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The notion of Reasonable Work in social assistance legislation in Switzerland

diversity and compatibility with international law?

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[1] Melanie Studer is currently writing her doctoral thesis on the notion of „reasonable work" in welfare-to-work measures in Switzerland. What is presented in this paper are first results of her research and the direction in which she thinks continuing her work. Cf. www.thirdlabourmarket.ch for more information on the research project, of which the thesis is a part.

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I. Introduction

The paradigm of activation and self-responsibility has penetrated many Western social welfare states. Switzerland is no exception to this. One important aspect of the activating welfare state are labour related aspects of policies, linking welfare benefits to the obligation to take part in welfare-to-work programs for people who are out of work. Mechanisms that are well known from the unemployment insurance have been copied and are also applied to social assistance beneficiaries: a shift from social solidarity and entitlement to benefits towards more individual responsibility and conditionality of benefits can be observed.[2] Social assistance beneficiaries also became objects of activation. The participation in programs in the second labour market is one aspect of such policies for social assistance recipients. The refusal to participate in welfare-to-work measures or the refusal to accept "reasonable work" is linked to sanctions or to the loss of eligibility status: the benefits are reduced or suspended – leaving the person subject to the activation measure with no financial support.

In the following I will focus on the notion of "reasonable work" as this notion is pivot in Switzerland: it is recognized that if activation measures are put in place, they should not be unreasonable, meaning they should not put excessive duties on welfare recipients. The notion is relevant in more than one respect: first, whoever has the legal and factual possibility to take up a reasonable job is considered not being in a situation of need and does thereby not qualify for welfare benefits – this also extends to welfare-to-work measures. Second, people who are supported by social services and receive welfare benefits have duties to mitigate, and a part of this duty is the duty to take up work and to participate in welfare-to-work measures. Despite this important function the notion "reasonable work" in welfare-to-work measures is not generally defined in the Swiss social assistance legislation.[3]

This paper will first give a brief introduction to the Swiss welfare system and in a second chapter present an analysis of the notion of "reasonable work" in 26 cantonal social assistance laws. These results will be contrasted with the Federal Supreme Court's interpretation of the notion "reasonable work" (Chapter IV). Chapter V will add an international human rights perspective and follow up on the question whether different aspects of the Right to Work, namely the prohibition of forced labour, the right to freely chosen work and the right to just and favourable working conditions offer additional criteria which have to be taken into account when deciding whether a certain position or program is "reasonable work" or not.

[2] Among others: Gundt Nicola, EU activation policy and its effects on the fundamental social right to work, European Journal of Social Law, No. 2 June 2013, p. 147-161, p. 158.
[3] Cf. Below: social assistance is mainly a matter of cantonal (decentralized) law.

II. Constitutional and legislative framework

The Swiss social security system relies on three layers: social insurances, social assistance and assistance when in need.

The **social insurances** are covering the risks of old age, sickness, accidents, maternity, invalidity and unemployment. The benefits of the unemployment insurance, the one most relevant to the present context, are dependent on contribution and limited in time. Also persons who could (financially) support themselves without the insurance benefits are granted benefits. The social insurances are based on federal legislation.

Subsidiary to the social insurances there are two layers of non-contributory means-tested systems: The second layer is the **social assistance**. The Swiss federal entities – the cantons – are based on article 115[4] of the Swiss Constitution[5] implicitly bound to establish a system for social assistance. Social assistance benefits are, unlike social insurance benefits, means-tested. They are only granted to persons who cannot support themselves and have exhausted social insurance benefits, their personal means and other sources of support (subsidiarity). The social assistance benefits are more comprehensive than the ones based on the right to assistance in need (see below) and should provide the means for social integration and participation in societal live. As mentioned, social assistance legislation is a matter of competence of the cantons. This means, that there are 26 different cantonal social assistance statutes.

The only instrument aiming at coordination and setting minimal standards in the area of social assistance are the guidelines of the Swiss Conference for Social assistance (SKOS)[6]. The guidelines are not legally binding, but all the cantons did incorporate them at least to some extent in their cantonal legislation, which proves the important role the guidelines occupy in the federal system. At least since 2005, the SKOS-guidelines provide an activation policy framework. According to these guidelines, benefits are connected to various behavioural duties, besides the fact that in order to be eligible for benefits, one has to be unable to provide for themselves (principle of subsidiarity). Among the behavioural duties is the duty to mitigate and thereby contributing to the occupational reintegration.[7]

The principle of reciprocity for benefits is also in the guidelines. Based on these duties, the beneficiaries are asked to accept reasonable employment and to participate in welfare-to-work programmes. A violation of these duties can lead to sanctions ranging from a restriction of benefits for a short period of time to the (indefinite) suspension of benefits. The basis for the sanctions are found in the cantonal laws on social

[4] Article 115 Cst.: "Persons in need shall be supported by their canton of residence. The Confederation regulates exceptions and powers."
[5] 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.
[6] The SKOS-Guidelines can be consulted online: <https://www.skos.ch/skos-richtlinien/ >(08.09.2017)
[7] Wizent Guido, Die sozialhilferechtliche Bedürftigkeit, Zürich/St. Gallen 2014, p. 238.

assistance but are in principle also backed up by the guidelines of the SKOS.[8] It is recognised, that the duties put on the social assistance beneficiary has to be proportionate and not exceed what can be reasonably required from a person – this also applies to work-related duties.

