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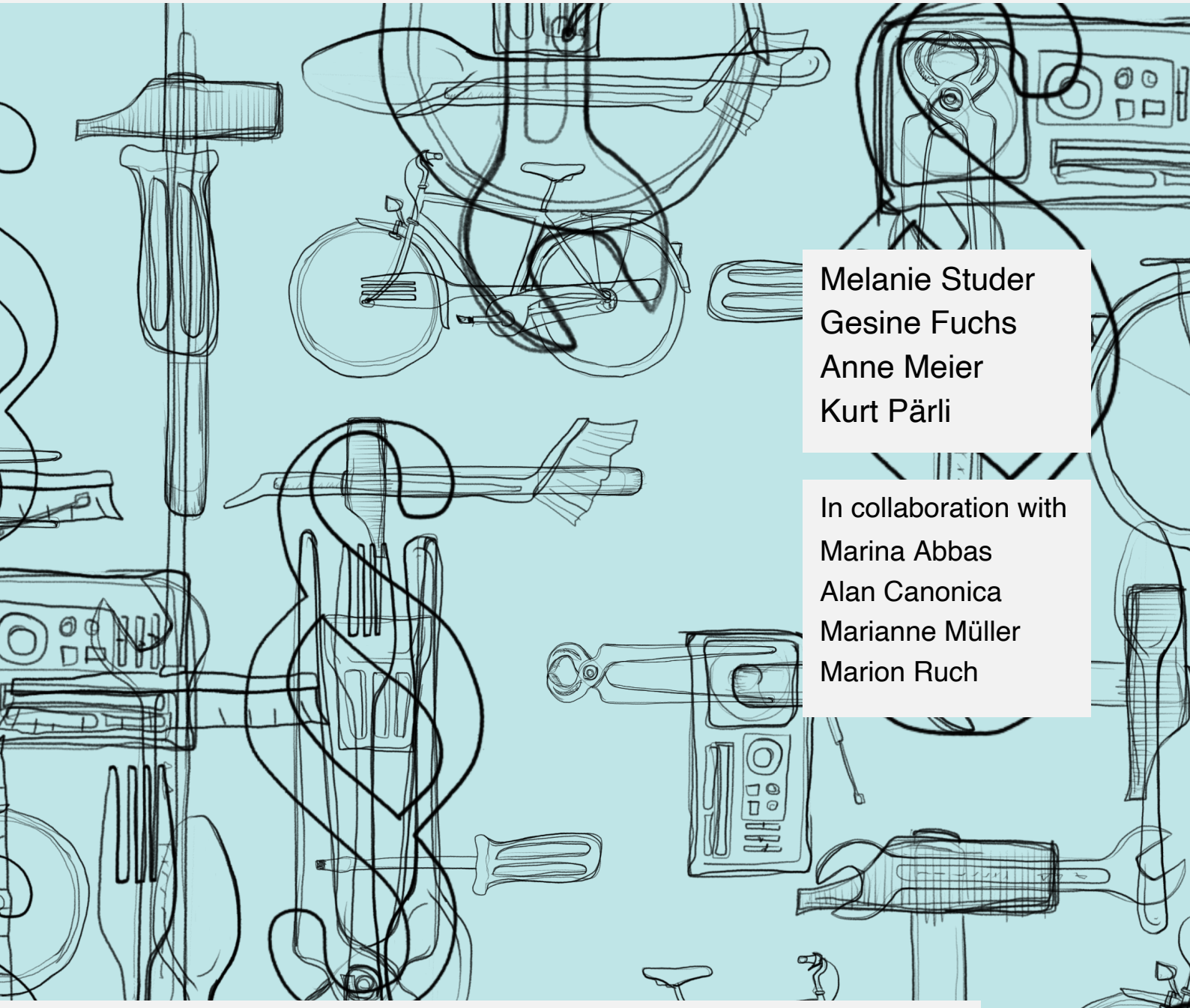

Melanie Studer
Gesine Fuchs
Anne Meier
Kurt Pärli

In collaboration with
Marina Abbas
Alan Canonica
Marianne Müller
Marion Ruch

Working under the conditions of social welfare - Final report

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Summary

As welfare states developed their activation policies, mandatory participation of welfare recipients in integration programmes, which include the duty to perform work, increased. It is still largely unclear under which conditions work is done in such programmes. This report presents the results of the research project “Working under the conditions of social welfare”.

Using interdisciplinary methods from social and legal research, we investigated the triangular relationship between social services, welfare recipients and the employing company in the context of working under social welfare. We noticed that although there are basically four widespread types of employment relationships throughout Switzerland (evaluation, qualification, placement, and participation), the actual structure of the legal relationships is extremely diverse.

Until now, the legal relationship – although work is being performed – has been shaped primarily by social welfare law, and, above all, it has been emphasised that participation in a programme is an obligation, the violation of which may lead to a reduction in benefits, up to and including the loss of eligibility for benefits. Through this process, the protective functions of labour law (designed to provide protection to the weaker party in the legal relationship) and social security law took less priority.

Our report shows that this is problematic in several ways. It favours a disciplining effect over actual reintegration. The strong emphasis on the mandatory character and enforcement through negative incentives (such as a reduction of the benefits) creates additional eligibility criteria for state benefits, which are intended to guarantee a life in dignity and social participation. Such policies can also have particularly drastic consequences for the legal status of individuals. Moreover, it has not been sufficiently clarified when state benefits can be refused and for which reasons.

Based on this analysis, we recommend making adjustments in three areas as well as the introduction of minimum standards for work under the conditions of social welfare. The intention is to ensure equal treatment, preserve the human dignity of welfare recipients, and bring the necessary clarity and legal certainty required for proper application of the law.

1. Participation in an occupational programme is not a prerequisite for entitlement to social welfare or emergency aid. Any reduction of benefits based on the refusal to participate in appropriate and reasonable occupational programmes must be proportionate.
2. The legal relationship in those programmes that involve the performance of work is regulated by employment contracts and wages are subject to social insurance.
3. State-of-the art evaluations must measure the impact of the programmes. This is a prerequisite for the State being able to control programme offers on the market.

These recommendations are based on existing practice in certain cantons and programmes.

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Part 1 Starting point

I. Work instead of social welfare

For most people, gainful employment is the most important source of income and it is increasingly synonymous with social integration. In the event of prolonged unemployment, social welfare and emergency aid, as the last safety net after social insurance benefits, offer a minimum economic livelihood and respectively the financial means required for a dignified standard of living (art. 12 Federal Constitution, Cst.). The structure of these benefits has changed significantly in recent years. With the second labour market (labour market policy measures within the framework of the unemployment insurance) and the third labour market (welfare-to-work programmes for welfare recipients), new forms of employment and legal relationships have appeared. The legal relationships in these frameworks often present the form of a triangle between companies, insured people or clients, and social insurance or social welfare programmes. So far, the prevalence and the precise legal implications have remained largely unclear. Therefore, our research project focuses on the previously little-researched employment relationships in welfare-to-work programmes from a legal and social science perspective. It questions the legal conditions under which work assignments take place in social welfare, what consequences arise for other legal relationships, and how widespread the various arrangements are. 1

These developments can be seen within the context of the activating and investing welfare state, which began to develop in Switzerland from the mid-1990s. In its policy, Switzerland followed the essential characteristics that can also be observed internationally[1]: Benefits were increasingly linked to behavioural expectations while, at the same time, a system of incentives and sanctions was introduced. The focus of state welfare programmes is on the need for clients and beneficiaries to adapt to the requirements of the labour market. Employment is considered to be the best means of social integration. Personal responsibility and the reciprocity of performance and counter-performance are emphasised. The right to benefits is increasingly linked to conditions. SANFORD SCHRAM speaks of “paternalistic neoliberalism” in which the unemployed and the people in need are disciplined to make them market-conform workers. Problems in the labour market are no longer perceived as structural, but increasingly individualised.[2] 2

The paradigm of activation was first implemented in Switzerland with the revision of the unemployment insurance in 1996.[3] Regional employment centres have been set up to strictly control compliance with the obligation to seek work. At the same time, labour market policy measures (such as retraining, further training, programmes for temporary work, etc.) were put in place, thus establishing a “second labour market”. In social welfare law, the shift towards a more activating welfare state became apparent with the new guidelines of the Swiss Conference for Social Welfare (SKOS). In 1998, the guidelines highlighted for the first time the reintegrative task of social welfare and linked it to the principle of reciprocity. 3

[1] KVIST.
[2] SCHRAM; SCHRAM/PAVLOVSKAYA.
[3] For an overview: BONOLI/CHAMPION. with further references.

The scope of discretion of social workers in ascribing benefits was extended. The revision of the SKOS guidelines of 2005 reduced the standard benefits by 10% but introduced financial incentives for integration (minimum integration allowance, income allowance).[4]

The relationship between social welfare and social insurance is largely complementary. The fragmented development of Swiss social insurance law, in particular, which has led to a and inconsistent regulatory landscape[5], means that gaps in coverage repeatedly occur in the system of social security.[6] For this reason, social welfare, as the last comprehensive safety net, will not become superfluous even in the event of the best possible social insurance arrangements.[7] Activation policies in Switzerland are also characterised by a high degree of horizontal federalism, subsidiarity and consensual elements. This creates legitimation and coordination problems for the involved parties. Federal diversity also proves to be a challenge in terms of scientific scrutiny. Welfare state change not only depends on historical developments and political institutions, but also on political power relationships and socio-cultural discourses. In this way, activation discourses and occupational and integration programmes can gain strong legitimising power for the welfare state and social welfare. Federalism can create space for political innovation ("Cantons as a political laboratory"). Overall, however, this tendency seems weak as costs continue to rise and political attempts to curtail social welfare prevail. 4

II. Stratified livelihood between work and social welfare

In this context, the research project focused on the complex employment relationships in welfare-to-work programmes that exist between programme, welfare recipients, and social welfare. Social welfare recipients are subordinated to both the social welfare agency and the company where they perform work, in the sense that they have to follow their instructions (cf. N 89). For the most part, the legal relationship is not classified as an employment relationship, regardless of the work actually performed. It also largely lacks social insurance protection (N 188). Likewise, the financial and organisational relationships between social services and companies are complex and not always obvious (N 197). 5

The status of "activated social welfare recipients" is new: It differs significantly from the *first labour market,* which is characterised by economic and contractual freedom (Art. 19 CO; Art. 27 Cst.). In the first labour market, employee and employer are both free to decide whether to enter a contractual relationship with one another involving the performance of work against remuneration. The working and wage conditions have grown historically and are regulated in more detail by the Code of Obligations (CO), the Employment Act (EmpA), collective bargaining agreements, and social partnership, thus moderating structural inequalities between workers and employers. Risks such as accident, old age, invalidity, and 6

[4] NADAI. p. 60.

[5] GYSIN, p. 74; CANONICA; this interplay between the design of social insurance coverage and social welfare can also be observed in the debate on the creation of bridging benefits for older unemployed people. Due to the increase in the number of older unemployed people unable to find a new job before exhausting their unemployment allowance and who are dependent on social welfare as a result, the introduction of a kind of "supplementary benefit" is being discussed for people over 60 who have exhausted their unemployment allowance. The introduction of these benefits has a significant decommodifying effect for those concerned: the pressure and expectation to rely on one's own labour on the market to secure livelihood is decreasing.

[6] WOLFFERS, p. 35.

[7] WOLFFERS, p. 35; GYSIN, p. 78.

unemployment are covered by appropriate compulsory social insurances; the obligation to contribute and the right to benefit are closely linked to the (relevant) wage.

In the event that an insured risk materialises, the insured individuals are obliged to do their best to mitigate the damage. In the *second labour market*, in the sense of the activating welfare state, they are encouraged to attend work or training programmes, while continuing to receive insurance benefits, the amount of which depends on the contributions previously paid. Participation, reasonableness, and arrangement of working conditions are chiefly regulated by federal law (e.g. Art. 59 ss. Unemployment Insurance Act, UIA). Even a health impairment does not mean that the people concerned are entitled to compensation for loss of earnings. Rather, the principle of "integration before pension" also applies to the invalidity insurance. In the course of the recent revisions of the invalidity insurance, the duty to attempt reintegration on the part of the insured individual has been significantly tightened. 7

If the social insurance benefits have been exhausted or are not available, social welfare steps in, providing modest benefits as required and based on the principle of subsidiarity and increasingly demanding a quid pro quo in return, such as participation in a welfare-to-work programme in the *third labour market* (reciprocity of benefits). The conditions of employment result mainly from cantonal social welfare legislation; currently, the influence of federal law can be observed in the field of accident insurance (N 194). It can also be assumed that the provisions of the EmpA are applicable in many cases. However, it remains unclear whether the respective companies are also controlled by the EmpA enforcement authorities. The type and amount of benefits under social welfare vary and come from different sources; the occupational programmes are generally not self-supporting from an economic point of view, instead they depend on social welfare contributions. Working in the third labour market is not always voluntary; participation in a welfare-to-work programme is subject to the threat of sanctions (reduction or termination of welfare benefits). 8

In reality, there is a wide variety of programmes, programme providers and situations in which people are assigned to such programmes by social welfare. We have identified the following categories of programmes: 9

1. *Evaluation* (structured situation analysis concerning employability and reintegration opportunities, recommendations for integration planning),
2. *Placement* in the first labour market,
3. *Qualification* (to improve employability) and
4. *Participation programmes* (in which existing labour (market) skills are retained and developed and the personal situation is stabilised).[8]

In recent years, case law and, subsequently, SKOS guidelines have increasingly restricted the conditions for entitlement to social assistance, mainly by extending the concept of subsidiarity (N 119). If welfare recipients refuse to participate in a welfare-to-work programme, this can lead to them no longer 10

[8] See BÜRGISSER/RIEDWEG/MEY/BERLI.

being considered as in need, thus losing their right to social welfare and emergency aid. This accentuated development means a stratification of the employment conditions and thus alternately favourable conditions for securing one's livelihood. Figure 1 summarises this.

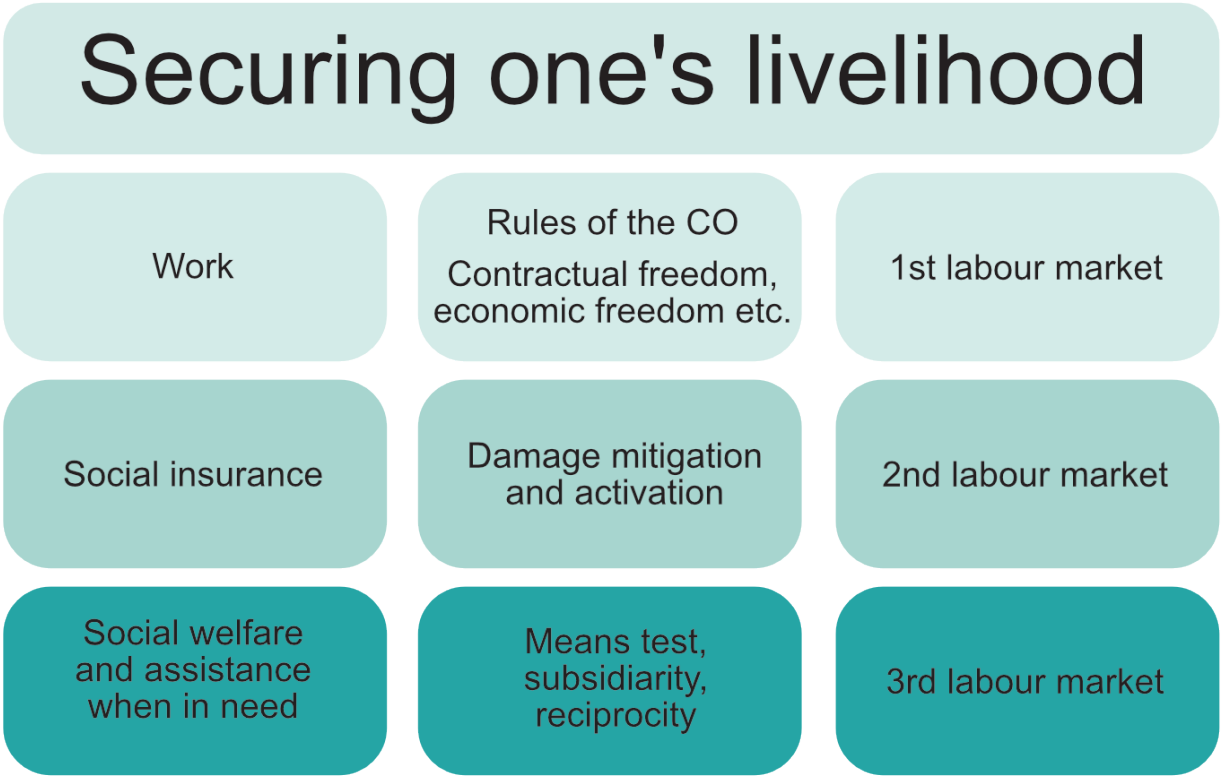

Figure 1 Livelihood (own presentation)

Research question

The growing restrictions and the expansion of the concept of subsidiarity are legally and politically problematic, as we will show. We ask how work without the application of labour law, i.e. work in the third labour market, metaphorically in the "basement", is legally and practically structured: 11

- For this purpose, we first introduce the legal framework of social welfare and emergency aid and explain a little more in detail - but still synoptically - what characterises an employment relationship in the first labour market (part 2).

On this basis, part 3 addresses the main question:

- What is the legal and practical structure of employment relationships in welfare-to-work programmes?
    - What are the goals of employment relationships in welfare-to-work programmes, how are they managed, and what impact do they have?
    - How are obligations regarding welfare-to-work measures in social welfare enforced by incentives, sanctions and, if necessary, by courts?
    - How are the employment relationships to be assessed from a labour and social insurance law perspective?

Building from this analysis, we develop recommendations regarding minimum standards for employment relationships in welfare-to-work programmes, the interpretation of the principle of subsidiarity, the treatment of employment relationships in labour and social insurance law, and evidence-based practice in the policy field (part 4).

The present study focuses on standard social welfare and excludes the numerous special provisions concerning asylum and foreigner law. Social welfare for Swiss abroad - which falls under federal responsibility[9] - is also not part of the project.

III. Methodology

In order to address the research questions, we analysed the existing regulations from a legal-dogmatic perspective and systematically examined the social welfare legislation of all 26 cantons. We started with a survey among cantonal social welfare agencies on the questions of prevalence, structure and governance of employment relationships in welfare-to-work programmes[10] and correlated the results with general data from the cantons. The results of the legal analyses and the cantonal survey led to the selection of three cantons that differ as widely as possible in terms of demographic profile, design, governance, and legal practice.[11] In the cantons of Uri, Bern and Vaud we conducted a total of 21 interviews with clients and programme managers in different social services. The interviews were recorded, transcribed and coded both openly and deductively. In addition, we analysed the content of documents such as company regulations or blank agreements.[12] In this context we also examined which employment relationships in welfare-to-work programmes meet labour and social insurance law standards. Finally, in order to understand and appreciate developments in the legal qualifications of employment relationships in welfare-to-work programmes and the eligibility criteria, we reviewed all published cantonal social welfare decisions between 2005 and 2017 and analysed those concerning occupational programmes, both legally and descriptively, with regards to “access to justice” and the outcome of the proceedings. 12

[9] Art. 40 para. 2 Cst; art. 1 para. 2 SocRA.

[10] All cantons except Thurgau and Appenzell-Innerrhoden participated.

[11] Most different systems design, cf. e.g. YIN.

[12] For expert interviews cf. BOGNER/LITTG/MANZ and GLÄSER/LAUDEL. For evaluation and analysis see MAYRING and MILES/HUBERMAN/SALDANA.

Part 2 Legal framework conditions

I. Social welfare and emergency aid

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

A distinction must be made between the benefits of social welfare (see below N 17) and the constitutionally guaranteed benefits based on Art. 12 Cst.. The right to assistance when in need, guaranteed by Art. 12 Cst., guarantees persons in distress and unable to provide for themselves the right to support and care, and to the financial means required for a decent standard of living. With this article, a fundamental social right giving an individual justiciable right was created. This means that individuals can claim governmental benefits directly based on this constitutional provision.[13] Art. 12 Cst. represents a minimum guarantee. It is not intended to guarantee a certain minimum income,[14] but only what is indispensable for a dignified existence and what can preserve against an undignified life of begging.[15] Such benefits include food, clothing, shelter and basic medical care.[16] The fundamental right to assistance when in need is subsidiary.[17] This means that these benefits are only provided as a last resort; in situations where primary means from personal responsibility, social insurance and general social welfare simply have failed.[18] 13

The scope of benefits is primarily specified in connection with people who would have to leave Switzerland due to a definitively enforceable removal order or who still benefit from the status of asylum-seeker.[19] An amount of CHF 21/day, CHF 8 of which is for food and hygiene and CHF 13 for accommodation, is considered sufficient for rejected asylum seekers to lead an existence in dignity.[20] 14

According to doctrine and existing case law, benefits according to Art. 12 Cst. cannot be restricted, because the scope of protection and the core of the guarantee coincide.[21] It is therefore a "black and white"[22] or "all or nothing"[23] provision. Either there is a right to benefits, or not. The Federal Supreme Court attributes the core content character of the provision to the close connection between the benefits and human dignity.[24] This makes the question of who is entitled to benefits and how the situation of need justifying the claim is characterised all the more central. In this context, the principle of subsidiarity enshrined in Art. 12 Cst. through the phrase "unable to provide for themselves" is of central importance. This is interpreted by existing case law in such a way that participation in (certain) welfare-to-work programmes is a prerequisite for the constitutional right to benefits (see in detail: N 119 ss.) 15

[13] BGE 131 I 166, C. 3.1; BIAGGINI, Kommentar BV, N 2 on art. 12 Cst.
[14] BIAGGINI, Kommentar BV, N 2 on Art. 12 Cst; MAHON, Petit Commentaire, N 4 on art. 12 Cst.
[15] In place of many: BGE 130 I 71, C. 4.1; UEBERSAX, p. 35.
[16] In place of many: BGE 130 I 71, C. 4.1.
[17] SCHEFER, p. 338.
[18] GÄCHTER/WERDER, BSK, N 8 on art. 12 Cst.; BELSER/WALDMANN, p. 32.
[19] For a somewhat older overview of the services in this area, see: BELSER/WALDMANN, p. 38 et seq.
[20] BGE 131 I 166, C. 8.1
[21] BGE 130 I 71, C. 4.2; then confirmed in: BGE 131 I 166, C. 3.1; BGE 139 I 218, C. 5.2; BGE 142 I 1, C. 7.2.4.
[22] BIAGGINI, Kommentar BV, N 9 on art. 12 Cst..
[23] UEBERSAX, p. 47.
[24] BGE 131 I 166, C. 3.1 esp.

According to the division of responsibilities in the Federal Constitution, the cantons are obliged to pay the benefits according to Art. 12 Cst..[25] This is derived from Art. 115 Cst.[26] The cantons can also delegate this task to the communes.[27] Accordingly, the constitutional right to assistance when in need is primarily substantiated by cantonal legislation.[28] 16

B. Cantonal social welfare

1. Cantonal competence

Regulating social assistance law in all areas that do not concern the intercantonal distribution of competence falls within the subsidiary general competence (Art. 3 BV) of the cantons. They alone are responsible for structuring the content of social welfare, because there is no federal competence in this regard.[29] Accordingly, each canton has its own social welfare legislation. 17

The cantons have the implicit obligation to provide support for their residents in need (Art. 115 Cst.).[30] The Federal Government regulates the responsibilities based on Art. 115 Cst. This competence was exhausted with the creation of the Federal Act on the Responsibility for providing Support to Persons in Need (SocRA).[31] 18

The fact that competence resides at cantonal level in what is a small-scale state system with increasing mobility and, at the same, time strong socio-spatial differences[32] is a challenge for social welfare, its administration and its clients. The demand for a federal solution was already the subject of the founding assembly of the “Armenpflegerkonferenz” in 1905, the predecessor of the Swiss Conference for Social Assistance (SKOS).[33] Since 2011, numerous parliamentary requests and petitions for a federal framework law have been submitted, but all of them have been rejected.[34] In order to implement these requests[35], a constitutional amendment would probably be necessary, so that a federal competence for legislation could be created.[36] 19

2. SKOS guidelines

The SKOS is the national professional association in the field of social welfare. Its members include all cantons, many communes, federal offices and private social organisations.[37] The SKOS has been issuing guidelines for the organisation and assessment of social welfare since 1963. In view of the cantonal competence, which has led to high federal diversity in the arrangement of support practice in terms of 20

[25] BELSER/WALDMANN, p. 38.
[26] MAHON, Petit Commentaire, N 7 on art. 12 Cst; MÜLLER, St. Galler Kommentar, N 25 on art. 12 Cst.
[27] BELSER/WALDMANN, p. 38.
[28] BELSER/WALDMANN, p. 39.
[29] GÄCHTER/FILIPPO, BSK, N 13 on art. 115 Cst; WIZENT, p. 125.
[30] BIAGGINI, Kommentar BV, N4 on art. 115 Cst; RIEDI HUNOLD, St. Galler Kommentar, N 3 on art. 115 Cst; HÄNZI, Richtlinien, p. 65; WIZENT, Bedürftigkeit, p. 125; STUDER/PÄRLI, Beschäftigungsprogramme, p. 1388; MÜLLER, p. 180 points out that art. 115 Cst is therefore more than a mere conflict rule.
[31] HÄNZI, Richtlinien, p. 65.
[32] Also on the consequences cf. SEITZ.
[33] GURNY/TECKLENBURG, p.15.
[34] KELLER, p. 7 et seq.
[35] See for a detailed overview: WALDBURGER, N 40 et seq.
[36] In place of many: GÄCHTER/FILIPPO, BSK, N 13 on art. 115 Cst; WIZENT, Bedürftigkeit p. 125; BIAGGINI, N 4 on art. 115 Cst.
[37] SKOS, www.skos.ch (Die SKOS), visited on 05/05/2020.

social welfare, one of the aims of these guidelines is to harmonise the support practice throughout Switzerland.[38] This is also based on the idea that overly wide differences in support practices are problematic with regards to the equality before the law, legal certainty and non-arbitrary treatment.[39] Their contribution in this regard should not be underestimated.[40] Legally organised as an association, the SKOS is an example of Swiss "horizontal federalism", in which a wide variety of actors try to solve problems through voluntary coordination.[41]

21 The SKOS guidelines are not binding in the sense of having a directly applicable legal basis - they are also not published in the legislation of the cantons.[42] At the legislative level, 13 cantons maintain that the SKOS guidelines must be observed when structuring the support relationship. 12 cantons have such a reference at ordinance level. One canton refers to the guidelines in their cantonal handbook.[43] These references to the SKOS guidelines make them binding for the authorities applying the law.[44]

22 It is also noticeable that, although various cantons refer to the SKOS guidelines, some of them adopt comprehensive exceptions with regards to the scope of their application.[45] In all cantons, the guidelines apply at least for orientation;[46] however, the difference among cantonal laws remains significant.

