

<Title: Chapter 5: The Duty to Work as Precondition for Human Dignity

<Subtitle: A Swiss Perspective on Work programmes>

<Authors: Melanie Studer and Kurt Pärli>

<Heading: Introduction>

The paradigm of activation and self-responsibility to provide for basic needs has been on top of the political agenda in most Western social welfare states for years. This is true for Switzerland and means-tested benefits are no exception to this development. Basic needs are guaranteed on the one hand by a constitutional right to minimum financial means and, on the other hand, through so-called measures of *social assistance* which include (further) financial support. Switzerland being a federal state, social assistance and the duties for the beneficiaries are regulated in statutes at cantonal level. There is no federal social assistance law.

Neither the constitutional right to minimum financial means, nor the right to social assistance are unconditional. Both rights are *subsidiary* to the individual's own resources and the obligation to work in the primary labour market. In addition, if the claimant is unemployed, they can be obliged to participate in a work programme offered by the social assistance authorities. Under certain circumstances, participation in such a work programme is not only a behavioural duty of the benefit recipient, which can lead to benefit cuts, but participation can also be an eligibility criterion for the benefits. The authors will focus on these programmes and mechanisms which can lead to questions over eligibility for minimum subsistence rights guaranteed by the constitutional right to financial support when one is in need (Article 12 of the Swiss Constitution; hereafter Cst. or the Constitution(1)). These programmes will be referred to under the term 'work programme' or 'remunerated work programme'. The first chapter of this book argued that the republican argument for the resourcing of basic liberties by a system of social security can contradict another requirement of the republican theory of non-domination: an equal distribution of the freedom to change occupation and employment. In this chapter the authors will examine whether the implementation of these programs is in accordance with fundamental rights and more precisely, whether they respect the normative framework elaborated in Chapter 4 by Elise Dermine.

To this end, the authors will offer a short introduction to the federal social assistance and work programme organisation in Switzerland. They will then move on to the right to assistance when in need (Article 12 Cst.) and investigate the scope of this right, its history, and its eligibility criteria. This allows them to show how this fundamental right to minimum subsistence is closely linked to human dignity and how it has been affected by the paradigm of activation and self-responsibility, leading to the construction of a duty

to work as a precondition of the benefits. With this background, the authors will consequently explore whether this system respects the limitations to a duty to work set by international human rights law, or whether we can observe violations thereof, also affecting human dignity. Some general reflections on the protection of human rights in the activating welfare state will precede this evaluation.

<Heading: Work-related duties in a federal social assistance system>

This section will show that the Swiss Confederation's federal structure – comprising 26 federal entities, the Cantons – greatly affects means-tested (social assistance) benefits and that the organisation of work programmes in the welfare system is highly decentralised. The Swiss system contains two layers of non-contributory means-tested benefits: social assistance and 'assistance when in need'. The former is dealt with at cantonal level. This is due to Article 3 of the Swiss Constitution, which guarantees the sovereignty of the Cantons, except to the extent that their sovereignty is limited by the Federal Constitution. Under Article 115 of the Swiss Constitution(2), the Cantons are implicitly bound to establish a system for social assistance (Biaggini 2017: § 4 ad Article 115 BV). As a consequence, there are 26 different cantonal social assistance statutes which also regulate the behavioural duties of social assistance recipients including their duties to accept a position in a work programme. Welfare-to-work (WTW) programmes, including work programmes, are developed in some Cantons at cantonal level; other Cantons have delegated this task to the municipalities. The only instrument aiming at coordination between the 26 Cantonal social assistance statutes are the (non-binding) guidelines of the Swiss Conference for Social Assistance (SKOS)(3). The SKOS guidelines also incorporate an activation policy framework.

The second form of means-tested benefits – the 'assistance when in need', is based on Article 12 Cst., which grants the means *indispensable for a dignified human existence* (to be discussed further in the next section). The provision of benefits is, however, a cantonal competence as well. Regulation of these benefits by the Cantons varies greatly (cf. Belser and Waldmann, 2010). The cantonal social assistance benefits should provide the means for social integration and participation in social life. In contrast, the benefits according to Article 12 Cst. ('assistance when in need') are restricted to the minimum required in order to preserve a life in dignity. The benefits arising from Article 12 Cst. can in consequence be seen as the constitutionally prescribed core of the benefits that the Cantons are bound to provide (Hänzi, 2011, p. 85; Schaller Schenk 2016, p. 258; Belser and Waldman, 2010). Article 12 Constitution becomes directly relevant only if the cantonal social assistance provisions fail to protect the dignity of welfare recipients (Hartmann, 2005, p. 418).

Both forms of benefits are only granted to persons who cannot support themselves and have exhausted social insurance benefits, their personal means and other sources of support. Therefore, the system follows the *principle of subsidiarity*, meaning that this final state safety net is only available if other (personal) efforts and resources have failed or have been exhausted. In fact, the subsidiarity of benefits to personal efforts and the importance of gainful employment and *personal responsibility* are highlighted in the Federal Constitution several times.(4) This also influences the sphere of social assistance as Cantons are bound to respect the Federal Constitution in all their activities.(5) The principle of subsidiarity in the field of social assistance can therefore be seen as an implementation of the constitutional value of self-responsibility (Schaller Schenk, 2016, p. 184) and leads us to assume that WTW measures in general, and work programmes more particularly, – aiming at promoting personal responsibility and autonomy - are compatible with these values (Pärli, 2004, p. 49).