The third layer of the social security is the "right to **assistance when in need**" according to article 12 in the federal constitution. Article 12 Cst. provides that "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." According to the Federal Supreme Court, article 12 guarantees only what is indispensable for a decent human existence, in order to preserve the person form an unworthy existence requiring begging.[9] The benefits are less extensive than the social assistance benefits.[10] The right to assistance when in need is understood as a social right giving an individual a justiciable right to government benefits. The benefits are restricted to food, shelter, clothing, and basic medical aid. These benefits are seen as a necessary condition in order to exercise other fundamental rights and an essential part of a democratic community.[11] Given that article 12 Constitution is a minimal guarantee, it is recognised that this fundamental right cannot be restricted. The scope of protection and the essence of the right are identical.[12] However, the benefits are not granted unconditionally but only given to those who are unable to provide for themselves. Typically, someone who can earn an income thanks to a suitable employment is able to provide for themselves and cannot pretend to the benefits. The principle of subsidiarity is hereby seen as the eligibility criterion to the minimal benefits according to article 12 Constitution. The question of whether a certain duty put on welfare beneficiaries would allow the person to provide for herself - and thus end the situation of need - is crucial. The Federal Supreme Court held that this was not the case when rejected asylum seekers refuse to cooperate to their own deportation. The duties to cooperate in the deportation procedure do – according to the court – not aim at ending the situation of need but only aim to the execution of the deportation.[13] In any case – also in connection with work-related actions – it is acknowledged that only actions that can be reasonably required from an individual can fall under the principle of subsidiarity and therefore constitute an eligibility criterion.

[8] SKOS-Guidelines, A.8.2.
[9] 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.
[10] Hänzi Claudia, Die Richtlinien der schweizerischen Konferenz für Sozialhilfe: Entwicklung, Bedeutung und Umsetzung der Richtlinien in den deutschsprachigen Kantonen der Schweiz, Basel 2011, p. 171.
[11] BGE 121 I 367.
[12] BGE 130 I 71.
[13] BGE 131 I 166.

III. The term reasonable work in social assistance legislation

A. Relevance

The notion of "reasonable work" is relevant in two aspects:

- First, as explained above, is the principle of subsidiarity understood as an **eligibility criterion** for both the social assistance benefits and the assistance when in need according to article 12 Cst. It is considered that whoever could provide for themselves by performing reasonable work is not any longer in the specific situation of need and is no longer eligible for benefits. It is considered that welfare-to-work programs also constitute a form of reasonable work in this sense.[14] The principle of subsidiarity is not only anchored in article 12 Cst. but also in all the 26 cantonal social assistance legislations. This seems to be one of the rare instances where we can observe unanimity in the cantonal social assistance legislation. The terms in which the subsidiarity is formulated are often similar and evoke that the one is eligible for benefits if no other public or private source covers the needs and if the person seeking help is not capable to provide for themselves, i.e. by taking up reasonable work.
- Second, social assistance beneficiaries face **behavioural duties**, among which the duty to mitigate and to do everything "reasonable" in order to improve their situation. Some cantonal laws do state this in vague terms; others do explicitly state that it is a duty to look for reasonable work, to accept reasonable work and to participate in welfare-to-work programs. If these duties are violated, benefits are cut or suspended. This principle is reflected by all cantonal legislations.

B. Prevalence of the notion "reasonable work" in the cantonal legislation

As the notion reasonable work is central and seems to be the only acknowledged limit to the work-obligations of welfare beneficiaries, the next section explores how the notion is anchored and defined in the 26 cantonal social assistance legislations.

An overview of the results is presented in the chart. This allows being as short as possible in the subsequent section.

[14] This is demonstrated by both the SKOS-guidelines and the cantonal legislation as analysed below but also by the federal Supreme Courts case law. Cf. Especially: BGE 130 I 71; BGE 139 I 218; BGE 142 I 1.

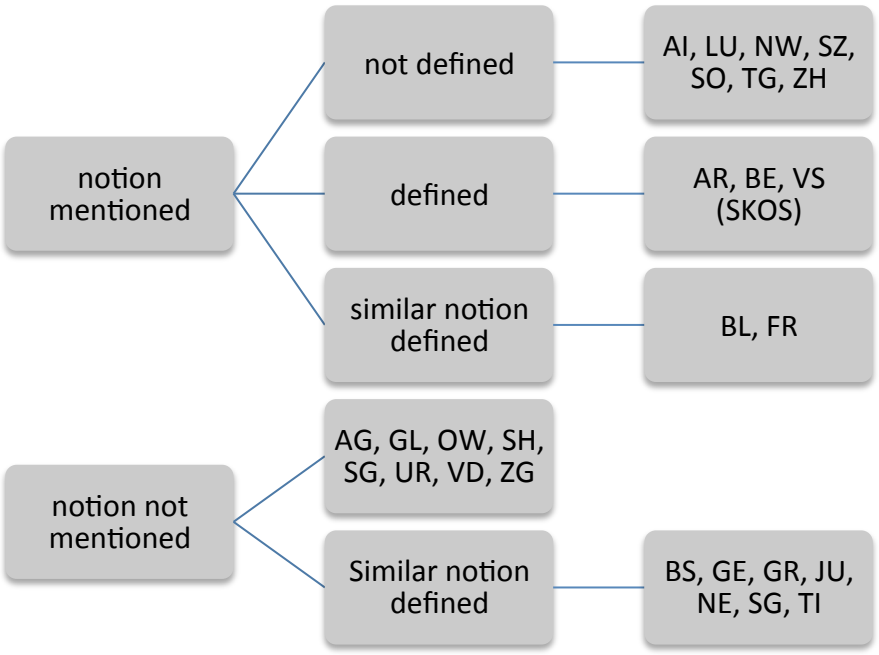

Figure 1: overview prevalence notion reasonable work in social assistance legislation. Source: own research, cf. list of abbreviations for details

1. Term is mentioned

12 out of 26 cantons do mention the notion reasonable work. However, only Appenzell-Innerhoden, Luzern, Nidwalden, Schwyz, Solothurn, Thurgau and Zürich do not know some specifications or definitions of the term. The other cantons are treated in more detail below (cf. III.B.2 and III.B.3). Also the SKOS guidelines do mention and define the term (cf. III.B.6).