23 The SKOS is a central institution limiting heterogenous approaches to social welfare in social welfare. It finds compromises capable of winning a majority and provides a common denominator, which should prevent a "race to the bottom". But this has a price. The development and revision of the guidelines is carried out in a process of "corporatist governance", i.e. a steering process in which certain actors exert more influence than others and from which only limited democratic legitimacy arises: the SKOS guidelines commission suggests revisions and changes, which are discussed in the legal commission and the social policy commission. With their official support, they are adopted by the SKOS board (with members from cantons, cities, communes and NGOs).[47] These internal procedures are complex and often also driven by informal hierarchies in which larger members have significantly more information, influence and status, as recent qualitative studies show.[48] Since 2016, the SKOS guidelines have also been approved by the CDSS, the Conference of Cantonal Social Services Directors, which gives them indirect democratic legitimacy. Therefore, the described corporatist formation must always be taken into account in any assessment of the SKOS guidelines.

[38] AMSTUTZ, Existenzsicherung, p. 51 et seq.; HÄNZI, Richtlinien, p. 171.

[39] AMSTUTZ, Existenzsicherung, p. 52.

[40] See also: WIZENT, Bedürftigkeit, p. 162.

[41] VATTER, p. 135 ss.

[42] Wizent, Bedürftigkeit, p. 160; whereby they are published at least in the canton of Aargau as an appendix to the Social assistance and prevention ordinance (SPV/AG).

[43] See for a summary: SCHWEIZERISCHE KONFERENZ FÜR SOZIALHILFE, Monitoring, p. 4.

[44] WIZENT, Bedürftigkeit, p. 160.

[45] I.e. § 10 SPV/AG.

[46] SCHWEIZERISCHE KONFERENZ FÜR SOZIALHILFE, Anwendung.

[47] SCHWEIZERISCHE KONFERENZ FÜR SOZIALHILFE, SKOS-Richtlinien auf einen Blick, p. 3.

[48] EIGENMANN.

3. Level of benefits

The benefits of social welfare go beyond those of emergency aid; this is evident in both the German and French versions of the Constitution which distinguish between “persons in need” (Bedürftige / personnes dans le besoin) according to Art. 115 Cst. and "persons in distress" (Personen in Notlage / personnes en situation de détresse) according to Art. 12 Cst.[49] 24

Social welfare is intended to cover the basic needs for a "modest" living. To this end, housing costs, the costs of basic medical care, and an amount covering the basic cost of living (GBL) must be covered.[50] With these benefits a “social livelihood” is granted, which should enable participation in economic, cultural, political and social life.[51] Anyone who is unable to do so with his or her income and the corresponding expenditure is considered to be in need and therefore has a right to social welfare. 25

The basic cost of living is currently set by the SKOS guidelines at CHF 997/month for an individual. According to the guidelines, young adults with their own household may receive a GBL 20% lower, i.e. CHF 797.60/month.[52] 26

The GBL was originally aligned to the income level of the lowest 20% of the population, later being moved to align with the lowest 10%. Recently, however, this alignment has been missing from this reference value. If the ratios of the lowest-income 10% were still relevant, the GBL would amount to CHF 1,076.[53] Overall, benefits and empirical demand are increasingly decoupling, while the level of sanctions and the segmentation of clients are increasing (or the introduction of new groups such as "young adults").[54] The discussion about how high the benefits have to be in order to achieve the targets of social welfare and to enable a decent standard of living is extremely topical, especially since in certain cantons efforts are being made to reduce the GBL, and sanction-related reductions in the GBL on the strength of the SKOS guidelines revision of 2015 can now reach up to 30%. In 2018, a study by the BÜRO Bass showed that a GBL reduced by 30% is insufficient to cover all existential needs,[55] and this can be problematic in connection with any reduction in benefits under social welfare.

4. Objectives

Social welfare has four main objectives: 27

- Securing existence
- Promotion of the economic and personal independence of the person in need
- Prevention and elimination of situations of distress
- Professional and social integration.[56]

[49] RIEDI HUNOLD, St. Galler Kommentar, N 2 on art. 115 Cst.

[50] SKOS Guidelines, A.6.

[51] SKOS Guidelines, A.1 in conjunction with D.1.; HÄNZI, Richtlinien, p. 67.

[52] SKOS Guidelines, B.4.

[53] Cf. in detail STUTZ/STETTLER/DUBACH/GERFIN; HEUSSER, Grundbedarf, who in particular also points out that the German Federal Constitutional Court (judgment 1 Cst.L 1/09 of the First Senate of the Federal Constitutional Court of 9 February 2010) states that the basic requirement must be determined in a comprehensible procedure and be based on statistical values, N 43 ss.

[54] See EIGENMANN , p. 36 ss.

[55] STUTZ/STETTLER/DUBACH/GERFIN.

[56] HÄNZI, Richtlinien, p. 112.

A total of 16 cantons mention the goal of professional and social integration in their legal basis, some of them already in the cantonal constitution.[57] This objective is closely related to the implementation of work and occupational programmes, to which the canton of Basel-Stadt explicitly refers: the placement and facilitation of access to social and occupational integration offers is mentioned as a task of social welfare.[58] The canton of Vaud already stipulates at the constitutional level that livelihood is to be achieved by preventing social and professional exclusion, integration measures and (in principle) non-reimbursable social support.[59] In the cantons that do not mention professional or social integration as a goal, the promotion of self-employment or the elimination of a situation of distress can also be regarded as legislative goals that can be achieved through assignment in a work or employment programme. 28

5. Principles of social welfare law and duties of conduct

Social welfare law is shaped by various *structural principles*, which result from the character of social welfare as the last safety net to ensure a livelihood. The principles express the central basic and valuation decisions and are rooted in human dignity, which itself is a basic principle.[60] They therefore permeate the entire law on social welfare and must also be taken into account in the legislation and the concretisation of Art. 12 Cst.[61] 29

Respect for *human dignity* is both the objective and the yardstick for support.[62] Human dignity demands that welfare recipients do not become the object of governmental action,[63] obliges the protection of the incomprehensible essence of human existence, and protects the individual uniqueness and possibly also the otherness of the individual.[64] This also results from Art. 7 Cst. which protects human dignity as a fundamental right which must be taken into account when designing and applying social welfare law. 30

According to the *principle of coverage requirement and finality*, social welfare has to cover a current, concrete and individual need,[65] and the reasons for the need are irrelevant. Even those who are in distress through their own fault have in principle the right to benefits.[66] Furthermore, the *principle of individualisation* obliges the social welfare authorities to provide support tailored to the peculiarities and needs of the individual case.[67] In this way, the diversity of human needs is taken into account,[68] although it should not be ignored that the principle of individualisation can, under certain circumstances, conflict with the principle of equality of rights and the prohibition of arbitrariness.[69] 31

[57] § 4 para 1 SPG/AG; art. 1 para. 2 SHG/AR; art. 3 (f) SHG/BE; § 2 para. 2 SHG/BS; art. 1 para. 1 LIASI/GE; art. 2 SHG/FR; art. 1 para. 2 LASoc/JU; § 2 SHG/LU; Art. 1 (c) LASoc/NE; art. 147 SG/SO; art. 2 SHEG/SH; art. 14 para. 1 KV/SG; § 19 para. 2 KV/SZ; § 111 KV/ZH; art. 60, para. 1 (a) Cst/VD.

[58] § 2 (2) SHG/BS.

[59] Art. 60 para. 1 Cst/VD.

[60] SCHALLER SCHENK, p. 181; WOLFFERS, p. 69; GYSIN, p. 106; HÄNZI, Richtlinien, p. 114; WIZENT, Bedürftigkeit, p. 209; ID, Sozialhilferecht, N 387.

[61] WIZENT, Bedürftigkeit, p. 209.

[62] HÄNZI, Richtlinien, p. 114.

[63] HÄNZI, Richtlinien, p. 68.

[64] BGE 143 IV 77, C. 4.1.

[65] WOLFFERS, p. 74.

[66] See also BGE 121 I 367, C. 3b. SCHALLER SCHENK, p. 186; MÖSCH PAYOT , § 39.29.

[67] See the uniform doctrine HÄNZI, Richtlinien, p. 46; COULLERY, Recht auf Sozialhilfe, p. 74; WOLFFERS, p. 73; WIZENT, Bedürftigkeit, p. 251; SCHLEICHER, p. 272; HÄFELI, p. 76; GYSIN, p. 107; in detail SCHALLER SCHENK; such as and also the SKOS Guidelines, A.4.

[68] WIZENT, Bedürftigkeit, p. 251.

[69] HÄNZI, Richtlinien, p. 116.

The *principle of subsidiarity* also indisputably represents a fundamental principle of social welfare law.[70] It is crucial for our question, which is why it is explored in more detail here. The principle of subsidiarity is contained in all cantonal legislations,[71] albeit with different degrees of clarity and regulatory density.[72] The principle of subsidiarity under social welfare can be seen as an expression of the obligation to mitigate damages in the sense of personal responsibility.[73] The following sources take precedence over social welfare benefits in terms of subsidiarity: 32

- (reasonable) self-help (incl. primarily own funds)
- third party benefit obligations
- voluntary third-party benefits[74]

The principle of subsidiarity breaks down into two levels. On the first level, one determines eligibility: is this person in a situation of need, and/or do they have access to personal or third-party resources which should be used to help cover the need. In this sense, the principle of subsidiarity helps to clarify the right to benefit from social welfare. On the second level, the principle of subsidiarity determines a certain number of obligations that the person in need must comply with in order to reduce their state of dependence, although without necessarily ending it (due to the lack of available resources)[75]. Such obligations are derived from the idea of "self-help" and the obligation to mitigate damages. 33

Far-reaching duties of conduct for social welfare recipients are derived from the principle of subsidiarity, which includes, in particular, the obligation to mitigate one's own need. According to current practice and interpretation, this also includes the obligation to participate in a welfare-to-work programme. The consequences of a breach of duties apply to both levels of the principle of subsidiarity: on the one hand, there may be a temporary reduction in social welfare benefits; on the other hand, the right to benefit may be forfeited (in detail N 119 ss.). 34

There are considerable cantonal differences with regards to the regulation of duties of conduct and the obligation to participate in a welfare-to-work programme (see in detail N 46 ss.). 35

C. Relationship between Art. 12 Cst. and social welfare law

There is a close connection between Art. 12 Cst. and the cantonal right to social welfare, but the right to assistance when in need includes more than just "small social assistance".[76] Art. 12 Cst. represents the core of social welfare law - those who are in distress are also in need.[77] Material emergency aid therefore always also constitutes material social support.[78] It is undisputed that the benefits of social 36

[70] WOLFFERS, p. 71; MÖSCH PAYOT, Sozialhilferecht, § 39.30; WIZENT, Bedürftigkeit, p. 228 ss.; SCHALLER SCHENK, p. 182 ss.; HÄNZI, Richtlinien, p. 114; HÄFELI, p. 73.

[71] § 5 SPG/AG; art. 3 ShiG/AI; art. 11 para. 2 SHG/AR; art. 9 para. 2 SHG/BE; § 5 para. 1 SHG/BL; § 5 SHG/BS; art. 5 SHG/FR; art. 9 LIASI/GE; art. 2 para. 2 SHG/GL; art. 3 para. 1 SHG/GR and art. 1 para. 1 UG/GR; art. 7 LASoc/JU; § 3 SHG/LU; art. 6 LASoc/NE; art. 3 SHG/NW; art. 3 SHG/OW; art. 4 SHEG/SH; § 2 SHG/SZ; § 9 SG/SO; art. 2 SHG/SG;
art. 2 SHG/TI; § 8 SHG/TG; art. 3 SHG UR; art. 2 SHG/VS; art. 3 LASV/VD; § 2bis SHG/ZG; § 2 SHG/ZH and § 14 SHG/ZH.

[72] See also: HÄFELI, p. 74; earlier: COULLERY, Recht auf Sozialhilfe, p. 75; TSCHUDI, Grundrecht, p. 122 excludes the canton of Grisons.

[73] GÄCHTER, Grundstrukturen, p. 67.

[74] HÄFELI, p. 73; HÄNZI, Richtlinien, p. 163; WOLFFERS, p. 71; also: SKOS Guidelines, A.4.

[75] WIZENT, Bedürftigkeit, p. 238.

[76] WIZENT, Bedürftigkeit, p. 116; BIGLER-EGGENBERGER, N 13 on art. 12 Cst; MÜLLER/SCHEFER, p. 777; HÄNZI, Richtlinien, p. 85; UEBERSAX, p. 42.

[77] WIZENT, Bedürftigkeit, p. 117.

[78] WIZENT, Bedürftigkeit, p. 121.

welfare are in principle above the constitutionally required minimum and that the level of benefits differs "significantly".[79] However, it is largely unclear exactly where the line is to be drawn which can be attributed to the fact that it is difficult to determine what "decent" according to Art. 12 Cst. actually means. The right to support in distress only becomes directly relevant when the cantonal law on social welfare falls below the minimum required under Art. 12 Cst. or is not granted. Then it is up to the courts to take the necessary measures in order to secure a decent standard of living according to Art. 12 Cst.[80]

II. Labour and social security law

As mentioned above, working in the first labour market is essentially characterised by economic freedom as well as freedom of contract, which are both particularly restricted by mandatory and unilaterally mandatory provisions of Art. 319 ss. CO. 37

The Code of Obligations defines the employment contract as follows: the individual employment contract obliges the employee to perform work for the employer for a definite or indefinite period of time while the employer is obliged to remunerate the employee by means of a wage, which is calculated according to periods of time (time wage) or according to the work performed (piecework wage). The employment contract is reciprocally binding and is understood as an exchange of benefits between employee and employer, namely work for money. As a matter of principle, it does not require any special form in order to be valid and can therefore arise orally, tacitly or explicitly. If the four conditions are met (work performance, duration, subordination and wage), the employment contract exists even if the parties have named it differently. In fact, the qualification of the employment contract has a mandatory character since the parties may not deviate from the mandatory (public law and Art. 361 CO) and semi-mandatory (Art. 362 CO) provisions. Furthermore, if the conditions set forth under Art. 319 CO are met, the parties to the employment contract are not allowed to decide that their relationship falls outside the rules of labour law. 38

The central feature of an employment contract according to Art. 319 CO is therefore the subordination of the employee to the executive power of the employer. The employer's authority to give directions is derived from this. There is therefore a paradox inherent in every employment contract: in a privately autonomous act, the employee "submits" to the employer's extensive executive power, which severely limits their autonomy. 39

However, the subordination or the employer's right to give directions does not apply without restrictions. In the same way that citizens are protected by fundamental rights against excessive governmental power, the worker is entitled to "rights of defence" against the economic power of the employer. These essentially consist of the employee's mandatory rights against the employer under employment contract law, which are set out in Art. 361 ss. CO. These include, among other things, protection against wrongful termination in terms of content and time in Art. 336 and 336c CO, but also the protection of the employee's right to privacy in Art. 328 ss. CO, which in Art. 328b CO also covers the right to privacy in data processing. In addition, the provisions of public employment law (through the reception clause in Art. 40

[79] WIZENT, Bedürftigkeit, p. 117; HÄNZI, Richtlinien, p. 82
[80] BELSER/WALDMANN, p. 37.

342 para. 2 CO), the Gender Equality Act (GEA), the Posted Workers Act (PWA), as well as the international labour law applicable to Switzerland impose a limit on the employer's executive power.

Via Art. 342 CO, the provisions of the EmpA and its ordinances also apply in an employment relationship. However, regardless of whether there is an employment contract in this sense, a company is obliged to apply these provisions in order to protect the health, especially of young workers as well as pregnant and breast-feeding workers and also to prevent excessive working hours. The EmpA also applies to someone who works without a wage in a foreign work organisation and in personal subordination, as well as to trainees, trial apprentices and to volunteers.[81] 41

Nor is the social welfare qualification of their relationship left to the disposition of the parties. Although both employed and non-employed people have the duty to pay contributions to the Old-Age and Survivors Insurance (Art. 1a para. 1 a/b OASIA), the pursuit of gainful employment affects the level of contributions and ultimately the level of benefits when the insured risk occurs. 42

According to Art. 3 para. 1 OASIA, the insured people are liable to pay contributions as long as they are gainfully employed. People in gainful employment can be self-employed or dependent. Art. 10 of the Federal Act on General Aspects Social Security Law (GSSLA) defines the term employee as follows: "employees are considered as people who perform work as employees and receive the relevant wage in accordance with the respective individual law". "The decisive factor is therefore whether the benefit in question has an economic connection with the employment relationship. Thus, the focus is not on which person pays the compensation to be qualified; therefore, the fact that compensation is not paid by the actual employer, but by a welfare fund, for example, does not exclude the assumption of a wage subject to the OASI contributions." Art. 11 GSSLA states: "An employer is someone who employs workers."

Thus, social insurance law autonomously qualifies the term “employee” based on Art. 10 GSSLA, i.e. the qualification under contract law is irrelevant.[82] Agreements between the contracting parties concerning their OASI-legal status (self-employed or dependent) or the OASI-legal qualifications of a wage as a relevant or non-relevant wage as well as about other social insurance obligations are not relevant.[83] According to well-established case law of the Federal Supreme Court, the decisive factors are rather the economic circumstances. [84] A person who is economically dependent on an employer as well as in terms of work organisation and bears no entrepreneurial risk is considered an employee.[85] The social insurance authorities check each income to see whether it comes from self-employment or employment. 43

If income is earned from gainful employment, contributions must be paid to the relevant social insurances based on the relevant wage. The central provision in this respect is Art. 5 OASIA. The contributions are owed by the employer, who must pay both his own contributions and those of the employee to the relevant compensation office. This concerns old-age and survivor' insurance (OASI), invalidity in- 44

[81] In this regard cf.: GEISER, Kommentar ArG, N 8 on art. 1 ArG.

[82] LOCHER/GÄCHTER, § 22, N 16; BGE 122 V 175, C. 6a/aa.

[83] Wegleitung über den massgebenden Lohn (cit. WML), Rz. 1032, source: http://www. bsv.admin.ch/vollzug/documents/view/361/lang:deu/category:22 (visited on 24/02/2020).

[84] BGE 111 V 267; 119 V 162; 123 V 163.

[85] BGE 123 V 161, C. 1; BGE 122 V 169, C. 3.

surance (IV), the loss of earnings compensation (LEC), family allowances (FA) and unemployment insurance (ALV). Accident insurance (AI) under the Accident Insurance Act (AIA) is also linked to the concept of employee under Art. 10 GSSLA, although under Art. 1a para. 2 AIA, people with a relationship similar to an employment contract may also be subject to compulsory accident insurance by official ordinance. In accordance with the Swiss Federal Occupational Pensions Act (OPA), reference is also made to the determination of the OASI. A relevant wage - according to the respective individual laws - is thus a central gateway to the social security system.

The arrangement of the employment relationship with respect to social insurance shows that an employment relationship consists not only of an exchange of work for remuneration, but also includes the exchange of duties of loyalty, and grants access to social security.[86] 45

[86] See REHBINDER, p. 135.

Part 3 Welfare-to-work programmes - legal framework and practice

I. Introduction: Duties, incentives and sanctions

The legal framework for working in a welfare-to-work-programme is largely determined by the cantonal social welfare legislation and the SKOS guidelines. Participation in welfare-to-work programme is basically a duty, which is enforced with positive (integration allowances) and negative incentives (reduction and suspension of benefits). 46

The duty to perform work in welfare-to-work programmes is well established in the cantonal legal frameworks. In total, no fewer than 19 cantons stipulate an obligation to participate in occupational programmes, while 22 of them stipulate an obligation to accept a reasonable job. In the (predominantly) French- and Italian-speaking cantons, the obligations of the social welfare recipients are specified in so-called integration agreements; however, additional general obligations, such as the obligation to accept reasonable work, are also stipulated by law. 47

Table 1 Overview of regulations on welfare-to-work programmes

	At law level	At ordinance level
(only) obligation to accept work	GL, SG[87]	SZ[88]
Obligation to accept work and obligation to participate in an occupational programme	AG, AR, BE, BS, LU, NW, SO, TG, ZH[89]	AI, BL, GR[90]
Cantons with an integration agreement		
Obligation to accept an integration agreement	FR, GE, JU, NE, VD[91]	VS, TI [92]
+ additional obligation to accept a reasonable job	VD[93]	FR, JU, TI, VS[94]

The regulatory density of obligations varies considerably, which is also reflected in the cantons included in the case study. The canton of Uri only stipulates in Art. 31 SHG/UR: if the person seeking help refuses reasonable cooperation in spite of a prior warning, especially if they violate the obligation to provide information or if they violate the stipulated obligations, conditions or directions, the social welfare authority may refuse, reduce or discontinue economic assistance. 48

[87] Art. 28 para. 2 (d) SHG/GL; Art. 12 SHG/SG

[88] § 9 para. 2 (d) SHV/SZ.

[89] § 13 para. 2 (a) and (b) SPG/AG; Art. 22 para. 1 esp. (d) SHG/AR; Art. 28 para. 2 (c) SHG/BE; § 14 para. 3 SHG/BS; § 29 para. 2 SHG/LU; Art. 22 para. 1 No. 4 and 6 SHG/NW; § 148 para. 2 (a) and (b) SG/SO; § 8 SHG/TG; § 24 para. 1 (a) No. 4 and 6 SHG/ZH.

[90] Art. 7 para. 2 (b) and art. 8 para. 3 ShiV/AI ; § 17 a para. 1 (f) to (i) SHV/BL; Art. 11 (a) ABzUG/GR.

[91] Art. 4a para. 2 SHG/FR; Art. 20 LIASI/GE; Art. 20 LASoc/JU; Art. 57 para. 1 SHG/NE; Art. 40 in conjunction with art. 56 LIASI/VD.

[92] Art. 23 para. 2 (c) ARGES/VS; at the legislative level it is mentioned that the social welfare recipient must actively participate in the integration contract, cf. art. 11 para. 1 SHG/VS; Art. 9a (g) SHV/TI.

[93] Art. 3 para. 2 LASV/VD; art. 40 LASV/VD; art. 23a LEmp.

[94] Art. 10 para. 5 SHG/FR; Art. 5 OASoc/JU; Art. 35 (b) OASoc/JU; Art. 9a SHV/TI; Art. 23 para. 1 ARGES/VS.

The canton of Bern not only has the obligation to provide information and to follow directions[95], but also a general obligation to mitigate, according to which social welfare recipients are obliged to take the necessary steps themselves to avoid, remedy or mitigate need.[96] Finally, the obligation to accept reasonable work or to participate in integration and occupational programmes is stated explicitly.[97] 49

The canton of Vaud has particularly nuanced and detailed provisions: the work and integration obligations are regulated by so-called integration agreements - sometimes also called integration contracts or similar - between the social welfare service and the social welfare recipients. The social welfare recipients are obliged to do everything possible to reduce their need (Art. 3 para. 2 LASV/VD) and to cooperate (Art. 40 LASV/VD). This also implies the obligation to conclude an integration agreement with any failure to abide by such an agreement in accordance with Art. 56 potentially leading to sanctions in accordance with Art. 56 LASV/VD. 50

The social welfare law in the canton of Vaud regulates social integration measures. A person who is classified by the social welfare service as "capable of employment" and therefore has to strive for professional integration is obliged to register with the employment agency for a job placement, and from that moment their obligations regarding work integration are regulated by cantonal employment law (LEmp/VD). This stipulates the obligation to do everything possible in pursuit of a return to a gainful activity. In their capacity as job seekers, they are subject to the same obligations as unemployed people in accordance with the federal unemployment insurance.[98] 51

As a positive incentive, participation in an occupational programme can involve an incentive payment, a so-called integration allowance (IZU). According to the SKOS guidelines, this should be between CHF 100 and CHF 300/month. The cantonal legislations deviate significantly from these guidelines.[99] How often this form of compensation is actually part of a welfare-to-work programme clarified below (N 91) shows in detail which negative incentives and sanctions are associated with participation. 52

In addition to these three parameters that shape working in an employment relationship under social welfare, the following points are equally relevant and are dealt with in more detail: How common are such programmes? Which goals do they pursue and what impact do they have? How are they contractually structured? What are the negative consequences of not participating and to what extent is the obligation to participate in a programme restricted? From a legal perspective, is the application of labour and social insurance law necessary? How are the offers managed and is access to the right for social welfare recipients guaranteed? 53

[95] Art. 28 para. 2 (a) SHG/BE.
[96] Art. 28 para. 2 (b) SHG/BE.
[97] Art. 28 para. 2 (c) SHG/BE.
[98] Art. 23a para. 1 LEmp/VD.
[99] For example: BE : CHF 100 (art. 8a para. 2 SHV/BE); UR CHF 200 (according to a decision of the executive council 31.08.2005); VD no integration allowance except for young people under 25 years of age but a higher GBL.

II. Prevalence

Due to the lack of a centralised registration system and obvious cantonal differences in definition, there are no reliable overall figures on effective participation in programmes. A basic prerequisite for effective governance is therefore not in place. An approximation is possible using various sources such as other research projects, social welfare statistics, and our cantonal survey. A research project on companies for social and professional integration (USBI) determined that there are over 400 such companies in Switzerland, in which around 43,000 unemployed people work, who, however, do not all receive social welfare, but are also supported by unemployment or invalidity insurance.[100] 54

According to a SKOS survey (2017), half of the cantons have established integration programmes. However, their availability differs. In five cantons, the communes have no access to such programmes at all, while in six cantons there are appropriate integration programmes for all social welfare services. 55

We therefore asked the cantonal social welfare offices about the *types of programmes* available in the canton. All programme types are available in 17 cantons, i.e. those for *evaluation*, *placement* in the first labour market, *qualification* or participation (cf. N 9). Only three types of programme are available in another five cantons (participation and evaluation programmes are less common); no information is available for the remaining four cantons. 56

The programmes that are the most significant in quantitative terms according to the estimates of the social welfare offices are qualification programmes, namely around 40%. In contrast, evaluations are only responsible for a small part of all places (about 12%). Participation places are also quite well represented. However, this varies widely by canton: for example, about half of all jobs in the canton of Geneva are evaluation places whereas in the canton of Vaud 80% of all places are intended for qualification. 57

According to the authorities, the rates for actual programme participation fluctuate between 4% and 100% (information from 19 cantons).[101] However, these estimates seem massively too high when compared to the FSO social welfare statistics. According to this source, only 4.4% of social welfare recipients over the age of 15 were in a labour integration or employment programme in 2016. The truth probably lies somewhere in the middle; only a minority of social welfare recipients are considered for an occupational programme. In 2018, 28% of the social welfare recipients over the age of 15 were already employed (and were receiving supplementary social support), 37% were inactive, e.g. people with health restrictions or care responsibilities. Only 36% of social welfare recipients over the age of 15 are working but without gainful employment.[102] 58

[100] ADAM/AVILÉS/SCHMITZ, p. 44.