All 26 Cantons provide work programmes for social assistance beneficiaries. The degree to which they are regulated in the legislation varies considerably. The aims are also formulated in various terms, ranging from social and professional integration to health preservation, providing a daily structure, and the general idea of reciprocity of benefits.(6) All Cantons allow *sanctions* in case of non-participation in a work programme. Strictly speaking – according to the SKOS-Guidelines – sanctions should only constitute a reduction of up to 30% of the contribution for basic needs (which amounts to a total of CHF 986/month(7) in a household of a single individual). Several Cantons, however, have adopted stricter sanction regimes in their legislation.(8) More importantly, certain violations of behavioural duties, especially of the duty to accept a job in a remunerated work programme, may lead to *questions over eligibility* for benefits, which also extends to eligibility for the constitutionally prescribed benefits according to Article 12 Cst (i.e. ‘assistance when in need’). This will be explained in more detail later and these programmes will be the focus of the remainder of this section.

<Heading: Constitutional right to (financial) assistance when in need and the duty to work>

<Subheading: 1. General>

As mentioned earlier, social assistance and work-related duties in social assistance schemes are regulated at cantonal level and the only substantive federal rule on the benefit provision is found in Article 12 of the federal Constitution, which reads: ‘Persons in need and unable to provide for themselves have the right to assistance and care, and to the financial means required for a decent standard of living’.

The interpretation of this provision – containing an individually justiciable social right – by the Courts and the Federal Supreme Court especially, has a potentially unifying effect on the whole system and can serve as a safeguard against excessive conditions and sanctions attached to the benefits. The following sections explore how the Federal Supreme Court has made use of the potential for unification concerning the obligation to work in a (remunerated) work programme.

<Subheading: 1. Historical background>

In 1995, the Swiss Federal Supreme Court responded to repeated requests from scholars and civil society organisations and recognised the *right to a secure existence* as an unwritten constitutional right.(9) The Court acknowledged that the protection of elementary human needs, such as nutrition, clothing, and shelter are a prerequisite for dignified human existence and development. The right was also declared applicable if a situation of need is self-inflicted. The Court, however, also mentioned that the deliberate refusal of an employment opportunity could lead to loss of benefits.(10)

In 1999, the revised Swiss Constitution came into force and the right to a secure existence became a written constitutional right. To highlight that the right to a secure existence is subject to the *principle of subsidiarity* and that *personal means override benefits*, the Parliament changed the wording from ‘Persons in need have the right to assistance and care (...)’(11) to the current complete phrasing of Article 12 Cst. mentioned earlier (cross-reference to 1. General) (Waldmann, 2006, p. 353). With this emphasis on the inability to provide for oneself, it was made clear that benefits based on Article 12 Cst. are only available if, despite all reasonable personal efforts, someone is unable to obtain the means necessary for a decent existence and if those means are not available either from a third party or another source. Expressing the principle of subsidiarity in the constitutional provision was thus a way of qualifying the entitlement to benefits.(12)

<Subheading: 1. A right to what?>

According to the Federal Supreme Court, Article 12 guarantees only what is indispensable for a *decent human existence*, in order to preserve the person from an unworthy existence requiring begging.(13) The benefits, less extensive than the social assistance benefits (Hänzi, 2011, p. 171), are restricted to food, shelter, clothing, and basic medical aid. These basics are seen as a necessary precondition which allow an individual to exercise other fundamental rights.(14) This conception as a minimum guarantee also means that the benefits based on Article 12 Cst. do not have to provide means for participation in social life (e.g. travel expenses in order to visit friends and family). Benefits may be as low as CHF 21/day(15) which is, in view of

the relatively high living costs (cf. note 7) and the fact that the Federal Supreme Court considers a minimum wage of CHF 19.45/hour (just) high enough to secure a decent living,(16) extremely low.

However, as the right to assistance when in need is a concretisation of the right to human dignity and therefore not to be generalised – it is impossible to provide a catalogue of benefits necessary to secure this right (Schefer 2001, p. 341; Hartmann 2005, p. 421). As Article 12 Cst. only guarantees limited benefits, the SKOS-guidelines do not consider the ‘assistance when in need’ as a suitable form of assistance for the permanent resident population in Switzerland.(17)

Because of the close link between this fundamental right and human dignity, it is recognised that it *cannot be restricted* and leaves no possibility for sanctions. The scope of protection and the essence of the right are identical.(18) As long as someone is considered in need, they have the right to all these minimum benefits. In principle, it is not possible to cut the benefits arising from Article 12 Cst. if a welfare beneficiary violates behavioural duties.

<Subheading: 1. ...and under which circumstances?>

However, recognition that the right to assistance when in need cannot be restricted does not mean that the benefits are granted unconditionally. In fact, the Federal Supreme Court interprets the phrase ‘*not being able to provide for themselves*’, incorporating the principle of subsidiarity, as an *eligibility criterion* for the benefits.

Typically, someone who earns an income thanks to *gainful employment* covering their expenses is able to provide for themselves and cannot claim the benefits. The principle of subsidiarity as an eligibility criterion for the minimum benefits according to Article 12 of the Constitution goes, however, beyond the distinction of whether other sources – like gainful employment – are available to cover the needs of a person. The Federal Supreme Court recognises that the principle of subsidiarity comprises certain duties – among which the duty to do everything which can be reasonably expected to end their situation of need. Part of this duty to exercise *reasonable self-help* is the duty to use one’s working power.(19) These duties, connected to the principle of subsidiarity, are seen as fundamental and their violation is liable to ‘*eradicate*’ *eligibility for the benefits*.(20) One aspect of self-help is to *accept any reasonable work* offer that would allow beneficiaries to provide for themselves. There is no generally accepted definition of reasonable work in the present context in Switzerland. The Federal Supreme Court stated clearly, in a series of judgements, that *work programmes are per se reasonable work* and that refusal to participate in such a programme is liable to ‘*eradicate*’ eligibility for the benefits.(21) Participating in work programmes is therefore one aspect which is treated as an eligibility criterion under the principle of subsidiarity.