All of these 12 cantons do link in similar ways the duty to accept reasonable work to a threat of sanctions ranging from the reduction to the suspension of benefits. The statutes of Zurich, Luzern and Nidwalden mention explicitly that the refusal of reasonable work leads – unlike other violations of (work-related) duties – to the suspension of all benefits.[15] The other cantons at least leave this option up to the discretion of the administration as they allow for either reductions or suspensions if someone does not accept reasonable work.[16]

What can be seen as problematic in the approach of just mentioning and not defining the notion is that it leads to a reduced justiciability due to the discretionary power left to the administration to which the courts are - at least to a certain extent - deferent.

[15] § 24a SHG/ZH; § 14 Abs. 3 SHV/LU; Art. 23 SHG/NW.
[16] cf. Article 14 al. 2 ShiG/AI; § 26a SHG/SZ; § 165 SHG/SO; §8b SHG/TG.

2. Term is mentioned and defined

Only 3 cantons – Appenzell-Ausserhoden, Bern and Valais, mention and define the notion of reasonable work in their legislation.

The canton of Bern defines in the statute that work is reasonable if it is appropriate to the **age, health status, the personal situation and the capabilities** of the welfare-beneficiary.[17] The ordinance goes on to state that welfare beneficiaries who are out of work are obliged to look for and accept work outside their former position.[18] It does, however, not stop there and defines that the participation in a welfare-to-work programme (co-)financed by the cantons is per se reasonable unless there are health reasons or care tasks hindering the beneficiary to participate.[19]

The canton of Valais states that the duty to accept reasonable work is part of the principle of subsidiarity and that for this purpose reasonable work is work, corresponding the **age, health status and personal situation** of the welfare-beneficiary. Reasonable work is not limited to the originally or formerly performed profession. Further, only work providing at least partially the means for subsistence is reasonable.[20]

The canton of Appenzell-Ausserrhoden does not actually define the notion reasonable work like the two cantons just presented, however, it states that the participation in a welfare-to-work programme is reasonable work and that the refusal to participate in a programme therefore leads to the same sanctions as the refusal to accept reasonable work.[21] This means that Appenzell-Ausserrhoden equates any program to reasonable work. This leaves no room for taking into account individual situations and makes it hard to argue against the placement in a specific program.

The main problem that can be seen – especially with the approach of the canton of Bern and Appenzell-Ausserrhoden is that it might amount to disproportionate legislation which does not allow for fair consideration of the individual situation of the welfare recipient when a welfare-to-work program is ordered.

3. Term is mentioned but (only) a similar notion is defined

The cantons of Basel-Land and Fribourg both mention the term "reasonable work" but do not define it explicitly. However, they circumscribe a different notion, having a similar function as the term "reasonable work", which is to limit the (work-related) duties of the beneficiary.

[17] Article 28 Al. 2 lit. c SHG/BE.
[18] Article 8g al. 1 SHV/BE.
[19] Article 8g al. 2 SHV/BE.
[20] Article 1 al. 4 lit. b SHV/VS.
[21] Article 20 al. 2 SHG/AR.

The canton of Basel-Land explicitly orders – under the penalty of sanctions – welfare recipients to accept reasonable work and to participate in welfare-to-work programs and to carry out assigned occupations.[22] While it does not further define what reasonable work is, it does define that welfare-to-work programs have to aim at enhancing the **employability** of the persons concerned and that they should also aim at better **reconciliation of work and family life**.[23] Further, § 19 SHG/BL mentions that a reasonable occupation has to enhance the capacity to cope – in an organised manner – with everyday life and that they can serve the interests of the general public or organisations of public utility.

In Fribourg welfare-to-work is regulated by integration agreements. An integration measure presented as a contract offer can only be rejected if it does not correspond to the beneficiary's **capabilities**. The capabilities are defined by taking into account their personal and family situation, their professional education, age and health status.[24] The aim of an integration measure can be diverse and is defined in a vague manner: strengthening of social competences and development of social contact. They can take place in different spheres: education, personal development, development of personal well-being, collective activities.

These two approaches seem to take into account the individual situation of the welfare-recipient and also refer to the chances of reintegration. However, also other aims and interests are pursued by welfare-to-work measures according to theses laws. And in this regard it is especially the legislation of Basel-Land, which seems problematic when it states that an occupation can serve the interests of the general public of an organisation of public utility. In fact, all measures provided for in social assistance legislation should be covered by the public interest of social assistance and this is to help the social assistance beneficiary to overcome a situation of (immediate) need and to become self-dependent and not to serve the interests of the general public or non-profit organizations.

4. Term is not mentioned

In 14 out of 26 cantons the notion reasonable work is not mentioned in the social assistance legislation. However, half of those cantons (cf. below) know a similar notion that limits the obligation of welfare beneficiaries to take up work or participate in a program.

