Social Rights and Conditional Benefits

Fundamental Social rights: New Forms of Regulation and Governance

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I. Work-First Welfare State from a Legal Perspective

The legislation on the welfare state - employment law and social security – underwent a profound *change* during the last decades in many countries of the world. The *Netherlands* set the starting point of this development in the early 1980ies with the reforms under the auspices of "*werk boven incomst*".[1] Since this time the *work-first welfare state* became a *paradigm* in many countries in and outside of Europe. It is based on the ideas of activation, which are becoming effective by case or contract management. There are many examples for those reforms in Denmark,[2] Sweden,[3] the United Kingdom,[4] France[5] and Germany,[6] as in the USA[7] or Australia.[8]

Since the first steps for implementation had been taken, there was and there is still a deep political and academic *debate* on the characteristics, failures and achievements of this reform. The main topics are whether activation and case management as new forms of regulation and governance in employment and social security law were effective, lead to adequate protection, were based on realistic assumptions and, above all could be assessed as a cutback of social benefits or an appropriate and successful means to strengthen social inclusion and participation. This debate pursues, but nowhere a consensus is in sight, quite to the contrary!

In the current debate the *economic* and *social* dimensions of the reform prevailed, whereas its *legal* dimension was so far neglected. This is, however, quite astonishing, as the reforms were not only made by new acts of legislation, but they affect also profoundly the legal structure of

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1 Hartog, The Netherlands: So what's so special about the Dutch model?, 1999; Visser/Hemerijck, "A Dutch Miracle", 1997; Zanden, Driewerf hoera voor het poldermodel, 2002.

2 Van Aerschot (2011) 18 J.S.S.L., p. 33; Kvist/Pedersen/Köhler, in Eichhorst et. al. (Eds), Bringing the Jobless into Work, 2008, 221; Obinger u.a. (Eds.), Transformations of the Welfare State, 2010, 80; Madsen, in Sarfati/Bottoli (Eds.), Labour market and social protection reforms in international perspective, 2002, 243.

3 Erhag, in Stendahl/Erhag/Devetzi (Eds.), A European Work-First Welfare State, 2008, 11.

4 Freedland/King, in Els Sol/Mies Westerveld (Eds.), Contractualism in Employment Services, 2005, 119; Harris, in Stendahl/Erhag/Devetzi, A European Work-First Welfare State, 2008, 49; Rahilly, ibid, 79; Adler, ibid., 95; Glennerster, British Social Policy 1945 to the Present, 2007 (3rd edition), chap. 9, 1991 et. sequ.; Powell (Ed.), New Labour, New Welfare State?, 1999; Andrews/Jacobs, Punishing the Poor, 1990.

5 L'Horty, Les nouvelles politiques de l'emploi, 2006; Hirsch et al., Code des droits contre l'exclusion, 2011 (2ème éd); Lafore, Revue de droit sanitaire et social 2008, 111.

6 Bundesministerium für Arbeit und Sozialordnung (Hg.), Moderne Dienstleistungen am Arbeitsmarkt, 2002; Schmähl, in Eichenhofer/Rische/Schmähl (Hg.), Handbuch der gesetzlichen Rentenversicherung, 2012, 2. Aufl, 6. Kapitel; Schuler-Harms (Hg.), Konsensuale Handlungsformen im Sozialleistungsrecht, 2012; Eichenhofer, Das Recht des aktivierenden Wohlfahrtsstaates, 2013; Eichenhofer, in Stendahl/Erhag/Devetzi, 2008, 133; Welti, ibid., 145.

7 Brodkin, in Sol/Westerveld, Contractualism in Employment Services, 2005, 73.

8 Considine, in Sol/Westerveld, Contractualism in Employment Services, 2005, 41.

social benefits, as they were and still are regularly regarded as an entitlement, emerging out of *social rights*.

The reform gave rise to new legislative aims for employment, welfare and social security law, and, hence, brought about a fundamentally new type of social benefit. Whereas the classical social welfare or security benefit was enshrined in unconditional entitlement, the activating welfare state is based on *conditional* ones. Those benefits depend on whether the beneficiary behaves in accordance with the expectations stipulated by the social administration, committed to deliverance of benefits. So, the difference between a *classical* and an *activating* welfare state lies in the different *structure* of social rights.