Scholars criticised the very first of these decisions(22). They claimed that a person who rejects reasonable work should only be sanctioned (i.e. having cantonal social assistance benefits cut according to the SKOS-guidelines), but not deprived of the assistance according to article 12 Cst. (Amstutz, 2003, p. 97 f.). In fact, the argumentation of the Federal Supreme Court is intellectually *challenging*, if not *contradictory*: someone in need is *a priori* eligible for benefits arising from Article 12 Cst., even if this situation is self-inflicted (Schefer, 2001, p. 348). The notion of need implies that other means of support were exhausted. The benefits cannot be restricted as the scope of protection and the essence of the right are identical. However, according to the Federal Supreme Court, the benefits can be combined with the condition to take up reasonable work in a remunerated work programme, and the refusal to do so leads to the loss of the eligibility for all benefits, as the beneficiaries *would objectively be able to provide for themselves* by performing reasonable work.

In other words: Article 12 of the Constitution is an “*all or nothing*” provision. But whether it is “all” or “nothing” depends on the behaviour of the welfare beneficiary. The consequences of misbehaviour are drastic: the benefits are cut to zero.(23) Two decisions from 2013 and 2016 clarified the conditions related to the refusal of benefits based on Article 12 Cst:

- A programme position needs to be *actually and concretely available* and the welfare beneficiary needs to be, based on fact and law(24), *capable of accepting the position*. This gives them the necessary possibility to end the situation of need.(25)

- A programme position needs to *offer a remuneration*, reaching at least the amount of the ‘assistance when in need’.(26) This allows for extremely low remunerations (for example CHF 21/day).(27)

<Subheading: 1. Summary>

In summary, it was first observed that Article 12 of the Swiss Constitution offers an individually justiciable right to the benefits indispensable for a life in dignity. Secondly, it was established that this right only covers the bare minimum needed to survive. This limited scope and the narrow connection to human dignity forbid that the right be restricted. However, thirdly, it was explained that the principle of subsidiarity is an eligibility criterion for the benefits. One eligibility criterion is the willingness to accept any remunerated work programme position which offers remuneration adding up to at least the benefits granted under Article 12 Cst. Someone who is not willing to accept such a position will be left without any benefits for as long as such a position is actually and concretely available. Once a position is not available anymore, the benefits must be granted again.

In the next section the authors will evaluate these programmes against the background of human rights law and thereby rely particularly on the normative framework developed by Dermine in Chapter 4. First, however, they will present some general thoughts on the protection of fundamental rights in the activating welfare state

<Heading: The impact of work programmes on (other) human rights and vice versa>

<Subheading: 1. A complicated relationship between positive and negative state obligations>

The activation reforms of the welfare state bringing about a *substantial amendment* of how benefits are delivered have taken place *without significant participation from human rights* bodies or a broader debate on the protection of human rights. The subtle – or, as shown earlier, not so subtle – pressure exercised on welfare recipients to accept work as a condition for help (De Schutter, 2015, p. 125) is indeed hard to assess under the traditional human rights protection doctrine.

International law does not need to be transposed in national legislation for it to be binding in Switzerland, which is following a monist system. If the Federal Constitution or other national law contradicts international law, the latter takes – besides some rare exceptions not relevant in the present context – precedence (Epiney, 2015, N 77 and 99 ad Article 5 BV). It has to be noted that Switzerland did not sign the ESC. However, as previously discussed, the right to assistance when in need, and the right to social assistance more generally, is a necessary state benefit to secure human dignity and the exercise of other human rights. Granting the benefits can be seen as a positive state obligation under various provisions of international human rights law which are also binding for Switzerland, such as article 11 ICESCR (cf. Leijten, 2018, p. 4; p. 195; Simpson, 2015, p. 86). The principal question is, therefore, how the obligation not to interfere with human rights and individual autonomy (negative state obligations) is respected in the social assistance system; a system which aims to fulfil human rights itself by putting people in a position where they can make use of their rights (positive state obligations).

The Federal Supreme Court has, in order to assess certain situations of possible human rights infringements in the social security system, developed the concept of *de facto infringements of fundamental rights*.⁽²⁸⁾ The specific case that developed this approach dealt with the disability insurance's refusal to cover the extra cost for a vehicle that a partly disabled person requested for his commute to work after a change of residence.⁽²⁹⁾ The lower courts held that the decision to move was an infringement of the insured person's obligation to take reasonable steps to minimize the effects and loss related to his injuries (duty to mitigate damages), and that the resulting need for a vehicle was not the insurance's obligation to

remedy. The Federal Supreme Court, however, assessed the situation differently and reflected on the *fundamental freedom of domicile*. These reflections were decisive for the Court to re-evaluate the previous demarcation between the disability insurance's duty to accord benefits, and the duty to mitigate damages. A human rights-based evaluation of the reasonable character of the duties to mitigate damages led to the conclusion that the denial of benefits constituted an unacceptable restriction on the freedom of domicile. The obligation to participate in a (remunerated) work programme is, however, assessed differently. The activating welfare state orders work measures as a condition for the continued enjoyment of benefits.

This '*ordered self-integration*' can be seen as a problematic aspect of negative state obligations – the state prescribes a certain behaviour, which leads to a loss of autonomy. Therefore, the case law⁽³⁰⁾ and certain scholars treat this situation of ordered self-integration as an immediate restriction of fundamental rights (cf. Hänzi, 2011, p. 72; Riemer-Kafka, 1999, p. 59), and they argue for the application of the generally known preconditions for limiting fundamental rights (public interest, legal basis, proportionality, no violation of the essence of the right). In practice, in our view this results in an *incomplete human rights assessment*: the interference with the fundamental right (e.g. personal freedom) is only qualified as minor and therefore easily justifiable. In addition, the consequences on the positive state obligations are not evaluated, even though the sanctions attached to the refusal to participate, inarguably, put the beneficiaries in a *situation of indirect constraint*: either accept the sanctions and thereby a violation of minimum subsistence rights (positive obligations), or attend the programme and thereby accept a restriction of fundamental freedoms (negative obligations).