The absence of the notion "reasonable work" does, however, not mean that in these cantons work obligations and work-related sanctions are absent. The openly formulated rules gives the authority vast discretionary power in deciding what kind of collaboration can be expected from the welfare beneficiary. The welfare beneficiary on the other hand has little ground for arguing against the lawfulness of a certain measure or against the reasonable character of a certain work. Furthermore, and foremost, all the cantons

[22] § 17a SHV/BL.
[23] § 16 SHG/BL.
[24] Article 3 al. 2 ARSHG/FR.

know the principle of subsidiarity as an eligibility criterion and according to case-law whoever is capable of performing reasonable work is not in need and therefore not eligible for benefits.

5. Term is not mentioned, but a similar notion

The legislation in 7[25] cantons does not use the term reasonable work but contains a formulation that seems to limit the duty to accept work in a similar way. 4 out of these 7 cantons have established welfare-to-work measures mainly through integration agreements. This means that the cantons with integration agreements are overrepresented in this group as out of all 26 cantons only the 7 predominantly Latin cantons know the system of integration agreements.[26]

The cantons of Geneva and Ticino – both operating with integration agreements – stipulate that an integration contract can be rejected if the person concerned can present "**good cause**".[27] The social assistance law of Geneva further states that the integration measure has to take into account the individual needs of the social assistance beneficiary and the situation on the employment market.

Similarly, the canton of Basel-Stadt states that an offered occupation has to be accepted unless "**serious cause**" can be presented.[28]

These cantons seem to accept that there are – undefined – reasons that can make a certain position unreasonable. It is however unclear why they did not use the notion "reasonable" or "proportionate" in order to indicate the existence of limits of work-requirements for social assistance beneficiaries.

The cantons of Graubünden and St. Gallen both provide that a position has to be accepted if it corresponds to the **capabilities** of the welfare beneficiary. The canton of Graubünden specifies that this concerns as well the physical as the psychical capabilities of the welfare beneficiary.[29]

Finally, the cantons of Jura and Neuchâtel both know integration agreements and some limiting conditions that these agreements have to meet:

Jura defines that an integration project should respect the **possibilities** of the welfare beneficiary and that they should be given the possibility to work and to re-find their autonomy. The administration should refrain from taking disproportionate measures.[30] An integration measure is only ordered against the

[25] BS, GE, GR, JU, NE, SG, TI.
[26] The (predominantly) French speaking cantons are: Fribourg, Geneva, Jura, Neuchâtel, Valais and Vaud. The (predominantly) Italian speaking canton is Ticino.
[27] Article 42C Al. 2 SHG/GE; Art. 9a SHV/TI.
[28] § 14 Al. 3 SHG/BS.
[29] Art. 11 lit. a SHV/GR.
[30] Art. 19 SHG/JU.

beneficiary's will if the aim of the measure can still be attained[31] – the aim should be to re-establish the autonomy and the capacity to work as well as achieving professional integration.[32]

Neuchâtel stipulates that an agreement has to respect the **personal** and **family situation, education, age and state of health** of the welfare beneficiary concerned. Further the agreement should – if possible – respect the **wishes** of the beneficiary.[33]

Two things can be noted: first, the notion reasonable work is also in these cantons relevant as a part of the principle of subsidiarity as an eligibility criterion. Second, further research is needed to see how the above-mentioned notions are applied in practice. For example it might be interesting to know whether in Graubünden only physical and psychical capabilities are considered or whether other reasons can also make a welfare-to-work position unreasonable.

6. The SKOS-guidelines

Finally, we need to mention that the non-binding SKOS-guidelines (cf. II.), which elaborate that searching for and accepting reasonable work is part of the duty to mitigate damages. Work is defined as reasonable if it corresponds the **age, health status** and the **personal situation** of the welfare recipient. Further, the guidelines state that the participation in a welfare-to-work programme is to be set on the same level as reasonable (gainful) employment if it has an impact on the salary and puts the welfare beneficiaries in a position to at least partially provide for themselves. The guidelines also state that welfare beneficiaries can be asked to look for work outside their former profession.[34] As mentioned above, all the cantons have incorporated the guidelines at least to a certain extent into their legislation. Often, only the chapter on how benefits are calculated is expressively followed by the cantons. Additional research is needed in order to see whether there are cantons that also refer to the SKOS-Guidelines when defining the notion reasonable work.

C. Closer look at the definitions

The following criteria do appear in the legislation in order to define what is reasonable work for welfare recipients:

[31] Art. 16 SHV/JU.
[32] Art. 14 SHV/JU.
[33] Art. 11 al. 2 SHV/NE. While this norm seems almost surprisingly accommodating to the beneficiary, it also shows that the integration agreement is not a normal contract or agreement dominated by the freedom of contract but that certain things can be imposed on the welfare- beneficiary against their wishes and consequently their will.
[34] SKOS-Guidelines, A.5.2.

