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Suitable, reasonable and Decent Work in the Activating Welfare State

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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.

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] Also social assistance beneficiaries are 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" and thereby contribute to the so far only marginal research on the actual conditions under which welfare-to-work measures take place.[3] The focus on the notion "reasonable work" is chosen as this notion is pivot in Switzerland: it is recognized that if welfare-to-work 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.

[2] Among others: Gundt, EU activation policy, p. 158.

[3] The existing legal research focuses either on the same mechanisms in the employment insurance (cf. for example: Gundt Nicola, The Right to work, EU Activation policies and national unemployment benefit schemes, European Labour Law Journal, Vol. 5 (2014, No. 3-4, p. 349 ss.) or if it is focussed on social assistance, the research is more principle based and does take only little interest in the the working conditions in welfare-to-work measures but focuses also on the „contractualisation" of social rights, (cf. Paz-Fuchs Amir, Welfare to work, Oxford, 2008; Eichenhofer Eberhard, The Law of the Activating welfare state, Baden-Baden, 2015; Eleveld Anja, The Duty to Work without a wage, Vol. 16 (3) September 2014, p. 204-224. Eleveld is, in her article, however, pointing to the need for additional research regarding the question of the influence of social and employment rights on welfare-to-work measures. In the US, scholars have discussed minimum wage coverage for workfare participants: Mahmoudov Vadim, Are Workfare Participants Employees? Legal Issues presented by a two-tiered labor force, Annual Survey of American Law, 1998, 349 ss.; Miller Kevin J., Welfare and the Minimum Wage: Are Workfare Participants " Employees " under the Fair Labor Standards Act?, University of Chicago Law Review, 1999, Vol. 66: Iss. 1, 183 ss Ellis Nan S., Work Is Its Own Reward : Are Workfare Participants Employees Entitled to Protection under the Fair Labor Standards Act?, Cornell Journal of Law and Public Policy, Vol. 13 (2003), Iss. 1, 1 ss.

The notion "reasonable work" in welfare-to-work measures is – despite its important function – not generally defined in the Swiss social assistance legislation.[4] This paper therefore focuses on an analysis of the Federal Supreme Court legislation and checks in a second part whether the defining elements extracted from the case law – if it were adapted as a legislative guideline – respect international social and economic and labour rights.

I will proceed as follows: In the first part I will briefly present the Swiss constitutional and legislative context in which welfare-to-work measures are embedded. Special attention will be paid to the right to assistance when in need, a justiciable social right to the benefits indispensible for a dignified human existence. With this theoretical background I will be pass on to an analysis of the Swiss Federal Supreme Court case law on the definition of the notion "reasonable work" in welfare-to-work measures. This case law allows me to extract some criteria the Court retains in order to define "reasonable work".

The second part of this paper checks, whether this definition respects defining principles that can be extracted from international law. I will thereby concentrate on different aspects of the right to work contained in article 6 ICESCR and the ILO's decent work concept. Namely, I will elaborate on the prohibition of forced labour, the right to freely chosen work and the right to fair and just conditions of work.

I argue that these (and other) international social and economic rights as well as international labour rights provide a (programmatic) framework that has to be respected in welfare-to-work measures.

II. Why not "suitable employment"?

Terminologically I have to be note that the term "suitable employment" is used in the international instruments in connection with the unemployment insurance and it was defined in the ILO Conventions 102 and 168. The notion "reasonable work" is used less frequently. For example in an ILO CEACR observation concerning a Danish law redefining "suitable employment" that "reasonable employment" can be understood as also including work outside the occupational field of an unemployed person, whereas the term "suitable" involves only work taking into account the previous position of the unemployed[5]. In the present paper I use the term "suitable employment" in connection with the ILO Conventions No. 102 and No. 168 and unemployment benefits. The term "reasonable work" is used in connection with welfare-to-work measures. This distinction is made for the following reasons: it takes into account the fact that the term "suitable employment" is already occupied by ILO Convention No. 102 and No. 168 and that this

[4] Cf. Below: social assistance is mainly a matter of cantonal (decentralized) law. Out of 26 only the laws of 2 cantons (Berne and Appenzell Ausserhoden) define the notion of reasonable work.
[5] ILC, CEACR, Direct Request, Denmark, Convention No. 102, 93rd session 2004.

concept applies according to the convention texts and treaty bodies only during an initial period[6] of unemployment. This suggests that the same definition might not be applied in welfare-to-work measures, what should also be reflected in the terminology. Also does this only make the question treated in this paper more pressing: how are social assistance beneficiaries protected against unreasonable job offers? Also, using the term "work" rather than employment, points out that not only standard employment is included but also occupation in the second labour market, in welfare-to-work programs, in the generally triangular relationship between social services, companies and social assistance beneficiaries, despite the fact, that the legal qualification of these relationships as employment is uncertain.

Very briefly, in order to assess the suitability of an employment, the authorities should according to article 21.2 ILO Convention No. 168[7] take into account:

- the age of the unemployed person
- their length of service in their former occupation,
- their acquired experience, the length of their period of unemployment,
- the labour market situation,
- the impact of the employment in question on their personal and family situation and
- whether the employment is vacant as a direct result of a stoppage of work due to an on-going labour dispute

It is also admitted that, according to the ILO Convention No.168 article 21,1, unemployment benefits may be refused, withdrawn, suspended or reduced, when the person concerned refuses to accept suitable employment. This underlines the fundamental importance of the definition of suitable employment in unemployment insurance systems and the fact that it is also by virtue of international law acceptable to sanction the refusal of an suitable employment with cuts or withdrawals of benefits.

III. The Swiss Case Law on reasonable work in welfare-to-work programs

First, I will situate welfare-to-work programs in the Swiss constitutional and legislative social security framework and I will emphasize the relevance of the definition of what constitutes suitable or reasonable work in these programs.

[6] 13 weeks in the case of Convention No. 102: cf. Article 24 ILO Convention No. 102; Dermine, freely chosen employment, p. 157; ILO, CEACR, Direct Request, Denmark, Convention No. 102, 93rd session 2004; and 26 weeks in the case of ILO Convention 168, cf. article 19 (2) (a) ILO Convention No. 168; ILO, CEACR, Observation, Norway, Convention No. 168, 101st session 2011; Dermine, suitable employment, p. 167 refering to further CEACR documentation.

[7] Further specifications on the definition can be found in, ILC, Recommendation 176, Employment Promotion and Protection against Unemployment, 75th session, article 14.

The cases presented in the following section show how the Federal Supreme Court defines reasonable welfare-to-work measures. What concept of reasonable employment is applied by the Court? What defining elements can be drawn from this case law?

In the case law there are some references to the "salary", "wage" or "remuneration" paid in the welfare-to-work programs. These amounts might seem high. It is in this regard important to put these amounts in relation to Swiss economic realities: the median wage in Switzerland was in 2014 CHF 6'189 and only 10 % earned less than CHF 4'178 per month.[8] In the sector of "personal services" – including for example hairdressers – the lowest median wage could be observed and this amounted to CHF 3'910. There is no minimum wage fixed in the legislation, however, some collective agreements are binding for the whole industry concerned. Based on the collective agreement for the building industry, the lowest wage admissible for a full-time job is CHF 4'413 per month; in the gastronomy the minimum wage is CHF 3'417 per month.

A. 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. As for the unemployment insurance, the one most relevant to the present context, benefits are dependent on contribution and limited in time. Benefits are however not based on need, meaning that also persons who could (financially) support themselves without the insurance benefits are granted benefits. The social insurances are based on federal legislation. The unemployed person is as a part of their duty to mitigate damages held to accept suitable employment from the first day of the unemployment period. Article 16 § 2 of the unemployment insurance statute[9] describes what kind of employment is unsuitable and therefore exempted from the obligation to accept an employment offer. This definition is – *prima vista* – compatible with the ILO Convention 168, which is binding for Switzerland.[10] However, just like the protection arising from ILO Convention No. 168, also this protection is limited in time.

