

# Constitutional Change and Minimum Social Protection in Norway

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## I. Introduction

Norway has one of the most developed welfare states in the world, belonging to the Social Democratic ‘Nordic’ welfare state family typically associated with universalism, financing through taxation, high levels of redistribution and generous welfare support. The universal and generous provisions of the Norwegian welfare state typically ensure more than a mere minimum of social protection. At the same time, the Norwegian welfare state is built on an assumption of active labour market participation, bringing all those who *can* contribute into a collective of taxpayers subject to high levels of taxation.

The Norwegian welfare state’s overall generosity makes the question of how the ‘minimum’ for a ‘life in dignity’ is defined a fascinating one. Focusing on minimum social protection in Norway can provide important insights into the normative foundations of the Norwegian welfare state, and cast light on how questions of poverty, inclusion and minimum protection are negotiated in wealthy societies. Despite regulations to combat social inequality, poverty is not uncommon in Norway. According to the Norwegian Statistical Bureau, 10,9 per cent of the population are at risk of

poverty, with a disposable income of less than sixty per cent of the national median.<sup>1</sup> The Committee on Economic, Social and Cultural Rights has expressed concern about the ‘continued increase in the incidence of poverty, particularly among children, as a result of the increase in income inequality’.<sup>2</sup> Lack of adequate housing and homelessness among vulnerable groups are also highlighted.<sup>3</sup> English-language analyses of the Norwegian welfare state have typically focussed on the overall system of welfare schemes and their comparative generosity. The question of how the Norwegian welfare state defines the *minimum* which an individual should have access to, by contrast, has so far not been explored in much detail.

This chapter aims to provide an understanding of the idea of ‘minimum social protection’ in the Norwegian welfare state, focusing in particular on the relationship between the country’s Constitution (*Grunnloven*) and ordinary social law. Originally, Norway’s Constitution – adopted in 1814 and the second-oldest existing constitution in the world – had enshrined only some core liberties and political rights. While select human rights were added to the Constitution throughout the 20<sup>th</sup> century, it continued to lack the type of full human rights catalogue typically included in 20<sup>th</sup> century European constitutions, in particular those of the post-1945 era. This changed in 2014, when, on the occasion of its 200<sup>th</sup> anniversary, the Constitution’s human rights catalogue was expanded and, among the addition of other rights, for the first time came to include a number of social rights. Most significantly in the context of this chapter, a provision was added that includes the right to a minimum level of subsistence (§ 110).<sup>4</sup> This provision will form a central focus of this chapter, analysing the arguments for including it in the Constitution, and asking what role this provision plays in practice.

In addition, the chapter discusses how social assistance is regulated at the ordinary social law level. A particular focus will be on how the concept of minimum social protection is understood and determined in the legal bases for social assistance, and what types of benefits and benefit levels the individual schemes provide in practice. Furthermore, the analysis extends

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1 A. Hattrem, Statistisk Sentralbyrå, ‘Hvor mange er fattige i Norge’ (15 April 2024), <<https://www.ssb.no/inntekt-og-forbruk/inntekt-og-formue/artikler/hvor-mange-er-fattige-i-norge>> accessed 30.8.2024.

2 Concluding observations on the sixth periodic report of Norway (2020) (E/C.12/NOR/CO/6), para. 32.

3 Ibid. para. 34.

4 § 110 Grunnloven.

to how the social assistance schemes interact with the social insurance schemes of the Norwegian National Insurance System (*Folketrygden*). The chapter in particular highlights the differences in how social assistance and the regular social insurance schemes are regulated and how benefit levels are determined. Whereas social insurance schemes follow a set calculation based on the figure “G” (determined once yearly by the Government), there is some more flexibility in setting benefit levels for social assistance in that municipalities have discretion in determining the precise amount an individual receives. This can be problematic from the perspective of legal certainty and equality. However, as this contribution shows, the municipalities receive very detailed guidelines from the Ministry of Labour and Social Affairs, which in turns limit strong variations in the exercise of discretion.

In the conclusion, the chapter offers some reflections on the future relationship between the constitutional guarantee for minimum social protection and the practical application of social law.

## II. Overview – The Norwegian Constitution and the Social Benefit System

### 1. Normative Background

#### a) Historical Development – The 1814 Constitution and the Norwegian Welfare State

The adoption of the 1814 Norwegian Constitution long precedes the establishment of the country’s modern welfare state.<sup>5</sup> When the Constitution was promulgated in Eidsvoll, just outside Kristiania (now Oslo) on 17 May 1814, this occurred in a context in which social questions had yet to become a political priority. Norway’s Constitution played a central role in the formation of its nationhood and ambitions for independence from both Denmark and Sweden. For this reason, the Constitution was centred around the institutions of the state, Norwegian sovereignty and the traditional freedom rights of the nineteenth century. This is reflected in the structure of the Constitution, in which the first chapters concerned the form of state and the division of powers between the different organs of the state. As was the case with most Constitutions adopted in the nineteenth century, human

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5 For an English-language introduction to Norwegian constitutional law, see: M. Langford and B. K. Berge, ‘Norway’s Constitution in a Comparative Perspective’ *Oslo Law Review* 6 (2019) 3, pp. 198–228.

rights – or ‘citizen rights’ (*borgerrettigheter*), as they were called in the Constitution – were placed further towards the end of the document, and they tended to focus on liberal freedoms. In the case of the 1814 Norwegian Constitution, the rights catalogue was found in Chapter E, running from § 96 to § 105, although this chapter also contained a number of unrelated provisions. These paragraphs were left virtually untouched until the 2014 anniversary.

The Norwegian welfare state developed without the Constitution having any direct influence. The poor relief system was retained for the remainder of the nineteenth century. In 1845, Norway adopted the first national poor relief act.<sup>6</sup> This was followed by further poor laws in 1863 and 1900. Around the turn of the century, Norway also adopted its first more encompassing social protection systems, including a set of work accidents schemes (1908, 1911 and 1915), health insurance (1909) and unemployment insurance (1906).<sup>7</sup> Throughout the twentieth century, Norway developed an expansive welfare state of the classical ‘Nordic’ type – with large welfare bureaucracies, generous benefit levels, access based on residency and employment/work, and a high degree of taxation and redistribution. While its social policy measures had initially, at least to some extent, been influenced by the insurance schemes found in continental Europe, following the Second World War they became more universalist and taxation became the main financing mechanism. Most significantly, the Scandinavian schemes were never limited to industrial workers, but almost from the outset included farmers as well.<sup>8</sup> During this time of expansion, no relevant provisions in the Constitution were invoked in advocating for an expansion of the welfare state. Nevertheless, one can argue that there was a more indirect influence of the Constitution in that the principles of equality and human

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6 A.L. Seip, *Sosialhjelpstaten blir til – norsk sosialpolitikk 1740-1920* (Oslo 1984), pp. 52-64.

7 *Ibid.*, pp. 87-106. Note that the elements of redistribution and universalism were important early on in Norwegian social policy discourses, which is why the schemes were renamed ‘trygd’ (‘protection’) rather than continuing with the term ‘insurance’, which had been used initially: A. Hatland, *De sosiale rettighetenes frammarsj gjennom 200 år*, p. 96.

