

Multilevel conditionality and Fundamental Social Rights: EU activation policy and its effects on the fundamental social right to work

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Introduction

This contribution discusses the impact of EU activation policy on the national welfare state and its guarantees concerning the fundamental social right to work. The main focus will be on the consequences of EU policies on the design of national welfare policies concerning the right to social security in the form of unemployment benefits. The paper also briefly touches upon possible long-term consequences of the current activation policy for the nature of the fundamental right to engage in freely chosen or accepted work and the quality of that work.

The main hypothesis is that due to a double policy conditionality, the character of national unemployment benefits changes from an inalienable fundamental human right to a (contractual) entitlement based on conditional reciprocity.

In the first part of this contribution, the right to work will be discussed briefly. The focus will be on the obligation to strive for a policy that ensures as high an employment level as possible, ideally resulting in full employment. Furthermore, Article 34 CFR and Article 12 ESC on the recognition of a right to social security will be discussed in their quality as precondition for the right to freely chosen work. After all, if no replacement income is provided, doubts may rise as to the freedom of choice, as acceptance of a (any) job will be dictated by sheer necessity.

The second part deals with the EU level of conditionality. It analyses the way the European economic policy influences European employment and social policy. The Europe 2020 Agenda aims at more (and better) jobs, an aim which, on first sight, seems to match perfectly the obligations emanating from the ESC. However, owing to the use of soft-law mechanisms and Member States' leeway to choose and define national targets in National Reform Programmes as they see fit, its protective value may be relatively minor. The soft-law characteristics of EU employment policy become important when the interdependence of European employment and economic policy is discussed. The EU-level coordination of macroeconomic policy in combination with hard law obligations and semi-automatic sanctions in the field of monetary policy may restrict Member States' room for manoeuvre. Member States that have to choose whether to pursue the employment or the economic aims might be inclined to choose the latter over the former, mainly because of the sanctioning mechanism. The inclination to prioritise budgetary and macro-economic aims to employment aims is further strengthened by the fact that Article 146 TEFU explicitly stipulates that employment policies are to be consistent with economic policies. This means that European employment policy is made subservient to economic aims, subordinated to the economic imperatives of balanced budgets and macro-economic stability.²

In the third part, the national level of conditionality is the focal point. Conditionality on Member State level is consequential of the choice the Member States face. It relates to the

¹ As this paper is still a draft, please do not quote without prior permission. Many thanks to N. Büttgen and S. Klosse of the Maastricht Law faculty Public Law department for their valuable comments on earlier drafts. Any errors remain my responsibility.

² D. Ashiagbor, *The European Employment Strategy*, Oxford University Press 2005, p. 1

encouragement to adopt activation policies leading to a higher percentage of participation in paid employment. This activation and participation policy, however, should not be costly, as this would endanger macro-economic stability, at least in the short run. Therefore, Member States will be inclined to design employment policies that combine maximum effect with minimal investment. Very generally, this tends to translate into Member States lowering benefits, shortening periods of eligibility and tightening eligibility criteria, such as the requirement to accept suitable work. Concerning the member State duty to also pursue activation policies, particular attention will be paid to contractualisation as relatively new form of ‘governance’ in social security law.³

Finally, the fourth part aims to start the discussion on the possible impact ‘governance’ through individualisation and ‘meritisation’ of benefits, may have on the right to (decent) work and to free choice of this work. One question for future research will be in how far the modification of the right to work into a contractual, individualised right will have consequences for the perception of the right to work as fundamental social right.

1. The fundamental social right to work and to social security

1.1: The right to work

The right to work is laid down in Article 1(1) of the European Social Charter (ESC).⁴ Although not being part of European Union law, the TFEU refers to ESC in Article 151. When dealing with employment and social matters, the Union and the Member States should bear in mind the fundamental rights laid down in the ESC. However, this does not mean that the EU is obliged to respect the minimal levels which the Charter defines.⁵ Any state which is a contracting party to the (Revised) European Social Charter accepts the obligation to progressively work towards realisation of full employment, free choice of work and improving employment conditions. To ensure the effective exercise of the right to work, the states parties accept ‘as one of their primary aims and responsibilities’ the achievement and maintenance of as high and stable a level of employment as possible, with a view to the attainment of full employment. In legal doctrine, it is generally agreed that the fundamental social right to work in a freely chosen or accepted employment does not confer on the individual an enforceable, subjective right to a certain job.⁶ It is furthermore generally agreed that a state cannot fulfil an obligation to offer a job guarantee to every individual wishing to engage in paid employment;⁷ work opportunities depend too much on economic circumstances, personal capabilities and skills, to name just a few factors mainly outside the state’s sphere of influence.⁸ According to the European Committee of Social Rights (the Committee), what can be expected under Article 1(1) ESC is that states adopt a coherent economic policy which pays due regard to achieving as high an employment level as possible.

³See, e.g. for Germany, § 15 SGB II Eingliederungsvereinbarung,

⁴ The focus will be laid on the (R)ESC because this instrument is explicitly mentioned in art. 151 TFEU. I am aware of the fact that the right to work is codified in other instruments as well.