Criteria	cantons mentioning it?	cantons expressively excluding it?
Age	BE, FR, NE, VS (SKOS)	BE (in welfare-to-work programs)
Health	BE, FR, NE, VS (SKOS)	
Personal (including family) situation	BE, NE, VS (SKOS)	
Former position or profession		BE, VS (SKOS)
Capabilities/Possibilities	BE, FR, GR, JU, SG	BE (in welfare-to-work programs)
Good cause/serious cause	BS, TI, GE	
Education	FR	
Generating income	VS (SKOS)	
Wishes of the welfare beneficiary	NE	
Chances to reintegrate / employability	BL (in welfare-to-work measures), JU (in welfare-to-work measures)	

What is striking is that there is no consideration for the working conditions at all in theses defining elements. While it is well known from the unemployment's insurance definition of "suitable employment" that a position is not suitable and therefore has not to be accepted if remuneration and working conditions do not correspond to the usual terms of employment in the sector, no such idea seems to have been transposed to the social assistance legislation.[35] Also the formulation in the SKOS-Guidelines does by no means provide such a criteria and rather leaves the possibility for wages in welfare-to-work measures offering no living wage.

Further, we can observe many open and vague rules, such as the "good cause" clause in BS, GE and TI. Only two cantons mention as a decisive factor the chances for reintegration in the first labour market. The former position is not considered in a single canton and the education of the welfare beneficiary is only mentioned in one canton.

Also it becomes clear that in further analysis it is crucial to elaborate on the question in how far there are (justifiable) differences between the notion reasonable work, when it is understood as a part of the principle of subsidiarity and thus as an eligibility criterion and when it is applied in connection with the mitigating duties. As shown above, certain cantons only define what aims a welfare-to-work program has

[35] cf. Article 16 § 2 lit. a Federal Law on the Unemployment Insurance, SR 837.0

to pursue but do not define more thoroughly what reasonable work outside a program is, meaning what kind of job welfare beneficiaries are bound to apply for and eventually accept. However, this last aspect is also of importance. As the few definitions that exist do not take into account the former position, profession or education of the welfare beneficiaries and given that working conditions (especially the wage) are not a relevant factor either, it is to conclude that these regulations offer little to no protection against being pushed in precarious work-relations and (further) social relegation.

Moreover it can be observed that at least the canton of Bern knows a stricter definition of what reasonable work in a program is as compared to the general definition of reasonable work – a legislative choice by a canton that has been upheld by the Federal Supreme Court.[36]

IV. Reasonable work in the Federal Supreme Court's Case Law

A formerly conducted analysis of the Swiss Federal Supreme Court's case law around the notion reasonable work for social assistance recipients has shown that the Supreme Court is reluctant to thoroughly investigate the conditions under which a welfare-to-work program takes place or to generally determine what reasonable work for welfare beneficiaries means.[37] In fact, only the following criteria could be extracted from the case law:

A. Factors making a position unreasonable

So far, only four factors making a position in a welfare-to-work program unreasonable could be observed in the case law:

- Degrading work[38]
- Health reasons[39]
- Overstraining work[40]
- Family responsibilities[41].

It is noteworthy that the Federal Supreme Court has so far never come to the conclusion that a certain program or an offered position was unreasonable. Also it was never specified what kind of work would be degrading and also it has to be noted that "overstraining" work is mainly understood in the way that the

[36] BGE 139 I 218, C. 4.4
[37] This research was presented at the Labour Law Research Network-Conference in Toronto earlier this year and the draft paper can be consulted online: https://thirdlabourmarket.ius.unibas.ch/en/activities/conferences/
[38] Judgement 8C_156/2007 (11.04.2008), C. 6.5.
[39] BGE 139 I 218
[40] BGE 139 I 218, C. 4.4 e contrario; judgement 8C_156/2007 (11.04.2008), C. 6.4.
[41] BGE 139 I 218; judgement 2P.275/2033 (06.11.2003)

intellectual requirements for a certain position should not surpass the intellectual capacity of the social assistance beneficiary.[42]

B. Factors not impacting the reasonable character of a position

On the other hand, the case law analysis has shown that there are several factors that do not fall under the threshold of an unreasonable position:

Unremunerated work in welfare-to-work programs is reasonable – however, if an unremunerated position is rejected it is not possible to cut all the benefits, at least the minimal benefits based on article 12 Constitution have still to be granted.[43] This also means that a position with **extremely low remuneration** has to be accepted.[44]

Further, the Federal Supreme Court held that

- a position that does **not fit the skillset** of the welfare recipient is reasonable,[45]
- **position outside the former profession** is reasonable, at least if someone is out of work for a longer period. [46]

In connection with welfare-to-work measures it is not seen as problematic if the welfare recipient does **not know the tasks** that he will be asked to perform **or the salary** that will be paid for the work performed in the program.[47] Additionally, the Federal Supreme Court does not consider it unreasonable if work is performed under the **threat of a criminal penalty**, on the contrary: the Supreme Court did suggest in 2016 to combine the order to participate in a program with a threat of the criminal penalty for non-compliance.[48]

C. Factors not taken into account

So far, not a single case could be observed in which the following criteria would have been taken into account in order to assess whether a position was reasonable or not:

- the **working conditions**
- the working **hours**
- **health and safety** at the workplace

[42] Judgement 8C_156/2007 (11.04.2008), C. 6.4.
[43] BGE 142 I 1.
[44] BGE 130 I 71; BGE 142 I 1.
[45] BGE 130 I 71; judgement 8C_156/2007 (11.04.2007), C. 6.4; BGE 139 I 218.
[46] BGE 139 I 218.
[47] BGE 130 I 71.
[48] BE 142 I 1.