8 S. Kuhnle and N. Kildal, ‘Velferdsstatens idégrunnlag i perspektiv’, in: A. Hatland, S. Kuhnle, T.I. Romøren (eds.), *Den norske velferdsstaten* (Oslo 2011), pp. 15-39, 17.

dignity enshrined in the Constitution led to a form of thinking that furthered the advancement of social policy.<sup>9</sup>

With the adoption of the Social Insurance Act (*Folketrygdloven*) in 1966, the various social security schemes with individual entitlements in place at the time were integrated into one act of law.<sup>10</sup> A little later, the expansion of the welfare state was further bolstered by the discovery of oil off the Norwegian West coast. Over the following decades, the formerly agrarian country would become one of the wealthiest states per capita in the world. The oil reserves could cushion any fluctuations in welfare expenditure. Throughout this period, the Constitution again did not play a decisive role in shaping the development of the welfare state. A new labour-market related provision was added to the Constitution in 1954 (the obligation of the State to create the conditions for every capable individual to provide for themselves through labour, § 110, in part a response to the high unemployment rates of the interwar period), but that remained one of the few obligations on the state to be added to the Constitution until later in the twentieth century. The Constitution was, of course, of central symbolic value in the country. It was also always more than a political document of symbolic significance. The Norwegian Supreme Court has the right and duty to review the constitutionality of legislation and other measures, a power which was long recognised in the customary law of the country and also referenced in a series of laws.<sup>11</sup> Since 2015, the right and obligation of courts to perform constitutional review has been laid down in § 89 of the Constitution. Over the decades, the courts have interpreted the provisions of the constitution further, giving them new contours and adapting them to societal changes. However, the Supreme Court overall uses this power restrictively, not taking on a role in shaping laws and policies that for example the German Federal Constitutional Court does. Given the comparative absence of social rights and other rights directly related to the welfare state,

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9 H. S. Aasen, 'Fra rettsstat til velferdsstat: Grunnloven og den moderne samfunnskontrakten', in: H. S. Aasen and N. Kildal (eds.), *Grunnloven og velferdsstaten* (2014), pp. 183-197, 187-188. Note that while the term "human dignity" was not directly included in the Constitution, it was generally agreed to have underlain the Constitution, at least for those parts of the population covered by its human rights catalogue.

10 Lov 17. juni 1966 nr. 12 om folketrygd; Ø. Bjørnson and I. E. Haavet, *Langsomt ble landet et velferdssamfunn – Trygdens historie 1894 – 1994* (Oslo 1994), p. 291; NOU 1990:20 Forenklet folketrygdlov, Chapter 0.1.6.

11 Rt. 1976 s. 1; it was first referred to in the so-called Plenumsloven of 1926, E. Sandmo, *Siste Ord – Høgsterett i norsk historie 1814-1965, Bind II, 1905-1965* (Oslo 2006), p 52.

there was less of a role to play for the Constitution in this domain than in other areas, such as criminal law.

Towards the end of the twentieth century, political figures began to call for reforms of the Constitution, which they argued was beginning to seem out of step with the social and political realities that defined contemporary Norwegian society. It was not surprising that, given its age and the specific context in which it was adopted, it did not fully reflect developments in modern society. In comparison to other countries' more modern constitutions, especially those adopted in the wake of the Second World War and decolonialisation, the Norwegian Constitution began to seem dated. For this reason, politicians made repeated calls to change the Constitution. Over the years, there was a "steady stream" of reform proposals for the constitution to better reflect the post-war values of the Norwegian state.<sup>12</sup> Some rights indeed were added, such as the right to freedom of religion on the 150<sup>th</sup> anniversary of the Constitution in 1964, and a right protecting the cultural rights of the Sami in 1988.<sup>13</sup> At the same time, it was not considered highly problematic from a *legal* perspective that the Constitution did not encompass many of the rights and principles upon which Norwegian society functioned. Norway was already a signatory to a long list of international conventions, including the UN Human Rights treaties and the European Convention on Human Rights, and recognised as legally binding in § 110c of the Constitution (§ 92 after the 2014 reform). The European convention and the two UN conventions on economic, social and cultural rights, and civil and political rights, were incorporated into the domestic legal order by the Human Rights Act<sup>14</sup> in 1999. The convention on the rights of the child, and the convention on the elimination of all forms of discrimination against women, were later included in the Human Rights Act. This Act granted the selected conventions precedence over domestic law in case of a conflict between international law and domestic regulations.

To sum up, the relationship between the Norwegian Constitution and the development of its welfare state was not one in which constitutional

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12 Stortinget, Dokument 16 (2011-2012), Rapport fra Menneskerettighetsutvalget om menneskerettigheter i Grunnloven (19 Desember 2011), p. 49. See also: T. Opsahl, "Trenger Norge en ny grunnlov?", in: T. Opsahl, *Statsrett og menneskerett* (Oslo 1995), p. 607, referenced in: O. Mestad, *Grunnlovshistoria – eit oversyn*, p. 51, fn 81.

13 On the history of the Constitution in the second half of the twentieth century, see: O. Mestad, *Grunnlovshistoria – eit oversyn*, p. 48.

14 Act May 21, 1999, No. 30 (Lov om styrking av menneskerettighetenes stilling i norsk rett).

provisions or the constitutional doctrine developed by the Supreme Court drove the development. Nevertheless, one may argue that the 1814 Constitution was central in generating the conditions in which a modern welfare state could emerge: a society based on principles of democratic participation, equality and human dignity.

b) The 2014 Constitutional Reform and the (Constitutional) Right to Minimum Protection

In 2014, new provisions were introduced into the Norwegian constitution that specifically concern the right to a minimum subsistence: a new provision in § 110 and the new § 104. The introduction of the right to minimum subsistence was part of an overall amendment of the Constitution upon its 200<sup>th</sup> anniversary in 2014 with a more updated human rights catalogue (an expansion of “Chapter E”), which includes the minimum social subsistence guarantee enshrined in § 110 and a particular provision on children in § 104. This followed years of parliamentary deliberations. The anniversary had long been seen as a fitting moment to give human rights a more central place in the Constitution, and to bring it more into alignment with the human rights obligations Norway already had under international law. Following a comprehensive deliberation process by the so-called Human Rights Committee (*Menneskerettighetsutvalget*), appointed by the Norwegian Parliament (*Storting*) on 18 June 2009, a report was published in 2011 recommending the adoption of a new human rights catalogue.<sup>15</sup> However, each of the new rights was introduced only after careful consideration by the Committee and Parliament. The question of why certain rights were chosen and others were not can provide key insights into the meaning of the articles chosen for the national self-image and identity of Norway today, including the values and principles underpinning its welfare regulations.

The Human Rights Committee had been appointed with the mandate of exploring if and how the fundamental rights protection in the Norwegian Constitution should be expanded.<sup>16</sup> It consisted of a number of senior politicians and legal experts, including academics. In its report, the Committee found that in terms of human rights the 1814 Constitution had only been

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15 Stortinget, Dokument 16 (n 12).