The reforms ushered in a *transformation of welfare, social security and employment law*. So, from a *legal* perspective it is, however, not clear on whether social rights have the same substance as the same legal guarantee before and after the reform. The answer to this question allows, hence, a deeper understanding of the transformations in the welfare states during the last decades.

For this purpose, the characteristics of social rights are identified (II), their modifications in the course of the transformation are highlighted (III), the newly established contract management in the light of the enforceability of social rights are assessed (IV) and the legal basis of collaboration and social rights are examined (V). In the context of activation sanctions play a pivotal role in the administration of social rights (VI). So as to conclude, due to all the changes these right underwent in the process of establishing the activating welfare state a new vision on social rights comes in sight and will be depicted (VII).

II. Characteristics of Social Rights

1. From charity to entitlement

Social policy all over the world has a deep *legacy* in the past of the European *civilization*. It originated from the *medieval* societies, when the church held a leading role in help, health care and assistance for the needy population. This commitment – at the beginning driven by

Christian belief and conviction - became by the end of the medieval era a binding commitment of each parish and after reformation each local community.[9]

In the Renascent period Poor Law emerged as a means to administer welfare in local communities. From this time onwards the protection of and the care for the poor became a central *objective* and a key *function* of *municipalities.* Permanent overseers for the poor were installed by and within the local governments, and city taxes were levied in order to bear the financial burden and charges of the public support for the indigent population. To avoid, that public help would be taken by those who became indigent due to their *own intention* and behaviour, *beggary* was banned as a criminal act and beggars were sanctioned for these contraventions.[10]

On the basis of the distinction between the *deserving* and the *undeserving* poor became crucial borderline. It delineated the legitimate beneficiaries of public help and separated them from those, who were not conceived as genuinely needy persons. Beggars were disregarded, as they were *able-bodied* and, hence, capable to help themselves. Since that time the ability to *self-help* excludes people from public help, This distinction had been made since its very beginning between the not able-bodied individuals, i. e. the sick, old, handicapped and – later also – the unemployed population.

Since that time social protection was a *key obligation* for the *public*, but the individual was not regarded as an entitled person. So, the public commitment to deliver services did not correspond to any individual legal entitlement to social benefits. This was the status of the *pre modern welfare* state as it had been established in Europe during the 18th century.

By the end of the 19th century,[11] social insurance became a new instrument for social policy with growing importance. For the first time in history, individual social rights emerged from *social insurance*. In this legal arrangement, wherein specific contributions were levied to finance the system of protection as a whole, support and help were to be delivered as *matters of rights*. These principles were related to the rule of law, which since that period also social legislation had to follow. Acts of Parliament in social insurance brought about individual rights, which the beneficiaries were capable to enforce before court or court-like tribunals.

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9 Piven/Cloward, Regulating the Poor, 1993.
10 Ibid.
11 Baldwin, The Politics of Social Solidarity, 1990; Swaan, In the Care of the State, 1990.

Today, this principle is no longer restricted to social rights, which matured within social insurance, but it also gives ground to those rights, which originate in social assistance, social compensation and social enhancement. In the framework of *human rights*, both the right to social security as the right to social assistance is formally acknowledged (Art. 22, 25 UN–DHR) as basic human rights.[12]

2. Fostering positive freedoms

Social rights are addressed to individuals in need and are to be effectuated by public administrations. So, in the administration of social rights public policy is necessarily involved. Its role is *not* to *abstain from state intervention* into the autonomous sphere of an individual, but it implies *state action*, in order to make the support or assistance becoming real, effective and, hence, genuinely protective indeed.

Social rights do not only create entitlements directed towards the public authority but by this entitlement those authorities are committed to establish living conditions, under which the individual can exploit her or his *freedom* to live an independent life.[13] Social entitlements are not adequately conceived as state obligations or financial burdens of the public, but they are at the same time matters of individual rights. They are even more to be conceived as fundamental human rights, standing on the same footing as the classical *human rights*. Some of these rights can be safeguarded, if the state respects a sphere of privacy and autonomy of the individual, into which the state is hindered to intervene. So in this respect human rights are to be conceived as *negative freedoms,*[14] which are to be effectuated by non- state intervention.