This is especially well demonstrated by one case in which the applicant was arguing that the order to participate in a remunerated work programme was a violation of his right to personal freedom according to article 10 § 2 Cst.⁽³¹⁾ The applicant was arguing that the '*massive factual coercion*' to participate in a programme amounted to a violation of his right to personal freedom, as well as of his right to economic freedom.⁽³²⁾ The Court held that this argument was inadmissible, as the applicant himself had explained that he could obtain a job anytime, but that he preferred to rely on benefits until reaching the age of retirement. Implicitly, this means that preferring not to work is not a position which is protected by this fundamental right. The applicant was ultimately *deprived of all his benefits* for the period of two months. The Court only focused on the negative state duties not to interfere with the personal freedom of the applicant and concluded that there was no (unjustifiable) infringement. What is missing is a holistic view of the situation: the denial of benefits itself for two months can lead to important implications on the right to human dignity, which is to be fulfilled by the provision of benefits (Article 12 Cst.) and thus through positive state obligations.

It seems especially necessary to investigate which dimensions of a human right are affected, not only by an order to participate in a programme, but also by the ultimate denial of the minimum state benefits. An analogous application of the concept of *de facto infringements* could allow for a holistic and human rights-based assessment of the limits of a welfare beneficiary's self-responsibility when compared with the state's obligations to protect, respect and fulfil human rights.

<Subheading: 1. Aspects of freely chosen work and forced labour>

<Subheading: 2. General>

The prohibition of forced labour and the right to freely chosen work are *important sources that could restrict the duty to take part in a work programme*. The Swiss Constitution recognises a right to economic freedom, which includes the right to freely chosen work (art. 27 Cst.(33)). The Federal Supreme Court has so far never (thoroughly) assessed an alleged violation of the right to freely chosen work or the prohibition of forced labour based on the internationally binding sources.(34) However, evaluating mandatory participation in a work programme under the constitutionally granted right to freely chosen work, the Court did not see a possible infringement of this right, as the applicant had not been pursuing paid economic activity for several years.(35)

Other cases also indicate the Court perceives the right to freely chosen work *as temporary* in nature and that its protection fades over time. After a 'reasonable' – unspecified – period of time, one is bound to accept any work, and the failure to do so exposes the welfare beneficiaries to sanctions.(36)

In a recent case, the Court held that, if the offered occupation matched the *definition of 'suitable employment'* according to the unemployment insurance, there would be no violation of the prohibition of forced or compulsory labour. In principle, the obligation to participate in work programmes would not amount to forced or compulsory labour.(37) That the Court does – despite this bold statement – take surprisingly little interest in the working conditions in the work programmes, will be discussed in section the last section..

These arguments do not consider all the dimensions of the prohibition of forced labour, which is another sign of the lack of awareness regarding possible human rights implications of WTW-duties and the duty to participate in a work programme especially. Therefore, the next sections will consider the case law of the Court against the human rights framework developed by Dermine in chapter 4.

<Subheading: 2 Exit options>

Dermine's framework, based on the right to freely chosen work and the prohibition of forced labour, asks for an 'exit option' to be left open to welfare beneficiaries ordered to participate in an occupational programme. This especially includes access to minimum subsistence rights while a sanction is imposed (see chapter 4).

The current approach of the Federal Supreme Court does not guarantee such an exit option. Where the recipient refuses to participate in a (poorly) remunerated programme, this can lead to the denial of eligibility to the benefits and consequently to the loss of all benefits – no minimum subsistence rights are granted during this exclusion from eligibility for benefits. The only choice left to the welfare beneficiary is to either accept the position, or to be left without benefits. No hardship payments are available for this period (cf. Eleveld, 2018, p. 457). This punitive measure also undermines the right to social security itself (Sepúlveda and Nyst, 2012, p. 52) and has to be classified as a *reinforcement of the legal duty to work* and a reduction of the individual's autonomy (cf. chapter 4).

This loss of autonomy combined with the lack of satisfaction of essential needs during the exclusion from benefits must be qualified as a violation of the right to human dignity and might under certain circumstances amount to inhuman and degrading treatment, which is also incompatible with human dignity (cf. Simpson, 2015, p. 76 for a similar analysis regarding the UK). In fact, it is understood that human dignity – even if a right that is hard to define – consists of three elements that are relevant in the present context: a prohibition of inhuman and degrading treatment; a protection of the individual's autonomy and a right to the satisfaction of essential needs (Clapham, 2006, p. 546 s. McCrudden, 2008, p. 686). Inhuman and degrading treatment might also be caused by the inadequacy of state support (Simpson, 2015, p. 68).

However, in the event that the recipient refuses an unremunerated programme they will continue to receive the assistance when in need, which can be seen as a (modest) exit option. It is important to note that in 2016 the court specified that it is possible to impose *non-pecuniary sanctions* on a beneficiary who is unwilling to accept an unremunerated programme. (38) As an example, the Court mentioned that the benefits could be provided *in kind rather than in cash*, or that the order to participate in a programme could be *combined with a threat of criminal sanctions* according to the criminal code.(39) According to the Court, such measures would not violate the scope of protection of the right to assistance when in need.(40) However, legal scholars disagree whether providing only in-kind benefits could lead to an undue restriction of other fundamental rights – mainly personal freedom and freedom of communication – and thereby lead to an inhuman existence, as no autonomy whatsoever is left to the person in need (cf. Amstutz, 2002, p. 271).(41) Furthermore, in the opinion of the authors, the threat of criminal penalty constitutes an undue burden for the welfare beneficiary and thus amounts to forced labour (cf chapter 4). When combined with

a criminal sanction, the refusal to participate in an unremunerated work programme can ultimately lead to imprisonment (cf. Meier and Studer, 2016, §62). The presumed exit-option for unremunerated work programmes is thereby invalidated. This neither respects the prohibition of forced labour nor provides for a system compatible with human dignity and again the autonomy of the beneficiary is undermined by these practices.