16 *Ibid.*, p. 17.

updated “to a modest degree” since its adoption.<sup>17</sup> In addition, it found that the language used was frequently outdated and difficult to understand for many individuals.<sup>18</sup> Those who read the Constitution, the Committee argued, could therefore receive a “skewed and incomplete picture of the values on which Norwegian society is founded”.<sup>19</sup> The overall state of human rights in the Constitution was one of ‘fragmentation’, which the Committee feared could lead to legal uncertainty. The Committee argued that it would be preferable for the Constitution to better reflect Norway’s commitments under international law. In addition, the Committee stressed that it was important that Norwegian courts would be able to solve legal disputes within its domestic legal order to prevent an overburdening of international bodies in resolving conflicts.<sup>20</sup> While the international provisions were already incorporated into national law,<sup>21</sup> a direct inclusion of human rights into the Constitution would provide a higher degree of legal certainty and visibility of Norway’s human rights commitments.

The relationship between international law and the domestic legal (constitutional) order was a central concern in the Committee’s report. As a signatory to, among others, the UN Declaration of Human Rights in 1948, and having ratified the later UN human rights conventions, as well as the European Convention on Human Rights, Norway was already party to a long list of human rights treaties. In particular, the Committee asked what rights needed to be expressly included in the Constitution, and which ones could remain unmentioned, but which would still be binding through the general incorporation mechanisms. It ruled out a complete incorporation of *all* human rights that Norway was bound by under international law. The considerations concerning the relationship between international law and the Constitution that explain the central role of international human rights treaties in the Committee’s deliberation process on what rights to include in the Constitution. In addition, the Committee looked at the human rights protection in a series of national constitutions. Regarding the question of which rights should be expressly included, the Committee emphasised that any new constitutional rights should reflect

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17 Ibid., p. 13.

18 Ibid.

19 Ibid.

20 Ibid.

21 Lov 21. Mai 1999 nr. 30 om styrking av menneskerettighetenes stilling i norsk rett (menneskerettsloven).

*Norwegian tradition and Norwegian values, both with a view to making visible the values on which Norwegian society is founded and with a view to ensuring that the Constitution is better suited to meeting Norway's future challenges.*<sup>22</sup>

In arguing for which rights should be included, the Committee therefore placed particular emphasis on the fact that the new provisions should reflect the “core values that are fundamental in Norwegian society”.<sup>23</sup> While it did not see the reform as introducing any material changes to the existing law, it did see a potential long-term effect beyond the symbolic: Most centrally, it argued that those rights that were to be included in the Constitution would provide an additional safeguard against short-term political fluctuations, as the threshold for changing the Constitution is significantly higher than for ordinary legislation.<sup>24</sup> Overall, the Committee considered its mandate to be that of identifying the most central human rights to which Norway had subscribed, which would then be included in the Constitution. Its deliberation process was therefore about identifying the most central human rights principles, while it was of the view that more detailed provisions could remain at the international level. At the same time, the Committee stressed that the provisions should not be too detailed and thereby unduly bind future generations.<sup>25</sup>

In relation to social rights, there was some disagreement within the Committee. A minority member representing a more conservative political line argued that including too many paragraphs that were programmatic in nature, “programmatic statements that most people consider to be unrealistic dreams without legal consequences”, could lead to a weakening of those provisions that contained ‘hard’ rights.<sup>26</sup> Such declaratory provisions, he argued, were found in particular with regard to social rights, and they should therefore be treated with caution and not be included in the Constitution’s human rights catalogue. For this reason, the minority member voted against the inclusion of any social rights into the Constitution.<sup>27</sup> However, the Committee’s majority advocated the inclusion of a set of

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22 Stortinget, Dokument 16 (n 12), p. 14. Unless specified otherwise, all translations from Norwegian into English are made by the authors.

23 Ibid., p. 48.

24 Ibid.

25 Ibid., p. 62.

26 See: ‘11.4.2, Særmerknad fra Carl I. Hagen’, Stortinget, Dokument 16 (n 12), pp. 62-63.

27 Stortinget, Dokument 16 (n 12), p. 63.

social rights, including the right to education and cultural rights. With regard to minimum protection specifically, a majority within the Human Rights Committee proposed the inclusion of the following social rights in the Constitution (emphasis added by the authors):<sup>28</sup>

§ 104 The Right of Children<sup>29</sup>

*Children have the right to respect for their human dignity. They have the right to be heard in questions that concern them, and due weight shall be attached to their views in accordance with their age and development.*

*For actions and decisions that affect children, the best interests of the child shall be a fundamental consideration.*

*Children have the right to protection of their personal integrity. The authorities of the state shall create conditions that facilitate the child's development, including ensuring that the child is provided with the necessary economic, social and health security, preferably within their own family.*

§ 110<sup>30</sup>

*The authorities of the state shall create conditions under which every person capable of work is able to earn a living through their work or enterprise. Those who cannot themselves provide for their own subsistence have the right to support from the state.*

*Specific provisions concerning the right of employees to co-determination at their work place shall be laid down by law.*

§ 111<sup>31</sup>

*It is incumbent on the state authorities to respect and ensure the right to a satisfactory standard of living. Likewise, it is incumbent on the state authorities to promote the health of the population and ensure the right to necessary health care.*

Regarding the general provisions – those covering the entire population and not children specifically – we see an interplay between § 110 and § 111, in that the provisions together were meant to cover minimum social protection. The Committee's majority saw the rights in § 110 and § 111 as

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28 In addition, the Committee proposed a series of rights that also fall into the category of 'social, economic and cultural rights', such as the cultural rights of the Sami and the right to a healthy environment.

29 This paragraph was entirely new in 2014.

30 The second sentence in this paragraph was new in 2014.

31 None of the proposed provisions in § 111 were included in the Constitution.

an integrated whole, derived from the same normative basis (see below), and in concert ensuring social protection, a satisfactory standard of living and of health (*sosial trygghet, tilfredsstillende levestandard og helse*). These rights are covered by the International Covenant on Economic, Social and Cultural Rights (ICESCR), which is incorporated into Norwegian law and given priority in case of conflict.<sup>32</sup> For children, § 104 adds an additional safeguard concerning minimum social protection, drawing on the UN convention on the rights of the child. This convention is also incorporated into Norwegian law with priority.

And yet, in the end, the Parliament opted not to include § 111 and therefore voted for a more minimal scope of social rights in the Constitution than the Committee had suggested. In particular, the conservative parties blocked the inclusion of § 111 in Parliament. This was based on an argument that this could risk too high a financial burden on the state by the open wording of § 111. It is, however, likely that the rejection of § 111 was also due to a general resistance towards including social rights in the Constitution,<sup>33</sup> despite the Human Rights Committee's explanation that § 111 should be interpreted restrictively: The proposed § 111 was, in accordance with the ICESCR, directed towards the State institutions, requiring them to recognize the right of everyone to the protected goods and to put in place a sufficient infrastructure to this end. Paragraph 111 was formulated in a similar way, not intended as an *individual* right. The Committee had also argued that the term "satisfactory" should be defined objectively and that it only covered a *minimum*, not a "good" living standard. However, in the end, only the right to a minimum subsistence was included in § 110.

