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Suitable, reasonable or decent work in the activating welfare state?

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Content

- 1) Why is the notion important?
- 2) Reasonable work in the Swiss Federal Supreme Court Case Law on welfare-to-work measures
- 3) Reasonable work according to 4 aspects of the Right to Work
 - the prohibition of forced and compulsory labour
 - the right to freely chosen work
 - the right to just and favourable working conditions
 - the decent work agenda
- 4) Conclusion

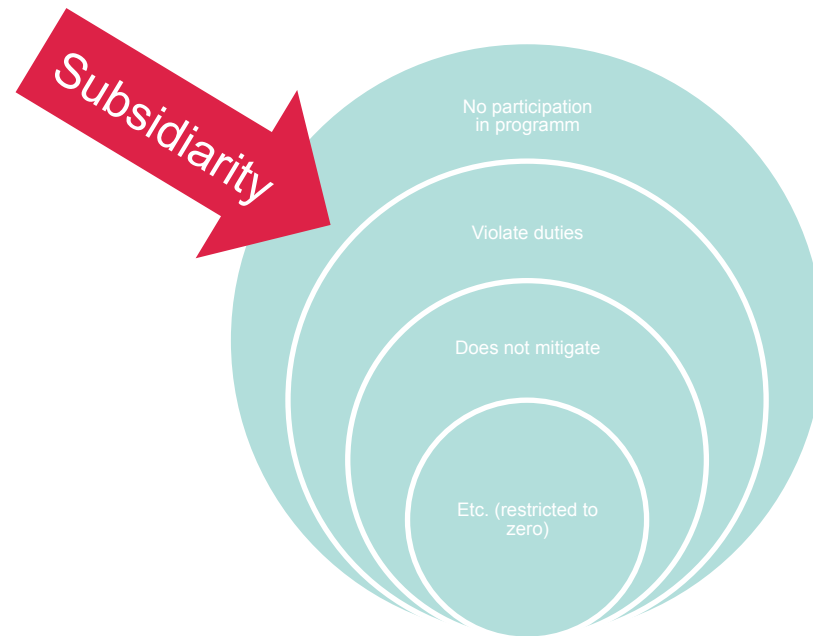
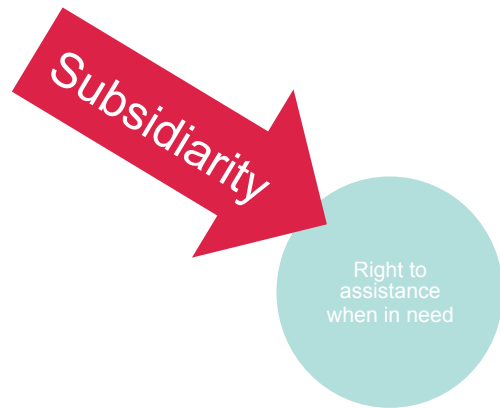
Constitutional and legislative framework

Right to assistance when in need (Art. 12 Cst.)

- Only the minimum indispensable for a decent existence
- Subsidiarity as a eligibility criterion: no benefits if i.e. reasonable work is rejected (one could care for themselves with reasonable work)
- Right cannot be restricted

Social Assistance (Art. 115 Cst. → Cantonal)

- Means for social (re-)integration
- Subsidiarity is an eligibility criterion: no benefits if reasonable work is rejected.
- Right can be restricted if behavioral duties (duty to mitigate damages) are violated
- Activation in guidelines at least since 2005. Reciprocity of benefits.



Relevance of the notion reasonable work

1) Whoever could take up reasonable work is considered not being in a situation of need and does not qualify for (any) welfare benefits. This also applies to welfare-to-work programs.

2) Whoever receives welfare benefits has duties to mitigate and collaborate:

- look for reasonable work
- accept reasonable work
- participate in reasonable welfare-to-work programs.

→ The refusal of reasonable work leads to sanctions (reduction in benefits) or the withdrawal of benefits (violation of principle of subsidiarity)

Case Law

BGE 139 I 218

Facts:

- Applicant - refused to accept a “trial position”, cleaning city parks, remuneration 2'600 CHF/month, position for 2 months.
- All his benefits were withdrawn

Arguments of the applicant:

- Arbitrary interpretation of the term “reasonable work”
- Violation of the right to assistance when in need (Art. 12 Cst.)

Case Law

Decision

- Program aims at establishing whether the applicant is ready and willing to work
- generally welfare-to-work measures are reasonable
- welfare-to-work takes priority over public benefits if a position is actually and legally available and can be taken up
- The court did not rely on the definition of “Suitable Employment” but on the cantonal definition of “reasonable work”. According to this: welfare-to-work measures are reasonable work unless health reasons or (child-) care tasks indicate otherwise. Such a definition is not arbitrary.
- Applicant was outside his initial profession for a longer time, so he had to accept work in other professions

Summary – Reasonable Work according to the Swiss Case law

Unreasonable:

- Degrading work
- Work is «unreasonable» when it cannot be expected due to health reasons
- Overstraining work (mainly understood in terms of intellectual capacity)
- family responsibilities can make work unreasonable