[101] One canton has stated that 100% are qualification places and 100% of the clients would participate in a programme within a year. This seems unlikely and should be treated with caution.

[102] See FEDERAL STATISTICAL OFFICE.

All cantonal differences show that the chance of being sent to an occupational programme differs significantly according to nationality and gender. 59

Table 2 Participation rates in work integration programmes 2016 - of all social welfare recipients aged 15 and over

	People in social welfare	People in work integration programmes	Rate
People over 15 in social welfare	191,040	5,132	2.7%
Swiss men	52,328	1,945	3.7%
Foreign men	45,255	1,340	3.0%
Swiss women	50,402	1,054	2.0%
Foreign women	42,998	794	1.8%

Source: Own calculations based on FSO data and from the FSO's social assistance statistics. Double counting in the cantons accounts for approximately 2%.

Swiss men are twice as likely to be in programmes as foreign women, although there are no factual reasons for this. Unequal access to programmes has been already identified in previous studies;[103] the thesis suggested here is that those in charge are assigned to programmes when those responsible think or believe that this is a worthwhile investment (and that men will be more likely to be in a continuous gainful employment than women). Considering the costs of the programmes, which are usually several hundred CHF a month/participant, this thesis is plausible. Overall, this raises questions about the (re)production of social inequality, transparency, and the function of welfare-to-work programmes. 60

Reasons for the cantonal differences in participation rates could not be identified by testing bivariate relationships. The availability of programme places, the social welfare rate, the basic political orientation in the cantons (strong right-wing parties vs. strong left-wing), or the organisation of social welfare (cantonal, predominantly municipal, joint) each only correlate weakly and in a statistically insignificant way with the observed cantonal differences. 61

III. Rationale, objectives and impact of the programmes

A. Legal basis

Instructions to social welfare recipients are to be justified in a functional and appropriate manner. This means that the instructions have to contribute to the achievement of the goals of social support and this also applies to the instruction to participate in a welfare-to-work programme. According to the SKOS guidelines, integration measures are necessary to counteract impending social disruption. Social costs caused by crime, mental illness, chronic financial dependency etc. should be prevented or contained.[104] Thus, the goal is professional and social integration. 62

At least 17 cantons mention welfare-to-work programmes in their legislation, but there are only sporadic mentions of their objectives. In French- and Italian-speaking cantons, the goals pursued by an integration agreement are defined differently than is the case in the German-speaking cantons. Among other 63

[103] NADAI/HAUSS/CANONICA, p. 15.
[104] SKOS Guidelines, D.1.

things, the measures should ensure human dignity,[105] promote social integration,[106] promote professional integration,[107] promote economic independence[108], or also be useful to society[109].

The restoration of autonomy or independence is mentioned several times as the goal or purpose of the programmes.[110] Promoting fitness for the labour market,[111] the improvement of vocational training[112] or the development of social skills and enabling social contacts are also among the objectives of the programmes.[113] Certain goals are difficult to measure, e.g. in the canton of Fribourg the aim is also to strengthen the ability to relate and adapt.[114] 64

In the survey, the cantonal social services repeatedly named objectives in the context of social work: social and professional integration, prevention of exclusion, personal and health stabilisation and the creation of a day structure. As many as seven times, integration into the first labour market was explicitly postulated. 65

B. Objectives in the programmes of the case studies

The objectives of employment relationships in welfare-to-work programmes are also extraordinarily varied in the cantonal case studies. The canton of Uri, which stands out due to tight legal regulations, has no legal requirements regarding the objectives of occupational programmes. The canton of Bern mentions professional and social integration, at least in close connection with the occupational programmes.[115] The canton of Vaud defines the objective of measures for social integration as preventing exclusion or promoting inclusion.[116] 66

In addition, the survey revealed the following objectives of measures: day structure and long-term occupation as well as 'evaluation' or ‘attendance control'. Work integration, preparation or integration into qualifying vocational training is another key objective; this can also occur in conjunction with combating labour shortages, as in the case of the ten-month employment contract in nursing care in the canton of Vaud.[117] These divergent objectives are also an expression of the spectrum of clients who can only be reached by means of diverse and tailored programmes. It is not straightforward to answer the question of which criteria ultimately explain why only a fraction of the clients in social welfare have to start a programme and the majority do not (see N 58 ss.). A major limitation to activation is likely to be the fact that around two thirds of long-term social welfare recipients have health problems, both physical and 67

[105] Art. 15 (a) LIASI/GE.
[106] Art. 15 (b) LIASI/GE; art. 2 ARSHG/FR; art. 15 para. 1 LASoc/JU; art. 31b (e) SHG/TI; art. 47 para. 1 (a) LASV/VD; art. 11 para. 1 SHG/VS
[107] Art. 15 (c) LIASI/GE; art. 15 para. 1 LASoc/JU; art. 53 para. 1 LASoc/NE; Art. 31b (d) SHG/TI; Art. 47 para. 1 (c) to (e) LASV/VD; Art. 11 para. 1 SHG/VS. Whereby JU and NE emphasise above all that regaining the ability to work is the aim of the measures; VD mentions the regaining of employability as an objective.
[108] Art. 15 (d) LIASI/GE; art. 47 para. 1 (b) LASV/VD; Art. 11 para. 2 SHG/VS
[109] Art. 2 para. 2 (f) ARSHG/FR.
[110] § 25 SPG/AG; Art. 15 LASoc/JU; art. 55 para. 1 (d) LASoc/NE; art. 11 para. 6 SHG/VS.
[111] § 16 SHG/BL; art. 15 LASoc/JU;
[112] Art. 55 (c) LASoc/NE.
[113] Art. 2 ARSHG/FR.
[114] Art. 2 para. 1 (a) ARSHG/FR.
[115] Art. 35 para. 1 SHG/BE; also: art. 17 SHG/AR; § 13 SHG/BS; § 15bis SHG/ZG; § 3a para. 1 SHG/ZH.
[116] Art. 48 para. 1 LASV/VD.
[117] S04, 37-39.

mental, and about 20% have acute addiction problems. This group is literally too sick for the labour market and too healthy for the invalidity insurance.[118]

68 Besides, the segmentation of client groups by origin, region and age plays a role. With regards to young people, it is worth investing, because there is still potential.[119] Young adults are more likely to be assigned to a programme, but the transition to vocational training is also sought.[120] One programme manager worries that more and more adolescents are on social welfare and says that they do not like being in the programme because staying at home is easier.[121] Younger clients are therefore more likely to be perceived as "undeserving poor", and thus as people to be activated. With older people, however, efforts and investments tend to decrease: "And people who might lose their jobs at the age of 50 or 55, of course in those cases I don't know how many measures will be tried, because you still have to use the resources."[122]

69 According to many clients, the daily structure and social involvement are given priority in their programmes. Some explicitly mention the return to the first labour market as an objective; others have established themselves in the current job.

70 There are also different regional opportunities. As the spectrum of measures varies from one commune or region to another, and cities generally have more diversity, the chances of finding a suitable programme are better there, while in rural areas there is a risk that clients will be assigned to programmes that are of no use to them.

71 The case studies show that clients generally do not choose a programme themselves: it is rather the coaches or social assistants who suggest programmes they believe to be suitable to their clients, after clients have already accepted their obligation to be "activated". Whether participation in a particular programme can actually be required from an individual is also important in this context. In the absence of a legal definition, it is primarily determined from case to case. The criterion of the distance between the place of residence and the place of work is often cited. However, it is not possible to say how often this is the decisive factor for a programme.

72 It remains to be seen how big the actual scope of discretion of the person in charge of the case is and how strong the influence of the cantonal *policy* is. This would require a systematic comparison with more cases.

[118] See, for example: WENGER, p. 20 ss.
[119] S06, 114, similar to P05, 10.
[120] S02, 6.
[121] P5, 13.
[122] P3, 16.

C. Evaluations

1. Evaluations are necessary

According to the SKOS guidelines, the quality of the programmes is measured in terms of their impact, i.e. the benefits they bring for the participant on the one hand and for the general public on the other.[123] Therefore, the effectiveness of offered measures for social and professional integration should be periodically checked from a scientific point of view.[124] Evaluations are thus necessary, but to the best of our knowledge there is no (coordinated) evaluation strategy, such as in unemployment insurance. We came across some evaluations as part of the project, but it can be assumed that only a fraction of the programme evaluations are publicly accessible. 73

In the cantons which appear in our case studies, reports are important and implemented. The BIAS concept in Bern mentions a regular review of the strategic partners, e.g. with regards to transparency, cooperation, development and variety of offers or cost efficiency, but already describes this as impact goals. No evaluations are requested, let alone carried out, for individually purchased programme places.[125] Evaluation is described as “neglected” but mentioned occasionally.[126] In practice, the evaluation pertains to the concrete participation of the welfare recipient, for example through final discussions with all persons involved.[127] 74

Published evaluations that focus on integration into the first labour market show modest, if any, positive effects; this is in line with international comparative research on active labour market policy.[128] Most evaluations relate to individual programmes, some of them focus only on the output and not the impact. The observation periods are often short and there are no control groups, so it remains unclear whether successful reintegration into the first labour market can be attributed to the programme or whether clients would have also achieved this without a programme.[129] 75

Cross-programme evaluations also find moderate success rates. An early evaluation of integration programmes in the canton of Basel-Landschaft found a success rate of 18% (the measure was the cause of an improvement in the income situation).[130] AEPPLI and RAGNI even found a negative influence from external integration programmes, especially among people with good prospects of reintegration, and concluded that often the most effective measure is not to take any measures.[131] NEUENSCHWANDER ET AL. follow an interesting approach:[132] in a panel survey, they asked clients to evaluate their social integration using 40 indicators, including their professional situation, motivation, work and language qualifications, and their health. The results show an improvement in the well-being of the participants even after the end of the programme; the reintegration rate in the first labour market here was 9%. However, 76

[123] SKOS Guidelines, D.3.
[124] SKOS Guidelines, D.4.
[125] S5, S9, 56
[126] S7, 193 and S1, 185 ss.
[127] S5, passim.
[128] CRÉPON/VAN DEN BERG and EICHHORST/KONLE-SEIDL.
[129] ECOPLAN as an example.
[130] EGGER DREHER AND PARTNER, p. 28 ss.
[131] AEPPLI/RAGNI, p.10 ss.
[132] NEUENSCHWANDER/FRITSCHI/OESCH/JÖRG.

the number of respondents fell very sharply in the course of the investigation, and the informative value is therefore limited.

The study on success factors for companies in social and professional integration was able to identify a number of strategic, economic and client-related factors from the assessments of companies assigning services and clients - for example, clients' resources, interests and motivation and their say in the measure.[133] Such assessments could provide good hypotheses for impact evaluations. 77

Structural reasons limit the prospects for methodologically better evaluations: small-scale organisation and heterogeneity of the programme landscape mean that data are often lacking or not comparable, that smaller communes can afford fewer evaluations than large ones, and that hardly any cross-programme evaluation is carried out with control groups. Overall, the success rates for programmes in relation to the first labour market are modest. 78

2. "Known to the court" effective

Notwithstanding this scientifically and politically unsatisfactory situation with regards to impact measurement, the Federal Supreme Court assumes that participation in a programme is fundamentally suitable to improve the situation of social welfare recipients as stated in BGE 130 I 71, C. 5.4: 79

> "The (...) argument of the complainant that the integration effect of occupational programmes - which allegedly have been proven to have a stigmatizing effect - is unproven or at least controversial, cannot change the fact that the Cantonal Court was allowed to consider the obligation to participate in integration and occupational programmes without arbitrariness as a reasonable measure within the meaning of Art. 24 SHG/SH, which is suitable to improve the complainant's situation. *This can, moreover, be described as known to the courts.*"[134]

In the cantonal case law it can be read on various occasions that experience has shown that a work programme has a good effect and improves the situation of the social welfare recipients.[135] To support this statement, reference is occasionally made to BGE 130 I 71.[136] An assignment in a programme also has a positive effect because an employment certificate is issued and references can be given.[137] 80

No judgment in the cantonal case law could be inferred in which a programme would have been declared unreasonable because it was considered unsuitable to improve the chances of reintegration. For example, the complainant that had an unpaid internship in the first labour market and therefore did not want to participate in a (partially) paid occupational welfare programme, was obliged to participate in the programme, even though the Court held that unpaid work in the first labour market offered better opportunities for reintegration than the occupational programme.[138] Also, the order to participate in the programme is still considered proportionate, even if only 10.2 % of the participants succeed in reintegrating through the specific programme.[139] 81

[133] ADAM/AVILÉS/SCHMITZ.
[134] Freely translated; emphasis by the authors.
[135] e.g. VerwG GR, judgment U 08 100 dd. 12/02/2009, C. 4a; VerwG SG, judgment B 2010/234 dd. 30/11/2010.
[136] e.g. VerwG ZH, judgment VB.2016.00434 dd. 01/11/2016; C. 2.4 (in fine); VerwG ZH, judgment VB.2015.00099 dd. 26/03/2015, C.2.3.; VerwG ZH, judgment VB.2014.00423 dd. 18/11/2014, C. 3.5 and 5.1.
[137] VerwG SO, judgment VWBES.2007.320 dd. 05/11/2007, C. II. 4. C.
[138] VerwG ZH, decision VB.2014.00122 dd. 05.11.2014, C.3.4
[139] VerwG ZH, judgment VB.2017.00253 dd. 04/09/2017, C. 4.2.

D. Political impact: discipline or emancipation?

Considering that the objectives of employment relationships in welfare-to-work programmes diverge according to the legal bases, that the activation rate differs depending on origin, gender and age, and that programme evaluations are only available to a limited extent, and resulting in only moderate reintegration rates, the question arises as to whether disciplining people experiencing poverty is an implicit objective or a result of such employment relationships in welfare-to-work programmes. Since modern times, poverty has been seen as an evil that goes hand in hand with moral misconduct and that has to be fought with work and pressure to work - whether in the form of English workhouses, administrative detention in Switzerland or with modern neoliberal workfare like in the USA. The division into deserving and undeserving poor, as well as the issue of whether someone is poor because they cannot or are unwilling to work, also permeates the debate and practice of employment relationships in welfare-to-work programmes.[140] Increased activation pressure and threats of sanctions do not only affect social welfare recipients, but also implicitly act as a warning to those who are not (yet) affected by poverty. 82

US research has shown that while workfare programmes reduce the rates and duration of social welfare benefits and that administrative barriers contribute to ineligibility; poverty rates do not decrease to the same extent. Earnings prospects and education rates are falling especially in households affected by "placement before training". There is also empirical evidence that the sanctioning practice is racially underpinned.[141] Bluntly, the sanctions regime can be described as a neoliberal mechanism of behaviour control through which the privileged classes discipline especially poverty-stricken women from minorities and impose a certain work ethic on them.[142] 83

Qualitative studies on the effects of Hartz IV in Germany argue that, due to omnipresent control mechanisms, the talk of personal responsibility is reversed: powerlessness, heteronomy and shame dominate the experience of a large proportion of those receiving benefits.[143] The theory of the "poverty trap" (people keep on receiving benefits because gainful employment is not worthwhile) was not confirmed. Instead, life in Hartz IV is characterised by social disintegration and stigmatisation, with most beneficiaries largely and continuously orienting themselves towards the norm of gainful employment and benefits. Discrimination mechanisms in sanction practice can also be assumed in Germany, since men and adolescents under Hartz IV are sanctioned significantly more often.[144] 84

It is fundamentally disputed whether disciplinary action in the form of sanctions (reduction or suspension of benefits) actually contributes to achieving the goal of professional and social integration. Certain economic models generally assume that (livelihood-securing) social welfare benefits in themselves have a negative impact on the willingness to work, which is why the obligations must be enforced consistently and the right to assistance expires if the service is refused. Social support should therefore be based 85

[140] MIKL-HORKE, p. 10 ss.; JOCHUM, p. 85 ss.; www.uek-administrative-versorgungen.ch (visited on 05/05/2020) and WACQUANT.
[141] CHANG/LANFRANCONI/CLARK , p. 4 ss. with further references.
[142] FORDING ET AL., p. 1610 ss.
[143] DÖRRE ET AL., p. 256.
[144] FUCHS, Workfare, p. 17 et seq.

on the workfare principle.[145] On the other hand, more recent legal doctrine tends to argue that compulsorily enforced participation in occupational programmes has led to misguided disciplinary measures rather than to overcoming need. A workfare approach should therefore be rejected.[146]

The following explanations under IV. (N 89 ss.) on the contractual structure of welfare-to-work programmes show, according to our source materials, a high degree of disciplinary actions as well as control effort and rather little scope for negotiation. The objectives of the measures are mostly described in general terms; whereas the reporting on the work and social behaviour of clients and instructions for the job are quite detailed. 86

Welfare-to-work programmes or integration measures are not problematic in themselves. If the programme and the client's needs match, if they participate voluntarily and have influence on the arrangement of their commitment, a measure can be successful, at least to the extent that well-being and self-esteem are improved.[147] Our case studies, for example in the canton of Bern, show that clients may receive the actual programme participation positively, whether due to the integration allowance, social contacts or recognition, and even if previous assignments have been moderately successful.[148] Another client expressed satisfaction with his work in the "Hundetagi" (dog day care centre), because it allowed him to do something and not just be on the dole.[149] Both also appreciated a certain autonomy in terms of work allotment. These statements coincide with the modest successes of German 1 € jobs, which had a positive effect on social integration, especially in the case of voluntary participation.[150] In these cases, one would have to speak of voluntary work (see also IV section D below). 87

In the experience of the social welfare services, when integration programmes take place close to or in the first labour market, not only are the sustainable successes higher, there is also a de-stigmatisation: for example, a client of ProTravail in the canton of Vaud reports that he is satisfied because he is doing a real job with an employment contract and a wage.[151] De-stigmatisation and a real chance of reintegration are also represented by the ten-month employment contracts in the nursing and care sector, which can be followed by an unlimited employment contract. That is also the reason why it seems urgent to generate more knowledge about the chances of success of individual programmes. It should be noted that, firstly, receiving social welfare and the availability of a programme is associated with a considerable loss of autonomy and, secondly, reintegration prospects are very different, which also, but not only, depends on the voluntary nature and motivation of the social welfare beneficiaries. 88

[145] LEISIBACH/SCHALTEGGER /SCHMID, p. 144.
[146] STUDER/PÄRLI, Beschäftigungsprogramme, p. 1393; PÄRLI, Recht auf Arbeit, p. 135 et seq., 139; HEUSSER, Repression, p. 127; MEIER/PÄRLI, Intégration, in particular footnote 122; critical also: WIZENT, Sozialhilferecht, N 856 et seq., N 866.
[147] See results from NEUENSCHWANDER/FRITSCHI/OESCH/JÖRG on measures of social integration, FERRARI ET AL. on social firms.
[148] K01.
[149] K13.
[150] FUCHS, Workfare, p. 14.
[151] K14, 8.

IV. Organisation of welfare-to-work programmes

A. Overview

In order to analyse the actual legal relationships in the triangle between social service, client and programme, we have used various sources. In the cantonal survey, the social welfare services were asked to provide information on one to three typical welfare-to-work programmes in their canton. Secondly, we were able to evaluate some (anonymised) documents such as contracts or agreements from the three case study cantons as well as to interview clients and social welfare services about these relationships. In the following we evaluate these sources from a social science and legal point of view. 89

The following information comes from the cantonal survey. These are assessments of selected programmes and not a full survey. 90

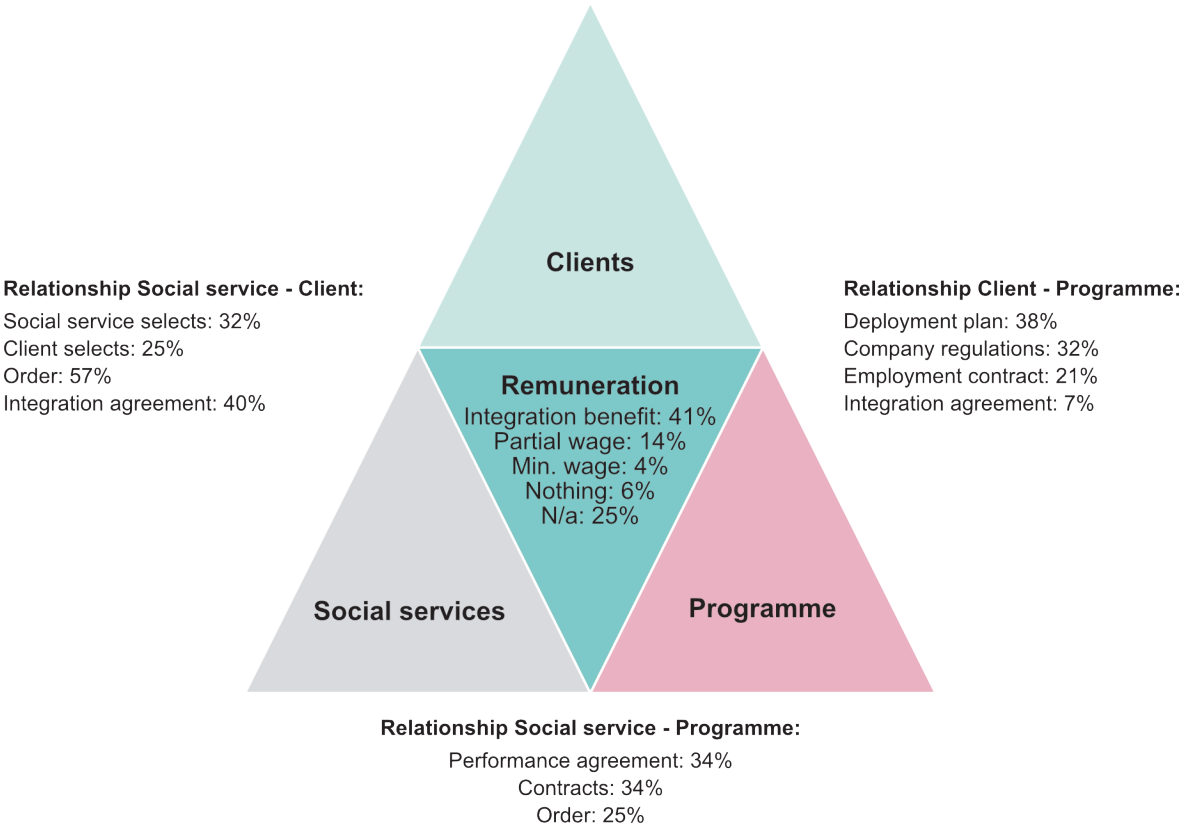

Figure 2 Relationships in the triangle – based on 68 programmes from cantonal survey 2017, multiple answers possible

Social welfare services and programmes are primarily linked to one another through performance agreements or contracts (for individual clients). In a third of all cases it is the social welfare service that gets to choose, in a quarter of these it is explicitly the client who has the choice. The assignment between the social welfare service and the client is sealed via a decision or an integration agreement, but in a fifth of the cases there are also other agreements. The work of the clients in the different programmes is regulated differently, sometimes several instruments are used, i.e. an integration agreement with the social welfare service and a deployment plan in the company. The following table shows how common individual models are. 91

Table 3 Organisation and remuneration of the work assignment

How is the work assignment organised?	Number of mentions	Cantons with this model
There is a deployment plan for clients	26 (38.2%)	13
Countersignature of company regulations	22 (32.3%)	12
Employment contract	14 (20.6%)	12
Integration agreement	5 (7.4%)	4
What is there in return?		
Integration allowance	28 (41.2%)	
Partial wage	12 (17.6%)	
Salary amounting to the minimum subsistence level under social welfare	1 (1.5%)	
Internship wage	2 (2.9%)	
Customary for the sector or minimum wage	3 (4.4%)	
Scholarship	1 (1.5%)	
Explicit: No compensation	4 (5.8%)	
(17 programmes without information)	N = 68 (100%)	

Cantonal survey 2017

The table above also shows that *employment contracts are only concluded in one fifth of the programmes*, otherwise work is mainly carried out with an implicit recognition of a work relationship (deployment plan or signing of company regulations). In over 40% of the programmes, participation only triggers an integration allowance. Just over a quarter of the programmes (18) involve wage payments, although these can vary considerably, particularly in the form of partial wage models. Finally, we asked about certain specific aspects of the programme and where and between whom they should be regulated. The results are as follows: 92

Table 4 Between whom are aspects of the work relationship regulated?

	Between social welfare service and programme	Between social service and client	In a triangle between everyone involved	Total mentions
Regulation of compensation	18	15	14	47 (information available on 69% of the programmes
Regulation of working hours	16	11	17	44 (64.7%)
Regulation of the period of assignment	13	13	26	52 (76.4%)
Regulation on end of assignment	13	12	27	52 (76.4%)

Cantonal survey 2017

It should be noted that while there is great diversity in terms of between whom the programmes are regulated, the actual regulations in a programme are relatively consistent: if one issue is regulated in the triangle of all those involved, other aspects will also be. Overall, information is only available for three quarters of the programmes, so there is room for improvement in terms of transparency.