A substantial part of all human rights, however, demands for state activities,[15] predominantly legislative action and administrative intervention, in order to safeguard the human rights are not only respected, but also protected and fulfilled. The last two commitments imply a whole range of state actions, either in the field of legislation as administration. This requires the

[12] Barak-Erez/Gross (Eds.), Exploring Social rights, 2007; Burca/Witte (Eds.), Social Rights in Europe, 2005; Ssenyonjo, Economic, Social and Cultural Rights in International Law, 2009; Eichenhofer, Soziale Menschenrechte im Völker-, europäischen und deutschen Recht, 2012.

[13] As all human rights are to be respected, protected and fulfilled,

[14] Berlin, Four Essays on Liberty, 1969.

[15] Fredman, Human Rights transformed: positive rights and positive duties, 2008.

formation of social institutions by means of public policy.[16] So public fostering of human rights makes it for the state necessary to undertake a combination of measures of non-intervention - i.e. to refrain from action - and intervention. This implies the necessity to foster both the negative as the positive freedom of individuals.

Above all, social policy puts a special emphasis on the idea of positive freedom. It has to enhance the potential and ability of an individual to act autonomously and at the same time, to give the entitled person a real choice in taking actions, due to the capabilities the individual is equipped with. With other words, social rights are meant to make the freedom of the individual to become a real and, hence, effective one. It transcends the freedom, guaranteed on paper, and strives for a freedom, which has a real impact on the individuals' lives.

3. Enabling and Empowering

This characteristic of social rights is to be explained and justified by the idea, that these rights are *not an end in itself* – irrespective of whether they are as benefits in cash directed towards the delivery of money or as benefits in kind incorporate an entitlement towards the delivery of services. They are understood as a technical means, far from being identical with the rendering of the benefit itself, to a further political and social end.

As cash benefits social security or social welfare benefits are paid to facilitate the recipient to take part in a consumer society to meet her or his needs. So, the aim of the delivery of benefits lies in creating purchasing power. As benefits in kind social security and social welfare benefits are to help the recipient to recover from disease or the loss of work.

So, the target of both types of benefits is to make the beneficiary *capable* to *participate* and to give her or him a stake in a society in the forms which are common to all members of society. So, benefits are given in order to enable and empower the beneficiaries. In this respect, social rights are the basis of personal freedom.[17]

[16] King, Judging Social Rights, Cambridge University Press, 2012.
[17] Van Langendonck, in Ketscher et al., Velferd og rettferd, Festskrift til Asbjorn Kjonstad 70 ar, 2013, 345, 352.

III. Transformation of the Welfare State and Social rights

1. Activation as integral goal of social benefits

Activation is a common feature of social policy. It has a long tradition in social history. The combat against *beggary* did not only accompany the formation of poor law, but to ban beggary was a means to make poor law becoming effective. As two sides of the same coin activation and social protection concurred. Social insurance was the answer to the growing awareness of the social origins of disease and the growing capability to cope with the consequences of disease. So measures of social hygiene accompanied the formation of health insurances and work accident insurances were an element in the context of health and safety at the workplace legislation, which made the development and protection of the human capital becoming a new and prominent item of public policy.

Growing *social risks* were side-effects of a technical society, which by virtue of the *economic freedom* of individuals transcended historical limits and developed a growing economic potential.[18] Social policy was since its beginning an integral component of public education and instruction. So, it is not unusual, but a really common feature of social policy to teach and educate the beneficiary.

The prevention of work accidents became a priority, after the employers had to finance the costs, which had been induced by work accidents. *Prevention* gave prospect of reducing victims as cost factors for the insurance and made thus the prevention of work accidents economically attractive. If health risks are to be borne by health insurances, the prevention of diseases lies in the economic interest of the insurance. A system of invalidity protection brings about rehabilitation as a cost-reducing alternative to the life-long compensation of invalidity pensioners. *Activation* was and is, hence, a *corollary of social protection*.