### c) Interpreting the New Constitutional Provisions

The Norwegian Parliament approved the changes to the Constitution on 13 May 2014, four days ahead of the Constitution's 200th anniversary.<sup>34</sup> As we have seen, § 111 was ultimately abandoned. A new provision in § 110 on the other hand was included, but here, too, different parties advocated for different versions. Ultimately, Parliament adopted the provision as proposed by the Human Rights Committee following its reasoning. For this reason,

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32 Paragraph 3 cf. paragraph 2 No. 2 of the Human Rights Act 21 May 1999 No. 30.

33 For an example of a more hesitant reasoning by a Committee member from the political right see: Stortinget, Dokument 16 (n 12), p. 63.

34 Kunngjøring av Stortingets vedtak 13. mai 2014 om endringer i Grunnloven.

the report of the Human Rights Committee can serve as an interpretative tool for understanding how the provision was intended. The right to minimum social protection is now laid down in the second sentence of the first section of § 110 of Norway's Constitution.

To understand the right to minimum social protection, and the Norwegian welfare contract more generally, however, section one of § 110 has to be read in its entirety:

*The authorities of the state shall create conditions under which every person capable of work is able to earn a living through their work or enterprise. Those who cannot themselves provide for their own subsistence have the right to support from the state.*

The overall idea enshrined in the first section of § 110 is that work or enterprise is to be the primary source of income for all adults until retirement. The right to support from the state is only to be invoked by those who *cannot* provide for themselves,<sup>35</sup> and the State has adopted strict activation measures to encourage and direct people into work (the Norwegian 'work line'<sup>36</sup>). In its deliberations, the Human Rights Committee stressed that the primary way of securing income should be through work. In Norway, as in the other Scandinavian countries, this extends to men and women.<sup>37</sup> In terms of the minimum social protection guarantee in the second sentence, the wording of the provision ensures subsistence for those who "cannot" provide for themselves, meaning a lack of will to do so would not suffice. This implies that conditions set in social law<sup>38</sup> do not provide an obstacle to meeting the standards of the constitutional provision as long as the core of the right is safeguarded.<sup>39</sup>

In its report, the Human Rights Committee had also proposed an alternative formulation of § 110, although it stated that it was in favour of the version that was ultimately adopted.<sup>40</sup> In the second alternative, it had pro-

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35 Stortinget, Dokument 16 (n 12), p. 239.

36 H. S. Aasen, '§ 110'; in: O. Mestad and D. Michalsen (eds.), *Grunnloven, Historisk kommentarutgave 1814-2020* (Oslo 2021), p. 1236.

37 *Ibid.*, p. 1236.

38 The Social Service Act 18 December 2009 No. 131 paragraphs 20 and 20a give the authorities power to reduce or take away social benefits if the benefit recipient does not fulfil certain obligations, such as taking on "suitable work" or other work promoting activities.

39 H.S. Aasen, '§ 110' (n 36), p. 1236.

40 Stortinget, Dokument 16 (n 12), p. 240.

posed to insert the words: “anyone who, due to illness, age, unemployment, childbirth or similar circumstances, is unable to provide for their own subsistence.” The Human Rights Committee had argued that this added a risk to the provision that it may not capture all social risks. Parliament concurred and opted for the neutral version that did not state any concrete social risks, thereby also providing a certain degree of political flexibility in terms of how such a need is defined. This wording also means that the provision is intended to reflect only an abstract minimum rather than to safeguard the currently existing social protection schemes. A further alternative was proposed but also abandoned again during the legislative process. It would have included the following wording: “every person has a duty to endeavour to provide for their own subsistence”.<sup>41</sup> The only party supporting it was the Labour Party. Although the proposal was abandoned without a debate, this was presumably because it may have placed an undue pressure on individuals who may have a wish to opt for a more traditional family model such as a single breadwinner model.<sup>42</sup>

In terms of eligibility for the minimum social protection guarantee, the wording of § 110 (“Den”, which means any person) indicates that basic social protection should not be limited to individuals who are insured in the obligatory Norwegian Social Insurance system (*Folketrygden*).<sup>43</sup> However, illegally residing adult immigrants are not legally entitled to primary healthcare and regular social assistance. They have, however, a right to emergency healthcare as well as care in connection with pregnancy and birth and infection prevention.<sup>44</sup> Illegally residing children are entitled to the full range of healthcare services, except the right to be registered with a permanent doctor. Illegally residing immigrants do not have a right to work, and they only have a right to necessary social services for a limited period until he/she in practice could have left the country.<sup>45</sup> Asylum seekers are (as long as their asylum application has not been rejected) entitled to almost the same benefits as Norwegians regarding healthcare and social assistance.

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41 Stortinget, Innstilling til Sortinget fra kontroll- og konstitusjonskomiteen 187 S (2013-2014), forslag 6.

42 H.S. Aasen, ‘§ 110’ (n 36), p. 1234.

43 H.S. Aasen, ‘Grunnloven og de sosiale rettighetene’, in: H.S. Aasen and N. Kildal (n. 9), p. 155; H.S. Aasen, ‘§ 110’ (n 36), p. 1235.

44 Regulation 16 December 2011 No. 1255 to the Patient and User’s Rights Act 2 July 1999 No. 63.

45 Regulation 16 December no. 1251 to the Social Service Act.

In terms of what it is that individuals can request, the constitutional provision is neutral. The means through which the minimum subsistence levels can be provided are left open – meaning that they could be provided through cash payments or benefits in kind.<sup>46</sup> Because it is a subsidiary provision (the primary responsibility of the individual is to provide for themselves, as laid down in the first part of § 110, only if they are unable to do so do the rights on minimum subsistence become relevant), the Human Rights Committee felt able to formulate the provision as an individual right.<sup>47</sup> Due to its nature as an individual right, it is in principle possible for individuals to bring their cases to court for constitutional review. The minimum level enshrined in § 110 of the Constitution generally falls far below the current social protection levels in place in the Norwegian welfare state, which means that it was unlikely at the time the provision was introduced that it would be tested much in court. However, groups who are legally or practically excluded from health and social protection, or live on the margins of the welfare state, are in principle given a possibility to use the legal system to secure his or her right to basic social support.

The Human Rights Committee considered the normative bases of the social rights it proposed (both § 110 and § 111),<sup>48</sup> including the provision concerning minimum social protection, and stated that

*In order for individuals to live a life in dignity and at the same time utilise the freedom that all human beings are born with, it is essential that the most elementary and basic human needs are covered.*<sup>49</sup>

It is thus human dignity and freedom that form the basis of this set of rights. In terms of what this means in practice, the Committee lists “food, water, clothes, housing and healthcare”.<sup>50</sup> This suggests that its idea of minimum social provision was centred on the basics, rather than guaranteeing a more encompassing type of access to social life and culture. The Committee stressed the importance of these basics being available in particular to children, as well as to anyone who for reasons of sickness, unemployment, old age “or similar” cannot provide for themselves. While political partici-

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46 Stortinget, Dokument 16 (n 12), p. 240.

47 Ibid., pp. 239-240; H.S. Aasen, ‘Grunnloven og de sosiale rettighetene’ (n 43), p. 155.

48 While the Committee had proposed two provisions (§§ 110 and 111), which taken together were meant to reflect these normative bases, these reflections still give us some important insights into the normative foundations for § 110.