⁵ O. de Schutter, *Anchoring the EU to the ESC: The case for accession*, in: G. de Burca, B. de Witte, *Social Rights in Europe*, Oxford University Press, 2005, p. 114.

⁶ See e.g.: D. Harris, J. Darcy, *The European Social Charter*, Transnational Publishers Inc. New York, 2nd edition 2001, p. 40; A. Swiatkowski, *Charter of Social Rights of the Council of Europe*, Kluwer International, Alphen a/d Rijn, 2007, p. 55

⁷ E.g. B. Hepple, *A right to work?*, (1981) *Ind. LJ Vol.*, 65, p. 69-70

⁸ Interestingly, some macro-economists posit that a state can, by using the correct fiscal policy and by getting priorities right, foster full employment. See W. Mitchell and J. Muysken: *Full Employment abandoned*, Edward Elgar, Cheltenham, 2008

The social programmes adopted should raise employment figures, or, at the very least, reduce unemployment.⁹ The absolute bottom line, according to the Committee in its first cycle of reporting, is crossed where a state deliberately abandons “the objective of full employment in favour of an economic system providing for a permanent pool of unemployed”.¹⁰

The Charter of Fundamental Rights of the European Union (CFR) does not recognise the right to work as such. Article 15 CFR recognises that everyone has the right to engage in work and to pursue a freely chosen or accepted occupation. From the explanatory memorandum, it seems that the content of Article 15 CFR differs from Article 1(1) ESC. The explanatory memorandum refers to CJEU case law dealing with restrictions to have access to certain professions, but does not contain any mention of Article 1(1) ESC. It might therefore be that the focus of the right to work within the CFR is not so much directed towards the obligation of a state to develop and implement an employment policy that keeps unemployment figures as low as possible, but rather towards the right to access to jobs that already exist.¹¹ However, the explanatory memorandum does contain a reference to Article 1(2) ESC, describing the right to a free choice of work. Article 1(2) ESC states that the parties should protect effectively the right of the worker to earn his living in an occupation freely entered upon. This provision prohibits labour conducted by a worker against his free will.¹² One of the issues that regularly come up in the Conclusions of the Committee of Social Rights is the question whether Parties may impose obligations on unemployment benefit recipients to actively look for work threatening insufficient activity with (partial, temporary) loss of benefits. Obviously, the threat of losing unemployment benefits constitutes a strong incentive to accept a job offer. But does that mean that the work is not entered upon freely? The Committee of Social Rights usually examines unemployment benefits under Article 12 ESC, but “in certain cases and under certain circumstances the loss of unemployment benefits on grounds of refusal to accept proposed employment could amount, indirectly, to a restriction on the right to work and as such the situation would be assessed under art. 1(2)”¹³ ESC. In the general introduction to its Conclusions from 2012, the Committee elaborates on this, using the “Guide to the concept of suitable employment in the context of unemployment benefits”.¹⁴ It holds that where an unemployed person rejects a job offer and therefore loses the right to unemployment benefits benefit or to social assistance, this might constitute a restriction of the freedom to work where the person concerned is compelled, on pain of losing benefits, to accept any job, notably a job with far less qualifications, significantly lower salary or which is in any other way incompatible with regional or local rules of family obligations.¹⁵

1.2: The right to social security

A right to social security is included in the social rights catalogue of the ESC in Article 12. During the last 20 years, Article 12 ESC has lost some of its power as the Committee changed its position on non-regression. Originally, the committee established a duty to progress; the States Parties were supposed to design and keep a system of social security covering at least

⁹ A. Swiatkowski, *Charter of Social Rights of the Council of Europe*, Kluwer International, Alphen a/d Rijn, 2007, p. 56

¹⁰ Committee of Social Rights, *Conclusions I*, 14

¹¹ D. Ashiagbor, ‘The right to work’, in G. de Burca, B. de Witte, *Social Rights in Europe*, Oxford University Press, New York, 2005, p. 244.

¹² A. Swiatkowski, *Charter of Social Rights of the Council of Europe*, Kluwer International, Alphen a/d Rijn, 2007, p. 59

¹³ Committee of Social Rights, *Conclusions XIX-1*, p. 257 (Iceland)

¹⁴ Committee of Experts on Social Security: *Guide to the Concept of suitable employment*, 2010

¹⁵ Committee of Social Rights, *Conclusions 2012, General Introduction*, p. 6-7.

some of the risks mentioned. The material as well as the personal scope of coverage should be steadily enlarged; benefit levels should become more generous.¹⁶ Later, this position changed. According to the Committee today, regression in the field of social security is possible, if well documented facts offer a justification.¹⁷ Individuals cannot, therefore, plead a non-regression duty in order to keep states from lowering benefits and tightening eligibility criteria. The right to social security as laid down in the ESC therefore offers no real protection against austerity-induced changes of eligibility criteria and / or benefit levels. Article 34 CFR does mention Article 12 ESC, but this reference is weakened by the explanatory memorandum. From the latter, it follows that the Charter merely recognises and respects the right to social security as a principle, meaning that the EU must be aware of the consequences for social security measures when legislating on issues within its competence.¹⁸ Article 34 CFR thus neither contains a right to social security nor an obligation for either EU or Member States to legislate on social security.¹⁹

In short, the social rights, particularly those laid down in the CFR, lack shape and authority and therefore do not offer much guidance concerning an EU wide employment policy. Instead, the ESC does offer slightly more guidance, especially the policy aim in Article 1(1) ESC which obliges States Parties to develop and implement an employment policy that is designed to create the highest possible level of employment, ideally full employment. Incidentally, the Europe 2020 agenda's main focus, activation and participation, seems to follow the general aim of Article 1(1) ESC: getting as many people into employment as possible. Can the Europe 2020 Agenda indeed be seen as an EU policy that is in line with the ESC and the CFR?