- and **the effectiveness of a program** meaning whether a certain position does enhance **the chances to be reintegrated** in the first labour market. Quite on the contrary: The Federal Supreme Court assumes in a decision from 2004 that welfare-to-work measures are per se to the benefit of the welfare beneficiary.[49]

V. Reasonable work according to the Right to Work

After analysing the legislation and the federal supreme courts practice it becomes clear that there are only very little limits set to the duty of welfare beneficiaries to accept reasonable work or to take part in a welfare-to-work program. However, welfare-to-work programs and duties to take up reasonable work do not take part in a sphere cut off from the influence of international human rights law.

In the following I therefore summarise what can be inferred from observations and case law of the relevant treaty bodies on the prohibition of forced labour, the right to freely chosen work and the right to just and favourable working conditions – all which are aspects of the right to work according to article 6 ICESCR – when defining the scope of the welfare beneficiaries duties to perform reasonable work.[50]

A. The prohibition of forced and compulsory labour

Whether or not welfare-to-work programs and other policies linking benefits to the duty to perform work constitute forced labour according to ILO-Convention 29, resp. article 8 ICCPR or article 4 ECHR is a recurring subject of discussion in the academic literature. While in fact non of the analysed observations[51] have found that welfare-to-work measures are forced labour, one is able to extract certain thresholds

[49] BGE 130 I 71, C. 5.4; This decision is still followed and used by cantonal courts to demonstrate that welfare-to-work measures are reasonable work, thereby avoiding a thorough analysis of the facts: Administrative Court (Verwaltungsgericht) Zürich, Entscheid VB.2016.00335 (28.09.2016), C. 4.1

[50] This research was presented at the Labour Law Research Network-Conference in Toronto earlier this year and the draft paper can be consulted online: https://thirdlabourmarket.ius.unibas.ch/en/activities/conferences/

[51] The following material have been analysed: HRC, *Faure v. Australia,* communication No. 1036/2001, 23 November 2005 (CCPR/C/85/D/1036/2001); **The Chilean MEP and POJH program and the Chilean Unemployment benefit system**: ILO, CEACR, Observation, Chile, Convention No. 122, Chile, 67th session, 1981; ILO, Report of the Committee set up to examine the representation presented by the National Trade Union Co-ordinating Council (CNS) of Chile under article 24 of the Constitution alleging non-observance of International Labour Conventions nos. 1, 2, 29, 30 and 122 by Chile, (Vol. LXVIII, 1985, Series B, Special Supplement 2/1985); ILO, Report of the Committee set up to examine the representation submitted by the National Trade Union Co-ordinating Council (CNS) of Chile under article 24 of the Constitution alleging non-observance of International Labour Conventions nos. 1, 2, 24, 29, 30, 35, 37, 38, 111 by Chile (Vol. LXXI, 1988, Series B, Supplement 1); ILC, CEACR, Direct request, Convention No. 29, Chile, 77th session, 1990; ILC, CEACR, Direct request, Convention No. 29, Chile, 82nd session 1995; ILC, CEACR, Direct request, Convention No. 29, Chile, 85th session, 1997; ILC, CEACR, Direct request, Convention No. 29, Chile, 82nd session 1995; ILC, CEACR, Direct request, Convention No. 29, Chile, 85th session, 1997; **Denmark's redefinition of suitable and reasonable work (ILO)**: ILC, CEACR, Direct Request, Denmark, Convention No. 102, 93rd session 2004; ILC, CEACR, Direct Request, Denmark, Convention No. 29, 97th session 2007; **Case law on article 4 ECHR:** European Commission on Human Rights, *X. v. The Netherlands,* no 7602/76, 13.12.1976; European Commission on Human Rights, *Talmon v. The Netherlands*, no. 30300/96, 26.12.1997. ECtHR, *Schuitemaker v. The Netherlands,* no. 15906/08, 4.5.2010;

which have to be observed by such policies in order for them not to be in breach of the said prohibition. These are the following criteria:

- Punitive character of the work should be excluded
- Measure has to be provided for by law and pursue a legitimate purpose
- no degrading or dehumanizing work
- Conscientious objections have to be considered
- Work should be generally socially accepted
- Loss of non-contributory benefits might be a penalty if wage is excessively low (and thus such work requirements could amount to forced labour)

B. Right to freely chosen work

The right to freely chosen work according to various international instruments (like article 6 ICESCR, ILO-Convention No. 122[52]) does – just like the prohibition of forced labour – protect the freedom to work but has a larger scope of application than the prohibition of forced labour. The analysed observations[53] show that additionally to what has been hold above, welfare-to-work measures have to observe the following points in order to not unduly restrict ones right to freely chosen work:

- Perspective to reintegrate in freely chosen occupation in the first labour market (only temporary restriction of right to freely chosen work)
- Conditionality / reciprocity of benefits is not a sufficient legitimate purpose
- Not respected by a scheme providing wages below half minimum wage, no social security, paid leave or employment contract.

C. Right to just and favourable working conditions

The right to just and favourable working conditions according to Article 7 ICESCR has– as far as the research conducted so far shows – not yet been the subject of any observations of treaty bodies in relation

[52] Article 27 of the International Convention on the rights of persons with disabilities has been excluded for the current analysis. However, it might be interesting to investigate whether this article sets additional criteria for defining the term reasonable work for social assistance beneficiaries suffering from a medical condition.