B. Contractual arrangements

In principle, genuine labour law issues are regulated in the agreements, contracts or decisions concluded prior to assignment in an integration programme. This includes the duration of the assignment, insurance law issues (accident, illness, liability), attendance and absences, remuneration and expenses, social insurance contributions, termination of contract, but also agreed objectives, rights and obligations as well as impending sanctions in the event of failure to provide the expected and agreed performance. They show the different roles assigned to clients of social welfare government institutions and programmes and can give an indication of the degree of self-determination. 93

In a social welfare service in Bern, several such agreements are necessary, one after the next: *first*, the person in charge of the case decides on basic participation in the measure and the client agrees. *Secondly*, a personal evaluation as well as the formulation of objectives and further steps take place in the triage centre. *Thirdly*, if participation in a programme is decided upon, a "cooperation agreement" is drawn up and signed by the specialist unit, the client and the employing company (the responsible social welfare service receives a copy of the agreement). Although it is supposed to be an agreement, it becomes clear that the client's obligations are given particularly high priority: point 2 of the general regulations lists undesirable behaviour that leads to "sanctions", immediately after the objectives pursued with the integration place and even before labour and insurance law issues. Here, too, potential misconduct relates exclusively to the clients, but not to the other signing actors. This is followed by the subject area “Working hours/holidays/absences”, in which it is determined, among other things, that holidays, public holidays and vacation are granted at least in accordance with the statutory provisions of the CO. In this section, too, the client is reminded of their obligations, since insufficient participation in or termination of the assignment can lead to sanctions by the social welfare service. Then the company’s obligations are specified in the contract. Here the expectation is expressed that the company will take part in the respective feedback meetings. Otherwise, the contractually regulated obligations are limited to control and information functions. For example, the company undertakes to report absences from the fourth day onwards or frequent brief absences on the part of the employee to the responsible coach at the responsible integration department, to provide information on the "working and social behaviour of employees" and to report "violations of rules". The next point defines that the employee is insured by the communal private liability insurance in case of damage and that the accident insurance of the client's health insurance must be activated in case of accidents. Finally, conflicts and the potential termination of the agreement are discussed. It is stipulated that the company can terminate the agreement “in justified situations” after consultation of the responsible coach of the integration department “with immediate effect”. Employees, on the other hand, can only terminate the contract “in consultation and with the consent” of the responsible coach and the social welfare service. There is therefore no unilateral termination option for the employee. The wording and content of the agreement clearly show, in summary, the power asymmetry and the unilateral power of interpretation. The agreement is hybrid: it deals with issues that are genuinely contractual, but it is not an employment contract. 94

In an *internship contract* with social welfare recipients and another regional strategic partner, on the other hand, the termination of the programme is more clearly defined as a negotiation process. "If difficulties arise", the supervisor should "find a suitable solution" together with the integration consultant and 95

the employee. In addition, this contract also mentions the “immediate termination of the agreement […] due to unreasonableness according to Art. 337 CO”. Subsequently, however, the misconduct of the client is also named here as a reason for exclusion, in concreto "unexcused absences, insufficient motivation, theft, inappropriate behaviour (aggression, threats, insults) and addiction problems".

96 In the case of the so-called *evaluation places* in the canton of Bern, which are imposed if authorities suspect undeclared work or if they feel the need to assess the clients, an employment according to the private employment law (Code of Obligations, CO) is concluded between the client and the social enterprise for three months. The social enterprise has no influence on who comes to the evaluation. The wages fluctuate between around 1,800 to over 4,000 CHF and are roughly calculated on the basis of the applicable social assistance law scales. The wages are subsidised by the social welfare service. Anyone who falls ill during an evaluation stint must bring a medical certificate from the 1st day (in the other programmes: from the 3rd day) and does not receive continued wage payment (according to Art. 324a para. 1 CO, continued wage payment is only provided if the employment relationship has lasted or was concluded for longer than three months.). Those who are sick for longer than roughly a week fall under the minimum subsistence level and have to go back to the social welfare service for additional support. In the case of an accident, it is different, and the company pays for the first three days and then the accident insurance does. Refusal to work in an evaluation place can, as N 119 expands on, lead to the suspension of social welfare for lack of need due to the principle of subsidiarity.

> The assignment in an evaluation place is therefore regulated by an employment contract, but the social welfare recipient has no scope for negotiation, which is also not contested by the Administrative Court. However, it is suggested that, as part of a confidence-building measure, the participants should be informed about the working conditions before taking up the position.[152] But in itself, it is not necessary to clarify all conditions of employment before starting the job.[153]

97 In the *canton of Uri*, appealable decisions are used if clients are to be included in the occupational programme. The characteristics differ somewhat among social welfare services. The decisions are signed by the social welfare service and sent by registered mail. Typically, they mention obligations and agreements on the assignment, outline the personal situation and define the objectives of the measure. They also list correct behaviour and benefit cuts if the decision is not complied with.

98 After assignment by the social welfare service, an " Agreement on the objectives of the integration programme" is signed between the provider, the assigning social welfare service, and the client. The wording of the objectives comes across as standardised and impersonal and not the product of negotiation with clients: "Daily structure in the work area", "Increasing vitality", "Stabilising and building up work and performance", "Checking / maintaining / increasing attendance". Then, the general guidelines for programme participation follow in a specific and concise form: the instructions of the divisional head of the division must be followed; there is a ban on cell phones in the workplace as well as a ban on parking on the premises. The programme participants are also advised that they are obliged to do everything possible to prevent occupational accidents and illnesses and to insure themselves against illness and accidents. The programme provider declines all liability in the event of accidents at work. Participation in the

[152] VerwG BE, judgment 100.2011.428U dd. 18/10/2012, C. 5.7.6.

[153] VerwG BE, judgement 100.2011.428Ua dd. 18/10/2012, C. 5.7.6.; similar also: VerwG SG, judgement B. 2015/4 dd. 30/06/2015, C. 2.2.1; VerwG VD, judgment PS.2014.0106 dd. 04/05/2015, E. 2.c.

programme ends after the agreed period of the assignment or when clients find employment. The last point is "Breaches of the rules and consequences". In the event of incidents, such as theft, the referring authority is informed immediately, and the further procedure is determined in a joint discussion. In the event of "Irregularities or violations of instructions from the head of the division or the assigning management ", an oral reprimand is first made, and solutions are sought together. Failure to comply with the solutions agreed upon will result in further warnings and may lead to programme exclusion. The agreement on objectives therefore ultimately consists of objectives reduced to keywords and primarily of guidelines to be followed (up to and including "Rule violations and consequences", everything is subsumed under guidelines).

99 The simultaneous “agreement” between the social welfare service and the integration programme regulates formal issues such as duration and costs. It is striking that, in contrast to the clients, the social welfare service and the integration programme can at any time unilaterally terminate the measure. It is therefore at the discretion of these two actors whether a joint solution will be sought in the event of a conflict, as mentioned in the target agreement signed with the participants.

100 The arrangement of the agreements and contracts as well as the financial flows suggest that the programme is primarily offering a service to the benefit of the social welfare services as opposed to the client, even though the client is the one performing work with economic value.[154] The agreements and contracts lack options for termination. The social welfare service and the integration programme reserve the right to determine the outcome of an assignment by assessing the behaviour of the employees. In the worst case, this right can lead to serious financial cuts for the participants, since the misconduct for which a warning has been issued can lead not only to the termination of the contract, but also to material sanctions - including exclusion from social welfare.[155] Accordingly, correct and incorrect behaviour of the participants is of great importance in the agreements. Exit from the contract on the part of the employees only appears legitimate if they have found a job in the first labour market. Ultimately, the contractual terms can be interpreted as an expression of mandatory service in return on the part of the clients for the financial support through social welfare. In this sense, the integration programmes take on the function of empowerment, increasing employability, ensuring a regulated daily structure and facilitating social contacts, on the one hand, but also the function of a control and disciplinary mechanism, on the other.

101 Accordingly, the freedom of contract, a characteristic feature of an employment contract, is only partially fulfilled. Although the agreement is also signed by the participants, they thereby primarily agree to comply with the listed obligations, whereas the refusal to sign inevitably raises the suspicion of a lack of willingness to provide a service in return for the social welfare money received. The same can be observed regarding wages. A genuine labour law category is used which, however, is interpreted differently, so that it is ultimately not a right of the social welfare recipient, but rather a burden: according to the Federal Supreme Court, it is irrelevant that the “wage” is not granted by the employing company, but by the social welfare service as a monetary benefit in the amount of emergency aid “pro rata for

[154] In the case of social firms, this is even included in the concept because they undertake to cover part of the costs through sales on the market, see MEYER, p. 3 s. with further references and ADAM/AVILES/SCHMITZ.

[155] See, for example, VerwG ZH, decision VB.2016.00353 dd. 28/09/2016, where the exercise of the supposed freedom from termination led to a 15% reduction in the GBL in a period of 6 months.

every completed working day in the programme" and thus represents a "minus business" for the community. According to case law, this monetary benefit is considered a remuneration that has to be taken into account in terms of subsidiarity, even if the commune does not pass on a remuneration of the employing company to the social welfare recipient in terms of a paying agent.[156]

C. Additional obligations?

In the case study interviews, obligations were discussed, particularly with a view to specific programmes and breaches of obligations in the case of sanctions (see below). Clients in programmes refer above all to rules of conduct that must also be observed in normal employment relationships: no bad language, neither drugs nor alcohol at work, and no unexcused absences. The employing companies see it in a similar way - e.g. unpunctuality in a shift operation is a no-go,[157] and after verbal and written warnings, termination of contract may also occur.[158] It is the responsibility of the employing company to ensure a harassment-free working atmosphere.[159] As will be shown in the case of sanctions, there is a grey area or area of discretion when it comes to fulfilling social welfare obligations, which must be dealt with in social work (motto: "Can't he or doesn't he want to? And if he can't, what's the reason? "). It was specifically mentioned by a social welfare service that refusing to learn German could be seen as a violation of the obligation to mitigate damage, especially if successful participation in the programme failed due to poor language skills.[160] 102

D. Perspective of the participants

Those who work in an evaluation programme interpret the contracts not entirely wrongly as normal employment contracts[161] similar to those of other normal companies. One programme manager, however, states succinctly: it acts like a real job in the first labour market, but is not one.[162] For others, however, contract terms and cash flows are opaque, as another participant explained that he did not know whether he gets paid by the company or by social service.[163] Such financial dependencies, which are difficult to understand, ultimately devalue the work performed, because it is not related to any remuneration derived from it. He is also not aware of what kind of contract it is.[164] He wanted to clarify this uncertainty about the character of the contract with his work colleagues, but then had to find out that they all have different contracts, which not only has to do with the assignment of people from different programmes and funding schemes,[165] but also with the different wages depending on the level of previous social welfare benefits. Apparently, as a French-speaking person, he signed a German contract 103

[156] Judgment FSC 8C_451/2019 dd. 19/08/2019, C. 4.3.1.
[157] P2, 76.
[158] P6, 116-125.
[159] S4, 133-134 in connection with a programme termination.
[160] S3, 152-153.
[161] K4, 44, K07, 35.
[162] P5, 18. "Es tut wie ein richtiger Arbeitsplatz im 1. Arbeitsmarkt, ist aber keiner"
[163] K3, 63; "[…] je sais pas si c'est l'entreprise qui me paie ou si c'est le social ou quoi. »
[164] "[…] donc le contrat qu'il y a ici je sais pas qu'est-ce que c'est ça."
[165] P5, 8-17.

without really knowing what was in it, so he struggles to understand.[166] For a client it is per se a motivation to work with an employment contract. In term of social status, such a contractually guaranteed assignment can be valuable, as once again it is possible to pursue a regular job, just like a "normal" job ("you can get up in the morning"). There is a daily routine in which the person leaves the house in the morning and returns in the evening. Ongoing visibility in the home environment is threatening and bears the stigma of being an unemployed person who is at home all day and dependent on the support of the general public. The person has also come to the conclusion that if he is up and ready every morning for the integration programme, he could just as well do it for a company in the first labour market.[167] In this respect, too, the signed employment contract conveys a little bit of "normality".

104 For people in social or professional integration programmes, the agreements, which are in many respects simply a collection of codes of conduct, are not necessarily perceived as such. Many speak of employment contracts, but some are aware of their “agreement” status.[168] It seems that these clients have adapted or conformed to the logic of social welfare and accept that they must meet the requirements and specifications of social welfare in order to receive financial support. The content of the agreements does not seem to be of particular importance to them. They often only remember the content roughly - such as the ban on drugs and alcohol[169]- or the stipulated workload as well as that rules on vacation and sickness are “like in a normal employment contract”.[170] Remarkable in this context is also the assessment of a leading manager in social integration. After enumerating a list of requirements, the manager concludes that the agreement is, however, not as strict as a “real” employment contract,[171] although the disciplinary elements would not be included in an ordinary employment contract.

V. Enforcement of obligations

A. General information

105 Work obligations are cornerstones of the activating welfare state and, as seen, are well anchored in a legal basis. If these obligations are violated, a reaction should not fail to materialise.[172] The enforcement of work obligations through sanctions is closely linked with activating welfare policy.

106 Negative incentives result in particular from the principle of subsidiarity and accordingly apply at both levels: both the level of benefits (sanctions; see B below) and the eligibility itself may be affected (the benefits are denied; see C below) if an obligation to work is violated. What also needs to be discussed is whether non-participation in an occupational programme constitutes an abuse of rights and whether social welfare and emergency aid can be discontinued for this reason (see D below).

[166] K3, 67. "[…] donc j’ai du mal à comprendre.”
[167] K7, 53. : "Und so wegen dem habe ich auch so, ich will mal wieder schauen, mal wieder richtig, mal ein anderer Arbeitsvertrag, mal richtig von einer richtigen Firma, grösseren Firma und so ja also das hat mich motiviert eigentlich, ja genau. "
[168] K2, 48-57, K6, 11-14.
[169] K12, 163-172.
[170] K10, 21 and 74-75; “wie in einem normalen Arbeitsvertrag”
[171] P1, 30; “nicht so streng wie jetzt ein richtiger Arbeitsvertrag.”
[172] WIZENT, Sozialhilferecht, N 832.

B. Sanctions

1. SKOS guidelines and legal basis

The SKOS guidelines stipulate that a sanction-based reduction of the basic requirements under social welfare is possible if legal obligations or conditions are violated. Before ordering a reduction in benefits, it must be checked whether: 107

- the misconduct justifies a reduction;
- the concerned person was aware of what kind of behaviour was expected and that non-compliance could lead to a reduction;
- the person concerned can provide relevant reasons for their behaviour.[173]

This addresses fundamental legal principles of a state governed by the rule of law, such as the right to be heard and the principle of proportionality. In addition, a sanction must always be compatible with the fundamental rights, which also means that a reduction in benefits can never lead to an encroachment in the level of assistance provided by article 12 Cst.[174]

The scope of the reduction should be between 5% and 30% of the basic cost of living (GBL). The suspension of the integration allowance and the income allowance can also be considered as a sanction. In the event of a reduction, the impact on other members of a support unit (especially children and adolescents) must be considered and the severity of the misconduct taken into account when determining the extent of the reduction. A reduction of 30% is only intended for repeated or serious breaches of obligations. In addition, a reduction should be limited in time: a reduction of 20 % or more should be limited to a maximum of 6 months and has to be reviewed after that; a less severe reduction has to be limited to a maximum of 12 months.[175] 108

Cantonal laws sometimes deviate considerably from these guidelines. Only the social welfare law of the canton of Ticino explicitly refers to the SKOS guidelines.[176] According to the latest SKOS monitoring, in most cantons the reduction is 30%. In the event of a violation of the work integration obligations, there are frequent (explicit) deviations from the SKOS guidelines.[177] 109

For example, the canton of Basel-Landschaft prescribes a reduction to emergency aid if the following obligations are violated, provided a prior warning was issued: 110

- striving to maintain the job;
- accepting a reasonable job;
- participating in ordered support programmes or exercising ordered jobs.[178]

In the case of other breaches of obligations, a reduction to the level of the emergency aid is only possible if the breaches go on or occur repeatedly. The regulation of the canton of Thurgau is similar, according to which, in deviation from the SKOS guidelines which are otherwise applicable, a reduction of up to

[173] SKOS Guidelines, A. 8.2.

[174] HÄNZI, Richtlinien, p. 152; MÖSCH PAYOT, Sozialhilfemissbrauch?!, p. 303; AMSTUTZ, Existenzsicherung, p. 301.

[175] SKOS Guidelines, A.8.2.

[176] Art. 23 para. 1 SHG/TI.

[177] SKOS, So werden die Richtlinien angewandt, www.skos.ch (SKOS Guidelines / Monitoring Social Assistance: Application of the guideline as of 01/01/2018), visited on 02/02/2020.

[178] § 18 para. 4 SHV/BL. Except for these obligations, this higher sanction also applies if the welfare beneficiary fails to assert all claims that take precedence over their right to social assistance within the meaning of § 5 SHG/BL.

40% can be applied in the event of "qualified reasons for reduction", which includes "repeated refusal to work.[179]

It is also worth mentioning the canton of Grisons, which sets out a reduction of more than 30% to the level of emergency aid only for foreigners who do not meet their economic, social or cultural integration obligations. This provision has already been rightly criticised as highly stereotyping.[180] The cantons of Lucerne (35%)[181] and Schwyz (40%)[182] principally advocate higher reductions than the 30% stipulated by the SKOS guidelines. 111

Against this background, especially in view of the occasionally very vague regulations of duties, it is not surprising that the SKOS also concluded that criteria for the application of sanctions are missing in many places.[183] This is also problematic because the compatibility of this sanction with fundamental rights has not been fully clarified (see N 26). The tightening of the sanction options from 15% to 30% as of January 2016 was accompanied by the abolition of the minimum integration allowance, which was clearly linked to a strengthening of the activating social welfare policy and increased the pressure on social welfare recipients to make of use of their ability to work (in an occupational programme). [184] 112

2. Reception in the case law practice

Cantonal case law regarding the sanctions imposed in the event of violations of work integration efforts has proved to be diverse. The cases in which the 30% sanction introduced in the SKOS guidelines in 2016 is being applied cannot yet be conclusively assessed. Occasional judgements, in which the 30% reduction was applied for six months in the case of violations of work obligations, can nevertheless already be found.[185] There are also repeated cases in which the GBL has been reduced by 15% over a period of twelve months, which ultimately corresponds to a 30% reduction over six months in financial terms.[186] 113

In a number of judgements, the cantonal court reduced the sanction, both in terms of the duration and the amount of the reduction, as not being commensurate with the wrongdoing.[187] In particular, an immediate downgrading to emergency aid (see also below N 119) without prior reduction is judged to be disproportionate.[188] 114

More recently, disputes about the (partial) suspension of social support and emergency aid within the meaning of the principle of subsidiarity due to non-participation in remunerated occupational pro- 115

[179] § 2h SHV/TG.

[180] WIZENT, Bedürftigkeit, p. 247.

[181] § 14 para. 1 SHV/LU.

[182] § 5 para. 2 SHV/SZ.

[183] SCHWEIZERISCHE KONFERENZ FÜR SOZIALHILFE , Monitoring, p. 12.

[184] Cf. also: KELLER, p. 13 ss.

[185] VerwG SO, judgment VWBES.2017.11 dd. 07/03/2017 (in addition, the reduction to emergency aid and the withdrawal of social assistance were threatened); VerwG SO, judgment VWBES.2017.332 dd. 16/10/2017 (initially 15% for 3 months, then 30% for 3-6 months, finally reduced to emergency aid); VerwG ZH, judgment VB.2017.00248 dd. 17/07/2017.

[186] VerwG BE, judgment 100.2011.147U dd. 04/10/2011; VerwG BE judgment 100.2010.107U dd. 04/01/2011; KG FR, judgment 605 2014 241 dd. 18/03/2016; VerwG ZH, judgment VB.2016.00791 dd. 03/03/2017.

[187] VerwG VD, judgment PS.2014.0106 dd. 04/05/2015 (reduction of the 25% reduction in time from 6 to 2 months); VerwG VD, judgment PS.2007.0110 dd. 20/12/2007, (reduction of the 25% reduction in time from 12 to 6 months); VerwG GE, judgment ATA/847/2010 dd. 30/11/2010 (reduction of the reduction to emergency aid to 15% for 6 months)

[188] Health and Social Department of the canton of Lucerne, judgment dd. 10/04/2017.

grammes, compared to disputes about reductions, have increased (of 9 partial suspensions due to subsidiarity, 5 have been decided on since 2014; of 30 suspensions, 14 since 2014; of 53 reductions, 20 since 2014).

3. Reception in the programme practice

The imposition of sanctions for non-participation in a programme or for misconduct in the programme, e.g. with a subsequent termination, is the responsibility of the case leader in social welfare services. In the programmes examined, problems such as personal overload, frequent absences or abusive behaviour - are reported by the programme to the social welfare service. There are also programmes with internal reprimand procedures.[189] In the canton of Bern, the social welfare services also receive progress reports and can then decide to have a conversation with a client or even a hearing with the head of the social welfare services.[190] In the opinion of the social workers interviewed, there is a margin of discretion in the imposition of sanctions that must be exercised by social workers, taking into account the overall situation.[191] It is important to find out the reasons for non-compliance with conditions; these lie primarily in the history and impairments of the client. Poor language skills, long travel times, an unfavourable location and failing programme flexibility were mentioned, or the fact that it was not adapted to the impairments of the participants.[192] Programme discontinuations seem to be relatively common because clients call in sick, arrive late or not at all, so that the measure is considered futile by both sides.[193] Surprisingly, this also applies to the evaluation places in the canton of Bern: according to the programme manager, only 50% of those assigned commence work, and a quarter of them only come irregularly.[194] 116

Sanctions and reductions in benefits are more common in the cantons of Bern and Uri than in the canton of Vaud. There, sanctions are more likely to be imposed in advance, for example for breach of the duty to provide information.[195] Adolescents and foreigners (lack of language skills, with volunteer positions that prevent them from seeking work) have a higher risk of sanctions.[196] Sanctions and conditions are judged to be hardly effective in unison. Most people are “not so simple minded”[197] that a sanction would result in compliant behaviour. One interviewee of a social welfare service said that even though he has been working in this field for twenty years, they have never been able to reintegrate someone who did not want to be reintegrated. So, he concludes that they work with people who are volunteers.[198] 117

4. Assessment and open questions

Sanctions have drastic consequences on the real lives of those affected. However, the social welfare authorities have a wide scope of discretion, which can be attributed to the sometimes very openly formulated laws. It is therefore all the more important to insist on compliance with the constitutional barriers 118

[189] P4, 39-42.
[190] P1, 92-95, S3, 105.
[191] S8, 148-165, S9, 53-54 and S3, 80-89.
[192] Examples S2, 41-45, 98.
[193] P4, 34
[194] P5, 14.
[195] S4, 135-151.
[196] S4, 151.
[197] S5, 55, 58-63.
[198] S4, 34, 46-50. “A ma connaissance (et je travaille dans ce domaine depuis vingt-ans), je n’ai jamais vu qu’on ait réussi à réinsérer une personne qui ne voulait pas l’être. Donc partant de ce constat, on travaille plutôt avec des personnes qui sont bénévoles“.

to the exercise of discretion, as stated in the SKOS guidelines. In addition, more in-depth studies of the practice and impact of sanctions are required. For example, the German Federal Constitutional Court recently declared some of the sanction options in the Social Welfare Code II (SGB II; Hartz IV) to be unconstitutional, since it is not sufficiently clear whether such strict sanctions are actually suitable for influencing the behaviour of the people concerned as desired.[199] Moreover there are additional barriers in terms of proportionality, such as the fact that a sanction is no longer applicable if instructions are subsequently complied with.[200] It is also necessary to demand that a complaint against a sanction has suspensive effect.[201]

C. Suspension due to non-existent eligibility requirements (subsidiarity)

1. Central importance of the Federal Supreme Court's case law

In its case law, the Federal Supreme Court justifies the view that participation in a reasonable occupational programme is a question of eligibility, and this applies equally to the right to social welfare (under cantonal legislation) as well as to emergency aid (under federal constitution). This was first stated by the Federal Supreme Court in judgement 2P.147/2002 dated 04/03/03 (Bern decorator). The complainant did not accept a work assignment offered to him, whereupon the relevant commune provided him with neither social support nor emergency aid according to article 12 Cst. The complainant argued that a complete withdrawal of support was unconstitutional. The Federal Supreme Court, on the other hand, explained that the applicant failed to recognise 119

> "that both the Federal Constitution and cantonal law attach certain conditions to the fundamental right to a secure livelihood. Thus, according to Art. 12 Cst., only those who are in a situation of need and are not able to provide for themselves have such a right. The Administrative Court rightly concluded from the quoted norms[202] that whoever claims such benefits, even though they are able to obtain the means necessary for survival themselves, are not entitled to governmental benefits to secure their livelihood."[203]

On the other hand, reductions in social welfare benefits (down to the constitutional minimum) are possible in the event of violations of obligations that are not such as to "eradicate" the eligibility criteria.[204] The eligibility criteria will be erased if reasonable work in welfare-to-work programme is rejected, provided the person concerned would be able to take care of herself or himself if the job were accepted.[205] 120

Scholars criticised this judgement. However, the Federal Supreme Court explicitly rejected this criticism in BGE 130 I 71[206] and responded that the criticism did not take sufficient account of the principle of subsidiarity or the priority of self-help and was therefore unconvincing.[207] Participation in an employment 121

[199] German Federal Constitutional Court (Bundesverfassungsgericht) - 1 BvL 7/16 dd. 05/11/2019.
[200] Cf. in a comparative perspective: ELEVELD.
[201] Cf. judgment FSC, 8C_152/2019 dd. 14/11/2020, C. 5.4.4.
[202] Art. 23 and 36 SHG/BE.
[203] Judgment FSC 2P.147/2002 dd. 04/03/2003, C. 3.3; freely translated.
[204] Judgment FSC 2P.147/2002 dd. 04/03/2003, C. 3.4.
[205] Judgment FSC 2P.147/2002 dd. 04/03/2003, C. 3.5.
[206] Cf. BGE 130 I 71, C. 4.3.; BGE 139 I 218, C. 3.4.
[207] BGE 130 I 71, C. 4.3.

programme was also a question of eligibility; in principle, such participation was to be regarded as reasonable work.[208]

This was substantiated in subsequent case law. In the Bernese evaluation programme-case (BGE 139 I 218), the Federal Supreme court noted that (any) support could be suspended if the job offered could be commenced at any time and participation would provide a subsistence level income. Only those who "find themselves unable", i.e. who are denied by law or fact the possibility to provide for themselves, are in need and are entitled to emergency aid within the meaning of Art. 12 Cst. On the other hand, no right is granted to anyone claiming such benefits, even though the person would objectively be in a position "to provide the means necessary for survival by his own efforts".[209] In such a case, a person is not in need according to Art. 12 Cst. They do not meet the eligibility criteria and therefore the question does not arise whether there is an interference with the essence of Art. 12 Cst. if the benefits are not granted.[210] This is the case at least for as long as work in a programme can be taken up at any time,[211] but only for the intended programme duration. Because it is only during this period that the possibility to take care of oneself would have existed.[212] 122

Consequently, according to the most recent exposition in BGE 142 I 1, participation in a non-remunerated occupational programme is not a question of eligibility for support when in need, as this means that there is no opportunity to look after oneself and that we therefore are dealing with a situation of need. 123

> This strong emphasis on subsidiarity and the primacy of reasonable self-help in the form of work can already be observed in the Federal Supreme Court's case law in BGE 121 I 367. When recognising the unwritten constitutional right to secure one's livelihood, the Federal Supreme Court already considered that a complete withdrawal of benefits is possible, for example, if an employment opportunity is deliberately refused.[213]

According to the Federal Supreme Court, failure to participate in a non-remunerated programme is a violation of obligations. Cantonal law provides for sanctions of such a violation, which may well consist in a reduction of social welfare benefits (see N 107 ss. above). 124

Participation in a (reasonable) occupational programme is therefore not only a duty of conduct (under social welfare), but an eligibility criterion to the right to support in distress according to article 12 Cst. and social welfare. 125

> Finally, the judgment 8C_850/2018 dated 12/06/2019 should be mentioned, in which the Federal Supreme Court stated that the person who is not in distress and therefore outside the protective area of Art. 12 Cst. is the person who, with a changed mind-set, would be able to take care of themselves. In itself, this is not covered by the previous interpretation of the principle of subsidiarity, since there would have been no possibility, through an assignment in a programme, to legally and factually earn the means that are indispensable for a decent standard of living.[214] It is still open to what extent this judgment will affect the practice of the Federal Supreme Court and the cantons in the future.

