

A European Work-First Welfare State

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Preface

In October 2006 a colloquium was arranged in Göteborg where a small number of experienced researchers were invited to discuss the impact of activation policies in three different countries (Germany, the United Kingdom and Sweden). Those invited represented a variety of disciplines such as law, sociology and sociology of law. All participants made their own presentations of papers and these papers were the first drafts to the empirical chapters presented below. The discussions around the papers were very inspiring and vital and the idea of a book took form in its aftermath.

Work, and increased access to work for as many as possible, has become a modern mantra in welfare policies. It is the primacy of work, as the proposed key-aspect of welfare sustainability, which has created notions such as *work-first welfare*. Since the 1980s, the issue of how to ensure that more individuals become self-supporting through wage labour has been high on the political agenda. Explanations for this development can be found in predictions of demographic shifts, in the breaking up of traditional family structures as well as in an increasingly competitive global economy – all examples of processes which challenge the present distribution of social security in the different welfare regimes of Europe. It has become a main political concern to develop strategies that will increase the level of active labour market participation of the workforce. *The European Work-First Welfare State* provides a comparative account of how different welfare states and legal systems in Europe have responded to this challenge.

We would like to thank the authors who have contributed chapters to this collection for their sincere commitment to the topic as well as for the professional joy their participation in this project has given us. Special thanks also to professor Kerstin Ekberg, Dr. Wolfgang Schulz-Weidner, professor Bjørn Hvinden and Dr. Håkan Johansson for their presentations and participation in the discussions at the colloquium. In addition we would especially like to thank Stamatia Devetzi for her sharp and stimulating work as a co-editor. Without the help of Birgitta Jännebring at CERGU the book would not have gone through the necessary transformation that somehow magically turns a manuscript into a book – thank you. We would finally also like to thank FAS for generous economic support and the Centre for European Research at Göteborg University for publishing the book.

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A European Work-First Welfare State?

Introductory remarks

Sara Stendal, Thomas Erhag, Stamatia Devetzi

Increasing employability through activation policies

It has become a concern for most – if not all – European countries to increase the level of labour market participation within the population aged 16-65. In some countries, like the Nordic countries, this is a concern embedded in a familiar normative environment where the primacy of work has a long tradition; in other countries the perspective is more innovative from a historical perspective. What all European countries have in common, though, is a future where the sustainability of the welfare state (as we know it) is at stake as a decreasing share of the population face the challenge of financing the increasing costs of welfare. It is in this context that the elaboration of different *activation policies* has worked its way into most social policy agendas across Europe. It is also in this context that the European Union launched the Employment Strategy (EES) eleven years ago, in 1997.

The concept of “activation” in the *narrow* sense – as often used in the literature – involves developing tighter links between unemployment protection policies and active labour market policies. More broadly, activation is about increasing labour market entry and participation, and phasing out temporary labour market exit options for working age claimants (early retirement, disability and long-term sickness benefits).¹ In this volume, and for comparative reasons, the notion of “activation” is used in its broad sense.

The framing of this volume is strongly influenced by the awareness that the notion of “employability” and the demarcation between who is assessed to be sick, disabled or unemployed easily creates communication problems cross-nationally. For the purpose of the present project we approached this dilemma by disregarding these demarcations as functional boundaries and instead we choose a broader framework for our discussion: *Activation policies in general - increasing the employability of the sick, the disabled and the unemployed.*

¹ Clasen/Clegg, Beyond Activation: Reforming European unemployment protection systems in post-industrial labour markets, European Societies 2006: 527-553.

In the notion of *activation policies* we include such measures that have as an aim to turn recipients of social security cash benefits, through strategies for increased employability, into participants on the (open) labour market. We describe it more broadly as “*employment support*”, as this notion appears to more comprehensive than the word “activation”, which usually implies a conditionality of welfare rights on job seeking efforts. Examples for such activation policies in the broad sense/“employment support” are: quota-systems, vocational rehabilitation, anti-discrimination legislation, adaptation of workplaces and other different systems of incentives/disincentives focusing on employers as well as potential employees. The measures we are interested in could be aimed at increasing the employability of an individual or groups of individuals and they should be aimed at increasing employability through diminishing causes of incapacity and inability (be they internal or external in relation to the individual concerned).

The contributions made in this volume are describing and discussing *legal strategies* used to increase labour market participation from a national perspective. By *legal strategies* we refer to the legislator’s choice of method to implement a specific policy, e.g. the creation of rights, the choice between using hard law/soft law, public/private law, statutory law/collective bargaining etc.² The national analyses thus include reflections on legal strategies for implementing activation policies for persons being sick, disabled or unemployed.

The research question – activation and rehabilitation of whom? - Targeting the need for employment support in a cross national setting

The aim of this chapter is to provide a short introduction to the subject of the Göteborg-colloquium and hence the nexus of the questions, around which the chapters in this book circles. A main question was: Are different legal strategies for activating the sick or unemployed an attempt to solve the same problem?