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[11]

[8] Bundesamt für Statistik, Medienmitteilung vom 30.11.2015, online <https://www.bfs.admin.ch/bfs/de/home/statistiken/arbeit-erwerb/loehne-erwerbseinkommen-arbeitskosten.assetdetail.39777.html> (21.04.2017)
[9] Bundesgesetz über die obligatorische Arbeitslosenversicherung und die Insolvenzentschädigung vom 25. Juni 1982, SR 837.0.
[10] one could raise concerns in regard to article 16, 3[bis] excluding unemployed under 30 from the protection of their former professional status.
[11] Article 115 Cst.: "Persons in need shall be supported by their Canton of residence. The Confederation regulates exceptions and powers."

of the Swiss Constitution[12] 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. At least since 2005, the guidelines[13] of the Swiss Conference for Social Assistance (SKOS) 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.[14] Also the element of reciprocity of benefits is 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 assistance but are in principle also backed up by the guidelines of the Conference for Social Assistance.[15] 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.[16] The benefits are more restricted than the social assistance benefits.[17] 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.[18] Given that article 12 Constitution is a minimal guarantee, it is recognised that this fundamental right

[12] 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.
[13] The guidelines are not binding for the cantons but most cantons did incorporate them in their legislation and do follow them at least to some extent. The SKOS-Guidelines can be consulted here: https://www.skos.ch/skos-richtlinien/ (21.04.2017)
[14] Wizent, Bedürftigkeit, p. 238.
[15] SKOS-Guidelines, A.8.2.
[16] 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.
[17] Hänzi, Richtlinien, p. 171.
[18] BGE 121 I 367.

cannot be restricted. The scope of protection and the essence of the right are identical.[19] However, the benefits are not granted unconditionally but only given to those, unable to provide for themselves, meaning that also the income from a suitable employment has to be realised before one can pretend to the benefits. The principle of subsidiarity is hereby seen as the eligibility criterion to the minimal benefits according to article 12 Constitution. As will be shown in more detail in the case studies below, the question of whether a certain duty put on welfare beneficiaries would put the person in a position 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.[20] 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.

B. Case Law

Welfare-to-work is regulated by 26 different cantonal laws and there is no commonly acknowledged definition of the term reasonable work in the legislation. Therefore, it is tried to establish the status quo by focusing on the Federal Supreme Court decisions. This presents the current minimal standard, not excluding that certain cantons have adopted a more human rights based approach.

1. Judgement 2P.147/2002 (3 March 2003) – "work instead of welfare" falls under the principle of subsidiarity

In this case, the applicant was asked to work in the maintenance and cleaning of public parks within the framework of a program called "work instead of welfare". He would have earned CHF 2'600 per month but refused to participate in the program as he feared that this would obstruct his chances to find work corresponding to his initial formation (interior-decorator). This refusal lead to the suspension of his benefits.

The applicant argued that the coercion to participate in the program was a violation of his personal freedom and that the local court had interpreted the notion of "suitable work" in an arbitrary manner. Furthermore, his right to assistance in need (art. 12 Cst.) was violated, because even if his situation of need was self-inflicted, in his view, he couldn't be excluded from the scope of application of art. 12 Cst (C. 3.1).

[19] BGE 130 I 71.
[20] BGE 131 I 166.

The Federal Supreme Court, however, concluded that, in order to enjoy the benefits of the right to assistance in need, preconditions have to be met. In particular, the right to welfare benefits is only granted if the beneficiaries are not able to provide for themselves. In this case, the rejected employment would have given the applicant the possibility, based on fact and law, to provide for himself. Therefore, he was not within the scope of social welfare, nor of the right to assistance when in need (C. 3.3).

Furthermore, the Federal Supreme Court held that it was erroneous for the applicant to claim that his personal freedom and his economic freedom was violated by the order to take part in the program. Also the cantonal authorities did not interpret the notion of "reasonable work" arbitrarily (C. 3.5.2). The Court came to this conclusions, knowing that the applicant expressed that he refused to work in order to punish the state for a failed immigration politic and that he would find work quickly if only he wanted to.

This was not an undisputed decision: scholars criticised the Court's view, claiming that the person who rejects reasonable work should only be sanctioned (i.e. cutting benefits, giving benefits in kind instead of cash), but not be deprived of the assistance according to article 12 Cst.[21] Also, commentators argued that it was difficult to draw a distinction between a self-inflicted situation of need – not influencing the right to assistance – and the failure to accept a reasonable work in order to end the situation of need.[22] These critics were, however, rejected by the Federal Supreme Court in the decision BGE 130 I 71 (cf. below) and this case did lay the foundation for the subsequent case law: social assistance beneficiaries who reject reasonable work are no longer regarded as being within the scope of protection of neither article 12 Constitution nor social assistance. They do not receive any benefits anymore.

2. Judgement 2P.275/2003 (6 November 2003) – over qualification does not make a job unreasonable

The applicant – an unmarried mother of two children (14 and 17 years old) – was supported by social assistance, as her independent therapeutic activity as a teacher in ecological awareness and lifestyle did not generate an income. The social welfare office asked her to accept a job – in a welfare-to-work programme – in a canteen where she would have earned CHF 3'365 a month for a 70% part-time activity. As the applicant did not accept the job, all her benefits (social assistance and assistance when in need) were suspended with the justification that the job would have put her in a situation where she would have been able to provide for herself and was reasonable. The lower instance relied on the unemployment insurance legislation in order to assess the reasonable character of the employment (C. 5.1). The criteria – the work has to respect the skills of the applicant and take into account the former position, further the working conditions had to respect local customs and professional customs – were repeated. However, the

[21] Amstutz, Existenzsicherung, p. 97 s.
[22] Pärli, AJP 1/2004, p. 44 s.

Court did not assess whether these criteria were met *in casu*. The Federal Supreme Court did merely state, that the employment in the canteen was not degrading, even though the applicant would not be challenged by the offered work; furthermore, her duty to care for her children did not make the position unreasonable. The decision to suspend the benefits is neither a violation of article 12 Cst. nor of the cantonal social assistance law (C. 5.2).

This seems to be the only case in which the wage offered is competitive to what is normally earned in the sector. Also, it was clearly stated that the former position, education and skills were not relevant factors in assessing the reasonable character of a work. On the other hand, parental duties are implicitly recognised as a relevant factor. It is nevertheless understandable that the court did in the present case not consider children of the age of 14 and 17 as a factor that would make a 70% job unreasonable.

3. BGE 130 I 71 (2004) – "reasonable" even if the wage is lower than the benefits

In this leading case,[23] the Federal Supreme Court upheld a cantonal decision that threatened the social assistance beneficiary with the loss of all benefits if he did not participate in a daily wages program organised by the municipality. The applicant argued that the occupation in the program would not be reasonable, as he did not know the work he would be expected to do and the wage he could earn (C. 3).

The Federal Supreme Court ruled, based on the principle of subsidiarity, that someone who is objectively capable of providing for themselves, especially by accepting reasonable work, does not enter the scope of protection of article 12 Cst. Also, the Court answered to critics of the decision 2P.147/2003, stating that they did not thoroughly take into account the principle of solidarity (C. 4.3).

Examining whether the applicant could reasonably be expected to work in the program and whether the work was reasonable, the Court held that it was known to the Court that such programs can improve the situation of the applicant. Scientific studies pointing to the fact, that most of these programs were not effective, were not taken into account by the court. Welfare-to-work programs could according to the Court – be seen as reasonable measures even if the wage does not reach the amount of the benefits otherwise received. However, the benefits and the wage combined would add up to an income almost equal to the income that could be gained in certain areas of the first labour market. As there is a certain possibility that the program enhances the chances for reintegration in the labour market, the measures are proved to be of public interest (C. 5.4). Also the work was seen as reasonable even if the wage did not reach the amount of the benefits.

[23] Leading cases are cases which were chosen to be published in a special bulletin by the Court because they clarify former case law or because they change former views or deal with a new problem.

This decision is still followed today and especially cited in order to prove that welfare-to-work programs are to the benefit of the welfare recipients and therefore reasonable[24]. This is not convincing: Courts should rely on the realities of the case they are presented and not on case law that did not take into account scientific studies. Further, the decision shows that it does not make work unreasonable to accept if the conditions are unknown to the welfare beneficiary and if the wage lies far below what could be regarded as a living wage in Switzerland.

4. Judgement 8C_156/2007 (11 April 2007) – "not degrading" equals "reasonable"

Here, the Federal Supreme Court held that an employment as a manual (unskilled) labourer with a wage of CHF 1650/month for a 60% part-time activity is reasonable work for an independent psychological couple's therapist. His benefits were – as a result of his refusal to accept the work – reduced by the amount of the possible wage. The Court reminded that the principle of subsidiarity requires people seeking help to do everything which can reasonably be expected in order to put an end to their situation of need – in particular, they have to use their working power. Again, the Court stated that in order to define what reasonable work is, it could be relied on the unemployment insurance statute, without checking whether the employment conditions – especially the wage – did correspond the profession and local custom The fact that the applicant was academically trained and that the manual labour did under challenge him, did not make the work unreasonable (C. 6.4). The employment offer was held not to be degrading, and therefore reasonable. (C. 6.5). Even though the CHF 1'650 were not actually at the disposal of the applicant (as he denied the job), the court did not criticise the reduction in benefits (E. 7.1).

Even if the principle applied by the Court is the same as in the cases presented above, the consequences were quite different: instead of a complete suspension of the benefits, there was only a reduction. Again, the Court held that it is not problematic if the work does not correspond to the skillset of the welfare-beneficiary.