2. From unconditional to conditional benefits

In the classical approach to social protection benefits' rights matured from prerequisites enshrined in social policy statutes. *Each social benefit* depends *on peculiar circumstances*, which give sufficient cause to render benefits. All social rights are linked to a more or less

[18] Beck, Die Risikogesellschaft, 1986.

specific and explicit state of emergency or need, which gives sufficient ground for the delivery of public support. So, there is and there were never unconditional benefits given to anybody in society.

All social benefits need a good cause to be rendered, as the economic independence of the human being is the precondition of social life, and welfare dependency is always a justifiable exception. This feature is, however, challenged by proposals and plans for the implementation of an unconditional minimum income to everyone – irrespective of the recipient's personal need. This proposal is bizarre in that sense, as it abstains from a persisting legacy in social policy.

There is a specific feature of the conditionality of social benefits, however, which allows a further distinction to delineate. It helps to explain the difference between the classical and the activating welfare state. There are conditions for social benefits, which are to be fulfilled or not fulfilled by actions of the beneficiary her – or himself. Under the auspices of the activating welfare state benefits' entitlements mature from actions expected by the beneficiary, e.g. to take part in training programmes, to run for available jobs or to take part in placement activities of the employment offices. Examples can be illustrated by the reforms of disability legislation[19] and Labour market policy.[20] The *conditional benefits* are mainly characterised by actions, which are to be pursued by the beneficiary her- or himself. In this respect, constitutional freedoms are not conceived as spheres for allowed non-activities, but opportunities to become active.

3. From defined to negotiated benefits

In the traditional welfare arrangement *social rights* was defined on the basis of *individual circumstances*, stemming from the *nature* or the *social living conditions* of the beneficiary, she or he is exposed to due to factors beyond her or his control. Bad health, work accidents, occupational diseases deriving from detrimental work conditions, unemployment – all these risks are embedded in a natural or social setting, which conceived as stemming from outside the individual sphere and being beyond the individual control of the beneficiary. So, in the

[19] Devetzi/Stendahl (Eds.), Too sick to work?, 2011.

[20] Kenworthy, in Castles/Leibfried/Lewis/Obinger/Pierson (Eds.), The Oxford Handbook of the Welfare State, 2010, 435; Eichenhofer, Das Recht des aktivierenden Woghlfahrtsstaates, 2013.

classical understanding of the welfare state's grounds for giving raise of benefits the social risk or the social need assumes the form of fatal incident, which is also treated likewise.

In the activating welfare state,[21] however, social needs or risks are taken as a starting point for a specific social intervention, which is determined to overcome the deficit by joint efforts of both beneficiary and administration. So, the social benefit is not meant to be a permanent support for the beneficiary to overcome a shortcoming, which persists for lifetime. It is above all not directed towards a life beyond work. It is, on the contrary, intended to regain a status in work also under the persistence of a given social deficit.

In this approach social benefits are not primarily predefined compensations for unalterable losses or deficits, but a starting point for the development of a *strategy* to *map* an appropriate *pathway* out of the contingency, which happened and ended in a calamity. Under these circumstances a social benefit is no longer a one-sided act, but a means to adapt living conditions of the beneficiaries to recently encountered challenges.

IV. Contract management and social rights

1. Contracts as Bargains

The notion of a contract is different in the various European jurisdictions. In the German legal tradition a contract represents a consensus achieved by agreement on the basis of contradictory interests and expectations.[22] In the French legal thinking a contract replaces the law as legal directive[23] for a conflict and in the Anglo-American legal thinking a contract is determined by an exchange of economic advantages, i.e. a contract represents a *give and take* or a *quid pro quo* a mutual transfer of advantages on the basis of a *consideration.*[24] So, in the context of the Anglo-Saxon legal thinking a contract is a bargain, which gives profit to both contracting parties.

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21 von Maydell et. al. (Eds.), Enabling Social Europe, 2006.

22 Flume, Das Rechtsgeschäft, 1992, 4. Aufl., 1 ff.

23 Art 1134 Code Civil: «Les conventions légalement formées tiennent lieu de la loi à ceux qui les ont faites».

24 Currie v. Misa (1875) LR 10 EX 153, p. 162: "A valuable consideration, in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility, given, suffered, or undertaken by the other".