<Subheading: 2. Time to look for a regular job>

In order to respect the right to freely chosen work, the participant of a work programme should have enough time to apply and train for a position in the primary labour market (see chapter 4). Under a *regular employment contract*, the right to (unpaid) time off to look for a new job once notice has been given to terminate the contract is granted to the employees.⁽⁴²⁾ Given that work programme participants appear to be hard to place, it seems hardly justifiable that this time would not be granted in this context – unless there is a clear focus on training the participants and an exclusion from an obligation to apply for jobs in the primary labour market.

The Federal Supreme Court has mentioned on several occasions that a work programme had to be accepted as it was not a full-time position and would leave enough time to the welfare beneficiary to look for a job in the primary labour market.⁽⁴³⁾ However, in the court cases where the beneficiaries faced the complete withdrawal of their benefits and complained about a violation of their personal freedom, the programmes were full-time positions.⁽⁴⁴⁾ Also, the Federal Supreme Court does not take much interest in knowing for how many weeks or months participation in a programme is ordered.⁽⁴⁵⁾ It holds that if a programme could provide an ‘income’ and could be started anytime, all benefits can be suspended for the length of the programme duration.⁽⁴⁶⁾

<Subheading: 2. Goals and effects of the programme>

The ultimate objective of a work programme should be to ensure full, productive and freely chosen employment – which can only be achieved when the work programmes ensure *meaningful* work and *improve employability* (De Schutter, 2015, p. 146). Conditions that do not lead to eliminating the situation of need are not allowed in connection with Article 12 Cst.⁽⁴⁷⁾ This implies the assessment of the impact of the programme. The case law in this regard is not rich. In 2004 the Federal Supreme Court held that it was ‘*known*’ that the programmes were *beneficial* to the welfare recipient, even though there were no scientific evaluations available to support this point of view.⁽⁴⁸⁾ Since this decision, the positive effect of the programmes has never been discussed again in front of the Federal Supreme Court, which is surprising given studies have

found the success of certain programmes inconclusive (Aeppli and Ragni, 2009, p. 8; Bonoli & Champion, 2014, focussing especially on the federal structures of Switzerland). It has also to be noted that the decentralised organisation of WTW-programmes in general can be an obstacle to thorough evaluations. One study's (positive or negative) findings can hardly be transposed to another programme.

Furthermore, it can be observed that the goal of the programmes discussed here⁽⁴⁹⁾ is not only the prospect of reintegration into gainful employment, but also other 'beneficial effects', such as helping to improve social skills, punctuality and teamwork.⁽⁵⁰⁾ One further aim of the programme discussed in the 2013 decision was to assess whether the welfare beneficiary is actually motivated to work and is explicitly seen as an instrument with which to sanction the 'uncooperative' welfare beneficiary.⁽⁵¹⁾ This tendency to use work programmes as a way to sanction instead of as an opportunity for reintegration can also be observed when the Court proposes to sanction beneficiaries unwilling to participate in an unremunerated programme with criminal sanctions. This raises the question of whether helping the welfare beneficiary is really the goal pursued by this system, or whether it is just a way of disciplining the poor (cf. for an analysis of these mechanisms in the US see: Wacquant, 2009; Soss, Fording and Schram, 2011; cf. Vonk, 2014, p. 195).⁽⁵²⁾ The latter has to be qualified as not only incompatible with the right to freely chosen work but also generally regarded as a WTW-regime that is incompatible with human dignity. To be compatible with the right to human dignity a WTW would have to enhance autonomy and connected values (i.e. self-determination and empowerment) (McCrudden, 2008, p. 701 referring to the decision of the Canadian *Gosselin* case).

<Subheading: 2. Working conditions and quality of work>

The quality of work in the programme is an important factor in deciding whether a programme could amount to forced labour or to an undue restriction of the right to freely chosen work (see chapter 4). Work made available by the state must *at least be acceptable, which means decent* and therefore respect the criteria stated under Article 7 ICESCR, including a fair wage and safe and healthy working conditions (Bueno, 2017, p. 468). Furthermore, the state has under Articles 2 and 8 ECHR a positive obligation to protect the life and health of everyone⁽⁵³⁾ – and not just employees – which makes it, in our view, mandatory to at least apply the rules on protection against accidents and general health protection, including protection against excessive working hours, to work programme participants.

The Federal Supreme Court partly acknowledges the importance of the working conditions in work programs for their assessment from a human rights perspective: in 2015, the Court stated that as long as

the working conditions in a programme correspond to the definition of suitable employment in the unemployment insurance,(54) a programme does not constitute forced labour,(55) and does therefore not constitute a disproportionate measure.

Despite this general awareness of the importance of working conditions, they have never been thoroughly assessed by the Federal Supreme Court in the present context. In particular, the question of whether the criteria stipulated in the unemployment insurance, such as respect for skills and usual conditions of work, as well as those regarding remuneration, are met is never seriously checked (Studer and Pärli, 2016, p. 1391). Quite on the contrary, the Federal Supreme Court also considers programmes as reasonable work when the *remuneration* is lower than the (social assistance) benefits received. In a decision from 2003,(56) a possible remuneration of CHF 500 per month was sufficient in order to justify the complete withdrawal of benefits. According to the 2016 decision,(57) remuneration amounting to the benefits of the ‘assistance when in need’ – which are, as mentioned earlier, limited to the bare minimum needed in order to survive – is sufficient. That this is nowhere close to a *living wage* required by Article 7 (a) (ii) ICESCR seems evident. It can also be reminded that the same Federal Supreme Court has found that a wage of CHF 19.45 / hour is (just) high enough to secure a decent living (mentioned earlier). Furthermore, the condition in the unemployment insurance legislation that the wages have to respect the norms in the concerned industry is not met by such low levels of remuneration.