[208] BGE 130 I 71, C. 5.3.
[209] BGE 139 I 218, C. 3.3.
[210] BGE 139 I 218, C. 3.3.
[211] BGE 139 I 218, C. 5.3.
[212] BGE 139 I 219, C. 5.5.
[213] BGE 121 I 367, C. 3d.
[214] For criticism of this judgment: STUDER, p. 340 ss.

Schematically, the current assessment of eligibility concerning subsidiarity and the relationship to duties of conduct can be presented as follows:

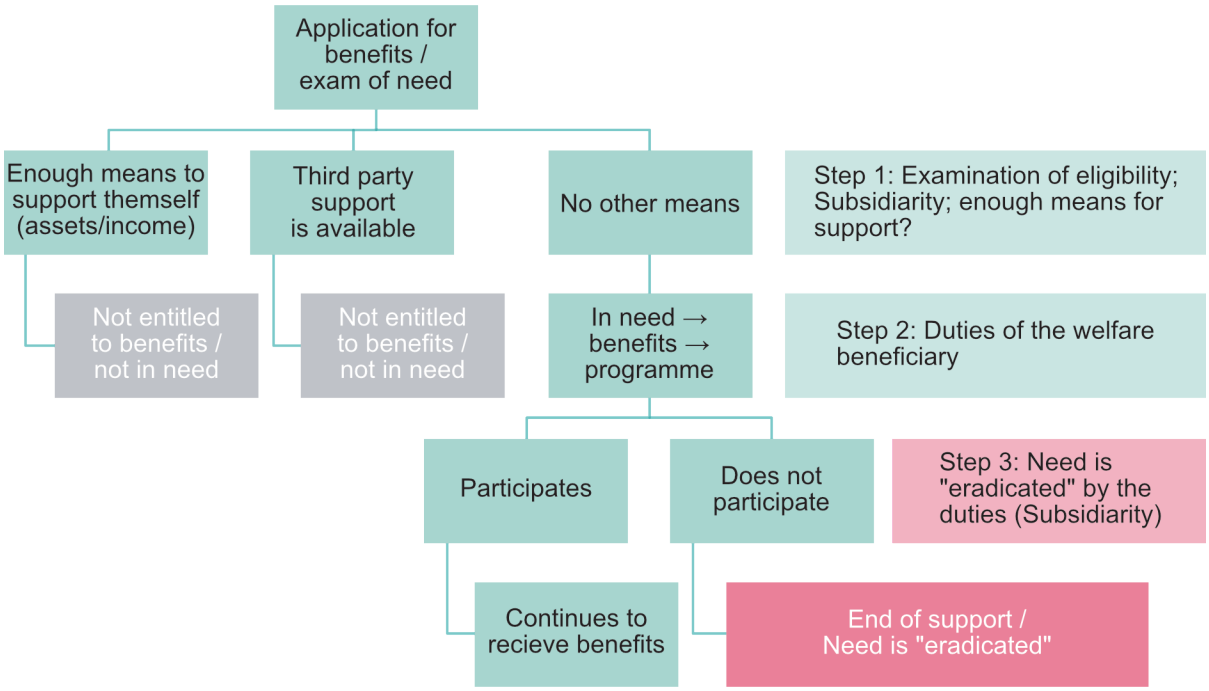

Figure 3: Eligibility assessment and subsidiarity (own presentation)

2. Diffusion and policy-shaping role of the Federal Supreme Court's case law

The Federal Supreme Court's case law has an impact on the case law practice in the cantons. For three key judgments, we determined how often they were cited in the following cantonal judgments. It is noteworthy that more citations appear in judgements that have nothing to do with the core of the BGE - employment relationships in welfare-to-work programmes. 126

Table 5 Important BGE and their reception, 2018

Year	Federal Supreme Court decision	Quoted…
2004	BGE 130 I 71 - Employment programmes generally represent reasonable work and are suitable for improving the situation of social welfare recipients.	57 times in relevant cantonal judgments, 131 times in others
2013	BGE 139 I 218 - Anyone who does not take part in a programme that could be commenced at any time has no right to social support or emergency aid.	21 times in relevant cantonal judgments; 9 times in others
2016	BGE 142 I 1 - Failure to participate in an occupational programme can only lead to loss of eligibility if the programme is remunerated at least in the amount of the emergency aid.	5 times in relevant cantonal judgments; 15 times in others

Source: Own calculations based on the database on cantonal social assistance judgments

The main arguments of the Federal Supreme Court on remunerated welfare-to-work programmes and their general reasonableness (see N 161 ss. below) were incorporated in a revision of the SKOS guidelines in 2015. Although they differentiate between a reduction and a (partial) suspension, the latter should only be possible if there is a violation of subsidiarity. However, the (partial) suspension of social 127

welfare benefits in the sense of subsidiarity should be possible if the supported person, knowing the consequences, expressly refuses to accept any work that is possible, reasonable and available to them.[215] According to SKOS guidelines chapter A.8.2, to which reference is made, this can also occur within the framework of a "remunerated occupational programme".

This is in line with all other new revisions that have tightened the duration and amount of possible sanctions. The revised guidelines on integration measures have led to the situation that the minimum subsistence level can only be achieved with the help of an integration allowance.[216] The case law of the Federal Supreme Court is obviously of great relevance, but this influence is tacit and has taken place without open public debate. This leads to the question of whether we want this (intellectually challenging) interpretation of the principle of subsidiarity. 128

As mentioned above, the principle of subsidiarity (N 32) is anchored in all cantonal legislations concerning social welfare. However, very few cantonal regulations describe the principle of subsidiarity in sufficient detail to clarify that the violation of certain obligations could lead to the loss of entitlement to social assistance and help when in need. The norms on sanctioning also make insufficient distinctions here. 129

This differentiation is obviously missing in the canton of Bern, since the legal basis does not mention the possibility of suspension of social welfare. The social welfare legislation of the canton of Bern explains subsidiarity in Art. 9 SHG/BE. In individual social welfare, subsidiarity means that assistance is only granted if and to the extent that a person in need cannot help themselves or when third-party help is not available or cannot be obtained in good time.[217] Art. 23 SHG/BE describes the need - which justifies the right - in a similar way: a person in need is someone, who is unable to make a living for themselves or cannot pay for it from their own resources in good time. A specification to the effect that obligations can arise from this, the non-compliance of which can lead to the cancellation of the eligibility criteria, was only made by the aforementioned case law of the Federal Supreme Court.[218] 130

If a particular interpretation is to be secured on a permanent basis, an amendment of law must be made. The example of the law revision in the canton of Aargau shows that this can also be done implicitly and without public debate. Commissioned by the parliament in 2013, the government presented amendments that would both increase sanctions and clarify procedures and conditions. The Supreme Federal Court's case law has been codified almost verbatim. The suspension of social welfare is explicitly indicated in cases of unproven need and violation of subsidiarity. Refusal to accept a possible, reasonable and concretely available job or to participate in a possible, reasonable and concretely available remunerated employment programme[219] is mentioned as one of the conditions that can lead to the suspension of benefits due to violated subsidiarity. A suspension or reduction is made by deducting the amount of the expected salary.[220] 131

Furthermore, the sanctions have become more severe. For example, the limit of reducing benefits to 70% of the GBL now only applies the first time there is a reduction. Preserving the minimum income for 132

[215] SKOS Guidelines, A.8.3.
[216] EIGENMANN, p. 45.
[217] Art. 9 para. 2 SHG/BE.
[218] See in particular BGE 139 I 218 but also judgment FSC 2P.147/2002 dd. 04/03/2002.
[219] § 5a para. 1 (b) No. 1 SPG/AG.
[220] § 5a para. 2 SPG/AG.

a decent subsistence level needs to be taken into account only the first time: subsequent sanctions can reduce benefits under the limit of 70% of the GBL.[221] The law declares a reduction below subsistence level to be permissible in particular if a person does not seek reasonable work or does not participate in a reasonable education or occupational programme.[222] The right to assistance when in need according to Art. 12 Cst.- remains intact.[223]

> However, it is clear from the message that the scope of Art. 12 Cst. is misjudged if it is stated that there is no right to emergency aid even in the event of a refusal to participate in a non-remunerated occupational programme and that, accordingly, a reduction in subsistence level can be made.[224] Also the reduction below the subsistence level does not in itself seem to be compatible with Art. 12 Cst.

The government's report also openly stated that the suspension of benefits was "the harshest sanction", but not legal in a situation of distress. In the consultation process, these rules were not criticised by anyone, nor did anyone mention them in the debates in the Grand Council in September 2016 and June 2017.

An important working tool in administrative practice are the manuals on social welfare. These are publicly accessible in eleven of the 26 cantons. They are reference works and interpretation aids for the social welfare services in the respective canton. Many of these manuals quote and explain the SKOS guidelines. Six of these eleven handbooks state that if a remunerated occupational programme is rejected, the need for social welfare is suspended, but only three (BL, TG, ZH) refer to the respective Federal Supreme Court decisions. These cantons have a well-managed list of judgments on many aspects of social welfare practice that can be used to make contestable decisions that meet current legal requirements and would be accepted in court. In summary, it can be said that the influence of the Federal Supreme Court is tacit here too. 133

While it is the legitimate function of the courts to interpret the law, it is up to the legislative power to decide whether a particular interpretation is politically desirable - or to advocate legal amendments. In the development discussed here, the influence of the Federal Supreme Court is not only made invisible, but its interpretation is seen as given, legitimate and fair. This invisibility also applies to the SKOS guidelines. In the cantons, they enjoy a status similar to that of the law and are an important point of reference, but their revision is neither open, nor fair, nor transparent and suffers from a lack of legitimation. 134

Judicial practice becomes a substitute for amendments to the law. This is problematic from the perspective of the separation of powers. It is a self-inflicted judicialisation of politics and a de-politicisation of the issue, because a legislative procedure can, and should be, accompanied by a public and parliamentary debate in which norms and values could play a role. It is extremely unfortunate that this did not happen in the example given. 135

For the person affected by the reduction or suspension, the distinction between a reduction and a suspension of benefits, as mentioned by MÖSCH PAYOT [225] and HÄNZI[226], is of no fundamental relevance. 136

[221] § 15 para. 1 SPV/AG.
[222] § 13b para. 2 SPG/AG.
[223] § 13b para. 5 SPG/AG.
[224] Regierungsrat des Kantons Aargau, Botschaft vom 25.05.2016 an den Grossen Rat, 16.114, Gesetz über die öffentliche Sozialhilfe und die soziale Prävention, p 13.
[225] MÖSCH PAYOT, Sozialhilfemissbrauch?!, p. 307.
[226] HÄNZI, Richtlinien, p. 153.

Whether they receive fewer or no benefits at all because they are accused of a violation of obligations or rather because it is assumed that they would be able to provide for themselves with the required behaviour (principle of subsidiarity) is irrelevant and both are perceived as a sanction.

3. Implications in practice

a) General information

The analysis of cantonal case law has shown that disputes over the interpretation of the principle of subsidiarity and the ensuing (partial) suspension of social welfare and emergency aid due to violated work duties are frequent. In 14% of all (n = 30) judgments, social welfare was completely suspended, while in a further 4% (n = 9) it was suspended only partially. The influence of the Federal Supreme Court's case law on cantonal administrative practice and case law is evident. The analysis of administrative and judicial practice with regards to content and the interpretation of the principle of subsidiarity applied therein shows, in particular, three aspects that need to be examined in more detail and which are problematic in view of the principles of social welfare and emergency aid. 137

b) Introduction of additional eligibility requirements

The lack of a clear legislative description of the requirements for subsidiarity tends to create additional eligibility criteria for social welfare and emergency aid benefits. 138

This can be clearly seen, for example, in a judgment by the administrative court of the canton of Solothurn: a person who had all his benefits suspended due to a non-commencement of work was informed that they would only receive support once they had provided "*evidence*" in the form of an assignment in an occupational programme.[227] This was not objectionable, since the complainant persistently and almost in a querulous manner tried to avoid active cooperation and the principle of reciprocity.[228] 139

The Federal Supreme Court does not consider it "manifestly untenable" that the Social Commission suspended ongoing support due to the lack of eligibility criteria because the complainant failed to provide documents from the disability insurance proceedings. The Federal Supreme Court supports the view that the Social Commission is dependent on precise *information on the state of health* in order to be able to assess whether a person has exhausted their opportunities for self-help, and what the opportunities are for social and professional integration. Since "only in this way can it (the Social Commission) decide whether the person concerned could carry out work excluding the right to social assistance and, if so, what kind of work could be expected of them for health reasons".[229] 140

With the Federal Supreme Court's judgment 8C_787/2011 dated 28/02/2012, a graduate in law who had completed an internship as part of his professional training to become a lawyer was not granted governmental support for the period after the internship because he had not sought work outside his traditional profession. The Federal Supreme Court stated that although such efforts had actually been undertaken, the social welfare office was required to examine after the rejection, whether the *work efforts* had been timely and sufficient in terms of quality and quantity.[230] 141

[227] VerwG SO, judgment, VWBES.2017.128 dd. 22/05/2017, C. 2.2.
[228] VerwG SO, judgment, VWBES.2017.128 dd. 22/05/2017, C. 2.3.
[229] Judgment FSC 8C_884/2012 dd. 22/01/2013, C. 4.2.; similar: VerwG TG, TVR 2010 No. 18 dd. 30/06/2010, C. 2.4.
[230] Judgment FSC 8C_787/2011 dd. 28/02/2012, C. 5.2.2.

In this regard, on the other hand, the judgment of the Administrative Court Grisons U 16 20 dated 09/09/2016, according to which work efforts are not a prerequisite for social support, must be approved.[231]

The case law of the canton of Fribourg explicitly states that "lack of *willingness to work*" can be punished not only by cuts in social welfare, but also by the suspension of all support.[232] The complainant was then alleged to be fit for work and therefore perfectly capable of performing an activity suited to their abilities.[233] 142

If participation in a programme is an eligibility criterion to social welfare and emergency aid benefits once the programme has been remunerated, the objectives of a welfare-to-work programme must also be taken into account. For example, the so-called test workplaces in the canton of Bern, which were to be assessed in BGE 139 I 218, aim to test a person's willingness to work and cooperate.[234] Ultimately, this means that those who are not willing to cooperate under this programme are not entitled to government support. 143

The introduction of additional eligibility criteria calls into question the function of social welfare and help when in need as a final support to be provided regardless of the reasons for the need. The fact that, moreover, this is done mainly through the judicial interpretation of the principle of subsidiarity and cannot be based on clearly formulated legal principles is detrimental to legal certainty. 144

c) Introduction of additional sanctions

The suspension of support based on the principle of subsidiarity should not, in theory, be a sanction, but a question of eligibility criteria. In practice, however, it turns out that assignment to a (remunerated) occupational programme is seen as a possibility for (additional) sanctioning and used to this end. 145

Some social workers see paid welfare-to-work programmes, which open up the possibility of complete termination of benefits, as an opportunity to sanction a person and not as an offer of help for economic independence.[235] People working in a paid (evaluation) job also occasionally experience it more as a sanction, rather than as representing the possibility of leading a self-determined life.[236] Thus, one of the stated performance targets of the remunerated test jobs is to be able to suspend all benefits in case of non-participation.[237] This is sometimes justified by the fact that it serves as an instrument to combat abuse: those who do not participate in the programme probably have other sources of income.[238] 146

Critical voices even point out that work programmes have been created as a sanctioning instrument. If a job in the first labour market is refused, the right to benefits cannot be suspended in application of the principle of subsidiarity, since job offers on the labour market - unlike a work programme - are only available for acceptance for a short time.[239] Thus, it is at the discretion of the social welfare services 147

[231] VerwG GR, judgment U 16 20 dd. 09/09/2016, C. 4.

[232] KG FR, judgment 605 2015 134/135 dd. 06/07/2015, C. 9a; HÄNZI, Richtlinien, p. 85 ss. is cited, although the author expresses criticism towards the federal judicial case law and does not mention the willingness to work as an eligibility criterion for right, but rather shows that a lack of willingness to work "shakes" the eligibility criteria for rights.

[233] KG FR, judgment 605 2015 134/135 dd. 06/07/2015, C. 9 c.

[234] Cf. GEF, BIAS Konzept 2020, p. 12.

[235] Interview S2.

[236] Interview K3, 67; similar also: HÄNZI, Richtlinien, p. 153; MÖSCH PAYOT, Sozialhilfemissbrauch?!, p. 307.

[237] GEF, BIAS Konzept 2020, p. 12.

[238] Interview S1 and S7.

[239] HÄNZ, Richtlinien, p. 91.

whether or not someone is in need or in distress according to Art. 12 Cst. If a (remunerated) programme place is offered, the need ends, regardless of whether someone actually participates in the programme or not. If the job is no longer available, need and eligibility are re-established.

148 Also in BGE 142 I 1, the offering of a job paid at the level of emergency aid is proposed as a means of sanctioning "recalcitrant" welfare recipients: "After all, it would be up to the respondent[240] to recompense their occupational programme in the amount of social welfare or at least emergency aid. In this case, it could refer to the aforementioned case law[241] and cancel social support[242], given insufficient participation in the programme."[243]

> As a result of this judgment, it can be seen in the canton of Zurich how the assignment in a remunerated programme is used as a means of sanctioning. A social welfare recipient refused to take part in a (low) paid work programme, whereupon the wage was calculated exactly in such a way that the result was a (daily) wage that corresponded to the need for support, thus creating the conditions for a complete suspension of benefits.[244]

149 The suspension as a result of not participating in a welfare-to-work programme may affect the entire support unit and not just the people deemed at fault themselves. In several judgments it can be observed that in the event of a family member not participating in the programme, support for the entire support unit was suspended.[245] This was justified by the Court by the fact that if social welfare were continued to be paid to the wife and children, the husband could continue to "(co-)benefit" from these benefits. In addition, the purpose of suspending the benefits "to encourage the complainant to mitigate or eliminate the need as far as reasonably possible would be undermined".[246] This clearly indicates that it is a particularly strict sanction for a violation of duties and not because a need no longer exists. The wife's objections that she was not at fault, which is why suspension was not justified towards her (and her children), and that she had not been given the opportunity to commence an evaluation programme and thus to provide for herself, were not heard.

150 (Partial) suspension by means of deducting the (hypothetical) income leads to reductions in social welfare, which are far above the reduction of 30% of the basic requirement of CHF 986 - i.e. just under CHF 300 - according to the SKOS guidelines.

> For example, the responsible cantonal courts have, in principle, approved of an hourly wage of CHF 2.35 from an unattended occupational programme.[247] Even with this low hourly wage, a full-time job results in a monthly wage of over CHF 400. Deducting this wage from the welfare benefits thus leads to a reduction of welfare benefits by slightly more than 40% or even more if the person in question is a young adult. There was also no fundamental objections to the deduction of an income of CHF 250 against an already reduced social welfare benefit, so that only emergency aid amounting to CHF 8/day

[240] The respondent was the municipality.
[241] Reference is made to BGE 139 I 218 as well as to the judgment FSC 2P.147/2002 dd. 04/03/2003.
[242] With which emergency assistance according to art. 12 Cst is meant.
[243] BGE 142 I 1, C. 7.2.6.; freely translated.
[244] VerwG ZH, judgment VB.2017.00509 dd. 11/06/2018.
[245] VerwG BE, judgments 200 16 361 dd. 22/09/2016; 200 16 434 BC dd. 12/07/16; 200 14 178 dd. 11/09/2014; Département de la santé et des affaires sociales NE, judgment REC.2011.107 dd. 31/05/2011.
[246] VerwG BE, judgment 200 16 361 dd. 22/09/2016, E. 4.4.
[247] VerwG GR, judgment U 15 5 dd. 01/04/2015, however, the matter was sent back to the lower instance due to formal defects and the crediting was cancelled.

(CHF 240/month plus health insurance premium and any self-retention) was paid. The cantonal court criticised the lack of a time limit on this sanction[248] (See also N 168 below for remuneration)

d) Introduction of culpability elements

The removal of eligibility in the event of non-participation in a programme in accordance with the case law of the Federal Supreme Court and current cantonal practice, particularly in the context of Art. 12 Cst. can lead to tensions between the principle of subsidiarity and the respective principles of coverage requirement and finality. According to the latter, support must be granted even when a need is self-inflicted. It must be based on the current and actual circumstances and it must be checked whether someone currently has the necessary means to meet their subsistence needs.[249] In this context, the consideration of hypothetical income is generally not permissible.[250] 151

In practice, however, a distinction must be made between a self-inflicted situation of need - in which case support is granted - and a situation of need that exists or persists because self-help has not been exhausted.[251] However, the latter case also represents an instance of self-inflicted need.[252] The self-infliction lies therein that not enough reasonable self-help was exercised. 152

Common doctrine is critical of this. Thus, an element of culpability alien to the subject is introduced to the core content of fundamental rights [253] and the social image of a 'personal responsibility' that has been stylised into a paradigm[254] is used to deprive people, who could if only they wanted to[255], of even the most minimal basis of existence.[256] 153

D. Can an abuse of rights result in suspension of the benefits?

Is a person not participating in a welfare-to-work programme behaving in an abusive manner and could they be denied assistance because of that? 154

According to the Federal Supreme Court's case law, it should be basically possible to suspend social welfare in a case of abusive behaviour even if there is no legal basis.[257] However, the Federal Supreme Court still explicitly leaves it open as to whether the benefits derived from Art. 12 Cst. can be withheld in the event of abusive behaviour.[258] For some time already, the doctrine predominantly agrees that forfeiture of rights under Art. 12 Cst. is not possible as a result of abuse of rights and criticises the Federal Supreme Court's case law, which leaves this question open.[259] According to the view advocated 155

[248] VerwG SG, judgment B 2009/64 dd. 19/08/2009, C. 3.3.

[249] AMSTUTZ, Anspruchsvoraussetzungen, p. 21.

[250] AMSTUTZ, Existenzsicherung, p. 169; WOLFFERS, p. 153; HÄNZI, Leistungen, p. 140; GYSIN, p. 118; WIZENT, Bedürftigkeit, p. 211; ID., Sozialhilferecht, N 399.

[251] PÄRLI, Aspekte, p. 51; ID., Auswirkungen, p. 111.

[252] PÄRLI, Aspekte, p. 51.

[253] HÄNZI, Richtlinien, p. 86 s.

[254] WIZENT, Bedürftigkeit, p. 89.

[255] AMSTUTZ, Anspruchsvoraussetzungen, p. 19.

[256] Criticism is also raised by: PÄRLI, Aspekte, p. 51; STUDER/PÄRLI, duty to work, p.98 ss.; HÄNZI, Pflicht, N 5.

[257] BGE 122 II 193, C. 2. c. ee; judgment FSC 2P.156/2005 dd. 17/10/2005, C. 5.1. ss.

[258] More recently: BGE 142 I 1, C. 7.2.5.; judgment FSC 8C_850/2018 dd. 12/06/2019.

[259] Without claim on completeness: AMSTUTZ, Anspruchsvoraussetzungen, p. 24 ss., SCHEFER, p. 349; WALDMANN, p. 368; MÜLLER/SCHEFER, p. 780; MEIER/STUDER, N 48; HANGARTNER, p. 1149; HARTMANN, p. 420; KIENER/VON BÜREN, p. 14; BREINING-KAUFMANN/WINTSCH, p. 509; GÄCHTER/WERDER, BSK-BV, N 40 on art. 12 Cst; MÖSCH PAYOT, Sozialhilfemissbrauch?!, p. 311; BIGLER-EGGENBERGER, St. Galler Kommentar, N 27 on art. 12 Cst.; RIEMER-KAFKA, Hilfe in Notlagen, p. 148; UEBERSAX, p. 54 ss.; MEYER-BLASER/GÄCHTER, p. 88; MÜLLER, St. Galler Kommentar, N 34 on art. 12 Cst, as long as it is assumed that the extent of protection is identical with the core content; in particular, in detail: GÄCHTER, Rechtsmissbrauch, p. 329 ss.

here, this is justified above all by the congruence of the scope of protection and the core content. The decisive factor is whether someone falls under the scope of protection of the right to support when in distress. As soon as this is affirmed, the benefits are to be granted based on Art. 12 Cst.[260] Particularly in the field of emergency aid, however, it is striking that the focus in case law has shifted away from the question of abuse of rights towards the question of eligibility within the meaning of subsidiarity.

156 The Federal Supreme Court sets narrow limits on the abuse of rights. One's own situation must have been created deliberately for the sole purpose of receiving social welfare. This willingness must be clear and undeniable and the abuse obvious. Mere circumstantial evidence is not enough.[261] The authors, who in principle believe that the refusal of reasonable work constitutes abusive behaviour, add that this can only be assumed if it happens repeatedly, the efforts to find work are clearly insufficient, and no other reason for the lack of efforts than deliberate intent can be discerned. It is therefore necessary to know the reasons for the uncooperative behaviour on the part of the social welfare recipient.[262] No abuse is to be assumed, even if there is joint responsibility or culpability for one's own situation of distress.[263]

157 The cases examined here did not meet these restrictive criteria. The Federal Supreme Court, in particular, is of the opinion that the refusal to take part in an unpaid occupational programme does not constitute an abuse of rights.[264] Neither is the fact that a German-speaking psychotherapist does not earn a (life-sustaining) income even after receiving a professional licence in the French-speaking canton of Valais[265] or that someone refuses to look for a remunerated job because of their attitude.[266] There is also no legally abusive behaviour if the lack of cooperation with the invalidity insurance on the part of the supported person is due to psychological issues.[267] Likewise, "recalcitrant" and unreliable behaviour does not represent an abuse of rights.[268]

E. Summary

158 There are no clear legal provisions giving authorities the right to deny welfare benefits based on a violation of the principle of subsidiarity. The interpretation of the principle in practice reveals the problem of this lack of clarity: additional eligibility criteria for social welfare and emergency aid are introduced, and benefits are reduced by well over 30% of the GBL. As a result, the means that are indispensable for a dignified standard of living are no longer guaranteed and, ultimately, elements of culpability are carried over into the fundamental core of the right as well as into social welfare. This is problematic not only from the point of view of the basic principles of social welfare and emergency aid, but also from a fundamental rights perspective.[269]

159 Thus, human dignity according to Art. 7 Cst. - which is indisputably also a basic principle of social welfare law and closely related to Art. 12 Cst. - guarantees a minimal freedom of disposition. Based on an open

[260] KIENER/VON BÜREN, p. 14; TSCHUDI, Nothilfe in Not, p. 31.
[261] Jugment FSC 8C_100/2017 dd. 14/06/2017, C. 8.3.1.
[262] WOLFFERS, p. 168; MÖSCH PAYOT, Sozialhilfemissbrauch?!, p. 285.
[263] MÖSCH PAYOT, Sozialhilfemissbrauch?!, p. 286.
[264] BGE 142 I 1, C. 7.2.5.
[265] Judgment FSC 8C_927/2008 dd. 11/02/2009, C. 5 and C. 6. for further examples from case law: MEIER/STUDER, N 46 ss.
[266] Judgment FSC 8C_850/2018 dd. 12/06/2019, C. 3.2.2.2.
[267] VerwG AG, judgment AGVE 2017 37 dd. 28/08/2017.
[268] Judgment FSC 8C_500/2012 dd. 22/11/2012, C. 7.4.2; see also regarding this judgment: HEUSSER, Grundbedarf, N 13 ss.
[269] These aspects are dealt with in detail in STUDER MELANIE'S PhD-thesis, which is the result of the present research project.

image of humanity, human dignity guarantees opportunities for an autonomous lifestyle and prohibits the paternalistic compulsion to live a life that the majority judges to be "good" and "correct".[270] Human dignity must also not be denied to those who do not perform up to expectation.[271] The personal responsibility and ideal image of the human being demanded by the state of those willing to work must not be overemphasised to such an extent that a person who does not meet this ideal is no longer awarded the benefits that are essential for a dignified standard of living. Therefore, the current interpretation of the principle of subsidiarity according to Art. 12 Cst. does not seem compatible with human dignity according to Art. 7 Cst.