In social policy a contract was traditionally regarded with suspicion. A wide-spread criticism against the contracts as legal forms was articulated under the auspices that under asymmetric social relations – above all the ones between employee and employers - a concluded contract cannot be expected to turn out as being a *fair* one.

Nevertheless, this rhetoric on contract pays not primarily tribute to a libertarian mind set, but plays a key role in the discourse on the activating welfare state. It emphasis the central target and overriding imperative of the activating welfare state: "No rights without responsibility!" This core message of the social policy *agenda* of *communitarianism e*mphasis the idea, that social benefits should not only be conditional in the sense, that the beneficiary has to cooperate with the social administration under a lawful defined state of emergency, but also that this cooperation can be demanded by the administration as the return, the price, the consideration under which the benefits are delivered. Social benefits should be conceived as a *something for a something*, instead of the *something for* a *nothing*, what the previous classical social benefits were – however inadequately – quite often are characterised.

So, in the activating welfare state the delivery of benefits is bound to the *cooperation* between *administration* and *beneficiary*. An income replacement for unemployed depends on the willingness of the recipient to look for jobs and qualification measures. The notion of contract describes a formal consensus between the representative of the administration and the benefit's recipient, aimed at finding individual solutions for re-integration in work and society instead of standardized solutions enshrined in the law as a bargain between the state and the individual. In this sense, social rights can be conceived as a part of "positive welfare". This is characterised by Anthony Giddens:[25] "The welfare state grew up as a mode of protecting – against misfortunes that 'happen' to people, certainly as far as social security is concerned- it essentially picks up pieces after mishaps have occurred. Positive welfare, by contrast, puts a much greater emphasis on the mobilising of life – political measures, aimed once more at connecting autonomy with personal and collective responsibilities". Activating the recipients of social benefits, implies imposing demands to those, who are entitled to social rights.

[25] Giddens, Beyond Left and Right,1994, p. 18.

2. Asymmetric relations between the contractors?

The idea of a contract in social administration is quite often *challenged* by the argument, that in *absence* of any *balanced* division of power and competence a fair compromise between the two contracting parties is hard to achieve, and, hence, will be never to be brought about.

There is indeed and without any doubts an enormous range of power on the administration's side. But sociological inquires[26] quite often demonstrate, that also on the beneficiaries' side there is a specific trap to be overcome. Due to their bad health, invalidity or unemployment – the "clients" are very often exhausted, depressed and lost their self-esteem. There is also a prevailing prejudice about the wide-spread attitude of unemployed beneficiaries to cheat or escape from work. Under those observations a unilateral approach of public guidance seems to be an illusion. Participation in a society implies to take over an active role; this cannot be implemented by unilaterally by a mere command.

So, the idea of contract articulates an alternative – presumably an *alternative faute de mieux*! It is based on the assumption, that a balanced and negotiated plan to pathways for social re-integration might be a better approach than a one-sided strategy *imposed* to a beneficiary, who is inclined to *oppose* everything imposed to her or him.

3. Potential of Contract Management

As social *re-integration* into the labour market is the key objective of social programmes, it is imperative to assess the possibilities on the beneficiaries' side as the potentials in the labour market on the other side. The success of placement depends on the accurate definition of the individual shortcomings of the beneficiaries and the economic chances offered by the specific local labour market to the individual. Integration is to be conceived as a process – open for both sides in each direction. As there is no built road to integration, which leads from the margin to the core of a society based on work, it seems necessary to find hidden tracks, which are seldom evident.

If, however, re-integration is to be regarded as a *path-finding activity*, wherein both the abilities of as the options for the beneficiaries are to be scrupulously mapped in advance, a

[26] Sennett, Zusammenarbeit: Was unsere Gesellschaft zusammenhält, 2012, 298 et sequ.

mutual understanding between the administration and the beneficiary is necessary to bring about a successful placement. This understanding is represented by a contract as the appropriate legal form of individual support.