It seems that the remuneration offered in certain work programmes is at an *excessively low level*, and is thus tantamount to exploiting constraints by offering people who had no other options, employment on terms that would not normally be acceptable.(58) Therefore, we can observe that a general extension of the *availability for work* condition is attached to the programmes. Furthermore, the Federal Supreme Court neglects the potential effect that the working conditions in programmes could have for regular employment conditions. Neither was the claim heard that such programmes undercut existing wage standards in the general labour market,(59) nor does the Court assess the remuneration with a broader view that work programmes should also contribute to creating decent working conditions for everyone. So far, we do not know of a successful case in which someone subject to a remunerated or unremunerated work programme was offered protection by labour law or employment law.(60)

<Subheading: 2 Possibility for individual or collective voice>

Additionally, capability for voice should be granted to the social assistance beneficiaries. This has an individual and collective dimension: on the individual level a welfare beneficiary needs to be given the possibility to negotiate the terms of their participation in the work programme and it is demanded that valid reasons

to refuse a work-position, such as personal factors are considered when someone is assigned to a work-position (see chapter 4). Respecting choices of the individuals and thereby allowing them to spend time, energy and skills according to their preferences is a source of individual and societal benefit (Bueno, 2017, p. 469). On a collective level, the possibility of appealing against a decision should be granted, which implies the existence of effective procedural rights – the need for an effective appeal is especially pressing as the right to assistance when in need is associated with many undefined legal terms (*unable to provide for themselves; reasonable self-help, etc.*). This confers considerable discretionary power on street-level bureaucrats. An effective system of judicial review is therefore necessary to make sure that this power is not used arbitrarily. We will address the issues of individual and collective voice one by one, though it will become apparent that they are linked.

On the individual level, it is understandable that the Federal Supreme Court does not protect the personal preference to depend on benefits rather than to work,⁽⁶¹⁾ even though the literature raises the question of whether *alternative lifestyles* would have to be respected by a welfare system with good reason (cf. De Schutter, 2015, p. 158). The Courts usually respect *health reasons and (child-)care duties* as a reason for rejecting a WTW measure.⁽⁶²⁾ Other components of the personal situation such as the capability to perform certain work activities are only assessed one-sidedly. If someone is not challenged by a work placement or his qualifications are not met, a position must still be accepted; it can only be rejected if the work is (intellectually) overstraining.⁽⁶³⁾ On one occasion, a position has been held reasonable even where the welfare beneficiary was unaware which exact tasks he would be asked to carry out,⁽⁶⁴⁾ which shows the lack of interest in the capabilities and possibilities of the welfare beneficiary.⁽⁶⁵⁾

The individual dimension of voice also concerns individual access to justice which seems to be obstructed because of a procedural rule. While generally the principle of *'iura novit curia'*⁽⁶⁶⁾ applies, this principle is relativised when it comes to violations of fundamental rights: the claimant has to distinctly argue how far a fundamental right was violated by a decision.⁽⁶⁷⁾ Therefore, the Court does, in many cases, not respond to general arguments on violations of fundamental rights – even if a violation is obvious. This can lead to questions over the effective protection of fundamental rights against uncontrolled interferences (cf. Müller, 2018, 156 ss.). This means that in order to get the Court to hear a claim of violation of a fundamental right, the complaint must be explicitly argued in a way that requires specific legal expertise. Legal representation becomes a key factor for a successful complaint. Free legal advice and assistance including legal representation is in principle available.⁽⁶⁸⁾ However, as has been shown by other scholars, legal representation is often denied and many procedural rules are not designed or applied to the advantage of social assistance recipients. As mentioned earlier, fundamental rights considerations are absent or only found in marginal

notes in the judgements of the Federal Supreme Court. This may be for many reasons, but a likely one seems to be this procedural rule which applies when human rights are invoked. It is thus hard to describe the procedures as fair and equal (cf. Hobi, 2018; Wizent, 2014, p. 509; Heusser, 2009).

Regarding collective voice (procedural requirements), the authors note that welfare recipients are not involved in the elaboration of occupational programmes. In addition, in many instances the decision of which programmes are developed for which target group is delegated from the political level to so-called 'strategic partners' who are not subject to (the same) democratic control mechanisms and enjoy discretionary power with less accountability. These procedural arrangements, combined with the lack of evaluation of WTW programmes discussed before may in our opinion result in insufficient control of discretionary powers.

<Heading: Conclusion>

Article 12 Constitution grants the means indispensable for a human existence and has close links to *human dignity*. The historical development of the right to assistance when in need shows that it has always been considered that *gainful employment takes priority* over the benefits arising out of Article 12 Cst. It was then emphasized that refusal to work in a remunerated work programme was a strong violation of the beneficiary's duties, which was so severe as to question whether the welfare beneficiary actually was in a situation of need. Remunerated work programmes have been defined as one instance of reasonable work in this sense, and the refusal to participate in these measures can therefore lead to suspension of all benefits. Through the mechanisms well-known from the 'activation turn' in the welfare state, a duty to work becomes a precondition for benefits granting (nothing but) human dignity and therefore the system constitutes a threat to human dignity itself. The construction of the principle of subsidiarity as an eligibility criterion to minimum benefits that led to this development strains the solidarity needed in order to unite a society and ensure a dignified life for everyone within that society (cf. Schefer, 2001, p. 339).