[53] Besides the already mentioned material regarding the Chilean MEP and POJH programs (cf. Footnote 51) I have analysed a series of CEACR observations on the UK "Mandatory Work Activity Program": ILC, CEACR, Observation Convention No. 122, UK, 102nd session, 2012; ILC, CEACR, Observation Convention No. 122, UK, 105th session 2015; the program is also discussed and mentioned by Vonk, repressive welfare states, p. 194; Paz-Fuchs Amir/Eleveld Anja, Workfare Revisisted, IndustrialLawJounal, Vol. 45, No. 1, March 2016, p. 29-59, p. 35; Dermine Elise, Activation Policies for the Unemployed and the International Human Rights Case Law on the Right to *Freely Chosen Work*, in: Dermine Elise/Dumont Daniel (eds.), Activation Policies for the Unemployed, the Right to Work and the Duty to Work, Brussels 2014, S.139-177, p. 156.

to welfare-to-work measures. This aspect will not be further examined for the present purpose,[54] however I think the question of whether the positive obligations[55] arising from article 7 ICESCR are respected by the very open definition of reasonable work (outside a program) – especially with regard to wage, working hours, health and safety, can legitimately be asked. It is known that working poor's are also a concern in Switzerland[56] and the Federal Supreme Court recognises that the introduction of a minimum wage is a appropriate instrument of social politics to combat the phenomenon.[57] Similarly, a definition of reasonable work that does not push welfare beneficiaries towards precarious jobs, not offering remuneration providing "decent living for themselves and their families " according to article 7 (a) (ii) ICESCR could well fall within the positive obligations arising out of article 7 ICESCR. That there are also individually justiciable rights contained in article 7 ICESR has not been recognised by the Federal Supreme Court,[58] which stresses the importance of properly addressing the positive obligations.

VI. Conclusive remarks

What can we infer from this – preliminary – analysis of different sources on the interpretation of the notion "reasonable work" for welfare beneficiaries?

All in all it can be held that the social assistance legislation in the Swiss cantons is not conclusive and offers little to no guidance either to the welfare beneficiary or to the administration when assessing the reasonable character of a certain position. Especially, only two cantons mention that a position should aim at the reintegration – this is however something the right to freely chosen work demands. Furthermore, the analysis of the case law of the Federal Supreme Court did demonstrate that the Court never – seriously – assesses the reintegration chances. In fact, scientific evidence and indications that welfare-to-work measures or the performance of unskilled labour do not have (significant) positive effects or may even have negative effects on the employability, are ignored by the Supreme Court and the legislation does not reflect the importance of this criteria.[59] The Court is also very reluctant to take into account the personal

[54] Cf. As well the draft paper oft he research presented at the Labour Law Research Network-Conference in Toronto earlier this year: https://thirdlabourmarket.ius.unibas.ch/en/activities/conferences/

[55] the Federal Supreme Court has so far not acknowledged that article 7 ICESCR is self-executing and confers individual rights, cf. BGE 136 I 290, C. 2.3.1 & C. 2.3.3.

[56] Unfortunately, there is no regular statistic indicating the percentage of working poor in Switzerland. However, in the canton of Neuchâtel, 2'359 persons out of 174'554 (=1.35%) benefit from social aid even though they exercise a full time activity and 4.3 % of the employed worked for a wage below what has been considered a living wage (judgement 2C_774/2014 (21.07.2017), C. 5.4.1).

[57] Judgement 2C_774/2014 (21.07.2017), C. 5.4; this decision upholds the introduction of a cantonal minimum wage of CHF 20/h.

[58] BGE 136 I 290, C. 2.3.1 & C. 2.3.3.

[59] Cf. (instead of many others): for a summary of empirical evidence on the (lacking) effectiveness and often even adverse effects of welfare-to-work policies on job quality: Raffass Tania, Demanding Activation, Jnl Soc. Pol. (2017), 46, 2, 349–365; for adverse effects of performing low-skilled labour or participating in a welfare-to-work program on the employability of (young) job seekers in Switzerland, Norway, Greece and Bulgaria: Negotiate,

situation of the welfare beneficiary but rather sees welfare-to-work measures generally as something positive without questioning the reasonable character of a specific placement. Even though the right to freely chosen work is regarded as justiciable by international bodies, the Federal Supreme Court is very reluctant to recognise the justiciable character of economic and social rights. However, article 27 of the federal constitution contains a right to economic freedom and the right to freely chosen work is seen as an inherent part of the economic freedom.[60] Nonetheless, the Court held in a 2003 judgement that – as the applicant was out of work since a long time –there was no indication whatsoever that the right was infringed.[61] This example shows that in order for such arguments even to be heard by the Federal Supreme Court an other Courts, a well elaborated and argued appeal is indispensible.[62] In this regard the adoption of legislation taking into account more defining elements from international law would strengthen the position of welfare beneficiaries.

There are no inconsistencies that can be observed between the cantonal legislation and the case law of the Federal Supreme Court regarding the interpretation of the notion reasonable work – which is also not surprising, given the fact that the cantonal legislation is vague. However, it seems that the legislation does – prima vista – not take into account all positive obligations arising from article 7 ICESCR. This hypothesis will have to be further investigated. If it will prove to be true, there will be further questions following: do the courts have to apply a cantonal law that violates positive obligations? And how could a successful litigation against such legislation and the application in the individual case be constructed?

Overall it can be hold that the law is vague and provides no guidance. A detailed analysis of the practice (case law and day-to-day practice of social workers and social assistance administrations) will allow to determine whether the legislation should be more precise and incorporate more human rights aspects or whether the cantonal laws existing are satisfactory.