49 Stortinget, Dokument 16 (n 12), p. 238.

50 Ibid., p. 238.

pation and social inclusion are not listed as part of this basic right, access to “food, water, clothes, housing and healthcare” are intended to ensure that the individual *can* participate in a democratic society and exercise their right to education.<sup>51</sup> The Committee concluded that: “If democracy is to be safeguarded and developed, and if individual human dignity is to be protected in our society, people’s basic needs must be met.”<sup>52</sup> The social rights in question were therefore intended to safeguard both the individual’s dignity as well as to ensure the stability of the country’s democracy. In this reading, therefore, the provision intends to secure more than the bare minimum for survival.

Generally, the Committee deemed its proposed rights to be overarching and argued that individual rights would have to continue to be regulated in the social security laws.<sup>53</sup> The Parliamentary committee agreed, stating that

*The idea is that the Constitution should express the fundamental principles, while details in ordinary legislation must be continuously adapted to different circumstances, such as socio-economic conditions, technological development, changes in living patterns, changes in moral perceptions and, not least, changes as a result of changing political majorities.*<sup>54</sup>

While the Committee did not intend for the inclusion of social rights to bring about a material change in the individual social protection schemes or the status quo of protection levels, it still argued that they would have a legal effect in that courts could now assess whether the constitutional provisions were satisfied, and develop a new benchmark, against which any future changes in the ordinary legislation would have to be measured.<sup>55</sup> It is these considerations that need to be borne in mind when assessing the relationship between the Constitution after the 2014 changes and the regular social security and social assistance legislation.

In addition to the ordinary right to a minimum subsistence level enshrined in § 110, the Constitution also contains § 104, which covers, among other rights, a right to minimum subsistence for children. The provision includes the following passages that are relevant for the purposes of this chapter:

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51 Ibid.

52 Ibid., p. 239.

53 Ibid.

54 Stortinget, Innstilling 187 S (n 41), p. 3.

55 Stortinget, Dokument 16 (n 12), p. 239.

*The authorities of the state shall create conditions that facilitate the child's development, including ensuring that the child is provided with the necessary economic, social and health security, preferably within their own family.*

One reason why an additional provision on children was added to the Constitution was that Norway had always been one of the leading countries in safeguarding the rights of children. The Human Rights Committee therefore argued that a separate provision in the Constitution would reflect this historical legacy and the values upon which Norwegian society is founded today.<sup>56</sup> Additional reasons included the potential of such a provision to increase protection levels for children. The above provision concerning the child's development (the first half of the sentence) needs to be understood as a programmatic declaration and not as a subjective right.<sup>57</sup> The second half of the sentence, which includes the word "ensuring" ("sikre") meanwhile, is generally thought to be enforceable in court.<sup>58</sup>

In constitutional law terms, the new provisions in §§ 110 and 104 have not been in place for a long time. For this reason, it is not possible to assess in any meaningful way the impact these provisions have had. Nevertheless, a few first reflections can be offered on the relationship between the new constitutional provisions and the existing schemes for minimum social protection:

A survey of High Court and Supreme Court decisions reveals that since the introduction of § 110, the provision has been invoked by the claimants in only about a dozen cases. However, in no case did this lead to a change in outcome. In fact, the courts did not engage with the provision in any detail. Instead, the courts tend to resolve via Social Insurance Act or mention Constitution only briefly.<sup>59</sup> Paragraph 104 has been one of the new constitutional provisions most frequently cited in court. Nevertheless, this has so far not involved the right of children to minimum subsistence.<sup>60</sup> While this may seem disappointing from a human rights perspective at first glance, it is, in fact, in line with the way the provision was intended. The minimum subsistence guarantees in § 104 and § 110 were not intended as a remedy to any acute problems and was not seen as bringing about

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56 T. Haugli, '§ 104', in: O. Mestad and D. Michalsen (n 36), pp. 1167-1177, 1172.

57 Ibid.

58 Ibid.

59 These claims are based on a search of relevant case law in Lovdata.no.

60 Ibid., p. 1177.

changes to the functioning of the welfare state. Rather, as we have seen, they were designed to bring the Constitution up to speed with the present-day functioning of the welfare state, so that the Constitution better reflects the current values of the Norwegian state. In addition, it was intended to add a constitutional safeguard for the future, in case of a change in politics and a serious deterioration of the current standards of minimum protection to be found in the welfare system.

In assessing the relationship between the Norwegian constitution and the right to minimum subsistence, one will therefore need to distinguish between the short and long-term effects of the 2014 amendments. While there has been no direct constitutional influence on the emergence of the schemes, § 110 certainly reflects a particular normative idea of the welfare state and has made it more difficult for future legislators to deviate from it. In addition, the deliberation process ahead of the constitutional reform of 2014 has also allowed for an open reflection on the normative bases of the Norwegian welfare state. And finally, at least in principle, it has given those who might need it the most, individuals suffering hardship and who may in some way fall between the cracks of the Norwegian welfare state, a tool to seek redress in court.<sup>61</sup>

## 2. Social Benefits – Legal Foundations, Benefit Calculation and Benefit Schemes

The main acts of the Norwegian welfare state regulating the minimum levels of protection are, first and foremost the Social Insurance Act (*Folketrygdloven*),<sup>62</sup> the Act on Social Services (*Lov om sosiale tjenester*),<sup>63</sup> the Patient and User's Rights Act regulating access to health and care services (*Lov om pasient- og brukerrettigheter*) and the Child Benefit Act (*Barnetrygdloven*).<sup>64</sup> An understanding of these key legal texts is essential to understanding how the overall legal framework for minimum social protection works.

*Folketrygdloven* is Norway's central piece of legislation in the area of social protection. It is the legal foundation of the Norwegian welfare state,

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61 In many cases, however, this access to justice will in practice be hampered by high legal costs and the general challenges faced by individuals with low resource levels.

62 Lov 28. februar 1997 nr. 19 om folketrygd (*folketrygdloven*).

63 Lov 18. desember 2009 nr. 131 om sosiale tjenester i arbeids- og velferdsforvaltningen (*sosialtjenesteloven*).

64 Lov 8. mars 2002 nr. 4 om barnetrygd (*barnetrygdloven*).

regulating all social insurance schemes. The Act accordingly regulates, among others, the schemes for unemployment benefits, sickness benefits, disability benefits, parental benefits and the public old-age pension scheme. All individuals ordinarily resident in Norway are members of the Social Insurance System, the *Folketrygden*. In addition, a small group of individuals based overseas are also members, such as individuals in the diplomatic service. *Folketrygdloven* is complemented by the Act on Social Services (*Lov om sosiale tjenester*), which in particular regulates social assistance and social services. Finally, the Child Benefit Act (*Barnetrygdloven*) regulates child benefits, and therefore has an important role in regulating the income of families.