2. Employment policy in an economic policy straitjacket

2.1: European employment policy

Until quite recently, policy aims of a more social nature have only played a minor part within the EU and were traditionally left to the national welfare state. Today, Article 3(3) TEU states that the Union shall establish a "...social market economy, aiming at full employment...". Full employment thus has become EU objectives. Member States and the Union shall work towards developing a coordinated strategy for employment (see Article 145 and Article 146(1) TFEU) and the Union shall contribute to a high level of employment by encouraging cooperation between Member States (Article 147(1) TFEU). This language is reminiscent of Article 1(1) ESC discussed above.

Still, even though the language of Article 3 TEU resembles the ESC guarantee to as full employment as possible, the main reason to proceed with a coordinated employment policy in the EU was much more pragmatic. At the very least since the 1990s, with rising and persistent high unemployment and jobless growth, employment and social policy came to be regarded as areas of common concern. It became clear that – on the one hand - persistent unemployment might involve severe risks to countries macroeconomic stability²⁰ while, on the other hand, high participation in paid employment was thought necessary for the sustainability of the

¹⁶ J. Tooze, 'Social Security and Social Assistance', in T. K. Hervey and J. Kenner, 'Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective', Hart Publishing, Oxford, 2003 p. 166

¹⁷ Committee of Social Rights, General observation on article 12 (3), Conclusions XIII-4, p. 143

¹⁸ Explanatory Memorandum: 11 October 2000, Charte 3373/00, Convent 49, note under article 34.

¹⁹ J. Tooze, 'Social Security and Social Assistance', in T. K. Hervey and J. Kenner, 'Economic and Social Rights under the EU Charter of Fundamental Rights – A Legal Perspective', Hart Publishing, Oxford, 2003 p. 165

²⁰ K. Jacobssohn, Soft regulation and the subtle transformation of states: the case of EU Employment policy, Journal of European Social Policy, 2004, 14(4), p. 357.

national welfare. This also explains why the issue of participation in paid employment is the core issue in European employment and social policy at the moment.²¹ Despite member States' still principal reluctance to cede competences in the employment and social fields, in view of the common challenges described above they provided both policy fields with a base in primary EU law through the Amsterdam Treaty. As indicated above, the Employment title creates the basis for the European Employment Strategy (EES) which must be consistent with the Broad Economic Policy Guidelines (BEPGs) adopted pursuant to Article 121 TFEU.²² This process is given form within the framework of the Union's multi-annual growth strategies. This integrated coordination intends to facilitate progress towards the Union's goals, while also encouraging policy development and learning among the Member States. Since 2010, the Europe 2020 Agenda, defines the EU policy goals up to the year 2020. The Agenda's general policy targets include a high level of employment and a skilled and adaptable workforce. The single most important target of the Europe 2020 Agenda is to raise the EU wide average participation percentage in paid employment of those aged 20-64 to 75% by 2020.²³ Evidently, under the Europe 2020 Agenda, activation and participation are defined key issues of employment policy. It does therefore not come as a surprise that the Employment Guidelines which have been formulated to stimulate and guide national policy reforms urge the Member States to increase labour market participation, to reduce structural unemployment and to promote job quality.²⁴ However, in the field of employment policy, and even within the Europe 2020 Agenda, the Member States are free to choose and define the targets they want to reach. The National Reform Plans drawn up in the wake of the guidelines thus contain a wide range of participation targets with on the one end Sweden aiming for well over 80% participation and the other extreme, the UK, not setting a target at all.²⁵ Guideline 7 advocates the integration and application of the Flexicurity principles²⁶ into national labour market policies to achieve the participation aims. It offers two ways to reach this higher participation. On the one hand, access to employment must be made easier. This track involves review and deregulation of rules regarding termination of employment contracts to make hiring of employees more attractive.²⁷ It also includes the call for (wider) acceptance of atypical forms of employment such as agency work or fixed term contracts. Here, the hope is that these atypical forms of contract provide stepping stones into (more) permanent employment.²⁸ Under the second, complementary track, the Guideline promotes active labour market policies, which include inter alia training schemes and employment subsidies to ease transitions to and on the labour market.²⁹ States are urged to implement or keep activation requirements in unemployment legislation, preferably within the framework of a 'mutual responsibilities approach' that maintains incentives for work whilst ensuring income, providing personalised job-search assistance and guarding against the risk of poverty.³⁰ Member States are to report annually on their progress concerning the targets laid down on the European level in their annual National Reform Programme. Member State

²¹ Commission Communication "Towards a job-rich recovery", COM (2012) 173 final, p. 20

²² Article 146 TFEU

²³ Council Decision of 21 October 2010 (2010/707/EU), OJ L 308/46, Guideline 7 last part

²⁴ Council Decision of 21 October 2010 (2010/707/EU), Guideline 7. Guidelines 8-10 include developing a skilled workforce, improving the quality of the education and training system and combating social exclusion and poverty.