5. BGE 139 I 218 (2012) – factual and legal possibility to earn an income

The next leading case concerned an applicant refusing to accept a "trial position"[25], which would have been remunerated with CHF 2'600/month and thus secured the applicant's existence. This refusal led to a suspension of the benefits for the foreseen duration of the trial position.

The Court reminded that the obligation to take up reasonable work is not only a duty of the beneficiary but a criterion that has to be met in order to enter the material scope of application of article 12 Cst. In order to

[24] Cf. for example: Verwaltungsgericht des Kantons Zürich, decision VB.2016.00335, 28.09.2016, C. 4.1
[25] so called "Testarbeitsplatz", a position for 1 or 2 months, aiming at evaluating the welfare beneficiaries capacity to work.

assess whether this employment was reasonable, the Court relied on the definition of reasonable work as stipulated in the cantonal law and decree on social assistance. The relevant article 8g of the decree provides that the participation in measures aiming at qualification, occupation, or integration are in principle reasonable, unless health reasons or (child-) care tasks are hindering the participation in such a program (C. 3.5).

The Court also held that it was incomprehensible why the well-trained applicant could not find a position on his own (C. 4.2). Further, the obligation to take up this work was not considered a restriction of the applicant's personal freedom stating that the participation in welfare-to-work measures generally a reasonable instruction and that it would constitute only a marginal infringement of his fundamental right (C. 4.3). It was also seen as unproblematic by the Federal Supreme Court that the cantonal Court did not rely on Article 16 of the unemployment insurance law in order to define reasonable work but rather on the cantonal social assistance legislation, declaring all work as reasonable as long as the health or childcare duties of the social assistance beneficiary is not hindering him from working (C. 4.4). The position did mainly aim at establishing whether the applicant was willing and capable of integrating in a team, that he was reliable and punctual. Given that he had been out of work for a longer period of time, he had to accept a work outside his former profession. The "trial position" was therefore seen as a measure that could improve the employability of the applicant (C. 4.4.).

This case shows that the Court does leave the cantons the freedom to define the notion of reasonable work. A definition, according to which work in a welfare-to-work programme is only unreasonable if health reasons or childcare duties are brought forward, is not seen as problematic.

6. Judgement 8C_536/2015 (22 December 2015) – suitable employment is not forced labour

The applicant was asked to work for a remuneration of CHF 500 for a half-time occupation in a programme offering occupation in the industry, trade, recycling and in thrift shops. As he refused to take up this position, his benefits were cut by CHF 500.

The first authority confronted with the application did order the social services to provide more information on the conditions of employment (presence requirements, worktime, remuneration). Social services did not accept this order and appealed to the cantonal administrative court where the order was pulled and the sanction against the social assistance beneficiary confirmed. Thereafter the social assistance beneficiary introduced an appeal to the federal Supreme Court.

The applicant – who was not represented by a lawyer – complained that the reduction of his social assistance benefits was a violation of his right to a freely chosen employment according to article 23 of the Universal Declaration of Human Rights. The Court, however, held, that the UDHR did not confer

individually justiciable rights and that if the occupation offered did match 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 welfare-to-work measures would not amount to forced or compulsory labour according to the Federal Supreme Court (C. 2.2).[26] The Court repeated once again (cf. BGE 130 I 71) that the remuneration did not need to be the same amount as the social assistance (C. 2.2). Implicitly the Court also assumed that the position was suitable, as the applicant did not suffer from ill-health or had family responsibilities hindering him from working (C 2.1). However, the court did not check whether the other criteria of a suitable employment according to the unemployment insurance legislation (article 16) were actually met – especially not whether the remuneration was equal to what is normally gained in the same industry.

To summarise, the court did recognise that in order not to amount to forced labour, the work had to be "suitable". However, the Court did not apply the criteria of suitable employment but relied rather on a different concept.

7. BGE 142 I 1 (2016) – minimum income for welfare-to-work programs?

The latest leading case in the field was decided in March 2016.[27] The benefits of the applicant were suspended as he refused to participate in an unpaid welfare-to-work program. He claimed this would be a violation of both the cantonal law on social assistance and the right to assistance when in need.

The Court summarised its precedent case law and reminded that, as a consequence of the principle of subsidiarity, the participation in an welfare-to-work program takes priority over public benefits (C. 7.2.2). However, in the present case, the principle of subsidiarity could not apply, as the assigned occupation was not remunerated, and therefore would not have given the applicant the possibility to provide for himself (C. 7.2.3). Thus, the withdrawl of all benefits was ruled to be a violation of article 12 Cst. and the Court adjudicated the applicant the minimal benefits arising from article 12 Cst., to the extent that the participation in the program would not be remunerated at least up to the amount of the benefits from article 12 Cst.

However, the Federal Supreme Court ruled that the applicant did not have a right to the benefits of the cantonal social assistance. The refusal to participate in an unpaid welfare-to-work program could, according to the Court, be sanctioned by the suppression of all social assistance (C. 7.3.).

[26], The Court is referring to Wizent, p. 88 to justify its statement. However, Wizent, p. 88, specifies that welfare-to-work programs can lead to problems under the aspect of the prohibition of forced labour when taking into account equal treatment and especially in cases where no due respect is given to the former profession or where the remuneration is not adequate.

[27] This decision is thoroughly discussed by Studer Melanie/Kurt Pärli, BGE 142 I 1, Sozialhilferechtliche Beschäftigungsprogramme zwischen Existenzsicherung, Subsidiarität, Zumutbarkeit und Sanktion, AJP, 10/2016 and by Meier Anne/Studer Melanie, Commentaire de l' ATF 142 I 1, Jusletter, 14 november 2016.

A further interesting note is that the Federal Supreme Court did in its decision give advice to the cantonal authorities to give consideration to combining the order to participate in a program with a threat of the criminal penalty for non-compliance (C. 7.2.5).

The Court did here specify its former case law: only if the remuneration in a welfare-to-work measure reaches the amount of the assistance when in need according to article 12 Cst. a refusal to participate in a measure can lead to the suppression of all benefits – i.e. the assistance when in need. The social assistance can, however, be reduced as the refusal to participate in the programme is a violation of the behavioural duties.

C. Summary and Conclusion

The case law of the Federal Supreme Court can be summarised as follows:

The refusal to accept an unremunerated occupation cannot lead to the suppression in benefits arising from article 12 of the Federal Constitution. However, such behaviour can lead to the suppression in benefits arising from the cantonal social assistance. If a "remunerated" occupation is rejected this can lead to the loss of all benefits, if the remuneration reaches at least the amount of the (individually defined) assistance when in need (article 12 Cst.). Unremunerated programs are not *per se* seen as unreasonable and the refusal to participate in them does lead to sanctions, i.e. a reduction of the benefits to the level of benefits according to article 12 Constitution. Although, since 2016, the Court attaches fundamental consequences to the question of whether an occupation is remunerated or not, it does not define what remuneration means, especially whether it is a "salary" that is relevant in the social security system – it is however to assume that the court does not think of the "remuneration" in these terms

Also, it is in connection with the question on the remuneration that it becomes most apparent, that the Federal Supreme Court does not apply the same criteria examining "suitable employment" in the unemployment insurance and "reasonable work" in the welfare-to-work schemes. The unemployment insurance legislation states that only remuneration that is equal to what is normally offered in the industry and that respects collective agreements, is suitable. However, in the cases presented above, remuneration lies clearly below that standard. The exception that proves the rule is judgement 2P.275/2003 (6.11.2003): the salary of CHF 3'365 / month for a 70 % position in gastronomy is respecting these guidelines of the unemployment insurance. But: a remuneration that only is as high as the assistance when in need can certainly not be seen as a "suitable wage" – in the most extreme cases the assistance in need means that one is provided a bed in a bunker and receives urgent medical care and CHF 8 / day (= CHF 248 / month).

Moreover, the Federal Supreme Court is not interested in working condition at all, neither working hours, nor safety provisions.

The Federal Supreme Court assumes – without ever looking at scientific evidence and referencing himself since more than 10 years that welfare-to-work programs enhance the chance to be reintegrated in the first labour market. Interdisciplinary studies indicating the contrary or the concrete situation of the applicant are not considered.

The case law does show somewhat of a dilemma: once it was decided that the right to assistance when in need according to article 12 Cst. could not be restricted, the Court chose to limit its material scope of application. Some saw the approach of the Court as helpful in order to balance needed restriction for the entitlement to benefits and the protection of fundamental rights.[28] In my view, the balance took an unfortunate shift towards the limitation of the material scope of article 12 Cst. without taking into account fundamental or social and economic rights.

The argument that fundamental rights such as the right to a freely chosen profession are violated by the obligation to participate in a program has never been examined, even though it was brought up.