Moreover, conflicts of this conception with the prohibition of forced and compulsory labour in accordance with Art. 4 ECHR are not excluded. The higher the expected negative consequences of refusing a job, the greater the impact on a person's free will to accept a job. If the threatened consequence is the loss of right to support when in need for several months, the person concerned has only the choice between accepting this work and an undignified life of begging. The benefits according to Art. 12 Cst. should protect against the latter. In order to prevent a conflict with the prohibition of forced labour, there should always be an opportunity to quit an employment relationship without this constituting a threat to one's existence. This means that even if a (remunerated) welfare-to-work programme is not attended and a person is in need, a minimum of benefits that ensure a dignified existence must be granted.[272] 160

VI. Limits of work obligations: reasonable work

A. SKOS guidelines and legal basis

Generally speaking, the idea of what can *reasonably* be asked from a social welfare recipient places a limit on the principle of personal responsibility and the behavioural duties that result from it. The balance between public and private interests provides an answer to the extent up to which an individual may be burdened with personal responsibility and where the obligation of a community of solidarity begins.[273] According to this principle, which flows from the constitutional principle of proportionality (Art. 5 para. 2 Cst.), nothing may be demanded of a person unless the interference in their personal interest is justified by (overriding) public interests. Legal obligations are limited by the principle of proportionality and their reasonableness in particular. [274] The test of reasonableness helps balance public interests and conflicting private interests in every individual case.[275] 161

Thus, the duties of social welfare recipients, in particular the obligation to participate in an occupational programme, are limited by reasonableness. If a programme is qualified as reasonable, refusal to participate can lead to sanctions – provided the occupational programme is remunerated, the refusal to participate can lead to the exclusion from eligibility for social welfare and emergency aid (subsidiarity). 162

[270] AMSTUTZ, Existenzsicherung, p. 75, emphasis in the original.
[271] WIZENT, Bedürftigkeit, p. 80; SCHEFER, p. 348.
[272] Cf. on the whole: DERMINE, p. 67 ss.; STUDER /PÄRLI, duty to work, p. 89 ss..
[273] GÄCHTER, Grundstrukturen, p. 70.
[274] MAURER, p. 236; GÄCHTER, Zumutbarkeit, p. 232.
[275] RIEMER-KAFKA, Selbstverantwortung, p. 86; MURER, Zumutbarkeit, p. 9.

SKOS guidelines stipulate that work is reasonable if it is appropriate to the age, health status and personal circumstances of the person in need. Participation in a remunerated welfare-to-work programme in the second labour market is equivalent to a reasonable job, with which one's own costs of living can be at least partially covered.[276] 163

The cantonal social welfare laws often do not define the reasonableness of a job in detail, leaving the task of applying the law and balancing of interests in each individual case to the courts and the administration.[277] 164

The canton of Bern in particular defines reasonableness relatively broadly. Art. 8g SHV/BE stipulates that work in a programme shall be considered reasonable unless a person's health or care responsibilities should contradict it. It is noteworthy that in Art. 28 para. 2 (c) SHG/BE a job is described as reasonable if it is appropriate to the age, state of health, personal circumstances, and skills of the person in need. Social welfare recipients are therefore required to make more adjustments when engaged in a programme than when working in the first labour market. 165

A more detailed regulation is to be found in the canton of Vaud where the obligations laid down in the UIA apply to employable social welfare recipients in professional integration according to Art. 23a LEmp/VD. Consequently, the definition of "reasonable work" is also based on Art. 16 UIA, or Art. 64a para. 2-4 UIA. In contrast, the LASV/VD does not specify any criteria of reasonableness for social integration measures. However, it describes some measures in quite a detailed manner and also provides, for example, that in the case of a measure supporting taking up employment,[278] a wage that is standard in the sector, or a wage in accordance with the collective bargaining agreement is to be paid (Art. 53a in conjunction with Art. 53b LASV/VD). 166

In the cross-section of all cantonal laws, the criteria of age, health and personal situation are mentioned several times and therefore appear to be regarded as particularly relevant. On the other hand, the abilities and possibilities of social welfare recipients are probably less important criteria in the eyes of the legislators when deciding whether something is reasonable for social welfare recipients, or not. Subjective reasons such as personal wishes are hardly mentioned, nor are further objective criteria such as working conditions. In particular, it should be noted that most cantons do not comment on what constitutes reasonable work in an occupational programme. 167

[276] SKOS Guidelines, A.5.3.
[277] GÄCHTER, Zumutbarkeit, p. 234.
[278] "*mesure de soutien à la prise d'emploi*"

Table 6 Overview of reasonableness (own presentation)

Criteria	Mentioned	Not significant
Age	BE, FR, NE, TI, VD, VS, SKOS	BE (in the occupational programme)
Health	BE, FR, NE, TI, VD, VS, SKOS	
Personal situation (incl. family situation)	BE, NE, TI, VS, VD, SKOS	BE (only supervisory tasks in the occupational programme)
Previous job		BE, VS, SKOS
Skills/opportunities	BE, FR, JU, SG	BE (in the occupational programme)
Education and professional training	FR, TI	
Earning of an income	VS, SKOS	
Wishes	NE, JU (willingness)	
Readiness	VD (internships)	
Way to work	VD (internships)	
Normal work?	VD (internships)	
New hiring on bad terms?	VD (internships)	
Opportunities for reintegration/employability on the market	BL (in certain programmes), JU (in occupational programmes)	
Important reasons	BS, TI, GE	

B. Reception in (court) practice

1. "In principle reasonable"

The Federal Supreme Court has previously never declared work in a welfare-to-work programme to be unreasonable. Rather, what generally applies is that an occupational programme or an integration measure is "in principle to be considered as reasonable work" and the orientation of social welfare may be linked to the condition to participate in such a programme.[279] The following factors in particular do not change the reasonableness of an assignment in a work integration programme: 168

- Underchallenging the social welfare recipients is accepted according to practice.[280] This is also confirmed by the cantonal case law.[281] There is no right to be assigned to a programme adapted to one's skills.[282] Work that a person is reluctant to do and thinks they cannot manage is also considered reasonable.[283]
- A programme place must also be accepted if it is outside a welfare recipient's original profession and does not correspond to his or her skills.[284]
- An assignment with an unclear area of responsibility must also be accepted.[285]

[279] BGE 130 I 71, C. 5.4.

[280] BGE 139 I 218, C. 4.4; BGE 130 I 71, C. 5.3; judgment FSC 8C_415/2013 dd. 23/01/2014, C. 4.1.

[281] VerwG BE, judgment 200 16 434 SH dd. 12/07/2016, C. 3.4.; VerwG BE, judgment 200 15 23 SH dd. 16/03/2015, C. 3.1.; VerwG ZH judgment VB.2016.00335 dd. 28/09/2016, C. 3; VerwG ZH, judgment VB.2015.00099 dd.26/03/2015 C. 4.5; VerwG ZH, judgment VB.2014.00122 dd.05/11/2014, C. 3.3.; VerwG ZH, judgment VB 2014.00423 dd. 18/11/2014, C. 3.5.

[282] VerwG ZH, judgment VB.2016.00335 dd. 28/09/2016, C. 4.1.

[283] VerwG ZH, judgment VB.2014.00423 dd. 18/11/2014, C. 5.3.

[284] See: judgment FSC 8C_156/2007 dd. 11/04/2008, C. 6.5; judgment FSC 2P.147/2002 dd. 04/03/2003, C. 3.5.2; VerwG BS, judgment VD.2010.265 dd. 25/11/2011, C. 2.4.

[285] BGE 130 I 71, C. 3.

- Programmes that are not remunerated are reasonable. However, the lack of remuneration means that the principle of subsidiarity cannot be applied.[286]
- In terms of wages, there are consequently no barriers to be found neither in the cantonal nor in the Federal Supreme Court's case law. Reasonable has been variously defined as:
    - a remuneration of CHF 1,650 for a 50% activity;[287]
    - an activity in a social company that guarantees an income of (min.) CHF 500 at a 50% work rate;[288]
    - an income of CHF 2,600 that (just) covers livelihood at a 100% work rate;[289]
    - an income in the amount of emergency aid according to Art. 12 Cst;[290]
    - an income of CHF 3'365 with a 70 % work activity as a canteen and cleaning staff for a mother of two; [291]
    - an hourly gross wage of CHF 12.25;[292]
    - a net wage of CHF 200 at an employment level of 10%.[293]
- With regards to further *employment conditions*, there are also hardly any limits to reasonableness to be found in the case law. This finding is in line with the fact that the contractual arrangement is mainly based on the fact that the welfare recipient has a duty to fulfil (see N 133). Remarkable in this context is the case law of the Administrative Court of the canton of Grisons, which consistently specifies under what conditions people are expected to work in an occupational programme. Decisions are repeatedly returned to the lower instance, because without information about the work performed or the amount of wages, it cannot be assessed whether a job is reasonable.[294]
- A job does not become unreasonable because the wage is not subject to *social insurance*; the complainant had "clearly not understood the purpose of this work assignment", which consisted of providing a daily structure and helping to reintegrate into the labour market .[295]
- Furthermore, the FSC considered that an instruction to participate in a (non-remunerated) occupational programme could be combined with a threat of punishment under Art. 292 SCC.[296] Thus, working under threat of punishment is reasonable according to the Federal Supreme Court.

2. Limits of reasonableness

When determining the limits of reasonableness, the Federal Supreme Court relies on the definitions listed in the cantonal legislations concerning reasonable work in occupational programmes. With regards to the regulation of the canton of Bern in Art. 8g SHV/BE, the Federal Supreme Court held that it 169

[286] BGE 142 I 1, C. 7.2.3.
[287] Judgment FSC 8C_156/2007 dd. 11/04/2008, C. 2.
[288] Judgment FSC 8C_546/2015 dd. 22/12/2015, C. 2.2.; cf. also: VerwG SG, judgment B 2015/4 dd. 30/06/2015, C. 2.2.1.
[289] BGE 139 I 218, C. 4.1.
[290] BGE 142 I 1, C. 7.2.6; confirmed in judgment FSC 8C_451/2019 dd. 19/08/2019, C. 4.3.
[291] Judgment FSC 2P.275/2003 dd. 06/11/2003, C. 2.
[292] VerwG ZH, judgment CST. 2016.00335 dd. 28/09/2016, C. 4.1.
[293] VerwG ZH, judgment VB.2017.00112 dd. 04/05/2017, C. 5.2.
[294] VerwG GR, judgment U 15 13/14 dd. 01/04/2015; judgment U 15 dd. 01/04/2015; judgment U 14 22 dd. 05/06/2014.
[295] VerwG SO, judgment VWBES.2010.149 dd. 09/08/2010, C. II. 2.c.
[296] BGE 142 I 1, C. 7.2.5.

was not objectionable if the reasonableness of participation in an occupational programme (in casu: test job in the canton of Bern) was measured by the cantonal standard and not by the norm stipulated by unemployment insurance (Art. 16 para. 2 UIA).[297] Accordingly, a job is reasonable unless there are health reasons or care responsibilities preventing the recipient from working. Since the plaintiff put forward none of these reasons in the case, refusing the test job led to the loss of eligibility.

In other judgments - in which there is no cantonal norm on reasonableness - the courts refer "alternatively" to Art. 16 UIA to determine the reasonableness of a job.[298] According to this, a job must, among other things, correspond with conditions customary in the sector and location, take due account of the skills and previous activities of the supported person and be appropriate to their personal circumstances and state of health. However, as the analysis above shows, the Federal Supreme Court deviates from these criteria without explicitly stating this.[299] For example, skills and any previous profession are not taken into account, and, particularly with regards to the wage question, it shows that the wages designated as "reasonable" by the Federal Supreme Court are not customary to the location and sector. 170

Cantonal case law also contains judgments which argue that social welfare must be subject to stricter criteria than those listed in Art. 16 UIA.[300] One of the reasons for this is that social welfare is a tax-financed system and that the situation in social welfare is less *comfortable* than in unemployment insurance.[301] 171

So far, a total of four criteria can be drawn from case law which can render work in an occupational programme unreasonable: 172

(1) The courts repeatedly mention that health reasons can speak against an assignment in a programme. This question is even discussed in a striking number of judgments.[302] However, this is not surprising given that 63% of long-term social welfare recipients have health restrictions.[303] Nevertheless, it is not clear what types of health restriction are meant and how to prove them. For example, a person addicted to alcohol was told that they still had some room for manoeuvre, as their alcohol addiction and its disabling effect had not been medically proven. However, the complainant's alcohol addiction was identified as the reason for the unsuccessful attempts at integration so far. A reduction in social welfare benefits as a result of yet another failure was justified by the need to rouse a sense of responsibility in the complainant.[304] 173

[297] BGE 139 I 218, C. 4.4.

[298] BGE 130 I 71, C. 5.3; from the cantonal case law e.g. Z.B. VerwG GR, judgment U 14 22 date 05/06/2014; judgment U 15 20 dd. 09/09/2016; VerwG SG judgment B 2015/4 dd 30/06/2015, C. 2.2.1; VerwG SO, judgment VWBES.2009.46 dd. 06/03/2009, C. II. 5.; VerwG SZ, judgment III 2007 9 dd. 22/03/2007 C. 2.2.; VerwG TG, TVR 2015 No. 23 dd. 25/02/2015; VerwG ZH, judgment VB.2005.00354 dd. 19/01/2006, C. 2.4; judgment VB 2012.00864 dd. 02/04/2013.

[299] Cf. also: STUDER/PÄRLI, Beschäftigungsprogramme, p. 1391.

[300] VerwG AG, judgment WBE.2010.397 dd. 19/04/2011, C. 4.3; VerwG BS, judgment VD.2010.265 dd. 24/12/2011, C. 2.4.

[301] KG FR, judgment 605 2016 166 dd. 31/08/2016, C. 6 a) aa).

[302] BGE 142 I 1, C. 6; BGE 139 I 218, C. 4.4; judgment FSC 8C_536/2015 dd. 22/12/2015, C. 2.1; from cantonal case law, e.g.: VerwG AG, judgment WBE.2011.104 dd. 23/09/2011; VerwG BE, judgment 200 16 434 SH dd. 12/07/2016; KG FR, judgment 3A 07 98 dd. 07/09/2009; KG FR, judgment 605 2012 364 dd. 06/06/2013; KG FR judgment 605 2013 227 dd. 20/08/2015; VerwG GR, judgment U 15 59 dd. 29/09/2015; VerwG GR, judgment U 14 22 dd. 05/06/2014; VerwG SO, judgment VWBES.2017.128 dd. 22/05/2017; OGer SH, judgment 60/2006/55 dd. 27/10/2006; VerwG SO VWBES.2016.310 BC 07/09/2016; VerwG SZ, judgment III 2011 184 dd. 18/01/2012; VerwG TG, TVR 2010 No. 18 dd. 30/06/2010; VerwG TG, TVR 2009 No. 27 dd. 25/02/2009 (concerns confidential medical assessment); VerwG TG, TVR 2005 No. 35 dd. 16/02/2015; TC VD, judgment PS.2006.0279 dd. 30/03/2007; VerwG ZH, judgment VB.2017.0282 dd. 15/09/2017; VerwG ZH, judgment VB.2017.00110 dd. 05/05/2017; VerwG ZH, judgment VB2012.00523 dd. 11/04/2013.

[303] SALZGEBER, p. 50 et seq.

[304] KG FR, judgment 605 2014 241 dd. 19/092014, C. 6 c.: « (...)le renvoyer à la couverture sociale minimale (...) doit aussi et surtout être envisagé comme un moyen de le responsabiliser.»

> In the summer of 2019, the Federal Supreme Court ruled that even people with an addictive disorder are in principle entitled to invalidity insurance benefits and that the effects of addictive disorders on a person's earning capacity do not principally preclude invalidity within the meaning of the Invalidity Insurance Act. In the case of addictive disorders, the indicator-oriented clarification procedure in accordance with BGE 141 V 281 must now also be carried out alongside an examination of whether the incapacity to work could objectively be overcome, or not.[305]

174 It was unreasonable for a severely overweight mother of three, whose inability to work was medically confirmed, to participate in a welfare-to-work programme.[306] The discontinuation of the integration allowance in the case of a person who did not adhere to the integration agreement was inadmissible, as the social worker should have recognised that it was impossible for the social welfare recipient to comply with the integration agreement for health reasons. The psychological problems were not supported by a medical certificate, but the social worker acknowledged their existence.[307]

175 (2) The Federal Supreme Court also mentioned that work in a programme is reasonable as long as it is not *degrading*. In this specific case, the Court confirmed that this job respected the complainant's human dignity, because he had not been able to prove that he had been overexerted, thereby also failing to prove the existence of an increased risk of injury.[308]

176 (3) Overexerting a person at the offered workplace is *e contrario* generally a reason that counts against the reasonableness of an assignment.[309]

177 (4) Finally, it is also accepted that *care responsibilities* can speak against taking up a job.[310] The decision as to when and to what extent people with care responsibilities towards (young) children may be asked to take up an activity – as part of an integration programme – is a highly value-loaded issue.[311] To what extent the new SKOS guidelines will be applied, which give higher priority to reintegration from the completion of the child's first year of age than to the care of one's own children, cannot yet be assessed on the basis of case law. At any rate, cantonal practice has so far proven to be inconsistent.

178 The Federal Supreme Court has not yet had to rule on the unreasonableness of an occupational programme due to the (old) *age* of a social welfare recipient. The cantonal case law is not clear in this regard. Old age can speak against participation in an occupational programme, but also in favour of it. The latter is justified by the fact that the age of 57 could indicate that it might be difficult to find a job in the first labour market. Here, an assignment in a one-month test job could improve the situation of the person concerned.[312]

[305] BGE 145 V 215; it remains to be seen whether this will actually enable addicts to claim disability insurance benefits, as it has been shown that the indicator-based clarification procedure did not lead to an increase in the number of benefits granted for somatoform pain disorders, see in detail: MEIER, p. 105 ss.

[306] VerwG AG, judgment WBE.2011.104 dd. 23/09/2011.

[307] TA GE, judgment ATA 51 2010 dd. 26/01/2010, C. 10.

[308] Judgment FSC 8C_156/2007 dd. 11/04/2008, C. 6.5.

[309] BGE 139 I 218, C. 4.4.; BGE 130 I 71, C. 5.3.

[310] VerwG GR, judgment U 11 60 dd. 03/ 11/2011, C. 3c.; VerwG SG, judgment B 2006/77 dd. 14/09/2006.

[311] WIZENT, Bedürftigkeit, p. 246.

[312] VerwG BE, judgment 100.2012.59U dd, 04/12/2012, C. 5.4.

C. Summary assessment

The assessment of whether a job in an occupational programme is reasonable or not is central. Only if the reasonableness is affirmed, can a directive to accept work or a sanction in the event of non-participation in the assigned programme be permissible. Nevertheless, the current legal basis and court practice do not provide clear guidelines as to which criteria should be used to assess reasonableness. Only isolated judgments based on the unreasonableness of a programme assignment could be derived from the analysis of case law.[313] 179

Although work in a programme is considered unreasonable if health reasons speak against it, it is by no way clear how a health status is to be proven. Overall, the reasonableness check is shortened, so that the result is that those who are objectively able to participate in a programme are obliged to do so. This does not result in the weighing of public and private interests with special consideration of aspects protected by fundamental rights, as required per se. Without clear criteria, it is almost impossible for people who are asked to work to argue against the reasonableness of a work assignment. Clearer rules in this area would dramatically increase legal certainty (on both sides). When drawing up these rules, however, it is important not to choose criteria that are too restrictive, as it must be possible to take account of the special features of each individual case. The norm in Art. 8g SHV/BE must therefore be assessed critically, with preference given to the detailed and nuanced approach adopted by the legislation of the canton of Vaud. 180

VII. Qualification of employment relationships under labour and social insurance law

A. Labour law

It is not difficult to find numerous practical examples of integration measures and occupational programmes that include work performed by social welfare recipients that require the conclusion of an employment contract within the meaning of Art. 319 ss. CO (see N 37 for the basics). The canton of Basel-Stadt currently pursues such an approach. The social welfare law provides the following provision in §13 al. 4: if the social welfare office employs short-term beneficiaries in a company without concluding an employment contract, the office itself becomes an employer. In this case, the social welfare office concludes a contract with the person to be placed, in which the service, the consideration and the duration of the measure are described. It must demand compensation from the company in line with conditions customary to the location and the sector, taking into account the work capacity. 181

Numerous measures in the canton of Vaud also meet these requirements. We have chosen two examples for illustration: 182

- "Pro-Log Emploi": through this measure, beneficiaries of social welfare are placed in a (state-subsidised) institution in the health care and social services sector by means of an employment

[313] STUDER MELANIE's PhD thesis, which is part of this research project, also deals in detail with the aspect of which criteria are to be taken into account when considering the basic rights of social welfare recipients.

contract limited to ten months. The main aim of this measure is to place the beneficiary in a permanent job in the health or social sector. In this case, the social welfare recipient therefore receives an employment contract within the meaning of Art. 319 ss. CO. The monthly wage amounts to CHF 3,748, and the collective agreement is applicable.

- "Macadam": this programme offers people who are "outside the labour market" the chance to re-experiment taking up a job by "helping" customers of the partner foundation, for example for removal, cleaning, gardening, handicraft works, etc. The recruitment of candidates is essentially carried out by a bus which is located on Place de la Riponne in Lausanne and where interested persons can register. There are three levels available: registration for a small job of a few hours (level 1), more comprehensive social assistance and commitment through a six-month employment contract with the foundation, with tasks to be performed once or twice a week (level 2), adaptation of the work in connection with a personal project, more comprehensive social support and compulsory contact with the responsible social worker (level 3). The change of levels is possible in both directions. All participants working in this project are "registered, insured, paid and receive a monthly pay slip". The net wage amounts to CHF 18 per work hour. The wages received are subject to income allowance: The participants can therefore keep half of their wage, up to a maximum of CHF 200 or 400 per month (Art. 25 RLASV/VD. Work clothing and shoes are provided in levels 2 and 3. In these cases, the individual is clearly in an employment relationship within the meaning of Art. 319 ss. CO.

183 It should again be recalled that, according to Art. 320 para. 2 CO, the individual employment contract is deemed to have been concluded where the employer accepts the performance of work over a certain period in his service which in the circumstances could reasonably be expected only in exchange for salary. These are then "de facto contractual relationships" which, on the basis of an irrefutable presumption, even exist against the will of the parties. In view of the examples examined, these criteria often seem to us to be united: numerous programmes include work performance under the programme management for a certain period of time.

184 However, the absolutely imperative nature of Art. 320 para. 2 CO, according to the prevailing doctrine, does not prevent the conclusion of an explicit and clear agreement that contradicts the legal presumption and consequently allows the existence of an employment contract without remuneration. The canton of Vaud, for instance, has a voluntary measure called MACIT (Missions d'action citoyennes) which undoubtedly involves employment contracts without remuneration. These are tasks within an associative cantonal network, of which there are around a hundred that can be offered to beneficiaries who wish to be active. These tasks have no ambition to integrate these people or to represent a job but allow them to carry out an activity in a social environment: for example, serving coffee or carrying out small activities. These voluntary jobs are not remunerated. Social welfare payments are not affected and there is no sanction once the measure ends.

185 In 1994, the Schweizerische Konferenz für öffentliche Fürsorge (SKöF) - the predecessor of SKOS - issued recommendations on how social welfare recipients' work should be regulated within the framework of welfare-to-work programmes: if work was performed, there had to be an employment contract and social insurance coverage . The wage had to be between CHF 15 and CHF 31 per hour. The recommendations also provided a list of criteria that made it possible to determine whether a particular

occupational programme allowed the goal of integration to be achieved. In addition, people were to be assigned reasonable tasks according to their capacities. The interinstitutional communication was to be strengthened, as well as contacts with economic associations and trade unions. The participant had to enjoy an employment contract and an appropriate wage. The risk of wage dumping with respect to the first labour market was stressed. A table with recommended gross wages was attached to these recommendations. These were clearly based on the wages of the first labour market. Salaries, payable 13 times a year, ranged from CHF 2,200 to CHF 4,500 depending on professional qualifications. It was therefore a matter of implementing the motto "social wage instead of social pension" (Soziallohn statt Sozialrente) in this way. [314]

In our opinion, there is no reason to deviate from these recommendations nowadays. They are clear, legally justified and effectively fulfil their dual function: the protection of vulnerable beneficiaries and the guarantee of their “activation” through work with a view to (re)integration into the first labour market. Unfortunately, as numerous practical examples show, cantonal legislation and practice have often deviated from these recommendations. Clarity, legal certainty and the protection of vulnerable people are thus at risk. Moreover, the federal legislator seems to follow the same reasoning, within the framework of the Federal Act on Institutions for the Rehabilitation of Persons on Invalidity Benefit (RehabIO). In fact, one of the conditions for obtaining recognition as an institution for the promotion of the integration of disabled people is to remunerate disabled people if their work is of economic value (Art. 5 lit. f). It is not acceptable that social welfare recipients should be treated differently. 186

It should be noted that Swiss employment contract law is extremely flexible and leaves the parties considerable room for manoeuvre. This is - as we have seen in N 93 Contractual arrangements – in some instances exploited in welfare-to-work programmes, but this does not always lead to the necessary protection of the vulnerable party. In particular, the concept of the “clarification jobs” in Bern underscores the need for employment contracts in accordance with the guidelines outlined here and for wages according to performance rather than need. 187

B. Social insurance

1. Main questions

The question arises as to how social welfare recipients, who participate in a welfare-to-work programme, are or should be covered by social insurance. The clarification of the OASI legal status is of great importance for the reasons mentioned in N 42. 188

In the field of social welfare, the following legal questions arise:

- Under what conditions can social welfare (partly or fully) be regarded as earned income within the meaning of the OASI? Can an activity within the framework of an occupational programme be described as gainful employment? And if so, under what conditions?
- Under what conditions is a social welfare beneficiary who works in an occupational programme insured by the employer against accidents?