²⁵ http://ec.europa.eu/europe2020/pdf/targets_en.pdf

²⁶ Eight possible principles of flexicurity, identified in: Commission Communication COM (2007) 359 final: Towards common principles of flexicurity, p. 9

²⁷ Council Decision of 21 October 2010 (2010/707/EU), OJ L 308/46, Guideline 7

²⁸ Guideline 7 in Annex to Council Decision of 21 October 2010 (2010/707/EU), OJ L 308/46

²⁹ *Ibidem*, Guidelines 8 and 9.

³⁰ Commission Communication "Towards a job-rich recovery", COM (2012) 173 final, p. 10; see also Council Decision of 21 October 2010 (2010/707/EU), OJ L 308/46, Guideline 7, first section.

progress is monitored and benchmarked, and if it is deemed insufficient, the Council may issue country-specific recommendations. Still, even the country-specific guidelines are no more than recommendations. This means that EU employment policy eventually depends on Member State goodwill to reach common objectives.

2.2: Interdependence of economic and employment policies

It has become obvious that since its insertion into the Treaty, EU coordination of employment policies has progressed considerably. Nevertheless, it is still subject to constraints following from economic policy.³¹ This subordination applies to the content as well as to the procedure of the EU employment policy.

The reasons for the ‘contagion’ with regard to the content are mainly historical. At the time of the formulation of the European Employment Strategy, the EU had accepted the OECD’s and ECB’s views on how to combat unemployment, which were essentially based on the idea that labour market rigidities were at the core of the European unemployment problem.³² OECD and ECB promoted a rather orthodox economic understanding of the labour market, positing that once the rigidities concerning hiring, firing and payment were abolished, unemployment would decline.³³ The EES was ‘born’ out of this belief that greater flexibility is the key to solving Europe’s unemployment problem.³⁴ Flexibility, reduction of employment protection legislation, active labour market policies and the modernisation of social security systems thus became cornerstones of EU Employment Policy since the 1990s and have shaped EU Employment Policy for the last 20 years. Today, as explained above, Guideline 7 of the current set of guidelines states that “(a)ctivation is key to increasing labour market participation “ and urges the Member States to integrate and apply the Flexicurity principles in national labour market policies. It is thus safe to state that the economic assumptions that helped shape the original EES still exist in today’s EU employment policy. When the EES was launched, it was accepted only on condition that it would not lead to a transfer of competence to the EU level, that it would not involve extra costs and that, most importantly, it would fully comply with EMU rules.³⁵ On the one hand, this implies that employment and social policy aims should reinforce economic stability and growth, in other words, that they should further the aims from a different sphere of policy. On the other hand, the integration of employment law issues or considerations into the Stability and Growth Pact (SGP) were consciously refused by the Member States. In the discussions on the convergence criteria prior to the Maastricht IGC, the Member States deliberated the possibility to include employment targets in the convergence criteria, because high and persistent unemployment was seen as one major risk for the macro-economic stability of a country.³⁶ After all, persistent, high unemployment can lead to high public expenditure and less (tax) revenues, thereby possibly creating a macroeconomic imbalance. However, as Member States were unwilling to cede competences in the field of employment, no targets relating to the field of employment policy were inserted in the convergence criteria.³⁷

³¹ D. Ashiagbor, *The European Employment Strategy*, Oxford University Press 2005, p. 94, 111.

³² D. Ashiagbor, *The European Employment Strategy*, Oxford University Press 2005, p. 36; K. Jacobssohn, *Soft regulation and the subtle transformation of states: the case of EU Employment policy*, *Journal of European Social Policy*, 2004, 14(4), p. 360

³³ D. Ashiagbor, *The European Employment Strategy*, Oxford University Press, New York, 2005, p.37

³⁴ *Ibidem*

³⁵ A.Hemerijck, *Changing Welfare States*, Oxford University Press, Oxford, 2013, p. 311

³⁶ D. Ashiagbor, *The European Employment Strategy*, Oxford University Press, New York, 2005, p. 85

³⁷ *Ibidem*, p. 103. Today, Regulation 1176/2011 provides for a role of unemployment figures as one of the figures which may trigger an excessive imbalance procedure.