This chapter's analysis of the limitations of the duty to participate in work programmes found that an *adequate theoretical framework* to assess (possible) human rights violations by work programmes is lacking. This is also reflected by the case law of the Federal Supreme Court. A *limited understanding of fundamental freedoms and social rights* is demonstrated by the Court. The analysis of this situation through Dermine's framework showed that human rights implications of work programmes are *not assessed comprehensively*. The Court takes little to no interest in the goals and effects of a programme. Certain points of

the case law of the Federal Supreme Court are even more problematic than just the absence of consideration: proposing criminal sanctions as an 'exit option' and low remunerations are both highly problematic under the right to freely chosen work and the prohibition of forced labour.

This lack of respect by the Federal Supreme Court for the normative requirements of human rights might (at least in part) also be due to procedural rules that reduce the possibility for individual and collective voice and, as a result, make it more difficult for welfare beneficiaries to control discretionary decisions of the administration and street-level bureaucrats. As a result, welfare beneficiaries are at risk of being subjected to arbitrary power in the meaning of the republican theory of non-domination (see Chapter 1).

All in all, the current practice of the Court fails to ensure the prohibition of forced labour or guarantee respect of the right to freely chosen work and other (social) rights to the point that it attaches a duty to work to the enjoyment of human dignity. Perhaps surprisingly, this is the result of a restrictive interpretation of a right, which was originally designed to protect the decent existence of everyone and the exercise of (other) fundamental rights: the right to assistance when in need according to Article 12 Constitution. In order to achieve a coherent system respecting human dignity, it is necessary to rebalance duties between the state and the individual, as required by human rights law. This also includes the related state duties to ensure the right to work and not to merely reduce it to an economic freedom to seek and engage in work (De Schutter, 2015, p. 152). Such a rebalance could contribute to realising *decent work conditions for everyone* – including those working in (remunerated) work programmes.

<Heading: Notes>

(1) Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101. The Constitution is published in English, however, the English version has no legal force and is for information purposes only.

(2) Article 115 Cst.: 'Persons in need shall be supported by their canton of residence. The Confederation regulates exceptions and powers.'

(3) The SKOS-Guidelines can be consulted online, viewed 16 November 2018 from <https://www.skos.ch/skos-richtlinien/>

(4) Cf. especially: article 6 ('All individuals shall take responsibility for themselves and shall, according to their abilities, contribute to achieving the tasks of the state and society.') and article 41 Cst. ('The Confederation and the Cantons shall, as a complement to personal responsibility and private initiative, endeavour to ensure that: {it follows a list of several social aims}).

(5) Art. 49, 1 Cst. 'Federal law takes precedence over any conflicting provision of cantonal law.'

(6) Survey among cantonal social assistance/welfare departments, unpublished, Basel; conducted in 2017 by the research team of the project 'Working under the conditions of social welfare', cf. www.thirdlabour-market.ch

(7) Not including rent and health insurance. The Swiss Franc (CHF) is currently (January 2019) slightly weaker than the EUR (1 CHF = approx. 0.89 EUR). The living costs in Switzerland are, however, relatively high. The median wage in 2016 was CHF 6'502 and only 10% of the employees earned less than CHF 4'313, cf. Bundesamt für Statistik 2018, Medienmitteilung vom 14.05.2018, viewed 5 July 2018 from <https://www.bfs.admin.ch/bfs/de/home/statistiken/arbeit-erwerb/loehne-erwerbseinkommen-arbeitskosten.assetdetail.5226936.html>.

(8) This is at the canton's discretion: unless the benefits are cut to a level not guaranteeing a dignified existence according to article 12 Cst., sanctions and sanctioning regimes can only be challenged on the grounds that they are disproportionate, which is a weaker claim than the violation of a (fundamental) right to benefits.

(9) BGE (Bundesgerichtsentscheid – Decision of the Federal Supreme Court) 121 I 367.

(10) BGE 121 I 367, C. 3.d.

(11) Botschaft über eine neue Bundesverfassung vom 20. November 1996, BBl 1997 I 1 ff., 149.

(12) BGE 130 I 71, C. 4.1.

(13) BGE 130 I 71, C. 4.1; BGE 131 I 166, C. 3.1, 8.1; BGE 134 I 69; 138 V 310, E. 2.1.

(14) BGE 121 I 367, C. 2 c.

(15) Consisting of CHF 8 for food and hygiene and CHF 13 for shelter; BGE 131 I 166, C. 8.1.

(16) Judgement 2C_774/2014 (21.07.2017), C. 5.6.6; There is no federally binding minimum wage in Switzerland.

(17) SKOS-Guidelines, A.9. In fact, the regime of art. 12 Cst. is mainly applied to and developed in relation to asylum seekers subject to a legally binding removal decision for which a departure deadline has been fixed. This group is excluded from more comprehensive benefit systems, namely the social assistance benefits (cf. Art. 82 Asylum Act of the 26 of June 1998, SR 142.31). The difference in treatment based on the resident status is justified, according to the Federal Supreme Court, because for persons without a permanent resident status, the integration into society and/or the labour market is not wanted, and therefore lower benefits are required (cf. BGE 131 I 166; for further reading cf, Belser and Waldmann, 2010).

(18) BGE 130 I 71, C. 4.1.

(19) Judgement 8C_156/2007 (11.03.2008) C. 6.4.

(20) Judgement 2P.147/2002 (04.03.2003) C. 3.4.

(21) Judgement 2P.147/2002 (04.03.2003); BGE 130 I 71; Judgement 8C_156/2007 (11.03.2008); BGE 139 I 218; Judgement 8C_536/2015 (22.12.2015); BGE 142 I 1.

(22) Judgement 2P.147/2002 (04.03.2003).

(23) Judgement 2P.147/2002 (04.03.2003); BGE 130 I 71; BGE 139 I 218.

(24) Someone without a work permit – like asylum seekers who are bound to leave the country – cannot be subject to this form of conditionality, cf. BGE 122 II 193, C. 2c.

(25) BGE 139 I 218.