The calculation of benefits within the general social security system (*Folketrygden*) is centred on a key figure, the so-called Basic Amount (*Grunnbeløpet*, abbreviated to “G”), which has been in existence since the introduction of the Social Insurance Act in 1967.<sup>65</sup> Norwegian social legislation contains fixed references to G, which is adjusted by way of government guidelines on an annual basis to match income growth. The Social Insurance Act states that it has to be adapted according to expected income growth, and to be adjusted for any discrepancies between previously expected income growth and actual income growth in the preceding two years.<sup>66</sup> For 2024, G amounted to 124,028 NOK (approx. 10.567 €). Within the Social Insurance Act, it is therefore easy to see the relationship between benefit levels and calculation bases in the various insurance schemes. Parental benefits, for example, cover an individual’s previous salary, up to 6G annually. Sickness and disability benefits are paid at the level of 66 % of previous salary up to 6G annually, whereas pension rights are accrued for income of up to 7,1G annually. For social assistance, meanwhile, the level of benefits is ultimately discretionary on the part of the municipalities and not regulated with reference to G.<sup>67</sup> The social assistance benefits are therefore not universal across the country, and they are also less predictable compared to the social security benefits provided by *Folketrygden*. This also means that social assistance does not necessarily rise in line with other

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65 For the yearly figures of the Base Amount since 1967, see: NAV, “Grunnbeløpet i folketrygden”: <<https://www.nav.no/grunnbeløpet#>> accessed 30.8.2024.

66 § 1-4 *folketrygdloven*.

67 According to the Act on social assistance § 3, the municipality is responsible for the provision of services, including economic assistance. The state is, however, responsible for providing guidelines etc., cf § 8.

benefit levels in times of increasing prices and costs, implying a significant risk that recipients of social assistance fall even further behind.

Social assistance is subsidiary to the schemes of the *Folketrygden*. A number of schemes will typically be applicable before an individual falls back on social assistance. The most important schemes shall be outlined here briefly to give the reader an understanding of when the eligibility period for social assistance begins in cases of a) sickness, injury and disability, and b) unemployment:

#### a) Sickness, Injury and Disability

In cases in which an individual is unable to work due to sickness, injury or disability, there are a number of schemes in place within the framework of the Social Insurance Act (*Folketrygdloven*). The work assessment allowance (*arbeidsavklaringspenger*) is paid during an active treatment for sickness or other event that has resulted in a reduced ability to work (by at least 50 %).<sup>68</sup> The aim must be that the individual returns to employment. The benefit is usually paid for a maximum of three years.<sup>69</sup> The benefit amounts to a minimum of 2G. Sickness benefits (*sykepenger*) are paid when an individual is unable to work due to sickness or injury. The benefit can be paid for up to 248 days in any three-year period. The daily benefit level of sickness benefits amounts to 1/260 of the 'sickness benefit basis' (*sykepengegrunnlag*), which is the previous salary up to an amount of 6G.<sup>70</sup> If the ability to work has been permanently reduced by at least 50 %, a disability benefit may be paid (*uføretrygd*), after a thorough and often lengthy process of assessing if, how and to what degree the impairment impacts on the person's ability to work. The benefit is calculated on the basis of the three best income years of the previous five years, up to 6G.<sup>71</sup> The minimum payment is 2,28G. There is no upper limit for how long it can be received, and the benefit can therefore be paid up to retirement age.

All of these schemes recognise the obligation of the welfare state to secure the individual in the case that they are unable to work due to any of the listed social risks. They do, however, go beyond the protection levels envisaged in § 110 of the Constitution in that the economic protection of persons

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68 § 11-5 folketrygdloven.

69 § 11-12 folketrygdloven.

70 § 8-10 folketrygdloven.

71 § 12-11 folketrygdloven.

with long- and full-time employment and high salaries provide more than a minimum level of subsistence as protected by the constitutional provision. For other persons, only when an individual reaches the end of their eligibility period, or before disability pension is granted, would social assistance step in and provide a minimum income (see below). In addition, there are several benefit schemes in place to cover the specific cost of additional expenditure in relation to long-term illness and special care needs, including the Basic Benefit (*grunnstønad*) and Assistance Allowance (*hjelpetønad*), as well as Higher Rate Assistance Allowance (*forhøyet hjelpetønad*). These ensure that individuals with special needs can sustain a decent standard of living despite the added expenditure their condition entails. Despite these regulations, many persons with disabilities, injuries and illness experience severe economic and administrative challenges trying to handle not only their own condition but also the communication and struggle with the welfare system, which has a strict control function as well as the service function.

## b) Long-Term Unemployment and Low Income

With regard to the risk of long-term unemployment without any exacerbating factors such as sickness or disability, but rather owing to market demands, the unemployment insurance scheme applies. The Norwegian unemployment insurance system differs from that of Sweden and Denmark (the so-called “Ghent model”) in that it is not optional. Instead, individuals who are a member of the Social Insurance System (*Folketrygden*) are automatically insured. When an individual meets the qualifying thresholds, a daily rate of 2,4 per mill of the ‘unemployment benefit basis’ (*dagpengegrunnlaget*) is paid out.<sup>72</sup> The base salary is calculated on the basis of the individual’s salary in the preceding 12 months, up to a salary of 6G.<sup>73</sup> Unemployment benefits can be paid out for a maximum period of 104 weeks.<sup>74</sup> After that, social assistance from the municipality takes over as the social protection alternative, if other alternatives in the Social Security Act are not available.

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72 § 4-11 folketrygdloven.

73 § 4-11 folketrygdloven.

74 § 4-15 folketrygdloven.

### III. Analysis

As regards minimum income, the most important schemes in Norway are social assistance, specific child benefits and the minimum pension (*minstespensjon*) within the pension system of the *Folketrygden*.

#### 1. Social Assistance

Social assistance is regulated in the Act on Social Services (*Lov om sosiale tjenester*). The purpose of the law is:

*[...] to improve the living conditions of disadvantaged people, contribute to social and economic security, including giving individuals the opportunity to live and reside independently, and promote transition to work, social inclusion and active participation in society.*<sup>75</sup>

The quote reflects the Norwegian – and Nordic – ‘work line’, but also ideas of human dignity through the emphasis on living conditions and independence. The Act “*is intended to contribute to greater equality of human worth and social status, and to prevent social problems*”.<sup>76</sup> This wording precedes the provision introduced in § 110 of the Constitution in 2014. However, we see here the same type of aims that the Human Rights Committee had also considered to be the normative bases for minimum protection. In this way, § 110 is in harmony with the pre-existing laws and their purposes of promoting equality and stabilising democratic society. We also see an additional reference to these considerations in § 12 of the Act, which concerns the general responsibilities of municipalities: “*The municipality shall seek to facilitate the development and strengthening of social community and solidarity in the neighbourhood*”.<sup>77</sup>

Section 18 of the Social Services Act regulates who has the right to minimum subsistence: “*Those unable to support themselves by working or exercising financial rights are entitled to financial support*.” The means test is strict, and includes the following assets: “*bank deposits, wealth and investment income, outstanding funds, realisable assets, rental income, inheritance,*

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75 § 1 sosialtjenesteloven.

76 § 1 sosialtjenesteloven.

77 § 12 sosialtjenesteloven.