The procedural influence of economic policies can best be perceived in the wording of Article 146 TFEU. That provision demands that national employment policy must be implemented in a way that is consistent with the Broad Economic Policy Guidelines (BEPG) developed within the framework of the EU economic and monetary policy. The need to regulate national monetary, budgetary and financial policies became obvious when the common European currency was first discussed. So, from Maastricht onwards, national economic policy became a matter of common concern, to be coordinated by the Council.³⁸ The Council sets out the BEPG according to the guiding principles of economic policy on EU level, being stable prices, sound public finances and monetary conditions and a sustainable balance of payments³⁹ which the Member States have to take into account in their domestic policy. More importantly, apart from the ‘mere’ coordination of national economic policies, which resemble the kind of governance used in the employment sphere, the Maastricht Treaty introduced convergence criteria concerning monetary and budgetary policy, the SGP and accessory secondary legislation.⁴⁰ Under the SGP, the main obligation of the Member States is to avoid excessive deficits.⁴¹ Compliance with budgetary discipline is monitored on the basis of two criteria: the ratio of government deficit to gross domestic product and the ratio of government debt to gross domestic product both should not exceed the reference values of 3% and 60% respectively.⁴² Finally, the SGP provides for semi-automatic sanctions with regard to Eurozone States⁴³ which can be so costly that States will do their utmost to prevent them.⁴⁴ Additionally, the European Semester for Economic Policy Coordination reporting and monitoring cycle aims at an integrated coordination of activities with regard to three types of economic dimensions and procedures. Unsurprisingly, the first two are budgetary discipline and prevention and correction of macro-economic imbalances respectively. The third “economic dimension” concerns monitoring the progress towards the targets established in the Europe 2020 Agenda.⁴⁵ Once again, it becomes clear that employment policy is regarded as part of economic policy. In this context, it is telling that the Europe 2020 Integrated Guidelines are contained in two distinct but “intrinsically interconnected”⁴⁶ decisions. The Employment guidelines thus have become part of the general effort to maintain macro-economic stability and to enhance growth. Therefore, economic considerations do influence employment policy considerations where the other way round, this influence was deemed undesirable.

The above shows two things, first, that EU employment coordination differs fundamentally from EU economic governance, secondly, that the former is made subservient to the latter. Concerning the first point, within the framework of economic, monetary and budgetary policy, the EU has at its disposal hard law obligations which the Member States must fulfil, in order not to risk sanctioning. The targets to be reached are obligatory for all member states. Concerning EU employment policy coordination, on the other hand, this really is no more than that: coordination. Although the Europe 2020 Agenda specifies an overall target of 75%

³⁸ See article 103 Maastricht Treaty, now article 121 TFEU.

³⁹ See article 119(3) TFEU

⁴⁰ See the so called Six-Pack and Two-Pack legislation packages. It is in this sphere that the true coercive nature of EU economic policy has become obvious since the start of the sovereign debt crisis.

⁴¹ Article 126(1) TFEU.

⁴² Protocol Nr. 12 annexed to TFEU, OJ C 115, 9.5.2008, p. 279–280

⁴³ TB and WTE (2011) The Euro Crisis: storm, meet structure. *European Constitutional Law Review*, 7, p. 353

⁴⁴ <http://euobserver.com/economic/120275> (last accessed May 29th 2013) However, this finding may be exacerbated by the current crisis, Hemerijck, (A. Hemerijck, *Changing Welfare States*, Oxford University Press, Oxford, 2013, p. 331) posits.

⁴⁵ DG Internal Policies, Background Note: European Semester

⁴⁶ Commission recommendation for a Council Recommendation, 27 April 2010 (COM (2010) 193 final), p. 3

participation by 2020, Member States are free to define (or not) their national targets in the National Reform Plans.⁴⁷ Targets therefore are self-imposed rather than imposed by the EU. Sanctions for failure to comply with national targets are absent.⁴⁸ These two characteristics taken together comprise the possible danger that Member States might be inclined to opt for less ambitious targets which are easily fulfilled but do not improve the participation situation or quietly leave targets that proved (too) ambitious. In short, this means that facing the lack of hard sanctions and thus in contrast to the EU economic governance, EU employment policy coordination appears ineffective in reaching one of its main aims, policy development.

With regard to the second finding, EU economic policy coordination is much more coercive than corresponding EU efforts on employment policy.⁴⁹ The mere character of the institutional regime already shows an imbalance towards a greater weight of economic considerations. This imbalance is reinforced by the subordination of EU employment policies to EU monetary and budgetary policies in the Treaty. Consequently, Member States will do anything they can to reach the budgetary aims. If this goes hand in hand with a boost to participation, so much for the better.⁵⁰

In conclusion, the integration of the employment policy guidelines, which, in fact, has been pre-empted by the wording of Article 146 TFEU and their effective incorporation into the governance process, intended to lead to economic and fiscal union, show that the employment objective is subservient to the Union's economic aims, despite the fact that Europe 2020 does in principle prioritise activation and participation in a way reminiscent of international Human Rights instruments.⁵¹

3. Conditionality on national level

As has become clear in the preceding section, EU Member States are confronted with EU policy priorities leaning heavily towards compliance with budgetary rules, particularly the SGP and its accessory legislation, as within the European Union, economic and monetary integration have been granted institutional privilege over national and supranational social policy repertoires.⁵² The effect on national level, as indicated above, seems to be that here also priority is given to economic targets. Member States must balance their budgets, which, in general, means to save on public expenditure.⁵³ Secondly, Member States should, at the lowest possible cost, try to reach the participation targets. It is therefore not surprising that, against the background of necessary cutbacks on public expenditure, on national level a contractualisation of the right to activation and to social security can be perceived.