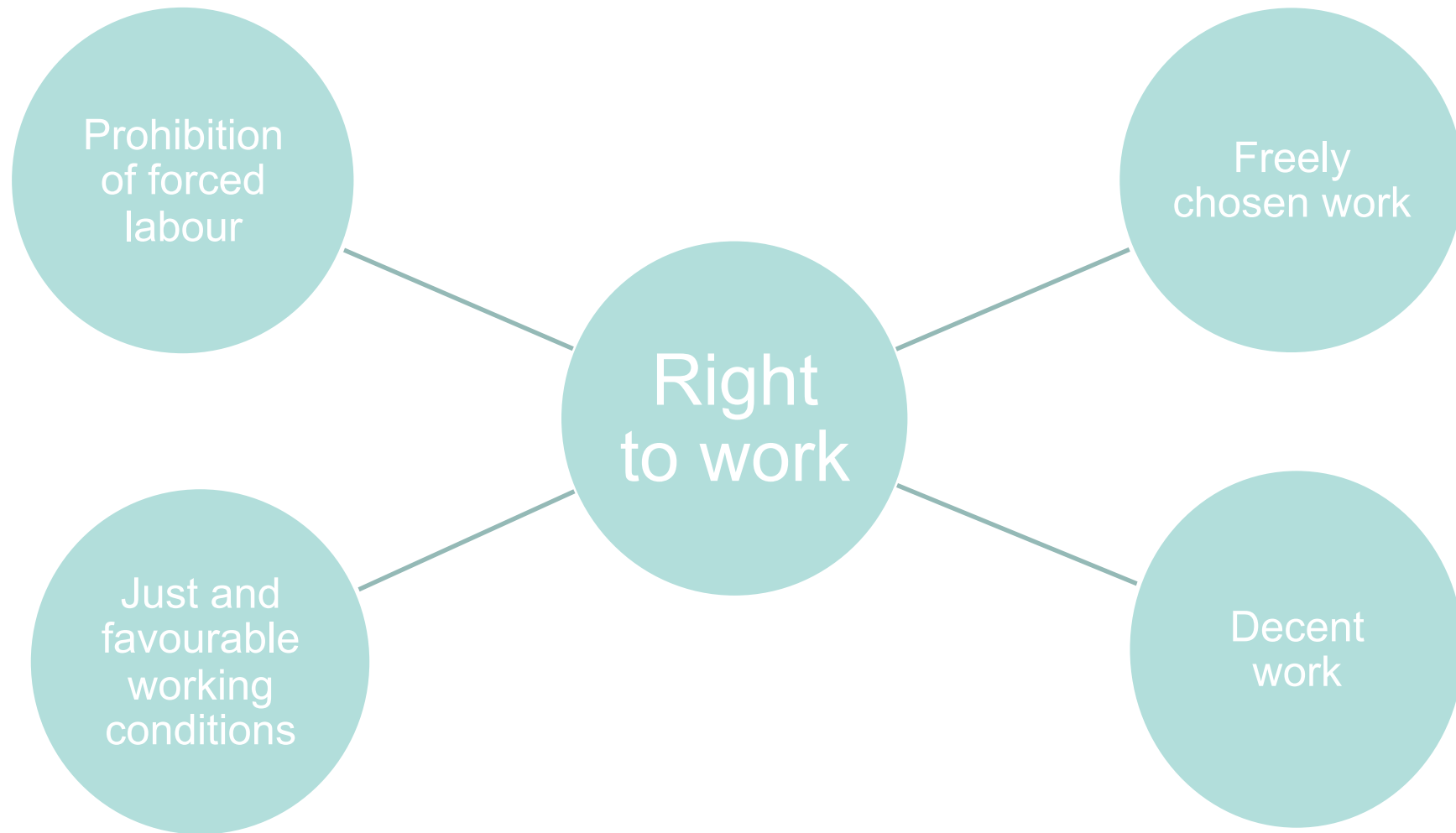
Reasonable:

- Unremunerated work is not unreasonable but if rejected, one is still eligible to assistance when in need.
- Work with (extremely) low remuneration
- Work, that does not fit the skillset
- Unknown tasks and salary
- Position outside former profession if out of work for a longer period
- Treat of a criminal penalty (suggested by the Court)

Not taken into account:

- working conditions
- Working hours
- Safety at the workplace
- Effectiveness of the programs / chances to be reintegrated (at least not seriously)

International aspects



Forced and Compulsory Labour

Elements extracted from observations / cases:

- Punitive character of the work should be excluded
- Measure has to be provided for by law and pursue a legitimate purpose
- Work should not be degrading or dehumanizing
- Conscientious objections have to be considered
- Work should be generally socially accepted
- Loss of non-contributory benefits might be a penalty if excessively low wage
- Problematic: excessively low wages, lack of social security protection, lack of labour legislation protection

Forced and Compulsory Labour

Shortcomings of Swiss Case Law

- Extremely low resp. no remuneration, absence of employment contracts and social security
- Suggested combination with threat of criminal penalty: highly problematic

Freely chosen work

Based on observation / cases :

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

Freely chosen work

Shortcomings

- Assumption that programs are per se reasonable work and to the benefit of the welfare recipient
- Length of the placement: seems that indefinite placements are as reasonable as placements limited in time (how long can the right to freely chosen employment be restricted?)

Just and Favourable working conditions

Potential shortcomings

- Unequal treatment based on social status?
- Health and safety provisions
- Equal remuneration and fair wage?
- Social welfare benefits as part of the remuneration/wage?

Decent Work

Elements

- Fundamental Principles and Rights at Work
- Employment creation and conditions of work
- Social security
- Social dialogue and tripartism

Potential

- Value added for welfare-to-work participants?
- Allowing a broader discussion on what role welfare-to-work measures have to fulfil in order to achieve decent work for all

Conclusion

- Not applying the concept of suitable employment to welfare-to-work measures is accepted by international bodies
- International law does provide guidelines for working conditions in welfare-to-work measures
- Federal Supreme Court does not respect many criteria set by international law
- Federal structure, complex rules on judicial review, programmatic character of many economic and social rights. Supreme Court is not (solely) „to blame“ for the current state. So which problems need to be addressed by whom?
- Is it justified to rely on a concept offering less protection given the function of social assistance?



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Thank you
for your attention.