So far the Federal Supreme Court retained four criteria making work unreasonable:

1) degrading character of the work
2) work that cannot be expected due to health reasons from the social assistance beneficiary
3) overstraining work (which is mainly understood in terms of intellectual capacity)
4) family responsibilities

A violation of theses criteria has, however, never be found. Also in the latest decision presented, it was not decided that the work was not reasonable but just that it did not put the social assistance beneficiary in a position to care for himself. However, he has to accept an unremunerated position, otherwise he faces the reduction of social assistance benefits. In respect of the question of family responsibilities it has to be noted that the guidelines on social assistance of the SKOS provide that employment and/or a welfare-to-work measure have to be taken up at the latest when the youngest child is one year old,[29] which is much earlier than what the civil law judges requires from the caregiving parent after a divorce.[30]

[28] Kälin Walter et. al, Die staatsrechtliche Rechtsprechung des Bundesgerichts in den Jahren 2004 und 2005, ZBJV 141/2005, p. 633 ss., 653.
[29] SKOS-Richtlinien, C.1-6.
[30] In fact, the civil law rules are subject to a quite fundamental change at the moment. However, up until now it is agreed upon that a part-time return to work is reasonable once the youngest kid is 10 years old. A full-time activity can be expected once the youngest kid is 16 years old.

IV. Framework of international obligations

For the purpose of this article I chose to elaborate on this question based on the different aspects of the right to work according to Art. 6 ICESCR[31], namely, the prohibition of forced and compulsory labour where not only the ICESCR but also the ICCPR, ILO Convention No. 29 and the ECHR are relevant sources, the right to freely chosen work, the right to just and favourable working conditions and the ILO-decent work agenda. The choice has been made as the aspects related to the right to work give a broad overview of problematic aspects and presents aspects of recurring discussions on welfare-to-work programs.[32]

Elaborating on these rights I will give a brief theoretical overview and then present the conclusion that can be drawn from case law and opinions of the relevant treaty bodies. For reasons of space, a brief summary of the reasoning and facts is only provided if necessary. For each aspect of the right to work I will state where the case law presented above falls (potentially) short of duly respecting international rights.

A. Prohibition of forced or compulsory labour

It seems to be a polarising question to decide whether welfare-to-work schemes can fall under the prohibition of forced labour or not. In the following section I will therefore present the relevant sources of the prohibition of forced labour and its defining criteria. Second, I will present the conclusions I have drawn from analysing observations, reports and cases I have analysed in order to draw from these defining criteria on what work can reasonably be expected from a social assistance beneficiary.

[31] A similar provision can be found in article 23 UDHR. I chose focus on the ICESCR / ECHR / ILO as these instruments have surveillance bodies (CESCR / ECtHR / CEACR) regularly issuing opinions, also discussing recent policies.

[32] What will be excluded from the following analysis is whether there is a duty to work, interconnected with the right to work, and whether this duty can be used as a justification for welfare-to-work programmes. This question has evoked diverse international literature, for example: Paz-Fuchs Amir, The right to work and the duty to work, in Mantouvalou Virginia (ed.), The right to work: legal and philosophical perspectives, Oxford/Portland 2015, pp. 177-194. Another aspect that will be excluded form the present analysis is the European Convention on Social Rights as Switzerland has not ratified this convention. However, it might be interesting to analyse whether the European Court of Human Rights does by virtue of the "integreated approach" to interpretation consider certain aspects of the European Social Rights convention as an integrative part of the rights contained in the European Convention on Human Rights; cf. for a short overview on the "integrated approach" to interpretation with regard to labour rights: Mantouvalou Virginia, The Prohibition of Slavery, Servitude and Forced and Compulsory Labour under Article 4 ECHR, in: Dorssemont/Lörcher/Schömann, *The European Convention on Human Rights and the Employment Relation*, Oxford/Portland 2013, p. 154 ss.; and ECtHR *Demir and Baykara v. Turkey,* App No 34503/97. Similarly, the question, whether social assistance benefits are possessions under article 1 of the first additional protocol to the ECHR will not be treated, as Switzerland did not ratify this protocol. Also in this regard, it might be worthy to analyze whether the integrated approach to interpretation could lead to the 1st additional protocol influencing the interpretation of ECHR rights.

1. Sources, definitions, exceptions

The prohibition of forced labour is also seen as one aspect of the Right to Work according to article 6 ICESCR[33]. More detailed rules can be found in article 8 (3) ICCPR and article 4 ECHR. Further, the ILO has dedicated its Convention No. 29 and Convention No.105 to forced labour.

Neither the ICCPR nor the ECHR do offer a definition of forced or compulsory labour. Both, the ICCPR as well as the ECHR rely – at least to a certain extent – on the definition given by article 2 (1) of the ILO Convention No. 29[34]. Forced and compulsory labour is thereby defined as "all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily".

Work or service are prohibited if they meet the two defining criteria: menace of any penalty and the absence of consent[35].

"Penalty" is to be understood in a broad sense, including not only penal sanctions but also the loss of rights or privileges. Also the menace of penalty may take many different forms – involving physical violence or psychological threats.[36] Also a form of penalty is the loss of access to employment or the loss of housing benefits.[37] The ILO did in fact clarify, that the threat of loss of contributory benefits would amount to a menace of penalty, whereas the loss of non-contributory benefits the obligation to perform some work in exchange for the benefits would not constitute compulsory labour, unless "the allowance paid were to constitute an excessively low level of remuneration for the work involved". This could be "tantamount to exploiting constraints by offering people who had no other option, employment on terms that would not normally be acceptable".[38]

Concerning the second element, the absence of consent, the ILO considers that there is an overlap of the two criteria, in cases where the consent is given under the menace of penalty: "There is no 'voluntary offer' under threat".[39] Further, the CEACR considers that formal consent may be invalidated by indirect coercion or external constraint which might emanate either from the authorities through statutory instruments or from the employer.[40] However, neither the state nor the employer can be held accountable

[33] Dermine, forced labour, p. 138; Saul/Kinley/Mowbray, p. 322.
[34] Nowak, article 8 CCPR n 15; Schabas, p. 210 f.; Grabenwarter/Pabel, § 20 N 91.
[35] ILC, *The Cost of Coercion*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, 98th session 2009, Report 1(B), § 25; Dermine, forced labour, p. 107 s; Nowak, article 8 CCPR N 17; Ssenyonjo, n 8.53 also mentioning "work or service" as an element of the definition, this might be notable as the exaction of work or service has to be distinguished from cases in which an obligation to undergo education or training is in question, cf. Kern and Sottas, Freedom of Workers: The Abolition of forced or Compulsory Labour, in J.-C. Javillier (ed.), International Labour Standards. A Global Approach, ILO Publications 2002, p. 42.
[36] ILC, *The Cost of Coercion*, § 25.
[37] Saul/Kinley/Mowbray, p. 324, referring to: ILC, *Eradication of Forced Labour,* § 37.
[38] ILC, General Report, report III (IA), 1998, 86th session, § 106.
[39] ILC, *Eradication of Forced Labour*, § 38.
[40] ILC, *Eradication of Forced Labour.* p. 108 s.

for all external factors. As an example, the CEACR mentions the need to work in order to earn one's living.[41] This could only become relevant in conjunction with other factors for which either the authorities or the private employers are responsible. Such relevance was pointed out by the Report of the Committee of Experts in regard to Regulation of the Federal Republic of Germany, by which asylum seekers - normally prohibited from taking up employment for at least two years from the date of their asylum request – are asked to perform " 'socially useful work', which they have no choice but to carry out, if they are to maintain their welfare entitlements".[42]

Also, a position entered into voluntarily and under no menace penalty may result in forced labour, if there is not a possibility to revoke the consent and thereby terminate the work.[43]

There is disagreement on the question whether article 4 ECHR requires an additional element. In fact, the early case law of the European Commission on Human Rights suggests that the work or service had, in addition to it being involuntary, to be "unjust", "oppressive" and its performance needed to constitute "an avoidable hardship" or in other words be "needlessly distressing" or "somewhat harassing"[44]. In fact, this criterion was applied by the European Commission on Human Rights[45] but never by the ECtHR. The Court has adopted the following approach in the *Van der Mussele*[46] Case: first, a risk comparable to "the menace of penalty" needs to be established. In a second step "that relative weight is to be attached to the argument regarding (…) 'prior consent'". In this regard the Court will take into account all circumstances "in order to determine whether the service required of (the applicant) falls within the prohibition of compulsory labour". This could especially then be the case, if the service imposed a burden, which was excessive or disproportionate in comparison to the advantages attached to the future exercise of the profession. Also in the more recent case of *Chitos v. Greece* the ECtHR examined the question whether a disproportionate burden was put on the applicant.[47] However, these and similar cases, where the "disproportionate burden" element was brought up, concerned cases where a certain profession or engagement had been taken up voluntarily.[48] The test of proportionality served thereby as a help by establishing whether a certain duty attached to the chosen profession was still covered by the persons consent than as a independent element in the assessment.[49]

[41] ILC, *Eradication of Forced Labour,* § 39 and footnote 64.
[42] ILC, CEACR Observation, Federal Republic of Germany, Convention No 29, 70th session 1984.
[43] ILC, CEACR, *Eradication of Forced Labour,* § 40.
[44] cf. European Commission on Human Rights, I. v. Norway, no. 1468/62, 17.12.1963; Grabenwarter/Pabel, § 20 N 91; Grabenwarter, article 4 ECHR n 4; Ssenynjo, n 8.55.
[45] European Commission on Human Right, i. V. Norway, no. 1468/62, 17.12.1963.
[46] ECtHR *Van der Mussele v. Belgium,* no. 8919/80, 23.11.1983.