⁴⁷ This ability to choose and define targets on national level may endanger the usefulness of the EES as policy instrument. Not only can it make benchmarking more difficult, it can also lead to Member States opting for less ambitious targets or no targets at all, which would end the mutual learning process.

⁴⁸ See the critique by J. Goetschy, (1999), *The European Employment Strategy: Genesis and Development*, *European Journal of Industrial Relations*, 5, p. 134.

⁴⁹ A. Hemerijck, *Changing Welfare States*, Oxford University Press, Oxford, 2013, p. 325

⁵⁰ However, within the Regulation on the prevention and correction of macroeconomic imbalances (Regulation 1176/2011 on the correction of macro-economic imbalances), unemployment is included as scoreboard factor. Persistent and / or manifest inactivity on this issue thus may lead to an excessive imbalance procedure.

⁵¹ D. Ashiagbor, *The European Employment Strategy*, Oxford University Press, New York, 2005, p. 1. See also S. Smismans, 'How to Be Fundamental with Soft Procedures? The Open method of Coordination and Fundamental Social Rights', in G. De Burca and B. De Witte, *Social Rights in Europe*, Oxford University Press, New York, 2005, p. 221,

⁵² A. Hemerijck, *Changing Welfare States*, Oxford University Press, Oxford, 2013, p. 294

⁵³ *Ibidem*, p. 292, 331; <http://euobserver.com/economic/120275> (accessed 28 May 2013);

3.1: Reduction of public spending: retrenching the welfare state

In reaction to the financial/budgetary restraints, the main priority in Member States' national policies is retrenchment.⁵⁴ Most Member States have, next to wage and hiring freezes in the public sector, specifically targeted spending on social security and social assistance costs. Retrenchment often comes down to lowering benefit levels while periods of entitlement are reduced and eligibility criteria are tightened. This sort of policy allows EU Member States to pursue two aims at the same time. On the one hand, retrenchment allows for cuts in government spending which, considering the deficit/GDP ratio requirement in Article 126 TFEU and the semi-automatic sanctioning in case of excessive deficits is desirable. An unintended but useful side-effect of this retrenchment is that it reinforces the efforts to reach the secondary aim as well: by nudging people into employment, as eligibility criteria are tightened and benefit levels are lowered, it also boosts participation figures, which helps reaching the quantitative activation aims set out in the Europe 2020 agenda.

3.2: Activation

Member States should develop and implement national policies consistent with the Europe 2020 employment targets. As the main target is participation in paid employment, activation policies take a central role on the national level as well. As discussed above, activation policies originate from the Flexicurity concept.⁵⁵ Two of its components, active labour market policies and the modernisation of social security systems are of critical importance with regard to today's activation policies. Active labour market policies describe all forms of measures which help to ease transitions onto, on and from the labour market. They include e.g. training and reintegration measures which help workers and work-seekers bridging the gap between their competences and the competences they need in order to apply successfully for a job and become part of the labour force again. Furthermore, they include the setting up of efficient job search support and work incentives.⁵⁶ While an activation policy resting on incentives may be quite effective, the consequential element of compulsion can become troubling from a human rights perspective (infra). It implies a shift of responsibility towards the individual, who, in effect, seems to be blamed for not having, keeping or getting a job, even when the lack of loss of job is structural and not personal. The social security modernisation aspect means that benefits should be designed to offer (short term) security during periods of transition or forced inactivity, but be coupled with activating components of effective help in job search and work incentives in order to prevent long term benefit reliance.⁵⁷ One of the core ideas is that a balance between rights (to benefits) and duties (to actively participate) has to be ensured.⁵⁸

Ideally, both components are mutually reinforcing. Understood and implemented in this way, activation policy means that a state should install and maintain a functioning system of job centres which offer free and individual advice on competences and possibilities of reintegration in the labour market as well as help in finding suitable training. From a budgetary perspective, activation policies thus offer a double reward: first, individuals remain in a benefit situation for shorter periods and thus cost less money, secondly, as soon as they

⁵⁴ A. Hemerijck, *Changing Welfare States*, Oxford University Press, Oxford, 2013, p. 333

⁵⁵ Commission Communication COM (2007) 359 final: Towards common principles of flexicurity, p. 5

⁵⁶ Ibidem, p. 6. See also article 29 CFR and the obligation it creates to have in place placement systems.

⁵⁷ The design of the benefits eventually shows that here, in contrast to the retrenchment option, a change of policy occurs, away from managing unemployment by offering income replacement (which then has to be lessened, due to financial constraints, see above), towards activation and re-insertion in the labour market.

⁵⁸ Commission Communication COM (2007) 359 final: Towards common principles of flexicurity, p. 6/7

are back in paid employment, they pay taxes and thereby help to keep the social security and assistance system sustainable.⁵⁹ Simultaneously, from a (human) rights perspective, the idea is that through participation in paid employment, the individual can earn his / her own living, which allows the individual to take responsibility for his / her own life and that through participation in paid employment, the individual is less prone to social exclusion.