V. Collaboration and social rights

1. Common Goal: Social Integration

The re-integration of beneficiaries into the labour – market lies not only in the interest of the latter, but also in the interest of the administration. Under the auspices of a social interventionist state social rights do not only create individual entitlements to cope with social or economic hardship, but in doing so, also social administrations get directly interested in avoiding or reducing the likelihood of social deficit, as they do profit from this economically. This stems from the characteristic of a social right as an opportunity to become active.

This mechanism can be easily illustrated by the work accident scheme. When this insurance for workers, who became a victim of a work accident or a professional disease, was implemented and the costs were imposed to the employers, the efforts to reduce work accidents and occupational diseases substantially had been enhanced, because the advantage of sinking insurance incidents was taken by the work accident's insurance scheme and, hence, also drawn by the employers in form of a reduced contribution load payable. To reduce unemployment becomes a central target, if unemployment compensation is high and the costs are to be borne by employees and employers.

So, a state administration with a substantial social commitment, social integration becomes an urgent aim, which to achieve lies in the joint interest of beneficiaries and administrations, as *both sides do* definitely *win*, when social integration becomes true. To draw the profit from social integration, collaboration and communication between administration and beneficiaries are required. In this sense in the lack of fundamentally opposing interests a contract is an appropriate instrument to get along to a negotiate a joint initiative taken by the administration and the beneficiary.

2. Negotiating Social Rights

A successful collaboration requires a substantial and sustainable communication. A successful administration depends on a series of reliable information on the living conditions and the potentials on the labour market and also the beneficiary profits from a transparent administration, which gives *accurate information* on the prospects and difficulties to overcome with a strategy found. So, a successful collaboration between the beneficiary and the administration has to be established on mutual communication. Also in this respect the contract has a key role to play, in order to create and broaden the information basis upon which *collaboration* can become effective.

So, in the end social rights to social inclusion become effective in the framework of a *contractual arrangement*, which allows a balance between rights and commitments, which offers at the same time support for and demands endeavours by the beneficiary. This component becomes evident in the context of the right to work. It does not give access to work places open to the public, but to a fair chance – *free of any discrimination* on whatever ground – to negotiate on a work contract with an employer.

There is, however, a critical concern, as to whether contract management might concur with the idea of equality. This is due to the fact, that contract are meant to find strategies which improved the individual chances best. So, contracts lead to individualization, whereas a classical understanding of equality demands from abstaining from all peculiarities among the individual beneficiaries. But also under the idea of equality it is permitted to treat different cases differently, so that equality is respected, as long as differences in treatments correspond to the differences of living situations. Under these auspices, a difference in treatment is not only allowed, but required in order to pay tribute to social differences.[27]

Utilizing these tools needs communication and collaboration. As both means are at hand to solve a deficit, which to overcome lies in the common and joint interest of both negotiating parties. Social rights are, hence, not primarily entitlements to a one-sided delivery of benefits in cash, but are directed towards a benefit in kind. It implies to have a say and a margin of individual discretion as to the appropriate way and means to bring about integration. This interest is fostered by integration and needs the contract as its appropriate legal form.

[27] Young, Justice and the Politics of Difference, 1990.

3. Contract as Basis for Sanctions

The *contractarian approach* in social administration underlines, that social rights are embedded in a wider social interrelation between the individual and the society as a whole. Under the auspices of such an idea of a social contract as the basis of social life all social rights are accompanied by social commitments. The latter are not restricted to bear systems of social protection financially due to the obligation imposed to the individual as a tax or contribution payer, but that also social rights as such coincide with the social commitment to overcome – if possible – the state of emergency, which gives ground to the social right.

In such a global idea of a *social contract*[28] the recipient is obliged to seek and accept all reasonable opportunities to work.[29] In this commitment a social protection system becomes visible, which reinforce social values about the work ethic.[30] In the light of such an approach it becomes a matter of credibility to impose sanctions upon those, "who have no good reasons to be or to remain unemployed".[31] So, it seems to be paradoxical, that a social right does not only give entitlements, but also imposes commitments to the beneficiary. It is true, that from the beneficiary's view, public demands on re- integration are far from being conceived as acts of self-determination.[32] But if social rights are meant to help the beneficiaries to become part of the social fabric, commitments are interconnected with rights, as both are required to bring about social integration. As to Amitai Etzioni:[33] "The first and most important foundation for the reconstruction of the moral order of a community is the informal support that members accord to values they adhere.... the social glue helps the moral order together". Social intervention is inspired by the attitude of "tough love"[34] towards the beneficiary, why support and demand are interconnected.