(26) BGE 142 I 1, C. 7.2.6.

(27) Cf. BGE 131 I 166, C. 8. As mentioned earlier, assistance when in need is regulated by the Cantons and the benefits differ.

(28) cf. a series of cases starting with BGE 113 V 22 (1987; costs for a disability adapted car in order to exercise the freedom of domicile - granted); BGE 118 V 206 (1992; costs for visiting and nursing a sick new born - granted); BGE 134 I 105 (2007; costs for the renovation of a flat in order to adapt it to the needs of a paraplegic child in order to exercise child care rights - granted); BGE 135 I 116 (2008; right to an electric pulling device for a wheelchair in order to enjoy family life – denied).

(29) BGE 113 V 22.

(30) In all the cases discussed here, the Court applied without any further discussion the general preconditions for the limitation of fundamental rights. In none of the cases that are discussed here, the Court seemed to doubt that – if anything – the general preconditions for the limitation of fundamental rights will be applied.

(31) article 10 § 2 Cst: ‘Every person has the right to personal liberty and in particular to physical and mental integrity and to freedom of movement.’ The right to personal freedom only protects the most fundamental aspects of personal development and private life, and not every single restriction of a personal lifestyle has an impact on one’s fundamental rights. The right to personal freedom is in comparison to the right to freely chosen work and the prohibition of forced labour (discussed later) a more general protection for the individual’s autonomy. Therefore, it is only relevant when there is not a more specific fundamental right infringed (for further reading: Tschentscher, 2015).

(32) Judgement 2P.147/2002 (04.03.2003), C. 3.5.2.

(33) Art. 27: 1 Economic freedom is guaranteed. 2 Economic freedom includes in particular the freedom to choose an occupation as well as the freedom to pursue a private economic activity.

(34) As mentioned, the ESC is not binding for Switzerland, but the right to freely chosen work and the prohibition of forced labour are contained in the ICESCR, ILO Convention No. 29 and the ECHR, which Switzerland did ratify. Furthermore, the Federal Constitution expressly protects the right to freely chosen work and the prohibition of forced labour is seen as the core content of this right.

(35) Judgement 2P.7/2003 (14.01.2003), C. 2.3.

(36) Judgement 2P.275/2003 (06.11.2003), E. 5.2.

(37) Judgement 8C_536/2015 (22.12.2015), C. 2.2.

(38) BGE 142 I 1, C. 7.2.5.

(39) Cf. article. 292 Swiss Criminal Code.

(40) BGE 142 I 1, C. 7.2.5.

(41) see also the doctrine cited in BGE 135 I 119, C. 7.2, which however left the question undecided.

(42) article 329 para. 3 Federal Act on the Amendment of the Swiss Civil Code of 30 March 1911, SR 220.

(43) BGE 130 I 71, C. 5.4.; Judgement 8C_156/2007, C. 6.5.

(44) BGE 139 I 218; Judgement 2P.147/2002 (04.03.2003).

(45) Cantonal policies might contain such information.

(46) BGE 139 I 218. Theoretically it would be possible to hold open a programme position for much longer than two months, which would justify an exclusion from benefits for a longer period of time. So far, the authors are not aware of cases in which the exclusion from benefits has been applied for more than three months.

(47) BGE 131 I 166, C. 4.4.

(48) BGE 130 I 71, C. 5.4.

(49) There are Cantons who have evaluations of the programmes and distinguish programmes according to the aim they pursue. Cf. for example: Canton de Vaud (2014). Cour des comptes du Canton de Vaud. Audit de la performance des mesures cantonales d'insertion professionnelle destinées aux bénéficiaires de l'aide sociale. Lausanne: Canton de Vaud.

(50) BGE 139 I 218, C. 4.4.

(51) This was stated in the decision of the Cantonal administrative Court, cf. Verwaltungsgericht des Kantons Bern, Bernische Verwaltungsrechtspflege (BVR) 2013, p. 463 ss. C. 2.2.

(52) cf. BGE 142 I 1, C. 7.2.5, where the Court refers to 'unruly' (renitent) welfare beneficiaries, requiring additional sanctions.

(53) ECtHR, 24.07.2014, Appl. No. 60908/11, 62110/11, 62129/11, 62312/11, 62338/11, Brincat and others v. Malta.

(54) The criteria in article 16, 2 of the Bundesgesetz über die obligatorische Arbeitslosenversicherung und die Insolvenzenschädigung, SR 837.0 correspond basically to the criteria set out by ILO Convention 168, which is binding for Switzerland. Further specifications are found in ILO Recommendation 176.

(55) Judgement 8C_536/2015 (22.12.2015), C. 2.2.

(56) BGE 130 I 71.

(57) BGE 142 I 1.

(58) cf. Dermine in chapter 4, with reference to CEACR General report, par. 106.

(59) Judgement 2P.7/2003 (14.01.2003), C. 2.3.

(60) Certain Cantons do use control mechanisms, like tripartite commissions, protecting against abusive working conditions.

(61) Judgement 2P.147/2002 (04.03.2003).

(62) BGE 142 I 1, C. 6; Judgement 8C_536/2015 (22.12.2015), C 2.1; BGE 139 I 218, C. 4.4.

(63) Judgement 8C_156/2007 (11.04.2008), C. 6.4.

(64) BGE 130 I 71, C. 3.

(65) Special attention would have to be paid to additional requirements set by specific international human rights treaties such as the Convention on the Rights of Persons with Disabilities stating that individual needs and strengths have to be the basis for rehabilitation programmes (Article 26 CRPD).

(66) Meaning “the Court knows the law“ and that the Court has to apply the law to the facts.

(67) Cf. Art. 106, 2 Bundesgesetz vom 17.05.2005 über das Bundesgericht, SR 173.110.

(68) article 29 para. 3 Cst.

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