[314] These recommendations are published in: HÄNZI, Richtlinien, p. 514 ss.

- What is the relationship between occupational programmes under social welfare and under unemployment insurance?

2. Old-age and disability insurance

Social welfare beneficiaries are to be regarded as not employed in the sense of the OASI if the social welfare income does not qualify as earned income, and as employed (not self-employed) if the social welfare income represents a relevant wage. In addition, the income in question must not be excluded from the definition of the relevant wage. 189

Participation in a welfare-to-work programme must be regarded as exercising an employed profitable activity within the meaning of the OASI, since its purpose is to earn an income and increase the national economic return. If an economic value can be attributed to the activity, the entire material social welfare must be regarded as earned income, and not only the integration allowance. The concept of gainful employment according to OASI is broad. Social welfare itself is not included in the list of amounts excluded from earned income. However, this does not mean that social welfare itself is an income from gainful employment within the meaning of Art. 5 OASIA. In addition, it must be possible to qualify the beneficiary's activity within the framework of the employment programme as gainful employment. 190

In our opinion, this is the case when social welfare is closely related to the work performed by the beneficiary. It must also be determined whether the work done has an economic value for the organiser of the occupational programme. If this is the case, the beneficiary's remuneration must be considered as earned income, even if this remuneration is transferred by the social welfare authorities (for example, by transferring the integration allowance). In this case, does the total amount of social welfare benefits represent earned income or only the integration allowance? In our opinion, the integration allowance is in principle an earned income if it is only transferred when participating in an occupational programme. If the beneficiary who refuses to participate in an integration programme continues to receive social welfare (minus the integration allowance), the transferred social welfare contributions do not in principle constitute earned income. However, the refusal of the beneficiary to participate in an occupational programme may, depending on the case, result in the suspension of all social welfare benefits. It must then be taken into account that social support is transferred as consideration for the activity carried out by the beneficiary and must therefore clearly be regarded as earned income in the sense of the OASI (basic amount of social welfare + integration allowance). Moreover, in our view, social welfare does not fall within the exceptions to the relevant wage within the meaning of Art. 8 ss. OASIO. The exception listed in paragraph 2203 of the Guidelines on the relevant wage in the OASI, IV and LEC (Wegleitung über den massgebenden Lohn in der AHV, IV und EO; WML, as of 1 January 2020) is not applicable to social welfare. There is in fact a right to receive social welfare if the conditions laid down by cantonal legislation are met. Furthermore, this exception is outdated. It does not fit contemporary social welfare policies, which are based on reciprocity. 191

People whose earning capacity is restricted and who work in "sheltered workshops" are not considered to be employed if their income is less than CHF 18.80 per day (or CHF 2.55 per hour). In our opinion, this limit does not apply to all welfare-to-work programmes. Rather, a case-by-case analysis will determine in which cases the performed work has an economic value. If it does, the social welfare recipient's 192

remuneration is earned income within the meaning of the OASI. Finally, an analogy with the remuneration of prison inmates within the meaning of Art. 83 SCC, which expressly excludes the concept of earned income, is not justified.

The qualification of an income as earned income from gainful employment (relevant wage) brings the person concerned advantages in many respects. On the one hand, to the extent that the OASI contributions exceed the minimum contribution, the income relevant for later pension calculation is improved. On the other hand, other social insurances are linked to the OASI status. 193

3. Accident insurance

Social welfare beneficiaries who work as part of an occupational programme should automatically be insured against accidents with their "employer" (the occupational programme or the integration measure under which the activity is carried out). Art. 73 AIA applies if the employer does not insure participants. According to the AIA, the concept of an employee includes people who carry out their work in the company but do not receive a wage (volunteers, interns, etc.). 194

Case law has confirmed that a person receiving social welfare benefits and working within the framework of an occupational programme without compensation (neither from the company nor from the competent authority) must be mandatorily insured against accidents.[315] Given the variety of regulations found in practice on this question, it seems to us that a great deal of effort is required to implement this case law in all cantons and programmes. 195

4. Unemployment insurance

According to the applicable law (Art. 23 para. 3bis UIA and Art. 38 para. 1 UIO), the salary of social welfare recipients within the framework of occupational programmes is not considered to be subject to contributions. Participation in a welfare-to-work programme does therefore not generate a relevant contribution period (Art. 13 UIA). [316] 196

VIII. Governance

A. Protection of the first labour market against competition

Some cantons have realised that welfare-to-work programmes can, under certain circumstances, lead to competition with the first labour market – especially if the employment of social welfare recipients does not comply with working conditions customary to the location and sector. 197

In this respect, the canton of Zug stipulates that when social welfare recipients are assigned to private sector companies, it must be ensured that no existing employment relationship is terminated for this assignment, that the employment contract is concluded for at least one year, and that a reduced wage is only paid during the maximum trial period of six months. After that, wages customary to the sector are payable.[317] Only in exceptional cases can a contribution of max. 30% of the wage customary to the 198

[315] Judgment FSC 8C_302/2017 dd. 18/08/2017.
[316] Cf. to the whole: BGE 139 V 212
[317] § 15bis para. 4 SHG/ZG.

sector be paid for a maximum of 3 months after the trial period, provided that the trade association concerned agrees.[318]

In the canton of Vaud, temporary welfare-to-work programmes under Art. 64a para. 1 (a) UIA for employable social welfare recipients are not allowed to compete directly with the private sector. For all programmes, a tripartite commission examines whether there is undesirable competition with the private sector.[319] 199

The canton of Geneva also states that care must be taken to ensure that the programmes do not give rise to any competition, in particular with sectors which are familiar with a collective bargaining agreement, but also with the public sector.[320]

B. Political governance

1. Switzerland

Governance of the offers, financing, and evaluation of the programmes by the social welfare authorities is crucial in view of the reintegration objectives of social welfare, the strong interference in the lifestyle of social welfare beneficiaries, and the costs. The challenges are great because of the mostly mixed responsibilities, the small size of the cantons, regional disparities and the diversity of the levels of the problems. This becomes evident in both the cantonal survey and the case studies. 200

At the end of the cantonal survey (N= 24), an open question was asked concerning what works well in terms of governance: 201

- 8 cantons explicitly say "Cooperation is good" (BE, GL, GR, JU, LU, NW, UR, VS)
- 10 cantons explicitly say "Variety of offers is good" (AR, BE, BL, GR, JU, NE, SG, SH, VS, ZH)
- 8 cantons explicitly say "Quality is good" (AG, FR, GE, GR, LU, SO, VD, ZG)

According to the cantonal social services, one of the more problematic aspects is too wide a variety and a lack of an overall view (BL, SG), the difficulty of quality comparison (BE) and the lack of transparency (BS). In Zug the quality is good, but the offers of a monopoly provider are rather expensive. In Uri, clients rated the quality of the sole provider as poor, but there are hardly any alternatives. In some cases, the cantonal social welfare offices criticise the fact that the services offered are not sufficiently tailored to the needs of the clients (AG, SO, VS); there are not enough target-group-specific offers - especially for young people (JU, LU, UR) and people over 50 (FR, JU, LU, UR, VD). LU, NE and NW see a greater need for qualification and retraining measures.

In four cantons (AR, GR, NW, SH) there is explicit criticism that the allocation practice is based on the costs of the offers - although it could perhaps be more successful with more intensive coaching rather than wage subsidisation offers. Here the notion of disciplinary action might outweigh the idea of reintegration. Quality standards were lacking in the canton of Grisons, and every commune could set up a programme. 202

[318] § 15bis para. 5 SHG/ZG.
[319] S4.
[320] Art. 42a para. 3 LIASI/GE.

2. Case studies: Governance in Bern, Uri and Vaud

In the three cantons examined, Bern, Vaud and Uri, the structure of the canton decisively influences the variety of programmes. However, the control options also vary within the cantons depending on the size of the social welfare services, financial possibilities and geographical location. 203

Bern

The range of welfare-to-work programmes is primarily controlled by the cantonal social welfare office. There are three basic offers: institutional offers, entrepreneurially managed social firms, and a partial wage model. 204

The institutional offers consist of occupational and integration offers of social welfare (BIAS) and communal integration offers (KIA). The BIAS offers the widest range of integration measures. To this end, the cantonal social welfare office negotiates performance agreements with so-called "strategic partners" on behalf of the Health and Welfare Directorate. These strategic partners structure and coordinate the offers in their region. The canton is divided into ten perimeters and therefore operates with just as many partners. 205

The strategic partners who have to offer certain offers are responsible for the specific organisation of the offers. They can do this themselves or collaborate with other providers. For a measure, the communes refer their clients to the respective strategic partner who make an assessment and decide on the suitable offer. The proximity of social welfare clients to the labour market is assessed in a graded system. The measures are divided accordingly into professional integration (BI), professional integration with prospects (BIP) and social integration (SI). In the BIAS concept, the canton prescribes that 80% of the budget is to be spent on professional and social integration, 20% on evaluation, placement, follow-up support along with individual modules (in short AVNE). 206

The range of offers in the canton of Bern is broad and covers the usual fields of activity, such as cleaning, catering, recycling, etc. There are various forms of organisation, such as specific programmes for adolescents and young adults (motivational semester). There are offers in social companies, partial wage models in the first labour market, or longer-term programmes for single-parent young mothers. Additional communal measures (KIA) primarily serve the purpose of social integration. 207

Clients can be assigned to an evaluation place (AP) for three months by the social welfare services. According to the detailed BIAS concept, the APs serve primarily to ascertain willingness to cooperate and work and to clarify any suspicion of abuse. Successful completion of the programme is considered a prerequisite for (continued) receipt of social welfare benefits. It is therefore primarily a control measure. 208

The BIAS model gives the communes the necessary scope to manage the local variety of programmes with their own offers. Larger actors such as the city of Bern repeatedly use this for pilot projects, while smaller communes often lack the financial and human resources. Overall, the social services can act more flexibly and individually than the social insurances with their fixed catalogues of measures. On the other hand, the strategic partners have a monopoly position in their catchment area; where, as in the city of Bern, the strategic partner is a state organisation, steering options tend to be higher than in regions with private strategic partners. However, smaller integration projects are also emerging outside 209

urban centres, including the creation of integration places in normal companies.[321] Possible additions to the offers through cooperation with other branches of social security are assessed cautiously; the formal inter-institutional cooperation is explicitly viewed as a failure.[322]

Vaud

There are ten regionally organised welfare services in the canton of Vaud (Centres sociaux régionaux, CSR). The cantonal Service de prévoyance et d'aide sociales (SPAS) in the Health and Social Department is responsible for supervising the integration services. The SPAS has at its disposal a budget with which it purchases services from providers. These measures serve the purpose of social integration. They are listed in a catalogue. The regional social welfare act as implementing authorities , which assign their clients to the measures listed in this catalogue. In addition, individualised measures for social integration can also be referred to by the implementing authorities if none of the standard measures in the catalogue seems appropriate in a particular case. The SPAS has a separate budget with which it can also finance these individualised measures of social integration. 210

A particular feature of the system in the canton of Vaud is that clients who are considered employable are referred to the employment agency for professional integration and can participate in measures for professional integration. This affects about a fifth of all people in social welfare. There are a few MIPs specifically designed for social welfare recipients. Initially, they can work for twelve months in an occupational measure, while clients of the unemployment insurance can normally only stay for a maximum of six months. In addition, there are so-called 'Allocations cantonales d'initiation au travail' and professional internships analogous to the induction grants of the unemployment insurance, which tend to offer more generous grants. There are also other specific measures for long-term unemployed social welfare recipients to facilitate their integration into work (Jusqu'à l'Emploi, Nouvelle Chance, etc.). 211

In the canton of Vaud, the employment agency acts as a gatekeeper. Those who are classified as non-placeable return to the regional welfare services. The same fate befalls clients who violate the (application) requirements of the employment agency. Since the unemployment agency and the recruitment consultants are assessed on the basis of the integration figures, according to this logic the clientele close to the labour market is initially supported, which helps to ensure good placement statistics. As a rule, social welfare recipients do not belong to this group. A manager of the SPAS commented that an employment agency advisor will focus primarily on clients who are easier to place, and then only deal with others when they have the time. [323] In addition, unemployed people are the most important clientele of the employment agency and this could prove a disadvantage for people on social welfare. The low proportion of social welfare clients in professional integration is attributed, among other things, to the strict rules of the unemployment insurance. The manager of SPAS explained that 20% of the social welfare beneficiaries are registered with the employment agency and 80% are not. This would suggest that 80% of the social welfare beneficiaries are not fit to work – a message that is politically difficult. However, the relentless logic of the unemployment insurance is pushed to the extreme by a very rigid 212

[321] S2, 18.
[322] S5, 43; S3, 136.
[323] S4, 54. "[…] ils vont surtout placer les bons risques et ils s'occupent des mauvais risques quand ils ont le temps."

employment agency implementing extremely strict standards defining fitness for work: one missed appointment and the employment agency refers a client back to the social welfare services.[324]

213 To undermine these logics, in a pilot project in Lausanne, social welfare recipients were advised jointly by employment agency specialists and social workers in a "Unité Commune". The evaluation[325] showed that, in comparison with a control group, the clients found work more often and were more satisfied with the counselling and support they received. Financially, however, there were only marginal savings.

214 Social welfare, on the other hand, controls the qualification options in a very active way. The FORJAD project (Formation professionnelle pour jeunes adultes en difficulté), which supports young adults in professional training by means of scholarships, serves as a model throughout Switzerland.[326] The canton is proud of the programmes it has set up, describing them as the “Rolls Royce” of Switzerland in this area.[327] Later, a vocational training programme for people aged between 26 and 40 was also introduced (Formation pour adultes FORMAD). In this case too, the canton sees itself as a pioneer. Funding basic training up until the age of 40 is described as a very progressive policy that is almost unique in Switzerland by the SPAS manager.[328]

215 In the canton of Vaud, social welfare clients can also work for ten months in nursing and care, where there is a high demand for labour, at the minimum wage customary in the sector without, however, being entitled to unemployment benefits. The wages are paid in full by the welfare state. If the work assignment is successful, the transition to permanent employment is possible.

Uri

216 There are a total of four (regional) social welfare services in the small and rural canton of Uri. Here, social welfare has hardly any opportunities to develop or control occupational programmes. In principle, Uri has only one integration programme to which social welfare recipients can be assigned. This offers various commercial employment opportunities as well as job application support. The RAV primarily refers unemployed people to this programme. Two restaurants offer assignment opportunities in the catering trade, albeit mainly for refugees. Programmes for specific groups are largely lacking; many meaningful and necessary offers cannot be implemented at the cantonal level due to the small number of cases. Instead, there is more frequent individual coaching and assignment to integration programmes outside the canton.

217 The specialists in social welfare services are dissatisfied with the existing integration programme in the canton of Uri because it offers employment more removed from the labour market rather than integration. However, the social welfare services cannot influence the structure of the offer, since they are a quantitatively negligible customer as far as the programme is concerned. In the entire canton, only seven

[324] S4, 19: "Il se trouve qu’on est arrivés […] à une situation où on a 20 pour cent de la population bénéficiaire du RI [social assistance] qui est inscrite à l’ORP [employment agency] et 80 pour cent pas, ce qui laisserait croire que 80 pour cent des bénéficiaires du RI n’est pas apte à travailler et, cela, ça ne passe pas politiquement, gros souci avec cela. Mais c’est la logique implacable de la LACI [unemployment insurance law], poussée à l’extrême par un service de l’emploi très, très, très rigoriste et qui a fixé des normes très strictes définissant l’aptitude au placement: un seul rdv [rendez-vous] à l’ORP raté et le bénéficiaire du RI est renvoyé aux services sociaux

[325] BONOLI ET AL, p. 5.

[326] MAILLARD, BONVIN/VIF-PRADALIER.

[327] S4, 162; "[…] on a le Rolls Royce en Suisse avec les programmes qu’on a mis sur pied.”

[328] S4, 162: "[…] jusqu’à 40 ans, on peut financer les formations de base, nous sommes un canton très progressiste de ce côté-là et c’est presque unique en Suisse"

social welfare beneficiaries were in a programme in 2016 (rate 2.1%). With the programme, the performance agreement was terminated and individual assignments are only made in exceptional cases in order to be able to act in a more "resource and client-oriented" manner.[329] The head of the cantonal Social Welfare Office states that social welfare does not have the resources for the further development of measures - for example, an envisaged case management for labour market integration analogous to that of migrants, or assignments in the first labour market. Thus only marginal “basic work” is possible.[330] Due to the small number of cases, close cooperation with other branches of social security is advisable. Thus, for example, social welfare can continue to finance a labour market measure initiated by the unemployment insurance after benefits have expired. Conversely, it would also be possible for the RAV to back measures for registered social welfare recipients. The employment agency acts cautiously in this regard.[331] Cooperation with social insurances also tends to be criticised in the canton of Uri. The joint planning and implementation of integration processes has failed.[332]

C. Conclusion

For one thing, the existence of employment relationships in welfare-to-work programmes necessitates precautions in terms of competition policy. Some cantons resolve this by means of provisions in their social welfare legislation, or by setting up tripartite commissions. Secondly, political governance of the offers is needed. These options for social welfare are shaped differently. In the canton of Bern, cantonal strategic governance is carried out by using the BIAS concept, which leaves the specific measures to regional private providers. The question nevertheless arises as to whether the innovation potential that could come from private providers and from a stronger competitive situation within the framework of the integration programmes is limited. In the canton of Vaud, the employment agency essentially determines the professional integration, but there are strong and exemplary measures controlled by the cantons for the qualification of social welfare recipients. In the canton of Uri, due to its small size and number of cases, there is hardly any active governance and conceptualisation, but individual measures are also used outside the canton. Social welfare services foreground the search for individually appropriate offers. This can lead to the paradoxical situation that social workers, as in the canton of Uri, do not consider a programme because it is too remote from the labour market, but which the employment agency is actively using. 218

Cooperation with social insurance is explicitly declared to have failed in the cantons of Bern and Uri. In the canton of Vaud, the employment agency practice of “skimming”, by which the placing of less risky clients is prioritised, has been criticised. Further analyses beyond the case study cantons would be necessary for a sound scientific assessment of the governance system. 219

[329] S9, 46.
[330] S9, 12.
[331] S9, 37.
[332] S5, 43.

IX. Access to justice and case law

A. Access to justice

The assignment to an employment relationship in a welfare-to-work programme interferes with the already limited autonomy of social welfare recipients. If such an assignment is not voluntary, it is important that the people concerned can contest the decision within the administration and, if necessary, have it reviewed in court. We have therefore not only examined the cantonal case law from a substantive legal point of view, but also with regards to quantity, prospects of success and argumentation patterns in the judgments. Here we focus on the access to justice. This question is particularly relevant in view of the divergent and often only general or missing definitions and formulations in the social welfare acts and orders. 220

Conditions and sanctions related to employment relationships in welfare-to-work programmes are contested in court. The relevant subjective factors of such a mobilisation of law[333] are legal awareness, legal knowledge and the knowledge of one's own legal rights. These factors are socially stratified, i.e. unequally distributed - socially weaker groups regularly have less knowledge and trust in the law. In addition, the use, enforcement and effect of law are strongly linked to the social and legal framework. Procedural rules (e.g. upstream administrative internal complaints procedures and time limits for objections), rights of action and the social, temporal and financial mobilisation costs have a strong influence on the likelihood of legal action. How good the "Access to Justice" as a living implementation of the principle of a state governed by the rule of law is, therefore, also depends on procedural law factors on the accessibility and comprehensibility of information. 221

In Switzerland, this access to social welfare law is not always available. Art. 29 Cst. defines general procedural guarantees and Art. 29 para. 3 Cst. specifies in particular the right to free legal assistance for people in need. However, case law has interpreted these guarantees in a very restrictive way for social welfare procedures. Applicants are entitled to support to cover the procedural costs if they do not have sufficient resources (social welfare recipients meet this condition), if the prospects of success are "judicious", e.g. about 50%, if the matter concerns the applicant in a significant way (e.g.: a 15% reduction in benefits does not qualify as a "significant prejudice"), and if the case raises particular factual or legal difficulties for the applicant. All conditions must be met cumulatively. The interpretation of the term "legal difficulties for the applicant" is very narrow. Even if these high obstacles are overcome, there is a high risk for the lawyers that their work will not or only partially be paid. This case law has been repeatedly and heavily criticised by practice and doctrine.[334] 222

[333] See FUCHS 2019. Whether the mobilisation is of a high or low level cannot be assessed due to the lack of figures on the total number of corresponding dispositions and objection procedures.
[334] With further examples: HOBI.

B. Court cases

The 220 decisions examined came from 19 cantons; 7 cantons had no relevant and Appenzell-Innerrhoden no accessible social welfare judgments at all.[335] 14.2% of all social welfare judgments between 2005 and 2017 concerned employment relationships in welfare-to-work programmes, which is a relatively large number. In the cantons of Thurgau, Basel-Landschaft, Basel-Stadt, Valais, Solothurn, Aargau and St. Gallen they represent one in every fourth judgment. Almost 65% of the judgments come from German-speaking Switzerland, but the judgments regarding employment relationships in welfare-to-work programmes are overrepresented in the German-speaking area with 83%. Here, significantly more is delegated to programmes. 223

In 89% of cases, social welfare recipients are the claimants. In 11% of the cases (n=24) the claimants are communes contesting the decision in an administrative procedure. The proportion of female social assistance beneficiaries among the claimants is only 20.4%. If couples are added, women make up 26.3% of the claimants. This wide gap can only partly be explained by a lower proportion of women among social welfare recipients who are unemployed but employable. 224

Legal representation in court is rare. In three quarters of all cases, the claimants were not represented by a lawyer, compared to 80% of the social welfare beneficiaries. Legal representation was twice as common in Western Switzerland: 13 claimants (36.1%) versus 32 (17.4%) in German-speaking Switzerland. The differences in legal representation between the cantons are strong and significant (Cramers V 0.522 ***).[336] 225

Actions against decisions by social welfare services were successful in one fifth and almost 17% were partially successful.: 226

Table 7 Results of legal proceedings according to claimant

Claimant	Success for social welfare recipients	Partial success for social welfare recipients	Defeat for social welfare recipients	Unknown	All cases
Commune	15 (62.5%)	3 (12.5%)	6 (25.0%)	0	24 (100%)
Social welfare recipients	32 (16.3%)	34 (17.3%)	128 (65.3%)	2 (1%)	196 (100%)
All cases	**47 (21.4%)**	**37 (16.8%)**	**134 (61%)**	**2 (0.9%)**	**220 (100%)**

Source: Own calculations according to the judgment database

The results of the proceedings also differ according to legal representation. The correlation between legal representation and trial outcome is clear and statistically significant, as the next table shows: 227

[335] The judgments were researched on the websites of the cantonal administrative court and in particular on the website https://www.weblaw.ch/fr/competence/editions_weblaw/datenbanken/sozialhilferecht.html (visited on 06/05/2020) operated by Weblaw.

[336] Cramer's V measures the strength of the relationship between two nominally scaled variables. 0 means none, 1 a complete relationship between the values.

Table 8 Results of legal proceedings according to legal representation (only social welfare beneficiaries as claimants

	Success for social welfare recipients	Partial success for social welfare recipients	Defeat for social welfare recipients	Unknown	All cases
Lawyer	8 (20.0%)	12 (30.0%)	20 (50.0%)	0	40 (100%)
No lawyer	23 (16.0%)	21 (14.6%)	100 (66.7%)	0	144 (100%)
Unknown	1 (8.3%)	1 (8.3%)	8 (66.7%)	2 (16.7%)	12 (100%)
All cases	**32 (16.3%)**	**34 (17.3%)**	**128 (65.3%)**	**2 (1.0%)**	**197 (100%)**

Source: Own calculations according to the judgment database

228 Claimants with lawyers have a significantly higher chance of not (completely) losing their case (Cramer's V 0.309***): without a lawyer they lost 69% of the cases completely, but with a lawyer this drops to 52.5%. When it comes to partial success, this is twice as high if a lawyer is present (30% to 14.5%). This result clearly speaks for easier and more uniform access to free legal representation. According to the explanations so far, it should have become clear that social welfare law often contains "legal difficulties" for claimants.

Part 4 Recommendations

I. Introduction of minimum standards

The legal basis on which assignments in occupational programmes are regulated are extremely diverse and, apart from the great importance attached to (work) duties, there is little common ground. The legal basis often remains vague. These ambiguities are particularly evident when interpreting the principle of subsidiarity and determining the reasonableness of work in an occupational programme. Here it can be observed how the practice, supported by the courts, leads to the fact that social welfare and emergency aid is made dependent on additional conditions to be fulfilled and that social welfare services have an extremely wide scope of action. The effects of this practice can lead to conflicts with human dignity and, in certain circumstances, can constitute forced labour. 229

The prevalence, offer and governance of occupational programmes varies a lot when different parts of the country, regional distribution and access by different groups of social welfare recipients are considered – although reliable data are still missing. From the case studies with the interviews and the document analysis, as well as from the legal and case law analysis, it follows, not surprisingly, that the socio-political effects of the programmes are diverse, but that the disciplinary logic dominates - for those affected by poverty and those who could potentially be affected in the future. There are only isolated evaluations of the question of whether and how (strongly) occupational programmes have an impact. 230

Against this background, from a legal, political and economic point of view, we advocate minimum standards in the field of employment under social welfare. We believe that these minimum standards should definitely cover the following topics: 231

- access to social welfare benefits (particularly with regards to the principle of subsidiarity);
- working conditions in occupational programmes and social insurances for beneficiaries;
- evaluation and governance of the programmes.