[28] Lundy, in Harris (Ed.), Social Security Law in Context, 2000, p. 291.
[29] Ibid., 292.
[30] Ibid., 294.
[31] Ibid., 293.
[32] Langendonck, 353,
[33] Etzioni, The Essential Communitarian Reader, 1998, 41, 42 et sequ.
[34] The original version of this phrase stemmed from an article written in the THE OBSERVER on 13.6.1993; McKeever, (2009) 16 J.S.S.L., p. 139, 142.

VI. Sanctions and social rights

1. Sanctions Sharpen Expectations

If a contract has been concluded between a social administration and a benefit recipient, this contract is not only an instrument to give orientation the right way to re-integration, but offers at the same time a basis for all sorts of sanctions, if the beneficiary her – or himself fails to behave in accordance with the steps outlined in the contract. So, *sanctions* are to be seen as a remedy to safeguard, that contractual *commitments* definitely *matter*. They are not only made for helping needy persons to re-integrate into the labour force, but they are also to be *taken seriously* by the beneficiary. Unless the actions are not taken as agreed upon by the contractors, a sanction imposed to the inactive beneficiary underlines that the commitment imposed has been meaningful. Sanctions are in this respect an instrument in order to achieve activation as the overall target of social integration.

From this follows, however, that sanctions have to meet certain legal requirements. The actions to be pursued are to be defined *precisely* and *realistically*. If both conditions are not met, no sanction can be lawfully imposed to the beneficiary. Unless the action demanded is unclear or *beyond* the personal *control* of the beneficiary, the beneficiary is *not to be blamed* for her or his *lack of activity*. So, no sanction can be lawfully enacted, if the omission of the demanded action is not due to the personal fault of the beneficiary.

2. Sanctions and the Rule of Law

As social administration is to execute public power and this power has to be execute under the rule of law, also sanctions are only justifiable, if the concur with the *rule of law*. So, despite sanctions in social administration[35] are normally not conceived as criminal actions, but as a *disqualification* as to the prerequisites for a benefit, sanctions are also in this context explicit *verdicts* of the beneficiary's behaviour. In this respect, a disqualification for a social right due to a personal mischief has the same characteristic of a verdict as a criminal sentence.

The sanctioning on the basis of law by an independent judge or jury is core element of criminal justice. The sanction for wrong behaviour is imposed by the social administration

[35] Lundy, in Harris, 291, 208.

itself, which, hence, draws profit from getting rid of the commitments imposed to the administration by social legislation. Under these circumstances the sanctions seem to be based on one-sided assessments made by institutions which both impose commitments to the beneficiary and sanction their violation on the same legal basis. So, it would be more adequate to establish a sanctioning regime, which is entrusted to an independent body working in coherence with court like procedural rules and establish roles, which are not related to the administration, who might profit from the sanctions.

In criminal justice, the sanctioning procedure is to be made *public*. This condition safeguards the public control, that the rule of law is respected. To make sanctions public helps also to give an example and so make exemplary, that a disregard of rules established between the administration and the beneficiary is neither tolerated nor accepted. Under this assumption sanctions for misbehaviour in social administration should be made also public.

Sanctions do always to emphasise rules and so to strengthen their social relevance. So, sanctions are not adequately constructed if they will be executed in the spirit of taking revenge or with the attitude to give a deterrent example to the public. As a means to strengthen rules sanctions for misbehaviour should be based on a *catalogue* of inappropriate actions, which identify the different unjustifiable precisely and describe the mischief definitely. Sanctions can only be imposed to the beneficiary, if he or she can grasp his or her misbehaviour and this is only possible, if the misbehaviour is precisely defined.