[48] The same can be hold in regard to the following cases: ECtHR, *Graziani-Weiss v. Austria,* no. 31950/06, 18.10.2011, where consideration was also given to the question of whether the work was paid; and ECtHR, *Steindel v. Germany,* no. 29878/07, 14.09.2010.
[49] for crititcism of this approach: Dermine, forced labour, p. 122.

To summarise, forced labour implies a relationship based on coercion and absence of freedom between the employer and the worker. With regard to the conditions of employment it has, however, been admitted that harsh conditions of work may result in forced labour.[50]

A further conceptual difference between the ILO conception of forced and compulsory labour on the one side and the ECHR and ICCPR[51] on the other side can be noted when it comes to the interpretation of *exceptions*. Under the ILO Convention No. 29, the forms of work listed as exceptions in article 2 (2) fall under the general definition of forced labour but are, nevertheless, expressively excluded from the scope of the convention.[52] In the view of the ECtHR, on the other hand, article 4 (3) ECHR (exceptions) and article 4 (2) ECHR (definition) form a whole and the exceptions indicate what must not be regarded as "forced or compulsory" labour. The exceptions take by this approach an important role in defining the notion of "forced or compulsory" labour.[53] Despite these differences, under either instrument, the question of proportionality emerges, when work is imposed by a State on individuals under general interest considerations.[54] Under the ILO Convention 29 the tripartite committee has used and interpretation by analogy in order to assess whether forms of work imposed under general interest considerations may equate with the exceptions in article 2 (2), and additionally, examining whether the charge imposed on the individual is proportionate.[55] Under article 4 ECHR, as pointed out above, a proportionality test is applied in order to assess the validity of consent.[56]

Other than that, the exceptions are in all three instruments very similarly phrased and encompass: work in the course of detention, military service, emergency service and normal civic obligations. The exceptions are, in the words of the ECtHR, "grounded on the governing ideas of the general interest, social solidarity and what is in the normal or ordinary course of affairs[57]".

2. Case law and observations of treaty bodies

There is a limited number of observations or case law of international or national bodies dealing directly or indirectly with welfare-to-work measures that are worth noting and they might challenge the view of

[50] Dermine, forced labour, p. 109
[51] In fact, only little jurisprudence exists on article 8 ICCPR and little is known on the Human Rights Committees conception of these exceptions, cf.: Joseph/Castan, n 10.04, 10.25, also the opinion given by the HRC in *Faure v. Australia* (see **Fehler! Verweisquelle konnte nicht gefunden werden.** below) is not conclusive on this matter but it seem that the HRC adopts rather the view of the ECtHR; similar: Dermine, forced labour, p. 115.
[52] ILC, CEACR, *Eradication of Forced Labour,* § 42; Dermine, forced labour, p. 124.
[53] Grabenwarter, article 4 n 7; Schabas, p. 212; Grabenwarter/Pabel, § 20 n 93; see also for an application in the case law: ECtHR, *Karlheinz Schmidt v, Germany,* no. 13580/88, 18.07.1994, § 22.
[54] Dermine, forced labour, p. 123.
[55] Dermine, forced labour, p. 112.
[56] Dermine, forced labour, p. 122 at the same time criticizing the approach taken by the court and suggesting (p. 137) that the test of proportionality should serve as an autonomous criterion in cases where work is imposed in the name of a general interest objective.
[57] ECtHR, *Van der Mussele v. Belgium,* no. 8919/80, 23.11.1983.

Paz-Fuchs & Eleveld that the broad an ideological, human rights-based challenge of aligning workfare with forced labour "never had a chance to succeed".[58]

I have analysed the following material[59]

- Human Rights Committee: Faure v. Australia[60] (concerned a programme where beneficiaries of non-contributory unemployment benefits were asked to undertake work placements, under the threat of loss of benefits)
- The Chilean MEP and POJH program and the Chilean Unemployment benefit system[61] and subsequent ILO observations[62] (concerned a program where unemployed workers had to work for less than half the minimum wage)
- Denmark's redefinition of suitable and reasonable work (ILO)[63]
- European Commission on Human Rights *X. v. The Netherlands*[64] (specialised construction worker saw his benefits suspended as he refused an employment in municipal plantation service)
- European Commission on Human Rights, *Talmon v. The Netherlands*[65] (an independent scientist refused to look for other employment opportunities – he alleged having serious conscientious objections)
- ECtHR, *Schuitemaker v. The Netherlands*[66] (social welfare beneficiaries were only allowed to reject employment, which is not generally socially accepted or employment against which they had conscientious objection)

[58] Paz-Fuchs/Eleveld, p. 31.
[59] Most of which has been thoroghly discussed by Dermine Elise in her two contributions on forced labour and the right to freely chosen work.
[60] HRC, *Faure v. Australia,* communication No. 1036/2001, 23 November 2005 (CCPR/C/85/D/1036/2001).
[61] 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;
[62] ILC, General Report, report III (IA), 1998, ILC, 86th session, § 106
ILC, CEACR, Eradication of Forced Labour, General Survey on ILO Convention No. 29 and 105, Report III (1b), 96th session Geneva 2007, § 129
[63] ILC, CEACR, Direct Request, Denmark, Convention No. 102, 93rd session 2004; ILC, CEACR, Direct Request, Denmark, Convention No. 29, 97th session 2007.
[64] European Commission on Human Rights, *X. v. The Netherlands,* no 7602/76, 13.12.1976.
[65] ILC, CEACR, Direct Request, Denmark, Convention No. 29, 97th session 2007; The same legislation were also dealt with by the European Commission on Social Rights supervising the application of the European Social Charter, cf. Dermine, freely chosen Work, p. 158 ss.
[66] ECtHR, *Schuitemaker v. The Netherlands,* no. 15906/08, 4.5.2010.

The analysis of these materials shows that up until now, a welfare-to-work policy has never been declared as forced labour. However, it can also not be agreed with Paz-Fuchs & Eleveld, who state that the claim never had a chance to succeed.[67]

In fact, it can be interfered form the cases studied, that in order to qualify as "reasonable work" and not to amount to forced labour, welfare-to-work measures have to meet certain criteria:

- A punitive character of the work should be excluded[68]
- The measure has to be provided for by law and pursue a legitimate purpose[69]
- The work should not be degrading or dehumanizing[70]
- Conscientious objections have to be considered[71]
- The work should be generally socially accepted[72]
- Excessively low wages, as well as the lack of protection of social security legislation and the lack of protection of labour legislations might give raise to concerns.[73]

Interestingly, even though forced labour is mainly concerned with the voluntariness of the work performed, certain criteria – like that the work should not be degrading or dehumanizing or that low wages and lack of social security protection might be problematic – tend towards the conditions of work.

In comparison, the position of the ILO on work requirements under contributory systems, is straightforward:

- the requirement to take up work that is not suitable employment according to the ILO Convention 102 might constitute a form of compulsory labour.[74]
- a requirement to perform work to receive (contributory) benefits constitutes compulsory labour.[75]

This also shows that apparently the concept of "suitable employment" for the unemployed is not the same as the one of "reasonable work" for social assistance beneficiaries. Also the ECtHR has accepted another

[67] Paz-Fuchs/Eleveld, p. 31.
[68] Cf. HRC, *Faure v. Australia,* communication No. 1036/2001, 23 November 2005 (CCRP/C/85/D/1036/2001), §4.7.
[69] Cf. *idem.*
[70] Cf. *idem.*
[71] Cf. ECtHR, *Schuitemaker v. The Netherlands,* no. 15906/08, 4.5.2010
[72] Cf. *idem.*
[73] 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), § 62.
[74] ILC, CEACR, Direct Request, Denmark, Convention No. 29, 97th session 2007.
[75] ILC, General Report, report III (IA), 86th session, 106.

category of "generally accepted work" instead of "suitable employment"[76] – another notion that lacks contours but that should not be defined without taking into account social and economic rights.