Employers assessments of young job applicants: Findings from a comparative study, Policy Brief no. 6 - May 2017 online <https://negotiate-research.eu/files/2017/06/POLICY_BRIEF_NO6.pdf>, (08.09.2017)

[60] Cf. Vallender Klaus A., N 14 ss. ad. Art. 27 BV, in: Ehrenzeller/Schindler/Schweizer/Vallender (Eds.),St. Galler Kommentar zur Schweizerischen Bundesverfassung, Zürich/St. Gallen 2014.

[61] cf. Judgment 2P.7/2003 (14.01.2003).

[62] However, often social assistance beneficiaries are denied legal aid and representation as it is considered that social assistance legislation does not pose (enough) difficulties that would make it necessary to be represented by a lawyer, cf. Heusser Pierre, Rechtsschutz: Für die Schwächsten zu Schwach, *plädoyer*, 1/09 v. 29.01.2009, p. 34-42.

List of abbreviations of the names of the cantons

AG	Aargau
AI	Appenzell-Innerrhoden
AR	Appenzell-Ausserrhoden
BE	Bern
BL	Basel-Landschaft
BS	Basel-Stadt
FR	Fribourg
GE	Geneva / Genève
GL	Glarus
GR	Graubünden
JU	Jura
LU	Luzern
NE	Neuchâtel
NW	Nidwalden
OW	Obwalden
SH	Schaffhausen
SG	St. Gallen
SO	Solothurn
SZ	Schwyz
TG	Thurgau
TI	Ticino
UR	Uri
VD	Vaud
VS	Valais
ZG	Zug
ZH	Zürich

List of cantonal legislation

Appenzell-Innerrhoden (AI):

Gesetz über die öffentliche Sozialhilfe (Sozialhilfegesetz, ShiG) vom 29. April 2001 (**ShiG/AI**), Gesetzessammlung 850.000.

Appenzell-Ausserrhoden (AR):

Gesetz über die öffentliche Sozialhilfe (Sozialhilfegesetz, SHG) vom 24. September 2007 (**SHG/AR**), Ausserrhodische Gesetzessammlung 851.1

Basel-Stadt (BS):

Sozialhilfegesetz vom 29. Juni 2000 (**SHG/BS**) Systematische Gesetzessammlung Basel-Stadt 890.100

Basel-Land (BL) :

Gesetz über die Sozial-, die Jugend- und die Behindertenhilfe (Sozialhilfegesetz, SHG) vom 21. Juni 2001 (**SHG/BL**), Systematische Gesetzessammlung 850.

Sozialhilfeverordnung (SHV) vom 25. September 2001 (SHV/BL), Systematische Gesetzessammlung 850.11

Bern (BE) :

Gesetz vom 11. Juni 2001 über die öffentliche Sozialhilfe (Sozialhilfegesetz, SHG), (**SHG/BE**), Bernische Systematische Gesetzessammlung 860.111

Verordnung über die öffentliche Sozialhilfe (Sozialhilfeverordnung, SHV), vom 24. Oktober 2001 (**SHV/BE**), Bernische Systematische Gesetzessammlung 860.111.

Fribourg (FR):

Ausführungsreglement vom 30. November 1999 zum Sozialhilfegesetz (ARSHG) (**ARSHG/FR**), Systematische Gesetzessammlung des Kantons Freiburg 831.0.11.

Genève (GE):

Loi sur l'insertion et l'aide sociale individuelle (LIASI) du 22 mars 2007 (**SHG/GE)**, Recueil systématique genevois J 4 04.

Graubünden (GR):

Ausführungsbestimmungen zum kantonalen Unterstützungsgesetz vom 08. November 2005 (**SHV/GR**), Bündner Rechtsbuch 546.270

Jura (JU) :

Loi sur l'action sociale du 15 décember 2000 (**SHG/JU**), Recueil systématique jurassien 850.1

Ordonnance sur l'action sociale du 30 avril 2002 (**SHV/JU**), Recueil systématique jurassien 850.111

Luzern (LU):

Sozialhilfeverordnung vom 13. Juli 1990 **(SHV/LU),** Systematische Rechtssammlung des Kantons Luzern 892a

Neuchâtel (NE):

Règlement d'exécution de la loir sur l'action sociale du 27 novembre 1996 (**SHV/NE**), Recueil systématique de la législation neuchâteloise 831.01.

Nidwalden (NW) :

Gesetz über die Sozialhilfe (Sozialhilfegesetz) vom 29. Januar 1997 (**SHG/NW**), Nidwaldner Gesetzessammlung 761.1

Schwyz (SZ):

Gesetz über die Sozialhilfe vom 18. Mai 1983 (**SHG/SZ**), Schwyzer Gesetzessammlung 380.100

Solothurn (SO) :

Sozialgesetz (SG) vom 31. Januar 2007 (**SG/SO**), Bereinigte Gesetzessammlung 831.2

Thurgau (TG):

Gesetz über die öffentliche Sozialhilfe (Sozialhilfegesetz) vom 29. März 1984 (**SHG/TG**), Thurgauer Rechtsbuch 850.1

Ticino (TI):

Regolamento sull'assistenza sociale del 18 febbraio 2003 (**SHV/TI**), Raccolta delle leggi del cantone Ticino 6.4.11.1.1

Valais (VS) :

Ausführungsreglement zum Gesetz über die Eingliederung und die Sozialhilfe (ARGES) vom 7. Dezember 2011 (**SHV/VS**), Walliser Gesetzessammlung 850.100

Zürich (ZH):

Sozialhilfegesetz (SHG) vom 14. Juni 1981 (**SHG/ZH**), Zürcher Gesetzessammlung 851.1.