3.3: Contractualisation of social rights as consequence

Although the motivations behind the activation policies to combine flexibility and security seem ideal and fulfil all exigencies from EU policy targets, as well as budgetary requirements in the long run, they have one big disadvantage: activation policies are expensive in the short run. They need substantial funding in terms of staff and facilities in order to be able to offer the individually tailored advice and support that makes them successful. Eventually, this form of activation should yield result in the form of a trained workforce able to adapt to changing circumstances and a better match between labour supply and labour demand. However, before that, the state will have to invest, and if that money is not readily available, this may form an insuperable obstacle for the implementation.

It is therefore not surprising that states look for other ways to implement activation policies. One possibility to keep costs as low as possible is to make use of one of the paradigms offered by the Flexicurity components: make sure that rights to benefits on the one hand and duties to actively participate in activation measures on the other hand are balanced.⁶⁰ One way of achieving this balance is by specifying rights to benefits and duties of the benefit recipient in the relevant laws. Here a fundamental paradigm shift in the perception of social security can be witnessed. The national welfare states, due to tight budgets, have come to realise that they cannot in all circumstances grant the economic well-being of their citizens. Responsibility for economic well-being is shifted from the state towards the individual and / or the employer.⁶¹ This is, in fact, another example of post-welfare state privatisation politics.⁶² In the social welfare state, the state or the general public was thought to have a duty towards its member that cannot fend for themselves and who, consequentially have a right to solidarity.⁶³ Today, however, instead of taking responsibility as public authority to grant social security and social assistance benefits as fundamental human rights, the state turns the right into an individual duty.⁶⁴ This duty usually is defined as the duty towards society not to make use of public funds for a longer period than strictly necessary and to do everything to ensure that this dependence is as short as possible.⁶⁵ In principle, there should be nothing wrong with providing people with incentives to earn their living again; after all, the provision of income through social security rest on the notion of solidarity within a community to provide resources for people in need. However, since the 1980s, solidarity as underlying concept of social security and social assistance is gradually being replaced by conditional reciprocity.⁶⁶ This concept is based on the distinction between 'deserving' and 'undeserving' poor, and

⁵⁹ Ibidem, Annex II.

⁶⁰ Ibidem, p. 6/7

⁶¹ D.M. Davis, Socio-economic rights in Oxford Handbook of comparative constitutional law, p. 2 of 26

⁶² P. Zumbansen, The Law of society : governance through contract, CLPE research papers, Vol. 03, no. 3, p. 2

⁶³ D. Roman, Devoir de travailler et protection sociale: d'une problématique de la dette sociale à la question des « devoirs sociaux », Revue de droit sanitaire et social 2009, p. 63.

⁶⁴ A. Supiot, Un faux dilemme: la loi ou le contrat? Dr. Soc. 2003, p. 59

⁶⁵ E. Eichenhofer, Social Rights and Conditional Benefits, Working Paper ILERA 2013 Europe Conference; W. Kymlicka, W. Norman, Return of the citizen: A survey of recent work on citizenship theory, (1994) Ethics Vol. 104, p. 356

⁶⁶ A. Hemerijck, Changing Welfare States, Oxford University Press, Oxford, 2013, p. 108.

specifies that only those who shoulder responsibility for themselves are seen as deserving.⁶⁷ However, in order to be able to identify whether or not an individual merits public assistance, the conditions that have to be fulfilled must be identified. In order to distinguish the deserving from the undeserving poor, national laws contain conditions concerning minimal duties to be fulfilled by the individual asking for benefits. Typically, these conditions include the acceptance of suitable jobs⁶⁸, search efforts, a certain number of job applications, but may, in case of social assistance benefits, also include the willingness to carry out unpaid work like cleaning public parks or supervising playgrounds. Non-compliance with the duties spelt out in the law gives rise to sanctions, usually complete or partial withdrawal of the benefit in question. These sanctions express the thought that those who do not ‘want to take their responsibility’, who refuse to be activated, do not deserve the help of their fellow citizens. The commitments of the beneficiary are thus taken very seriously, by both parts of the bargain. If the benefit recipient does not keep his part of the bargain, the ‘community’ will no longer be held responsible for his well-being. Several governments go even further, instead of defining rights and duties of the benefit recipient in the law, they allow the use of contractual arrangements to define rights and duties of the state versus the individual. This is the ultimate form of establishing whether or not the individual in question merits the public assistance.⁶⁹ In Germany, for example, an individual can be asked to sign a contract on re-insertion in the labour market (*Eingliederungsvereinbarung*).⁷⁰ This contract should specify the activation measures of the authorities and the activation duties of the individual. Another example is France, where the Articles L.5411-6-1 to 5411-6-3 Code du travail specify that the unemployed has a right to an individualised plan for returning into employment which must specify the type(s) of work, the region, the wage level and so on. In a remarkable judgment, though only an interim order in first instance, it became clear that these rights are justiciable.⁷¹ Consequently, it can be inferred that this new form of regulating and administering of social security and social assistance fundamentally alters the perception of the right to social security and social assistance as laid down in e.g. Article 12 ESC or Article 34 CFR. Compared to the traditional function of social security law consisting in protection of the individual by law, and based on the concept of solidarity, the new policy of contractualisation leads to responsabilisation of the individual, not offering protection any more, but adding to his responsibilities.⁷² The result is a shift in the perception of social rights: They are no longer perceived as part and parcel of inalienable Human Rights, but become negotiable and granting them becomes conditional upon the fulfilment of duties towards society. Instead of describing an inalienable human right (which might not be justiciable), the law or contract changes the