Relatively little can be said about whether welfare-to-work measures qualify as "normal civic duties" and thereby fall under the exception provided for in all the instruments studied.[77] The *Faure v. Australia* case was only assessed under the angel of whether the "work fo the dole" program did constitute a normal civic obligation – and even in this case, the HRC stated that the work had to meet certain criteria in order to fall under the exception. Moreover, there is a proportionality test in order to assess whether a certain work obligation falls under and the exception. The obligation has in virtue of this test to serve a legitimate general interest and respond to exigencies of social solidarity.[78]

3. Shortcomings of the Swiss Case Law?

Even if the international bodies – just like the Swiss Federal Supreme Court – do not rely on the concept of suitable employment, it seems that the Swiss Court is (too) little concerned about a possible violation of the prohibition of forced labour. Its wide definition of reasonable work and the assumption that programs are *per se* reasonable are problematic. Also the Swiss Federal Supreme Court does not examine the concrete realities, when the especially the CEACR materials give account of detailed investigations in the programs, their effectiveness etc.

First, the extremely low, respectively the absence of, remuneration in certain programs, the absence of employment contracts and social security could be problematic and if well presented amount to a violation of the prohibition of forced labour.

Second, by suggesting combining the order to participate in a programme with the treat of criminal penalty, the Court proposes an approach that would be in breach of the prohibition of forced labour. A criminal sanction would make the debate on whether the loss of non-contributory benefits is a "penalty" under Article 8 ICCPR, article 4 ECHR resp. ILO Convention No. 29 obsolete. The threat of criminal sanction would without question fulfil this criterion. Given the uncertainty whether welfare-to-work measures fall under the exception of "normal civic duties" at all and that if so, they would need to pass a proportionality test, it is clear that such a proposition is problematic. It has to be – in my view – considered an undue burden put on the social assistance beneficiary, if he risks imprisonment[79] in addition to losing (most of) their benefits in case of a refusal of a welfare-to-work placement.

[76] ECtHR, *Schuitemaker v. The Netherlands,* no. 15906/08, 4.5.2010.
[77] cf. Dermine, forced labour, p. 135.
[78] cf. Dermine, forced labour, p. 137.
[79] Article 292 of the swiss criminal code (SR 311.0) which would be applied provides for fines. However, in view of the financial situation of the persons concerned, it is to assume that fines would remain unpaid. In this case a custodial sentence could be ordered.

B. The right to freely chosen work

As seen above, the prohibition of forced labour can give some contours to the notion of "reasonable work" in welfare-to-work programs. However, its impact seems to be limited. So we turn to the right to freely chosen work and will elaborate whether it ads additional restraints on the definition of the notion suitable employment in welfare-to-work programs. Even authors being more critical on the impact of the prohibition of forced labour on welfare-to-work measures have pointed to the right to freely chosen work as a path worth pursuing when contesting welfare-to-work measures.[80]

Again, I will first present the relevant sources and then turn to a summary of the relevant observations and case law of international bodies.

1. Sources and definitions

It has already been noted that the notion of suitable employment can also be linked to the right to freely chosen work – a right contained in several instruments of international law. In the ICESCR it is found in article 6 constituting the negative side – or the liberty component[81] – of the right to work.[82] The right to freely chosen or accepted work, as guaranteed by the ICESCR, underlines the strong link between the respect for the personal choice of work to the individual dignity and the importance of work for social and economic inclusion and the personal development.[83] The ICESR right to freely chosen employment is by scholars recognised as being directly applicable and justiciable.[84]

The right to freely chosen work – as a part of the right to work – includes the right to choose a trade or profession, as well as a right to accept or refuse an offer of employment.[85]

Also, the ILO recognises by its Convention No. 122 the need to establish an employment policy that is "designed to promote full, productive and freely chosen employment" (article 1 (1)). The Convention recognises, that the positive right to work and the right to freely chosen work are two sides of the same right and that the realisation of the right to work can not be pursued to the detriment of the right to freely chosen work. In its general comment on the right to work the Committee on Economic, Social and Cultural Rights also refers to the ILO Convention 122 and mentions that the Convention links the obligation of State parties to create the conditions for full employment with the obligation to ensure the absence of forced labour.[86]

[80] Paz-Fuchs/Eleveld, workfare revisited, p. 38.
[81] Mundlak, right to work, p. 192 s.
[82] Dermine, freely chosen work, p. 141.
[83] Economic and Social Council, The Right to work, General comment No. 18, E/C.12/GC/18, 6 February 2006, n 4.
[84] Dermine, freely chosen work, p. 143; Pärli et. al. n 337.
[85] Saul/Kinley/Mowbray, p. 282.
[86] Economic and Social Council, The Right to work, General comment No. 18, E/C.12/GC/18, 6 February 2006, n 4.

Generally, it can be hold, that the right to freely chosen work offers a wider protection of the freedom of work than the prohibition of forced labour.[87] But also here, it is rather the relationship between the employer and the worker that is concerned than the conditions of employment.

2. Case law and observations of treaty bodies

Under the ILO Convention No. 122 the CEACR did issue some opinions that are concerned with activation policies for unemployment benefits or social assistance beneficiaries and which allow to draw conclusions on what is deemed to be suitable employment in such schemes.

I have analysed the following material:

- The Chilean MEP and POJH program and the Chilean Unemployment benefit system and subsequent ILO observations[88]
- A series of CEACR observations on the UK "Mandatory Work Activity Program" [89] (work placements for people who are unemployed since three years or more, aiming at serving the community, refusal to participate leads to the loss of benefits)

It can be said that work schemes that raise concerns under the forced labour prohibition are likely to do so under the right to freely chosen work.

In addition to what has been held above, the observations on the "Mandatory Work Activity Program" suggest that welfare-to-work measures are only to be considered as "reasonable work" and can be demanded from welfare beneficiaries, if the program offers a perspective to be reintegrated in freely chosen occupation in the first labour market. The legitimate purpose, that a measure has to pursue, can thereby not only be the conditionality of welfare benefits. There needs also to be a perspective to the reintegration.

Regarding the Chilean programs, the Committee came to the conclusion that the scheme, in which wages below half the minimum wage, without social security, paid leave or an employment contract, could not be considered as productive and freely chosen employment within the meaning of the convention.[90]

Also, it has been acknowledged that, in order to protect the right to freely chosen work, the right to organise was essential.[91] "Reasonable work" must therefore allow for workers organisation.

[87] Dermine, freely chosen work, p. 149.
[88] Cf. Footnote 61; 62.
[89] LC, 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/Eleveld, workfare revisited, p. 35; Dermine, freely chosen work, p. 156.
[90] ILC, CEACR, Observation, Chile, Convention No. 122, Chile, 67th session, 1981.

3. Shortcomings of the Swiss Case Law?

None of the criteria defining "reasonable work" according to the Case law of the Swiss Federal Supreme Court make reference to the chances of reintegration in the first labour market. On the contrary, the Federal Supreme Court stated in 2004 that welfare-to-work program were *per se* for the benefit of the persons involved. The Court never took into account the (statistical) effectiveness of a program by assessing whether it can be reasonably expected from a person to participate in a program. Similarly, the definition retained by the Court does not give any regard to the length of the placement. It rather seems, that indefinite placements are just as well reasonable as placements for a limited time.

C. Right to just and favourable working conditions

What has been considered so far concerns mainly the question whether a work relationship has been entered upon freely, without coercion. Interestingly, it could be observed that a sort of minimal working conditions can be derived from these rights.[92] In the next step it will however be tried to establish the potential of the right to just and favourable working conditions according to article 7 ICESCR for influencing welfare-to-work practices.

1. Sources and definitions

Article 7 ICESCR stipulates a right to just and favourable working conditions. The right is recognised as having a strong link to the right to work[93] and representing the individual dimension of the right to work.[94] The General Comment describes the right to just and favourable working conditions as the corollary of the right to work as freely chosen and accepted and also establishes a link to trade union rights which are considered as crucial means of introducing, maintaining and defending just and favourable conditions of work. The Economic and social council underlines the importance of the rights contained in article 7 ICESCR as a prerequisite for the enjoyment of other Covenant right as for example the right to the highest attainable standard of physical and mental health.[95]

In some regards, the text of article 7 is intentionally general, as it was considered best to leave the elaboration of detailed rules to specialized bodies – especially the ILO. So Article 7 ICESCR is also formulated in a way to allow it to serve as a link to the detailed labour instruments of the ILO.[96]

[91] 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), § 90.
[92] Cf. Dermine, freely chosen work, p. 147.
[93] Economic and Social Council, The Right to work, General comment No. 18, E/C.12/GC/18, 6 February 2006, N 8
[94] Ssenyonjo, n 8.01.
[95] Economic and Social Council, The right to just and favourable conditions of work, General comment No. 23, E/C.12/GC/23, 27 April 2016, n 1; similar: Saul/Kinley/Mowbray, p. 393.
[96] Saul/Kinley/Mowbray, p. 395.