*gifts and gains, compensation, legacies and similar*”.<sup>78</sup> However, a certain degree of discretion can be exercised, and whether all of these assets need to be monetised to become eligible also depends on how long or short the estimated period of dependence on social assistance will be.<sup>79</sup> In other words, if the situation suggests that an individual will only be dependent on support for a short period of time, it would be unreasonable to expect all existing assets to be sold. In addition, people will not be required to move if their home is seen as necessary to accommodate the family in a reasonable manner and is not too expensive to keep. An individual also cannot be expected to take out a loan to cover their life expenses in lieu of social assistance.<sup>80</sup> In relation to households, those living in house shares are to be considered singles, while married couples’ assets are usually considered together (exceptions apply in cases of actual separation or domestic violence).<sup>81</sup>

The level to be paid is discretionary. The municipalities receive annual guidelines issued by the state, but caseworkers ultimately set the amount, taking into account the specific circumstances of the individual concerned, including family responsibilities. The exercise of discretion by case workers is not without challenges and problems from an equality perspective and as regards predictability of outcome. Research has shown that a wide range of factors may determine caseworkers’ discretion and decision-making.<sup>82</sup> This carries the risk of biased or inconsistent decision outcomes.

At the same time, the ministerial regulations for social assistance are detailed, and give suggested rates to be paid. This indicates that the application of the social assistance regulation can be expected to show a certain level of consistency across the country and from case to case. For 2024, the monthly rate to be paid to singles under the state guidelines was 7,850 NOK (approx. 657 €), and 13,100 NOK (approx. 1,096 €) for couples.<sup>83</sup> For indi-

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78 Rundskriv til Lov om sosiale tjenester i NAV (R35-00), NAV – Arbeids- og velferdsetaten, 22 June 2012, 4.18.2.19.

79 Ibid.

80 Ibid.

81 Ibid., 4.18.2.4, 4.18.2.5.

82 On this topic in the specific context of social assistance in Norway, see for example: A. Bjelland, *Skjønn og økonomisk sosialhjelp i NAV – En kvalitativ studie om betydningen av skjønnsvurderinger i saksbehandling av søknader om økonomisk sosialhjelp* (Master’s Dissertation, University of Agder, 2021).

83 Regjeringen, Rundskriv A-3/2023 Statlege rettleiande retningslinjer for økonomisk stønad for 2024. Note that the Norwegian Krone is very weak at the time of writing, which means that the figures may seem surprisingly low when converted into €.

viduals living in shared housing, the rate is 6,600 NOK (approx. 552 €).<sup>84</sup> These figures do not include housing costs (see below), as the costs for housing varies so much that they need to be assessed on an individual basis. Since 2006, the figures recommended by the state have been adapted yearly in accordance with expected changes in consumer prices. As of 2023, 54,779 individuals had social assistance as a main income source (out of a population of 5,550,200), meaning 0.99 per cent of the population.<sup>85</sup> In total, 152,645 individuals received social assistance as a form of income source (2.75 per cent of the population). The average monthly social assistance rate amounted to 12,078 NOK (approx. 1,010 €).<sup>86</sup>

The law is unclear on what specifically is meant by “subsistence”. However, this has since been defined by the interpretative guidelines issued by the authorities. The ministerial regulations for social assistance, issued annually by the Ministry of Labour and Social Inclusion, provide a good sense of what the minimum comprises:

*expenses for very basic needs, such as food, clothing, communication, household items and hygiene and more, and also [...] other aspects of daily life, such as leisure and social needs.*<sup>87</sup>

This means that even in what is traditionally the least generous of schemes in a welfare state, the ‘last safety net’ of social assistance, several dimensions of human life are factored into determining benefit levels. Beyond the most basic needs for survival such as food and clothing, there is a participative dimension through the focus on communication. In addition, with daily life, leisure and social needs being considered, we see a further emphasis on participation and cultural and social wellbeing. This corresponds to the normative foundations that the Human Rights Committee had identified, and the role of minimum social protection in also ensuring the stability and development of democracy. We can therefore see that the Norwegian idea of ‘minimum protection’ contains an element of participation, placing the individual within their social environment. Thus, the concept of minimum

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84 Regjeringen, Rundskriv A-3/2023 (n 83). On the situation when there are children in the household, see below, pp. 19-20.

85 Statistisk sentralbyrå, “Økonomisk sosialhjelp”: <<https://www.ssb.no/sosiale-forhold-og-kriminalitet/trygd-og-stonad/statistikk/okonomisk-sosialhjelp>> accessed 10.9.2024.

86 Ibid.

87 Regjeringen, Rundskriv A-3/2023 (n 83).

subsistence is based on an idea of human dignity that goes beyond mere physical survival.

This is also emphasised in the interpretative guidelines issued by the Norwegian Welfare Authority (NAV) for the Social Services Act:

*The purpose of the Act forms the basis for the lower limit for an acceptable benefit level. The benefit must be at a level that helps to realise the objectives of the Act for the individual. The term "subsistence" therefore involves more than covering basic needs such as food and shelter. Coverage of expenses should make it possible to maintain a standard of living at a reasonable and sober level, adapted to general welfare developments and the local community of which the service recipient is a part. The concept of subsistence is therefore a dynamic concept.<sup>88</sup>*

The guidelines highlight the variability of what this means:

*What constitutes a reasonable subsistence level will vary depending on personal circumstances, such as family situation, household size, place of residence, living situation, age and health. [...]*

*The considerations that form the basis for the assessment of what constitutes justifiable subsistence for the individual must be justified on a concrete and individual basis. If this is not done, or if the assessment is not within the purpose and framework of the law, the result may be that the requirement of justifiability is not met.<sup>89</sup>*

The significant space for discretion implies less predictability compared to fixed schemes but also allows for individual concern and assessment of situation. The guidelines also take into account that expenses may vary according to health status, age and individual life situation. This is to be factored in in the case worker's exercise of discretion:

*The calculation of financial support must take into account expenses that are common for people of a similar age and life situation. If the service recipient is young and in the early stages of adulthood, their needs will be different from those of recipients who are well into adulthood. For young adults, it will be common to acquire household goods and other assets as finances allow, and this can be taken into account in the benefit calculation for service recipients in this age group. For older service recipients with*

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88 Regjeringen, Rundskriv NAV (R35-00) (n 78), 4.18.1.1.

89 Ibid.

*no possibility of a future increase in income, it would be reasonable to take into account that the financial situation is permanent and that the standard of living for the age group is higher than for young adults.*<sup>90</sup>

The guidelines state that, typically, the subsistence needs include food and drink, clothes and shoes, household and hygiene products, media and communication, leisure activities, transportation and housing and electricity. The guidelines stress that clothing allowances need to match the needs for clothing in different seasons and should also factor in clothes for special occasions such as Christmas and birthdays. With regard to food, special allowances can be made for special dietary requirements.