3. Sanctions and the Right to Existence

Sanctions in social administration mean to reduce or withdraw benefits which are given to meet basic needs. So, each sanction has an immediate effect on the circumstances under which the *rights to existence, health, education or work* are to be made sure. So, all sanctions of misbehaviour in the context of an activating welfare regime have to be justified in the light of the social right at stake. The appropriate rule cannot be found in apostle Paul's wisdom: "If anyone will not work, neither let him eat!",[36] as it does not coincide with the ethic of a welfare state, which does not even withdraw the right to existence or health to those who

[36] Paul, 2nd epistle to the Thessalonians, 3, 10.

committed substantial crimes. Why, one might ask, should the right to existence be disregarded to those who do not comply with expectations on social re-integration?[37]

From this follows, that sanctions should not be banned, but limited in an appropriate manner. Moderate sanctions are more convincing than harsh ones! So, proportionality and moderation should prevail, as the reduction or even the withdrawal of basic social rights is unlawful without a convincing good cause. The *mere disregard* of any rule on *collaboration* between the administration and the beneficiary is not enough to deny *basic social rights*, which are at the same time typically also regarded and protected as basic human rights. So, instead of a complete withdrawal a reduction of benefits has to be taken into account. If a benefit in cash is to be reduced, the administration should think about a substitute in the form of a benefit in kind. And finally, if benefits are completely withdrawn, a delivery of benefits on the basis of a credit should be taken into account as a more humane and appropriate alternative. The less restrictive sanctions are quite often accompanied with an additional work load for the administration. But this price is to be paid, in order to make sanctions becoming both effective and moderate at the same time.

Quite often sanctions for misbehaviour of one beneficiary have an impact on *third persons*. A young unemployed person, who disqualifies for benefits due to laziness or intention, will normally be borne by her or his family. The solidarity within families make this burden.-sharing even a legal obligation. Under this assumption, the sanctions of misbehaviour have an impact on the economic status of the wrongdoer's family. But this is not justifiable, if the family is not personally responsible for the mischief.

So, a sanctioning regime requires *appropriate* rules, which can also be justified in the light of the relevant social right being at stake. A prudent sanctioning policy is, hence, not only a political priority, but also an urgent *legal demand*. Each mischief is to be sanctioned, in order to emphasize the rules. But both are to be made *explicit*, and the sanctions taken have to be put in accordance with the specific mischief. Independent sanctioning is much more convincing than a one-sided one, done by the administration alone. Publicity of sanctioning is of central importance and *moderate* sanctions are not a symbol for public weakness, as harsh sanctions do not stand for public strength. A *prudent* system of sanctioning is based on attitude *sine ira et studio*, i.e. beyond wrath and eager: fully aware of the need for sanctions to

[37] Langendonck, 353.

emphasize the rules and a prudent moderation as to the sanctioning measures, but at the same time aware, that these sanctions are only convincing, if they concur also with the social rights being at stake.

VII. Conclusion

In the activating welfare state of today social rights are established as conditional rights. In such an arrangement social entitlements depend on the beneficiaries' cooperation with the administration. *Conditional benefits* help to tackle social deficits on an individual basis and are, hence, benevolent to both the beneficiary as the administration.

If *adequately administered* conditional benefits open the *prospect to overcome* a social *calamity* and, so, master a state of persisting need and shortcomings in basic rights of existence. Conditional benefits illustrate, that social rights are not to be restricted on public help, but they imply the vision to overcome a status of need and misery- and, hence, it should not be reduced to an entitlement for compensation for persisting loss. Each social deficit, which can be overcome, should also be overcome by virtue of a given social right. Therefore, collaboration is required and commitments to collaborate are both necessary and lawful to bring a social re-integration about.

In this context also sanctions for misbehaviour can be applied, so that commitments are respect and do finitely matter. But the sanctions should be also legitimate. And therefore a series of conditions are to be met, which are not always respected and safeguarded. Sanctions are to be established on the basis of precise rules by independent agencies. They should be predictable as to their content and instead to exaggerated strive for moderation. Because sanction of misbehaviour in overcoming social deficits, means reducing or even withdrawing social rights. So, sanctions of the violation of social commitments have to concur with social rights in finding a fair balance.

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