cit.* pp. 644 and ff.

³⁷ Götz, W. Hartz IV..., *op.cit.* pp. 59 and ff.

³⁸ BVerfGE 4, 7 (15); 41, 29 (50); 45, 187 (227); 108, 282 (300); 115, 118 (158); 221, 69 (92).

³⁹ According to Kant "the individual does not have a right to do nothing". Kant, Emmanuel (1797). *Die Metaphysik der Sitten*, Rechtslehre (margin n°. 6), p. 447.

⁴⁰ BVerfGE 50, 290 (362); 81, 242 (254); BVerwGE 67, 1 (5). For more Schneider, Hans-Peter (1985). Artikel 12 GG - Freiheit des Berufs und Grundrecht der Arbeit. *Veröffentlichungen der Vereinigung der deutschen Staatsrechtslehrer*, 43, pp. 7-15.

⁴¹ Holzner, T. Bedingungsloses..., *op.cit.* p. 190.

⁴² For this reason, for example, the Bavarian Constitution regulates in art. 166 III an obligation to work.

⁴³ BVerwGE 23, 149 (153); 47, 103 (106 and ff.); 67, 163 (168).

⁴⁴ Stapf-Finé, Heinz, (2007). Ein Grundeinkommen sprengt unser Sozialsystem. Bedarfsorientierte Grundversicherung ausbauen - und so (Alterns-) Armut vermeiden. *Soziale Sicherheit*, p. 257.

⁴⁵ Holzner, T. Bedingungsloses..., *op.cit.*, p. 192.

⁴⁶ BVerwGE, 67, 1 (5f).

⁴⁷ BVerfGE 4, 7 (15 and ff.); 33, 303 (334); 45, 187 (227); 109, 133 (151); 221, 69 (92).

by this income.⁴⁸ The basic income would render this socialisation superfluous for part of the population.⁴⁹

Finally, this work concludes that the German Constitution does not require this instrument, and also that the amount of the basic income falls below the constitutional guarantees that ensure existence, given that it does not guarantee the minimum individual subsistence level demanded by the Constitution. Specifically, without the condition of proof of need, all benefit equally, special individual needs are not covered. In this context, it is worth noting that social benefits should be understood according to the slogan “help for self-help” (*Hilfe zur Selbsthilfe*). In other words, they are intended to help the individual to find a new job, so social aid has a subsidiary nature.⁵⁰ The basic income turns upside down this principle of exception, where the allowance is the rule and work is voluntary. For this very reason, it is appropriate to conclude with the unconstitutionality of this model of basic income.⁵¹ From the constitutional point of view it is possible to extend and develop the social security and tax system. However, there are serious doubts as to the constitutionality of a basic income of this type.⁵²

4. CONCLUSION

This work has shown that German society, the labour market, the Constitution, and the German social state are not currently prepared for or in need of a universal Basic Income. Bearing in mind that the basic income has the potential to emancipate the individual from paid employment,⁵³ it represents a break with the traditional market rules: the model is inverted and the citizen gains “freedom from work”, and not “through work”. This paradigm shift may represent a challenge for today’s model of social state based on the work ethic. Furthermore, one should take into account that the introduction of a universal basic income for all could reopen class, cultural and ethnic conflicts, which would benefit populist parties.⁵⁴ This measure would split society into two classes: those who work and those who receive income. This profound difference could potentially create a social divide.⁵⁵ It would also act as disincentive to work, further destabilising the social state.

From the point of view of Constitutional law, it has been demonstrated that a universal basic income, in not applying a *principle of individuality* when needs are assessed, does not guarantee the minimum subsistence level established in the Basic Law of Bonn. Therefore, there are seri-

⁴⁸ Süchting, Gerald (2013). Die Rechtswidrigkeit des Bedingungslosen Grundeinkommens, in Kleszczewski, Diethelm & Müller-Mezger, Steffi & Neuhaus, Frank (Ed.), *Von der Idee des Gemeinbesitzes zum Projekt eines unbedingten Grundeinkommens*, Münster, Mentis Verlag, pp. 111-132; Deutsche Bundestag BT-262/16, Rechtliche Voraussetzungen für die Einführung eines bedingungslosen Grundeinkommens in Deutschland, p. 7.

⁴⁹ Holzner, T. Bedingungsloses..., *op.cit.* p. 191.

⁵⁰ BVerwGE 23, 149 (153); 27, 58 (63); 67, 1 (5 and ff); 68, 91 (94); 98, 203 (204).

⁵¹ Holzner, T. Bedingungsloses..., *op.cit.* p. 191.

⁵² On the unlawfulness of a Basic Income, *vid.* Süchting, G. Die Rechtswidrigkeit ...*op.cit.* pp. 111-132.

⁵³ Casassas, David & De Wispelaere, Jurgen (2011). Renta básica y emancipación social: principios, diseños y coaliciones. In Casassas, David & Raventós, Daniel (Ed.), *La renta básica en la era de las grandes desigualdades*, Barcelona, Editorial Montesinos, pp. 105 and ff.

⁵⁴ Segura Alastrué, Mario (2018). Los robots en el derecho financiero y tributario. *La Ley Actualidad*, p. 181; the author wisely warns that “adopting a measure like the universal basic income has many variables, and all should be considered before a decision is taken”. Standing, G. *La renta...*, *op.cit.* p. 65; Lopez, Casanovas, Guillem. (In Press) Cuidado con la renta básica”, *El País* at <http://www.elpais.com> (2.9.2018).

⁵⁵ Segura Alastrué, M. Los robots..., *op.cit.* pp. 184.

ous doubts as to the constitutionality of an unconditional universal basic income.⁵⁶ However, it is constitutionally viable to develop a social and tax system directed towards individual needs. In other words, this study shows that within the system there are other safer alternatives to an unconditional basic income that do not threaten social cohesion. Ultimately, the flaws, shortcomings and limitations of existing social assistance systems make it necessary to reassess the social protection system. However, this is not a reason to introduce a universal basic income for all, as has been explained in these pages.

⁵⁶ Holzner, T. *Bedingungsloses...*, *op.cit.* p.197.