



University  
of Basel

Faculty of Law



# Human Dignity through Workfare? A Swiss Perspective

Melanie Studer, MLaw, Lawyer, PhD candidate at the University of Basel, Chair for social private law

IVR Lucerne, July 2019

Special Workshop 26 – In search for a Social Minimum: Human Dignity, Poverty and Human Rights

# Content

- 1) Introduction
- 2) Right to assistance when in need and its link to human dignity
- 3) Right to assistance when in need and workfare
- 4) The right to human dignity and workfare
- 5) The right to an adequate standard of living and workfare
- 6) Conclusion

# Article 12 Cst.

## Right to assistance when in need

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.

n.B.: Not to confuse with social assistance benefits, those are more comprehensive and should provide means for social participation and reintegration (are subject to the same eligibility criteria and can be restricted)

To deliver social assistance and assistance when in need is a cantonal task – 26 different regimes. Article 12 Cst. has however the potential for unification and to stop a „race to the bottom“

# What I mean by Workfare

- Activation and paradigm of self-responsibility has penetrated the social welfare state and also the means tested benefits → welfare-to-work programmes
- The participation in certain welfare-to-work programmes is an eligibility criterion to the benefits according to article 12 Cst.
- These programmes are referred to as workfare-programmes.

# Right to assistance when in need – Basics

- In 1995 recognised as a **unwritten constitutional** right: the protection of elementary human need (nutrition, shelter, medical care) are a prerequisite for a dignified human existence.
- **Right to life, equality before the law (minimal material justice) and right to personal freedom ask for minimal state benefits covering basic need.**
- **Human dignity** guarantees every person what they can expect from society **for the sake of their humanity**, also if the situation is self-inflicted → individually justiciable right to state benefits
- What is indispensable for a decent human existence?
  - Food, shelter, clothing, basic medical aid.
  - CHF 21/day (CHF 8 for food, hygiene; CHF 13 for shelter)
- Limited scope → no restrictions possible, as this would also entail a restriction of human dignity and this is never permissible;
- Article 12 Cst. → **emphasis on subsidiarity**, the benefits are only available if despite all personal effort, someone is **unable to provide for themselves**.

# Eligibility to the benefits – workfare and article 12 Cst.

- „not being able to provide for themselves“ → principle of subsidiarity → eligibility criterion
- This comprises certain duties of the person in need: the duty to do everything which can be reasonably expected to end their situation of need.
- Accepting **reasonable work** is such a duty. A **workfare programme is reasonable work** in this sense and whoever does not participate in this programme loses the right to the benefits as they are no longer considered as being in a situation of need → „**eradicate**“ **the eligibility for the benefits**
- The workfare-programme has to be actually and concretely available; the programme offers remuneration reaching at least the amount of the assistance when in need (e.g. CHF 21/day).
- All or nothing provision, but whether it's all or nothing is determined by the behaviour of the person in need, despite that also self-inflicted need is covered

# Questions

- Is this conception of behavioural duties which are a prerequisite for dignity based benefits compatible with...
  - the right to Human Dignity according to Article 7 Cst.?
  - the right to an adequate standard of living according to the ICESCR?

# Human dignity (Art. 7 Cst.) and workfare

Article 7 Cst. : Human dignity must be respected and protected.

Human Dignity: Kantian Idea; protects the actual human being (Unfasslichkeitsformel/intangibility formula) and paradox of the notion.

Holds three core elements:

- prohibition of inhuman and degrading treatment
- Protection for the individual's autonomy (intangibility formula; minimal freedom of disposition)
- Satisfaction of essential needs (also positive state obligations are attached to 7 Cst.; similar to 3 ECHR)

Not only a **fundamental right** but also a **constitutional principle**, all state action has to be in the interest of dignity.



# Workfare as an eligibility criterion to 12 Cst. = compatible with 7 Cst.?

- Conception of human dignity as an intangible notion – protection of the actual human being and as a guarantee for minimal autonomy
- This prohibits the connection of article 12 Cst. with behavioural duties
- Otherwise: specific conception of a human being as a performing, economically independent and self-sufficient person.
- “trap” of the human dignity-paradox: the behavioural duties attached to dignity-based benefits goes hand in hand with a narrow conception of what a “dignified person” is → exclusion
- “personal responsibility” has become such a strong guiding principle of the welfare state that it is used to withdraw basic benefits and can thereby even become the mean to degrade and exclude someone

# Does dignity justify and even require workfare?

- Dignity as a constitutional principle protecting collective views
- Protecting human dignity as a public interest to justify restrictions of autonomy (i.e. prohibition of dwarf-throwing).
- Could workfare be in the best interest of those affected and the necessary to protect dignity in a collective sense? Is workfare a justifiable interference in the interest of enhancing dignity?
- protection is reversed: workfare is beneficial for the welfare beneficiaries (Federal Supreme Court), therefore a participation can be ordered. But: Danger of the „tyranny of dignity“ → collective views define what a dignified life is (protection of intrinsic self-worth?)
- In my view: such a reversal of the protection should not be accepted – bigger danger for dignity than the (self-chosen) possible social exclusion by the few who prefer not lead a „life in dignity as a working member of society“

# Workfare: duty of possibility?

- One reason for the stigmatisation of welfare beneficiaries: disturbed reciprocity relationship between welfare recipients and society („something for nothing“)
- Does dignity require that there are possibilities for welfare beneficiaries „to give something back“?
- Yes; they can contribute to social integration (possibly professional reintegration) and improve the feeling of self-respect (positive state obligation to fulfil human rights)
- However: sanctions attached to the „possibility“ to participate aims at influencing the behaviour of welfare recipients, undermining of the autonomy. Distrust in welfare recipients expressed by such a policy undermines its potential good faith.

# Adequate standard of living (ICESCR) and workfare

- Minimal core obligations: recognising the idea that basic entitlements are necessary prerequisite for living a life of value → similar function as article 12 Cst.
- Limiting the „minimal core“ is not compatible with the nature of the right to an adequate standard of living → similar as art. 12 Cst (no restrictions allowed)
- → What are the eligibility criteria to minimal core rights? And is workfare a permitted eligibility test?

# Workfare a permitted eligibility criterion to core contents of ICESCR?

- Qualifying conditions have to be reasonable, proportionate and transparent.
- → Workfare in the Swiss system is however based on a discretionary decision making process of the administration (risk of unequal treatment, could be shown by statistics)
- Access to minimum subsistence rights should always be granted – no indication that making access to these benefits conditional on the participation in a workfare programme would be compatible with the right to an adequate standard of living (also in connection with the European Social Charter)

# The role of art. 7 Cst. and Art. 11 ICESCR in the case law

- Art. 7 Cst. is almost never directly invoked or discussed – neither the Federal Supreme Court nor the cantonal Courts reflect on the connection between Article 12 and 7 Cst.
- The ICSECR is not treated as self-executing and probably for this reason never invoked in the case law

# Conclusion

- The benefits of Art. 12 Cst are limited to a bare minimum (which is already questionable whether this is enough to secure dignity) but based on an idea of distributive justice and that state benefits might be a prerequisite to a life in dignity.
- Participating in a workfare programme is an eligibility criterion to Article 12 Cst.
- This eligibility criterion seems neither compatible with the right to human dignity article 7 Cst.
  - No autonomy; „trap“ of the paradox of dignity; Danger of the tyranny of dignity, Participating in a work-programme should be a possibility, not an obligation
- not compatible with the right to an adequate standard of living according to the ICESCR
- What does this mean for human dignity and a decent social minimum on a theoretical basis...?



University  
of Basel

Faculty of Law



**Thank you**  
for your attention.