The right to just and favourable conditions of work is, according to the General Comment on article 7, a right for everyone without any distinction and applies to all workers in all settings, also unpaid workers.[97]

The provision of "fair wages" according to article 7 (a) (i) ICESCR implies a notion of justice, considering that workers should be rewarded for the fair socio-economic value of their work performed,[98] and the responsibilities of the worker, the level of skill and education required to perform the work as well as the impact on the health and safety of the worker and the impact on the worker's family life.[99] Also, workers should not have to pay back wages for work already performed.[100]

Equal remuneration for work of equal value is a further concern of article 7 ICESCR. Even though the article was certainly conceived as a measure against discrimination on grounds of gender, it is recognised that equality applies to all workers without any distinction based on race, ethnicity, nationality, migration or health status, disability, age, sexual orientation, gender identity or any other ground.[101] Also the Committee mentions in the General Comment, that where the State has direct influence over rates of remuneration, it should be rapidly ensured that remuneration for work of equal value in the civil service as well as for work under public contract or in enterprises fully or partially owned by the state, is equal.[102]

Remuneration, including wages and other benefits, has, according to article 7 (a) (ii) to provide the workers with a decent living for themselves and their families in accordance with the provisions of the ICESCR. Remuneration does not only include a wage but also other direct or indirect allowances in cash or in kind paid by the employer to the employee, such as contributions to health insurance, housing and food allowances.[103] The amount of the remuneration has therefore to be determined by reference to outside factors like the cost of living and economic and social conditions and should be sufficient to enable the enjoyment of the rights to social security, health care, education, also granted by the Covenant.[104] In order for the remuneration to be fair it has to grant food, water and sanitation, housing, clothing and additional expenses.[105] The CESCR has rather focused on this aspect – do wages provide for a decent living? – of article 7 ICESCR than whether wages were fair and has criticized wages as too low if they do not provide

[97] Economic and Social Council, The right to just and favourable conditions of work, General comment No. 23, E/C.12/GC/23, 27 April 2016, n 5.
[98] Saul/Kinley/Mowbray, p. 393.
[99] Economic and Social Council, The right to just and favourable conditions of work, General comment No. 23, E/C.12/GC/23, 27 April 2016, n 10.
[100] *Idem.*
[101] Economic and Social Council, The right to just and favourable conditions of work, General comment No. 23, E/C.12/GC/23, 27 April 2016, n 11; Saul/Kinley/Mowbray, p. 427.
[102] Economic and Social Council, The right to just and favourable conditions of work, General comment No. 23, E/C.12/GC/23, 27 April 2016, n 14.
[103] Economic and Social Council, The right to just and favourable conditions of work, General comment No. 23, E/C.12/GC/23, 27 April 2016, n 7.
[104] Economic and Social Council, The right to just and favourable conditions of work, General comment No. 23, E/C.12/GC/23, 27 April 2016, n 18.
[105] *Idem.*

for a living above the poverty line[106], wages that do not allow a modest standard of living[107] or a standard of living in dignity[108]. The setting of a minimum wage is considered as a mean of ensuring remuneration for a decent living,[109] and a minimum wage should apply systematically, protecting as many people as possible, including workers in vulnerable situations.[110]

Besides remuneration article 7 ICESCR is also concerned with safe and healthy working conditions (b). Especially regarding this provisions numerous ILO Conventions take up the role of articulating in detail specific states obligations.[111] The Committee on Economic and Social Rights is, however, underscoring the importance of this provision by stating that it is closely related to other Covenant rights such as the right to the highest attainable level of physical and mental health.[112] Further, it might also be considered as an aspect of the right to personal integrity.[113]

2. Potential and shortcomings of the Swiss Case Law?

The research conducted so far has not shown any observations or cases in which the treaty bodies were directly confronted with the working conditions in welfare-to-work measures under article 7 ICESCR. Also the definition of "reasonable work" by the Federal Supreme Court does not retain any of the criteria set out above, expect for the consideration that has to be given to the health of the social assistance beneficiary. However, it is not clear whether the Supreme Court thereby states that all rules on health protection of workers have to be respected in order for work to be reasonable.

Conflicts between the Right to just and favourable working conditions and Switzerland's current practice can further be detected in the following areas:

- it might amount to unequal treatment based on social status when welfare beneficiaries are asked to perform public service work (e.g. park maintenance). This especially in cases where they work together with regular employees, which benefit from a regular public work contract. In these

[106] Saul/Kinley/Mowbary, p. 407 referring to CESCR Concluding Observations: Mexico, E/C.12/1993/16 (5 January 1994) n 6; Ukraine E/C.12/1995/15 (28 december 1995) n 20
[107] Saul/Kinley/Mowbray, p. 407 referring to CESCR, Concluding Observations: Kenya, E/C.12/1993/6 (3 June 1993), n12.
[108] Saul/Kinley/Mowbray, p. 407 referring to CESCR, Concluding Observations, Bolivia, E/C.12/1/Add.60 (21 May 2001, n 17.
[109] Economic and Social Council, The right to just and favourable conditions of work, General comment No. 23, E/C.12/GC/23, 27 April 2016, n 19.
[110] Economic and Social Council, The right to just and favourable conditions of work, General comment No. 23, E/C.12/GC/23, 27 April 2016, n 23.
[111] Saul/Kinley/Mowbray, p. 444; Ssenyonjo, n 8.01, providing an extensive list of technical ILO agreements; also the General comment No 23, n 25 s. is referring to the ILO Conventions.
[112] Economic and Social Council, The right to just and favourable conditions of work, General comment No. 23, E/C.12/GC/23, 27 April 2016, n 25.
[113] Saul/Kinley/Mowbray, p. 443.

circumstances, the "benefits" that welfare beneficiaries receive for their work can hardly be regarded as fair in comparison to the economic and social value.

- Excluding welfare-to-work participants from minimum wage protection is problematic. In Switzerland, no legal minimum wage applies, but there are numerous collective agreements offering minimum wage. Some agreements exclude welfare-to-work participants from the minimum wage protection but were nevertheless declared binding for the whole industry by the federal government.[114] This might contradict the obligation of the state to aim at protecting workers in vulnerable situations. Also the Economic and Social Council states clearly that "State parties should adopt legislation and other measures to promote equal remuneration for work of equal value" and that also remuneration set through collective agreements should be aimed at ensuring equality for work of equal value.[115]
- If welfare-to-work participant do not benefit from *all* health and safety provisions, this would be a circumvention of these rules.

Further, it should be clarified whether welfare benefits can be considered as a part of the "fair wage" and "equal remuneration" according to article 7 or not.[116] This should in my view be answered in the negative, as it seems hardly compatible with considerations of fairness, dignity and justice to let employers pay wages too low to secure a decent standard of living and to assume that the state will secure a decent standard of living with benefits. Social assistance benefits should also in this regard be treated as the last resort and not as an inherent part of a "fair wage" or "equal remuneration", even more so if the State is part of the work-relationship. Also it seems that the Economic and Social Council only considers allowances from the employer to the employee as remuneration.[117] Otherwise, the right to work – of which the right to just and favourable working conditions is one aspect – will fall short of fulfilling its role as a "right to social inclusion".[118]

[114] As an example the collective bargaining agreement for the gastronomy does set a minimum wage also for workers without professional formation but excludes workers with reduced performance coming from state subsidized reintegration programs.
[115] Economic and Social Council, The right to just and favourable conditions of work, General comment No. 23, E/C.12/GC/23, 27 April 2016,
[116] Cf. Craven, The international covenant on economic, social, and cultural rights : a perspective on its development, Oxford 1995, p. 230.
[117] Economic and Social Council, The right to just and favourable conditions of work, General comment No. 23, E/C.12/GC/23, 27 April 2016, n 7.
[118] Ssenyonjo, n 8.09.

D. The ILO "Decent Work" agenda

It has been recognized that if the right to work constitutes also of a duty to work, such a duty is limited to decent work and that in general the right to work must be tied to dignified work.[119] The notion of decent work has been specified and elaborated upon by the ILO in the decent work agenda. But also the Committee on Social, Economic and Cultural Rights mentions that "work as specified in article 6 of the Covenant must be *decent work"*.[120] Therefore, it is interesting to investigate what the decent work agenda might add to the problem discussed.