⁶⁷ The history of this concept is a long one, the English Poor laws already distinguished between the able-bodied and the genuinely needy person.⁶⁷ However, when, between 1920 and 1950 the welfare state was developed, and social insurance made its entry, provision was made by the individual himself through contributions. This, of course, meant that when the risk materialised, there was a legally enforceable right to a benefit. As described before, this system became untenable in the 1980s with many people receiving generous, long-term benefits not linked to any kind of return. In several European states (e.g. Denmark and Finland) even the constitution makes this distinction (C. Fabre, ‘Social Rights in European Constitutions, in : G. De Burca, B. de Witte, Social rights in Europe, Oxford University Press, New York, 2005, p. 20)

⁶⁸ Near universal, see e.g.:

⁶⁹ D. Roman, *Devoir de travailler et protection sociale: d’une problématique de la dette sociale à la question des « devoirs sociaux »*, Revue de droit sanitaire et social 2009

⁷⁰ Article 15 SGB II

⁷¹ A. Fabre, ‘Le demandeur d’emploi n’a pas que des obligations, il a aussi des droits’. TA Paris, référé liberté, 11 septembre 2012, Rev DT 2012, p. 558. This seems to be the second big change the contractualisation of social security benefits may bring about. In addition to privatising rights and duties, it also makes the – generally vague and programmatic – social right to work legally enforceable.

⁷² S. White, Review Article: Social Rights and the Social Contract - Political theory and the new welfare politics, (2000) B.J.Pol.S. 30, p. 508.

right into a conditional right, depending on the individual fulfilling the conditions stipulated in law or agreed by contract.

In short, the pressure to implement a cost-effective activation policy leads to contractual arrangements which redefine the fundamental social right to work and to social security. The nature of these rights changes accordingly, but, on the other hand, they become justiciable, as the French case showed. Does this mean that in order to become justiciable, the right to work must always be concretised? If this concretisation goes hand in hand with attaching conditions to the right, in how far does the character of the right to work as fundamental right survive?

4. Conclusion

From the fundamental rights perspective, the realisation of the right to work asks for the development and implementation of an employment policy aiming at as low as possible unemployment, ideally full employment. However, this fundamental rights perspective has been found to be incompatible with reality in times of crisis. The right to work and its policy implications are first of all subject to conditionalities on EU level. Within the EU, particularly the Eurozone, the first priority is budgetary and macro-economic stability. In general, this means austerity measures, leading to retrenchment of welfare, not only concerning the benefit periods and level, but also eligibility criteria. Austerity policy in general is not the best policy to achieve job growth, therefore, this policy alone is hard to reconcile with the aim of keeping unemployment as low as possible.⁷³ The EU activation policy aims, on the other hand are too weak to provide a proper counterbalancing force. Not only do they lack the obligatory character and the sanctioning mechanism which secures implementation of the economic aims, the whole EU activation policy is based on economic presuppositions, where activation is seen not as royal way to individual self-development but rather as a way to save on benefits and to earn on taxes, thereby reaching macro-economic aims. The main danger is that, due to the budgetary restraints, expensive activation policies, which eventually lead to better jobs, and better matching, become unavailable. What may materialise, however, is a kind of incomplete activation policy consisting mainly in welfare retrenchment that eventually nudges people to accept jobs they would not normally consider suitable, and accept only for fear of sanctions. This policy eventually endangers not only the aim of qualitatively good jobs but also the aim of lasting integration and true benefit independence which a qualitatively high standing activation policy could reach, or at least pursue. As things are, employment quality is at best a secondary target of the EU overall employment policy, despite all communications to the contrary. Being a secondary concern for the EU, Member States must treat it as such as well, their national policy being conditioned by the EU Integrated Guidelines, National Reform Programmes and Stability and Convergence Programmes. Activation policy as secondary policy aim should be as inexpensive as possible and still yield the best possible results in terms of participation percentages.

On the Member State level, in addition to being subjected to economic concerns and constraints, the fundamental social right to unemployment benefits and / or to social assistance benefits are to a growing extent made conditional on the recipient's behaviour. Benefits are no longer considered a right; entitlements exist only to the extent that the individual fulfils his part of an activation deal by accepting measures such as community services, training, or a suitable job offer. Only after having proven himself a 'worthy, responsible citizen', by shouldering his duty towards society will society accept the burden of solidarity.

⁷³ W.Mitchell and J. Muysken: Full Employment abandoned, Edward Elgar, Cheltenham, 2008

This conditional reciprocity of fundamental social rights, expressed in law of even in contractual arrangements, fundamentally changes the character of these rights. It fundamentally alters the idea of social rights as inalienable human rights which should be offered because of the human nature of the individual and less because that individual is willing to be 'productive'. Social rights have a value on their own and should not be measured in economic achievement terms.