Minimum standards could be included in the SKOS recommendations. The idea of a federal framework law in connection with social welfare was also mentioned. Whichever method is chosen, the minimum standards should be binding in order to have the expected effect. The minimum standards should make it possible to avoid a downward levelling in addition to potential, but in practice rare, "social welfare tourism" between the cantons. 232

The minimum standards attempt in particular to ensure the protection of the beneficiary's *dignity* and to guarantee additional *legal security* for all actors. This should facilitate the work of social workers and increase *administrative efficiency*, thus also creating a *savings potential*.

For social welfare recipients, the aim is to avoid the "criminalisation of poverty", which can arise if threats and sanctions are imposed should they refuse to participate in an occupational programme. The minimum standards also ensure the existence of fair and equitable *working conditions* in this area, as should be the case in the first and second labour markets. In this way, the respect of *equal treatment* in order to avoid any discrimination on grounds of social position (Art. 8 para. 2 Cst.) is guaranteed. 233

II. Adjusting the principle of subsidiarity and reasonableness

In the area of negative incentives for participation in an occupational programme, it was shown that in particular the interpretation of the principle of subsidiarity, according to which there is no (or better no longer) right to social welfare and emergency aid if participation in a (remunerated) occupational programme is refused, is associated with various problems, including conflicts with fundamental rights. These must be addressed. In our opinion, there are several possibilities for action. 234

On the one hand, negative incentives and constraints in connection with occupational programmes could be dispensed with entirely. This would not only solve the problem of loss of eligibility, but would also remove further uncertainties regarding the impact of work-related sanctions. This would also solve the question of the compatibility of benefit reductions with fundamental rights and in particular the prohibition of forced labour. The city of Zurich has been pursuing a similar approach since mid-2018. Occupational programmes are, in principle, on a voluntary basis. Under threat of sanctions, only people who have qualifications that are in demand on the labour market but who are not motivated must participate.[337] This applies to about 1% of the social welfare recipients in the city of Zurich. The remaining social welfare recipients do not have sufficient qualifications to permanently integrate themselves into a livelihood-securing activity in the first labour market, or they are already working, receiving daily unemployment benefits, or cannot work due to health issues or care responsibilities.[338] 235

On the other hand, and this is to be demanded in the sense of a minimum measure, the interpretation of the principle of subsidiarity must be adjusted; a refusal to participate in a remunerated occupational programme must not lead to the loss of eligibility for social welfare and emergency aid. In this context, sanctions within the scope provided for by the legal basis remain permissible in the event of a violation of the instruction to participate in a programme. It remains to be examined whether the programme is reasonable and the sanction appropriate for the misconduct. The question of whether the sanction - in the individual case - is suitable for bringing about the desired change in behaviour also requires in-depth examination. 236

[337] Social Department of the City of Zurich, media release of 31 October 2017, “Fokus Arbeitsmarkt 2025” of the Social Department, <https://www.stadt-zuerich.ch/sd/de/index/ueber_das_departement/medien/medienmitteilungen_aktuell/2017/171031a.html> (visited on 22/01/2020).

[338] NZZ dd. 22/05/2019, Die Stadt Zürich verteidigt die Entscheidung, auf Sanktionen in der Sozialhilfe weitgehend zu verzichten <https://www.nzz.ch/zuerich/die-stadt-zuerich-verteidigt-die-entscheidung-auf-sanktionen-in-der-sozialhilfe-weitgehend-zu-verzichten-ld.1483660> (visited on 22/01/2020).

Accordingly, the examination of requirements and possible sanctions would in future look as follows: 237

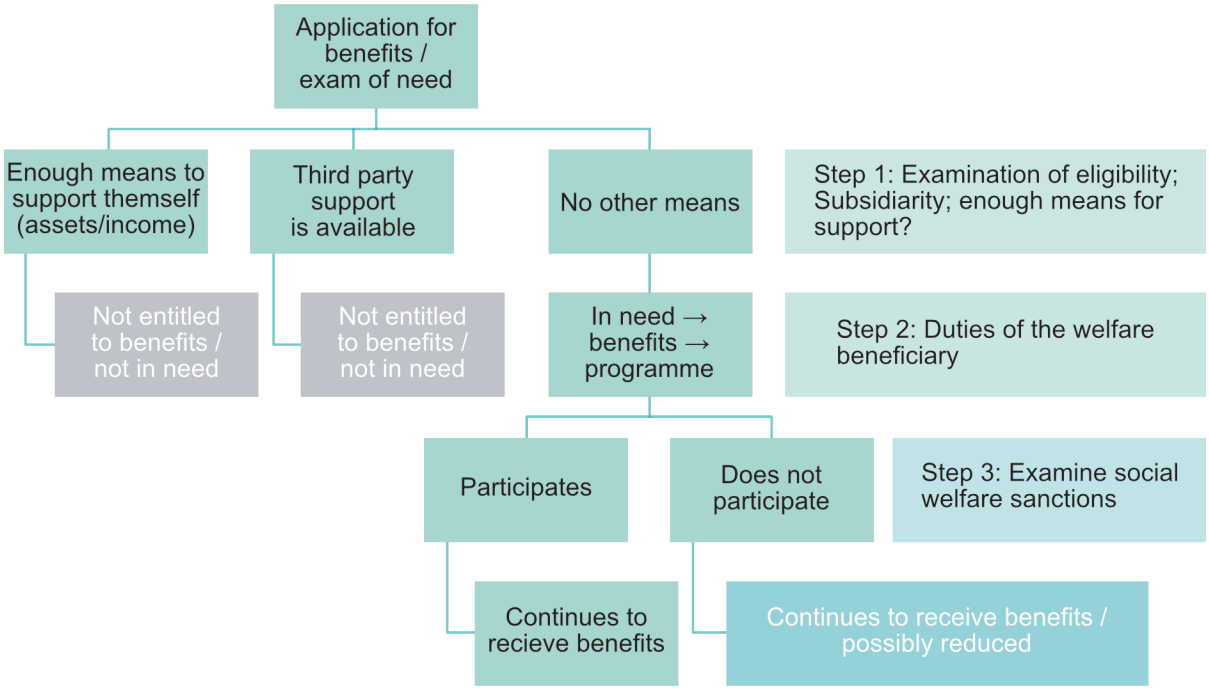

Figure 4 Claim assessment and subsidiarity new (own presentation)

The (Federal Supreme Court's) case law can give the impetus for these changes, which are necessary to guarantee human dignity, although a change in practice is not expected in the near future. A clarification in the SKOS guidelines and, since these have the necessary binding force, in the cantonal social welfare legislation would have to be checked accordingly. The responsible administrative units are also free to change their practice. 238

Closely linked to the interpretation of the principle of subsidiarity is also the assessment of the reasonableness of a work assignment in an occupational programme. In this regard, more detailed and nuanced legal regulations are required. Here, for example, the regulations from the canton of Vaud are worth commending. 239

III. Application of labour law and social insurance law

In connection with the working conditions in occupational programmes, we believe that we can rely on the SKöF 1994 recommendations "*Social* wages *instead of social pensions*", namely: 240

- The work performance of the social welfare recipients in an occupational programme should be regulated with an employment contract (under either public or private law, Art. 319 ss. CO) if such performance generates an economic value;
- Employees should have appropriate insurance coverage;
- Depending on the job, the wages should range between CHF 15 and CHF 31 per hour, with 13 months' wages between CHF 2,512 and CHF 5,138 per month (adjusted in 2018).

The following applies to the working conditions: if the social welfare recipient is employed by the commune/canton and carries out work there, there is an employment relationship that is subject to public employment law or Art. 319 et seq. CO. If the social welfare recipient is employed by the commune and is deployed by a third party ("social enterprise") to carry out the work, there is a triangular relationship: between the authorities and the company a performance agreement is established; between the company and the beneficiary there is no contract (cf. employment leasing model), but the obligation to apply the employment contract applies by analogy (e.g. the right of instruction; protection of personality...). If a social welfare recipient is employed by a third party ("social enterprise") and carries out work there that has an economic value, there exists an employment contract (Art. 319 CO). And finally, if the social welfare recipient is deployed by a third party ("social enterprise") and carries out work there that does not generate any economic value, there exists a mandate or contract *sui generis*. 241

In any case, the Federal Employment Act is fully applicable according to its scope of application. The regulations for the protection of health, safety and personality in the workplace, including the protection of personal data, are always applicable, even in a case where the EmpA is not applicable due to its own regulations. The Federal Act on Gender Equality (GAE - equal wages; assignment of tasks, protection against sexual harassment) is always applicable. Finally, the work arrangements studied here seem not to meet the prerequisites for the applicability of the Recruitment Act (RecA); Art. 19-22 RecA can, however, be a source of inspiration for minimum standards. 242

Regarding remuneration, it must not be subject to reimbursement within the meaning of social welfare law. The legal provisions concerning the prohibition of assignment of wages (Art. 325 CO) and withholding of wages (Art. 323a CO) apply here. The "activated" working social welfare recipient is entitled to weekly holidays and vacation (Art. 329 ss. CO) as well as protection against abusive dismissals (Art. 336 CO), if the contract was concluded for an unlimited period of time, and protection against unjustified dismissal (Art. 337 CO). In addition, the recipient is entitled to a wage in case of inability to work (Art. 324a and 324b CO). 243

The contract has to be concluded in written form (at least to the extent of Art. 330b CO). The reactivated service recipient is subject to the duty of care and loyalty (Art. 321a CO). No success is owed in labour law and the employer has no disciplinary power within the framework of the employment contract. As sanctions for violation of contract, compensation for damages (Art. 321e CO) and termination are available options. However, the employer has the possibility to provide its own system of sanctions (company jurisdiction), including fines. 244

Beneficiaries working in the company are considered employees in the event of mass redundancy (Art. 335d ss. CO). When there is a collective bargaining agreement, it applies unless it contains an explicit exception for welfare-to-work programmes. Finally, the civil courts have competence to judge on disputes between the social welfare recipient and the employing company (Art. 342 para. 2 CO). 245

In the context of social insurance, the minimum standards mainly serve to prevent gaps in coverage, especially for people who work permanently in occupational programmes without succeeding in (re)integrating into the first labour market. It is advisable to define the nature of the "income" earned in an occupational programme within the meaning of the OASI. All earned income is subject to the OASI 246

regulations and social contributions must be paid. Finally, the social welfare beneficiaries are to be insured against accidents (duty of the employer according to AIA), even if no wages are paid.

IV. Strengthening evidence-based policy

247 In addition to social welfare, considerable public funds flow into the activation of social welfare beneficiaries. Whether this is worthwhile, i.e. whether the desired impact is achieved, is a question of values and objectives derived from them, which are not always open and clear. Impact research examines three important aspects, namely whether the desired changes actually occur, whether the defined problem can be solved appropriately through governance, and whether the measures are efficient and effective, i.e. whether the changes actually result from the measures.[339] How do the measures affect the behaviour of the target groups (impact)? What are the social effects (outcome)? This requires a clear definition of the problem and the construction of impact models as well as the operationalisation of objectives in indicators that are appropriate and not restrictive.

248 Evaluations should therefore be provided for by law, similar to the UIA. Inter-cantonal cooperation would be appropriate to generate sufficiently large research designs, compare several programmes with each other and also to provide for control groups. For this purpose, evaluation strategies make sense but a pragmatic approach is also needed, as the comparative reports on the integration measures in the canton of Geneva show.[340]

249 Evidence does not immediately translate into policy change. It is known from Germany that more autonomy-generating promotion such as support for business start-ups or longer qualification measures have the highest and most long-term success rates, but are only marginally used.[341] The success of basic professional training via FORJAD has been known in Switzerland for almost ten years, but the slogan of qualification instead of social welfare has only been hesitantly and sporadically implemented (e.g. Basel-Stadt, city of Zurich). Several explanations can be considered here, which should be clarified empirically and comparatively. On the one hand, the complex requirements for the coherent design of social welfare benefits are certainly a reason for which disincentives and threshold effects in social welfare benefits must be avoided. At the level of knowledge stocks and knowledge markets, the FORJAD results, for example, may not match everyday knowledge[342] and ideas about social welfare recipients that prevail in politics.[343] The efforts to drastically reduce basic needs, the increasing unequal treatment of different groups in social welfare according to origin and residence status, and the allegation of abuse of social welfare are opposing trends. Policymakers are therefore called upon to debate, define and monitor the objectives of occupational programmes and corresponding indicators of success.

[339] KNOEPFEL ET AL, p. 244 et seq.
[340] OBSERVATOIRE DE L'AIDE SOCIALE ET DE L'INSERTION.
[341] FUCHS, Workfare, 14 s.
[342] Plural knowledge of experience and action can be defined as everyday knowledge with "unquestionable implicitness", cf. WETTERER, p. 56.
[343] KAUFMANN.

V. Other approaches worth considering

Our research has shown that many aspects of working under the conditions of social welfare are still poorly examined and not all gaps have been filled. 250

In particular, we did not examine in depth the question of whether and to what extent welfare-to-work programmes compete with the first labour market. In this context, the use of permanent tripartite commissions nevertheless seems worth considering. In analogy to the tripartite commissions with regards to the labour market measures of the unemployment insurance, these would have to examine whether there is competition and thus also check that working conditions in the first labour market are not put under pressure by welfare-to-work programmes. 251

As we have established, the EmpA and thus the health protection regulations and the provisions on working hours also apply to employment relationships in welfare-to-work programmes. In principle, it is therefore also the task of the cantonal labour inspectorates to monitor compliance with these conditions in welfare-to-work programmes. Whether this actually happens in practice would require further clarification. The competent authorities are obliged to apply the EmpA ex officio (Art. 41 EmpA). In addition, not only individual employees but also associations have the possibility of having the validity of the EmpA determined by decision (Art. 41 in conjunction with Art. 58 EmpA). 252

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Interviews

K1	Client of a Social Integration Programme, City of Bern
K2	Client of a Social Integration Programme, City of Bern
K3	Client of a Professional Integration Programme City of Bern
K4	Client of a Professional Integration Programme, City of Bern
K5	Client of a Professional Integration Programme, City of Bern
K6	Client of a Social Integration Programme, City of Bern
K7	Client of a Professional Integration Programme, City of Bern
K8	Client of an Occupational Programme Programme Uri
K9	Client of an Occupational Programme Programme Uri
K10	Client of a Social Integration Programme, City of Bern
K11	Client of an Occupational Programme Programme Uri
K12	Client of an Occupational Programme Programme Uri
K13	Client of a Social Integration Programme, City of Bern
K14	Client of a Professional Integration Programme, Vaud
P1	Head of Social Integration Programme, City of Bern
P2	Team Leader of Professional Integration Programme, City of Bern
P3	Team Leader Social Integration Programme, City of Bern
P4	Management Occupational Programme Uri
P5	Management Occupational Programme, City of Bern
P6	Management Professional Programme Vaud
S1	Head of Social Welfare Office of the City of Bern and Co-President of SKOS
S2	Social workers of Social Services Region Konolfingen, Bern
S3	Head of Social Services Region Konolfingen, Bern
S4	Vaud Cantonal Administration – Welfare and Social Assistance Services
S5	Head of Social Services Altdorf
S6	Head of Social Services Urner Oberland, Erstfeld
S7	Head of the Center of Competence (for) Work/Employment, City of Bern
S8	Coach of the Center of Competence (for) Work/Employment Arbeit, City of Bern
S9	Head of the cantonal Social Welfare Office Uri
S10	Head of the Employment Services, Vaud
S11	Entreprise sociale d'insertion (ESI), OSEO Vaud (Vevey)
S12	Legal advisor at Planet 13, Basel
S13	Management UFS, Zurich
S14	Head of Planet 13, Basel

Figures

Tables

List of abbreviations

AG	Aargau
AI	Accident insurance
AI	Appenzell Innerrhoden
AIA	Federal Act on (Accident Insurance Act) of 20 March 1981, CC 832.20
AJP	Aktuelle juristische Praxis
ALV	Unemployment insurance
AP	Evaluation place
AR	Appenzell Ausserhoden
art.	article
ARV	Zeitschrift für Arbeitsrecht und Arbeitslosenversicherung
AVNE	Evaluation, placement, follow-up support along with individual modules
BE	Bern
BGE	Leading Decision of the Federal Supreme Court (Bundesgerichtsentscheid)
BI	Professional Integration
BIAS	Occupational and integration offers of social welfare
BIP	Professional integration with prospects
BJM	Basler juristische Mitteilungen
BL	Basel-Landschaft
BS	Basel-Stadt
BSK	Basler Kommentar
c.	consideration
CC	Classified Compilation of federal law (cf. www.admin.ch / Federal Law)
CDSS	Conference of cantonal social services directors
CHF	Swiss francs
CHSS	Journal Social Security
cf.	confer
cit.	cited
CO	Federal Act on the Amendment of the Swiss Civil Code (Part Five: The Code of Obligations) of 30 March 1911, CC 220
Cst	Federal Constitution of the Swiss Confederation of 18 April 1999, CC 101
CSR	Centres sociaux régionaux
dd.	decision date
dRSK	Der digitale Rechtsprechungs-Kommentar
e.g.	for example
ECHR	Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) of 4 November 1950, CC 0.101
ed.	editor
eds.	editors
esp.	especially
Etc.	et cetera
Et al.	and others
et seq.	and following

EmpA	Federal Act on Employment in Business, Trade and Industry (Employment Act) of 13 March 1964, CC 822.11
FA	Family allowances
ss.	and the following
FORJAD	Formation professionelle pour jeunes adultes en difficulté
FORMAD	Formation pour adultes
FR	Fribourg
FSC	Swiss Federal Supreme Court (www.bger.ch)
FSO	Federal statistical office
GBL	Amount, covering the basic cost of living (Grundbedarf für den Lebenslunterhalt)
GE	Geneva
GEA	Federal Act on Gender Equality (Gender Equality Act) of 24 March 1995, CC 151.1
GEF	Gesundheits- und Fürsorgedirektion des Kantons Bern (Health and welfare Department of the canton of Bern)
GL	Glarus
GSSLA	Federal Act on General Aspects Social Security Law of 6 October 2000, CC 830.1
GR	Graubünden
id.	Idem, the same
i.e.	in other words
incl.	included, including
InvIA	Federal Act on Invalidity Insurance (Invalidity Insurance Act) of 19 June 1959, CC 831.20
IV	Invalidity insurance
JU	Jura
KG	cantonal court (Kantonsgericht)
KIA	Communal integration offers
LEC	Loss of earnings compensation
LU	Lucerne
MACIT	Missions d'action citoyennes
MIP	Mesures d'insertion professionelles
MIS	Mesures d'insertion sociale
N	Note
NE	Neuchâtel
NGO	Non-Governmental Organisation
NW	Nidwalden
OASI	Old-age and survivors' insurance
OASIA	Federal Act on Old-Age and Survivors' Insurance of 20 December 1946, CC 831.10
OASIO	Federal Ordinance on Old-Age and Survivors Insurance of 31 October 1947, CC 831.101
OPA	Federal Act on Occupational Old Age, Survivors' and Invalidity Pension Provision (Occupational Pensions Act) of 25 June 1982, CC 831.40
OW	Obwalden
p.	page
para.	Paragraph

passim	here and there
PWA	Federal Act on Posted Workers of 8 October 1999, CC 823.20
RecA	Federal Act on Recruitment and the Hiring of Services of 6 October 1989, CC 823.11
RehabIO	Federal Act on Institutions for the Rehabilitation of Persons on Invalidity Benefit of 6 October 2006, CC 831.26
SCC	Swiss Criminal Code of 21 December 1937, CC 311.0
SG	St.Gallen
SGB II	Social welfare code II
SH	Schaffhausen
SI	Social integration
SKOS	Swiss Conference for Social Assistance
SKöF	Schweizerische Konferenz für öffentliche Fürsorge - Swiss Conference on Public Welfare (predecessor of SKOS)
SO	Solothurn
SocRA	Federal Act on the Responsibility for providing Support to Persons in Need (Social Responsibility Act) of 24 June 1977, CC 851.1
SPAS	Service de prévoyance et d'aide sociales
TC	Cantonal court (Tribunal Cantonal)
SZ	Schwyz
TG	Thurgau
TI	Ticino
UIA	Federal Act on Compulsory Unemployment Insurance and Benefits on Insurance Act (Federal Unemployment Insurance Act) of 25 June 1982, CC 837.0
UIO	Ordinance on Compulsory Unemployment Insurance and Benefits on Insolvency (Unemployment Insurance Ordinance) of 31 August 1983, CC 837.01
UR	Uri
USBI	Companies for social and Professional integration
VerwG	Verwaltungsgericht /administrative court
VD	Vaud
VS	Valais
WML	Wegleitung über den massgebenden Lohn in der AHV, IV und EO des Bundesamts für Sozialversicherungen, Version 15 vom 1. Januar 2020
ZBI	Schweizerisches Zentralblatt für Staats- und Verwaltungsrecht
ZESO	Zeitschrift für Sozialhilfe
ZG	Zug
ZH	Zurich
ZSR	Zeitschrift für Schweizerisches Recht

Further publications from the project

STUDER MELANIE / PÄRLI KURT, The duty to work as precondition for human dignity: a Swiss perspective on work programmes, in: Anja Eleveld/Thomas Kampen/Josien Arts (eds.), Welfare to Work in Contemporary European Welfare States. Legal, Sociological and Philosophical Perspecitves on Justice and Domination, Bristol 2020, p. 89 ss.

STUDER MELANIE, Recht auf Nothilfe und Geisteshaltung, SZS 6/2019, p. 340 ss.

MEIER ANNE/PÄRLI KURT, *Intégration* par le travail dans l'aide sociale. Incertitudes sur la qualification des rapports juridiques et risques pour les bénéficiaires "activés", Jusletter of 3 June 2019.

FUCHS GESINE, Sozialpolitische Wirkungen von „Workfare" im Wohlfahrtsstaat, Zentrum für Europäische Geschlechterstudien (ZEUGS) – Working Paper No. 10|2018.

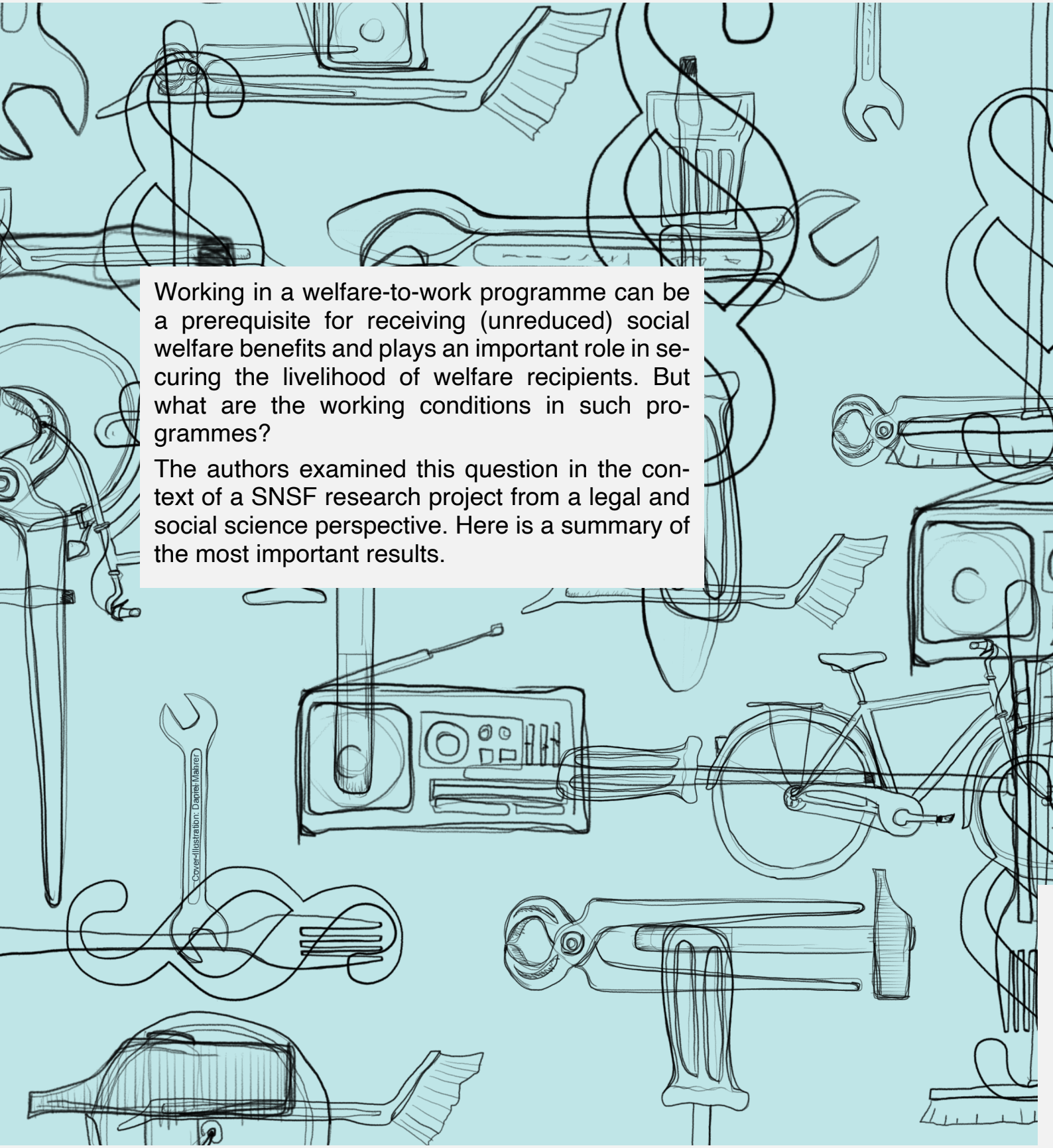
MEIER ANNE / PÄRLI KURT, Sozialversicherungsrechtliche Fragen bei Beschäftigungsverhältnissen unter sozialhilferechtlichen Bedingungen, SZS 1/2018, p. 4 ss.

FUCHS GESINE / MEIER ANNE/PÄRLI KURT/ STUDER MELANIE, Rechtlich unklare Beschäftigungsverhältnisse für Sozialhilfeempfänger, ZESO 1/2018, p. 22 ss.

MEIER ANNE /STUDER MELANIE, Commentaire de l'ATF 142 I 1, Jusletter of 14 November 2016.

PÄRLI KURT / MELANIE STUDER, BGE 142 I 1: Sozialhilferechtliche Beschäftigungsprogramme zwischen Existenzsicherung, Subsidiarität, Zumutbarkeit und Sanktion, AJP 10/2016, p. 1385 ss.

For more information about the project, references to future publications and downloads: www.thirdlabourmarktet.ch



Working in a welfare-to-work programme can be a prerequisite for receiving (unreduced) social welfare benefits and plays an important role in securing the livelihood of welfare recipients. But what are the working conditions in such programmes?

The authors examined this question in the context of a SNSF research project from a legal and social science perspective. Here is a summary of the most important results.