In return for social assistance, the municipality is entitled to demand that individuals perform some form of work in their municipality.<sup>91</sup> For individuals under the age of 30, the municipality *has to* demand work in return for social assistance.<sup>92</sup> In this way, the Norwegian ‘work line’ is central even in relation to the most basic form of subsistence. The political intent behind this is that in particular younger individuals should be strongly discouraged from staying away from the labour market for too long, which could endanger their employability on a long-term basis. For those who do not comply with activation obligations, sanctions can be issued.<sup>93</sup> It should also be mentioned that, while § 110 includes all those on Norwegian territory, the social assistance granted under the Act on Social Services is only available to individuals *legally* resident in Norway. Special regulations apply to those groups who fall outside of this category, such as immigrants without legal residence or who lack valid documentation of their membership in the European transborder health schemes.<sup>94</sup> As is the case in *Folketrygden*, this highlights the strong distinction the Norwegian welfare state makes between ‘insiders’ and ‘outsiders’.

In sum, therefore, we observe that the Norwegian social assistance system is rather flexible. Not only is social assistance paid out in a discretionary manner, the guidelines issued by the welfare authorities also stress the wide range of different factors that must be taken into account when exercising discretion in each case. This flexibility is not always unproblematic, as the wide scope for discretion by municipality case workers can make

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90 Ibid., 4.18.2.8.

91 § 20 sosialtjenesteloven.

92 § 20a sosialtjenesteloven.

93 §§ 20, 20a sosialtjenesteloven.

94 See above in section II.1.c).

social assistance recipients dependent on good-will and they become more vulnerable to power abuse compared to citizens with a regular income.<sup>95</sup> Still, the detailed guidelines also limit variations in decision-making, ensuring that the same factors are taken into account across the country and from case to case.

## 2. Childhood and Parenthood

As we have seen, a special provision on the rights of children was added as part of the 2014 Constitutional reform (§ 104). This was meant to reflect, not least, that the rights of children have a central position in Norwegian society. Several schemes are in place in the Norwegian social law system that have the purpose of ensuring that children's minimum subsistence needs are met. This includes the regular child benefit (*barnetrygd*) and extended child benefit (*udvidet barnetrygd*) for single parents. Eligibility for these benefits is not dependent on a means test, however, and in most cases, the benefit will contribute to more than a mere minimum subsistence level.

Social assistance, however, is a means-tested benefit (see above on the general system), which factors in children in the household. For children between 0 and 5 years of age, the state guidelines for social assistance recommend in 2024 a payment of 3,850 NOK (approx. 281 €). This rises to 3,950 NOK (approx. 290 €) for children aged between 6 and 10, and to 5,150 NOK (approx. 381 €) for children aged between 11 and 17.<sup>96</sup> The particular position of children in the family is highlighted in the accompanying documents to the Act on Social Services. The interpretative guidelines of the Welfare Agency (NAV) stress:

*If the service recipient has children, special consideration must be given to their needs. Children and young people must be ensured a safe upbringing and be able to participate in normal school and leisure activities, regardless of whether their parents are in financial difficulties. This means that expenses for children and young people may be included in the cost of living, even if similar expenses for adults are not.<sup>97</sup>*

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95 E. Nilssen and I. Voll, 'Rettslig proseduralisering og 'governmentality' i norsk aktiveringspolitikk [Legal proceduralization and 'governmentality' in Norwegian activation policy]', *Retfærd* 153 (2016) 3, pp. 58-71.

96 Regjeringen, Rundskriv A-3/2023 (n 83).

97 Rundskriv NAV (R35-00) (n 78).

The guidelines also state that, in the case of families, children's income in their spare time and holidays is not to be counted in the means-testing or calculation of benefits. The same applies to the child benefit.<sup>98</sup> The law is therefore conscious of not limiting children's opportunities in society and within the labour market, and that their possibilities for participation in society are not limited through their parents' or caregiver's dependence on social assistance. A general risk with both the child benefit and the rates for social assistance paid for families with children in the household, meanwhile, is that it is difficult to ensure that the benefits paid actually reach the children.

Finally, for children who have lost one or both of their parents, a children's pension is paid until they are 20 years of age. According to the Social Insurance Act, the purpose of the child pension is "to secure income for children when one or both parents have died".<sup>99</sup> From 1 January 2024, children who have lost one parent receive an amount equivalent to 1 G per year 124,028 NOK (approx. 10,567 €). Children who have lost both of their parents will receive 2.25 G annually (279,063 NOK, approx. 23,369 €). The children's pension is therefore also directed at securing a minimum subsistence level of children in need.

### 3. Retirement

The Norwegian pension system ensures a minimum protection level also for individuals in old age. While § 110 is mainly directed at the working age population, and those of retirement age are not expected to work, the Norwegian pension system contains a minimum level of pension benefits (*grunnpensjon*) which ensures that individuals do not risk suffering financial hardship in the way seen in pension systems without a corresponding minimum level. The entitlement to full pay of the minimum protection level (*grunnpensjon*) is secured through being a resident of Norway for 40 years,<sup>100</sup> and can be taken out from age 67. From 1 January 2024, the level has been 223,358 kroner annually (approx. 18,707 €). This figure is also referred to as minimum pension level (*minste pensjonsnivå*). A slightly lower rate applies for individuals living in shared households. Those with shorter periods of residence in Norway receive a sum proportionate to

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98 Rundskriv NAV (R35-00) (n 78), 4.18.1.

99 § 18-1 folketryktdloven.

100 § 3-2 folketryktdloven.

their period of residence. They are entitled to an additional benefit to top up the difference. However, unlike for those who meet the residency requirement, the additional benefit is means-tested. Since the pension level of the lowest pension amounts to approx. 18,613 NOK (1,559 €) monthly, it is higher than the minimum level recommended in the guidelines for social assistance (around 657 €). Clearly, the minimum pension level provides more than what is considered the minimum level to live a ‘life in dignity’ (note, on the other hand, that it needs to cover all expenditure, including for housing). Within the pension system, there is therefore an additional element of recognition of an individual’s lifetime contributions to society, and an idea that retirees should receive more than that which is considered the minimum deemed essential to survive.

#### IV. Conclusion

As this chapter has shown, there is a comprehensive system in place in Norway for guaranteeing minimum social protection for individuals in need. The exact benefit levels are determined on a case-by-case basis. While scenarios in which case workers need to exercise discretion will always lead to some outcomes that are perceived as unduly harsh, the detailed guidelines issued by the Ministry of Labour and Social Affairs and the Norwegian Welfare Agency aim to ensure that individuals in need can live a ‘life in dignity’. Since 2014, the right to a minimum subsistence has been enshrined in § 110 of the Norwegian Constitution, highlighting that it is one of the guiding principles of the welfare state. While this did not have a particular impact on the ways in which minimum income schemes work today, the Parliament nevertheless affirmed the centrality of this dimension of the welfare state by adding this provision to its Constitution. Note, however, that more encompassing rights such as the right to health and a decent standard of living were abandoned in the legislative process implying that the social rights in the Constitution do not fully reflect the scope of the Norwegian welfare state today.

By forming a guarantee enshrined in the Constitution, the right to minimum subsistence has become part of the fabric of the Norwegian Constitutional order. Most significantly, § 110 provides a safeguard against an erosion of minimum social protection levels and it has granted individuals a subjective right to have their case tested in court. At the same time, the importance of this should not be overstated. Through a wide range

of schemes, the Norwegian welfare state today offers significantly higher social protection levels for most individuals than those laid down in the Constitution's § 110. One can hope, therefore, that court cases in which individuals need to invoke § 110 will remain few and far between.