1. Sources and definitions

The ILO developed the notion "decent work" in 1999; it is defined as productive work in which rights are protected, which generates an adequate income, with adequate social protection. The goal of the decent-work agenda is the promotion of "opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity".[121] The program is aiming at a universal coverage of all workers (self-employed, irregular, informal sector etc.). However, institutional and policy framework for achieving these objectives must depend on the specific social and economic circumstances, history and tradition.[122]

The question whether the decent work agenda also relates to welfare-to-work programs and if they are compatible, has – as far as the research conducted shows– not yet been the subject of an extensive study but has been raised.[123] This seems to be a relevant question; especially as welfare-to-work programs have to be considered as a part of an employment policy, which should take into account the decent work indicators.[124] For example the analysis on the implementation of the decent work agenda in Austria mentions the redefinition of "reasonableness" in the unemployment insurance as a factor in the assessment.[125] Also, the ILO report on the follow up on the Fundamental principles and rights at work considers, that minimal standards should also apply to prison workers and that "decent work" could be a starting point in doing so.[126] Even if the concepts could not be identical, a minimum standard regarding

[119] Mundlak, right to work 2007, p. 193; Mantouvalou Virginia, The Right to non-Exploitative Work, in: Mantouvalou Virginia (ed.), The right to work: legal and philosophical perspectives, Oxford/Portland 2015, p. 39 s.
[120] Economic and Social Council, The Right to work, General comment No. 18, E/C.12/GC/18, 6 February 2006, n 7. However, it seems to be a recent development that also the UN Human Rights treaty bodies recognises the effort of the ILO to promote decent work as human rights related, cf. Senghaas-Knobloch, decent work, p. 23
[121] ILC, Decent Work, Report of the Director-General, 87th session, Geneva 1999. ILO, Non-standard Employment around the world, Geneva 2016, p. 247.
[122] Ghai, universality, p. 4.
[123] Gurny, decent work, p. 136.
[124] ILC, Decent Work, Report of the Director-General, 87th session, Geneva 1999.
[125] ILO, Decent Work Country Profile Austria, Geneva 2009, p. 4.
[126] ILC, A global alliance against forced labour, 93rd session 2005, Report I (B), n. 122.

wage, health and security and education about worker's rights should be applied.[127] An analogous argument should also apply to welfare-to-work participants, especially as the formulation of the agenda lets think that it is not confined to those in standard employment.[128] In view of this universal aspiration of the program and the fact that the employment policy and thereby also activation policies for social assistance beneficiaries are seen as a part of a decent work framework, it is to assume, that welfare-to-work measures participants are also part of the concerns of this agenda.

The "Decent Work" programme of the ILO defines four dimensions of decent work[129]:

1. *Fundamental Principles and Rights at Work*, consisting of four core labour standards, freedom of association, freedom from forced or compulsory labour, freedom from child labour and non-discrimination in employment.[130] The declaration of Fundamental Principles and Rights at Work is non-binding but reflects a broad consensus on minimum labour rights[131], and it can be seen as the starting point of the Decent Work initiative.[132]
2. *Employment creation and conditions of work*, which has been described as the equivalent of the right to employment or the right to work,[133] as considered above.
3. *Social security*, concerned with the promotion of the right to social security and the right to safe and healthy working conditions.[134] The promotion of social security concerns especially people who are not in a formal employment relationship, and it in my view crucial to extend this to workfare-participants. Social security aspects have not been considered above, but are also contained in the ICESCR (Art. 9 ICESCR especially).
4. *Social dialogue and tripartism*, aiming at ensuring workers' participation in the decision making process.[135] Traditionally social dialogue requires the participation of employer and employee representatives as early as possible in decision-making process.[136]

[127] *Idem*.
[128] Alston, core labour standards, p. 488.
[129] ILO, Decent work indicators : guidelines for producers and users of statistical and legal framework indicators: ILO manual: second version, Geneva 2013, p. 12.
[130] ILC, Declaration of fundamental rights and principles at work, 86th session, Geneva, 18 June 1998, paragraph 2, p. 5; Alston, core labor standards, p. 458; Ssenyonjo, n 8.01; cf. for the vivid debate in between scholars on the adoption of the fundamental principles and rights at work: Alston, core labour standards, p. 458; Standing, International Labour Organisation, p. 313; Langille, true story, p. 436; Maupain Francis, Revitalization Not Retreat: The Real Potential oft he 1998 ILO Declartion fort he Universal Protection of Workers' Rights", *European Journal of International Law,* 16 (2005) 3*,* 439-465 and again answered by Alston Philip, Facing Up to the Complexities of the ILO's Core Labour Standards Agenda, *European Journal of International Law,* 16 (2005) 3, 467-480. A similar argument to the one of Langille is also made by Kaufmann Christine, Globalisation, p. 71.
[131] Kaufmann, Globalisation, p. 72.
[132] Kaufmann, Globalisation, p. 77.
[133] Alston, core labour standards, p. 488.
[134] Alston, core labour standards, p. 488.
[135] Alston, core labour standards, p. 488.
[136] Senghaas-Knobloch, decent work, p. 24.

2. Potential of the decent work framework?

The decent work program does not confer individual human rights to workers, and Saul, Kinley and Mowbray mention, that decent work does not need to be interesting, stimulating or enjoyable.[137]

Rather, the agenda focuses on enshrining already existing ILO goals and rights in labour and human rights policies of the ILO member states. This, and the fact that the concept is closely interconnected with all the aspects of the right to work and that it depends mainly on already existing frameworks, it is at this point questionable what the value added of this framework might be for welfare-to-work participants. One possible answer to this question is, that exactly its vagueness could allow for a more philosophical discussion on what is actually decent work and which role welfare-to-work measures should fulfil in achieving decent work for all. A purely rights based approach, might exactly not leave room for such considerations, as states might often take the position that the economic and social rights are not directly applicable and thereby shutting the door to any discussion.

Furthermore, it seems evident that welfare-to-work measures do raise certain questions on their compatibility with the decent work agenda. As discussed above – in its most extreme forms it might amount to forced or compulsory work. In less extreme cases there are still questions on whether it can be considered as freely chosen and productive work that provides adequate earnings. Such work should not be qualified as reasonable.

V. Conclusion

The analysis of the case law of the Swiss Federal Supreme Court on welfare-to-work measures showed, that the Court does not apply the criteria of "suitable employment" but rather a different concept, called in the present paper "reasonable work". Four criteria can be extracted from the case law, that makes work unreasonable:

- work with a degrading character
- work that cannot be expected due to health reasons from the social assistance beneficiary
- overstraining work
- family responsibilities that are not compatible with the working hours.

The analysis conducted in Chapter IV has shown that it is accepted by international bodies overseeing the application of the various aspects of the right to work to apply different criteria when defining the notion of "reasonable work" in welfare-to-work programs than when defining "suitable employment" in the unemployment insurance. However, it is also clear that welfare-to-work measures do not take place in a

[137] p. 281.

space cut off from the influence of economic and social right and labour rights. Therefore, certain criteria defining the notion "reasonable work" could still be extracted from the analysis of the prohibition of forced labour and the right to freely chosen work. These criteria are – among others:

- measure has to be provided for by law and serve a legitimate purpose, namely aim to the reintegration in a freely chosen occupation
- work should not be degrading or dehumanizing
- work should provide for a wage that is not excessively low, social security and protection from labour legislation
- health and safety provisions should be respected

Comparing these international criteria with the elements that the Federal Supreme Court set for work to be unreasonable, I found that the Federal Supreme Court disinterest, which the Court demonstrated regarding the concrete working conditions, the personal situation of the social assistance beneficiaries and whether the programs serve a legitimate purpose aiming at the social assistance beneficiaries' reintegration in the first labour market is problematic. Also, the Federal Supreme Court shows no concern for the possible violation of fundamental rights in connection with the programs.

In conclusion, it can be said that the "guidelines" for defining "reasonable work" extracted from the Federal Supreme Courts case law do not respect many criteria set by the international case law. Switzerland does so far not comply with all its obligations in respect to welfare-to-work measures. Especially the suggestions to associate a threat of criminal penalty to the order to take part in a welfare-to-work measure shows how little consideration the Federal Supreme Court gives to the position of the individual concerned and therefore welfare-to-work programs are (at least) on the verge of violating fundamental rights. The federalized structure of social assistance legislation and complex rules on judicial review and the programmatic character of many important international rules for the present context does, however, not make it easy to propose an immediate remedy for this situation and also leaves by no mean the Federal Supreme Court as the "responsible" party for this unsatisfactory state.

It is also questionable whether it is – for international bodies and national courts – justified to renounce the concept of "suitable employment" and to rely on a concept offering less protection in view of the function of social assistance as the very last safety net in a welfare state. So far, I am not convinced that the fact that unemployment benefits are contribution based and social assistance benefits financed through taxes, does automatically justify the introduction of harsher preconditions for social assistance beneficiaries.[138] Maybe it is in this regard that the notion of "decent work" can fully develop its potential and encourage a debate about dignified work for everyone – also for welfare-to-work participants.

[138] cf. Gundt Nicola, EU activation policy, p. 148 fn. 4, defending this idea.

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Abbreviations

BGE	Bundesgerichtsentscheid (leading case of the Swiss Federal Supreme Court)
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CESCR	Committee on Social, Economic and Cultural Rights
Cst.	Federal Constitution of the Swiss Confederation of 18 April 1999, SR 101
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
HCR	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ILC	International Labour Conference
ILO	International Labour Organization
SKOS	Schweizerische Konferenz für Sozialhilfe (*Swiss Conference on Social assistance)*
UDHR	Universal Declaration of Human Rights
UNO	United Nations Organisation