The notion of *activation/employment support* used in this book includes, as mentioned above, such measures that have as an aim to turn recipients of social security cash benefits into participants on the (open) labour market, through strategies for increased employability. One of these measures is rehabilitation. Here, the focus is on “work-focused rehabilitation”. This notion, coming originally from the Swed-

² The concept of legal strategies is thus used to capture the way legal constructs (rules, principles, practises) are functioning as building blocs in the implementation of social policies, and how the different usage and combination of these will determine different modes of governance. Legal strategies are worked out and determined on different levels – locally, nationally, regionally and internationally. Thus, although national legislation (statutory law) would be a prime example of where to look for legal constructs, this is not an exclusive source. In the area of welfare law there is increasing awareness of the pluralistic elements of legal systems and the notion of legal strategies does not exclude such a perspective. Thus, legal strategies are not always coherent, they do not necessarily point in the same direction, not even on the ideal, normative, level.

ish social security system³, is used in our comparison to generally describe legal strategies with the aim to safeguard labour market participation for individuals who, if not working, would be dependent on some kind of health-related social security benefit. Defined this way, the “work-focused rehabilitation” is to be distinguished from the “rehabilitation” in a broad sense, where the primary aim is to respond to the medical or social needs of the individual. The desired outcome of “work-focused rehabilitation” is the (re-)integration to the labour market.

As regards Sweden, the long-term sick make up a considerable proportion of Swedens potentially employable population and they are needed on the labour market. Statistics in Sweden show that every day, 14 % of the population of working age (20-64 years) are either on sick leave or recipients of sickness compensation.⁴ This has been identified as a national problem and there is a political will to solve this. One strategy to be used in this process is work-focused rehabilitation, aiming to bring recipients of sickness benefits back to employment.

In other European countries the situation is often somewhat different and *unemployment* is instead identified as the main problem from where people should be “activated” or “rehabilitated”. There, the focus is rather on turning the unemployed to “active” members of the labour market instead of them being “passive” recipients of benefits.

In both cases, though, it is generally accepted that there is a need for some kind of “activation” or “employment support” in order to move the recipients of cash benefits into paid work again. The question here is if some *normative patterns*, common to all different measures of “employment support” can be identified.

Taking these considerations into account, an overarching question within the framework of this book concerns *the normative impact of different legal strategies in the field of “employment support”*. In this book the authors describe and evaluate different strategies in Sweden, Germany and the United Kingdom. These countries represent different welfare regimes⁵ as well as different legal families in currently used typologies. The intention is to explore the subject from a legal perspective, searching for knowledge in the legal traditions of Sweden, Germany and the United Kingdom that will allow us to further understand the role of “law” in the field of “employment support”.

Another important question dealt with at the colloquium was about the possible effects of the interplay between national and EU employment and welfare legisla-

³ Arbetslivsinriktad rehabilitering

⁴ Sw. sjukersättning, formerly disability pension.

⁵ Germany belongs to the conservative model according to the typology created by Esping-Anderson. The United Kingdom belongs to the liberal regime while Sweden belongs to the social democratic. The two latter are antipodes in the regime debate. However, it has been noted that Britain and Sweden at one time were quite similar in their welfare attributes. If comparing the British (Beveridge) system of the 50's with the yet undeveloped Scandinavian models – similarities seems to have been more striking than differences, see Esping-Andersen, 1999, p.87 and p. 173. Still, research made by Powell and Barrientos, taking into account the developments of the 1990s and adding new variables (in particular active labour market policies) to Esping-Andersen's typology, confirms the notion that Sweden and the United Kingdom have created different types of welfare systems. (Powell and Barrientos, 2004, European Journal of political Research, pp 83-105).

tion in Europe. Employment and re-employment has been identified as a key European problem and also since Amsterdam mentioned in the EC-treaty chapter VI on Employment (art 125 ff) and art 136-137.⁶ However, (almost) all law-making power in the area of social security takes place within the framework of a national legal environment. Reform in the area of employability, activation and rehabilitation is often concerned with *national solutions*.

Despite how different the solutions may be, the goals are common at the European level. During the Portuguese (2000) and Swedish presidency (2001) in the EU, the employment field was made an important part of the Lisbon process. The employment guidelines have fixed overarching and complementary objectives: One is the so-called *full employment* (70 % overall, more than 60 % for women, 50 % for older people, to be accomplished by 2010). Other objectives are *quality and productivity at work*, and *social cohesion and inclusion*. It is quite obvious that full employment and social inclusion are seen as complementary – employment is seen as the key element for social inclusion. The over-arching goals of Lisbon focus on employment as a pre-condition for welfare. Thus, it is important to look at the different national legal strategies under a European perspective, in order to see if (and how) different paths may lead to the same goal.

When looking at comparative statistics of labour market participation one is struck by the different patterns shown in different European countries. Only five countries have reached the goal of an employment rate over 70 %.⁷ Sweden is an example of a member state with high labour market participation (73,1 % in 2006), low unemployment (7,1)⁸ but high figures on absence from work due to sickness (appr. 4% of persons between 20-64) and also an increasing number of people standing outside the labour market as disabled, i.e. recipients of invalidity pension (appr. 10% of persons between 20-64).⁹ Other European countries have a different structure, e.g. Germany with (lower) labour market participation figures of 67,5%, comparatively low figures of sickness absence but higher rates of unemployment (9,8).¹⁰ This could be an example of how different legal strategies may lead to different results – whereas the main question still remains the same: how to bring as many people as possible (back) to employment.

⁶ Full employment and the fight against social exclusion are vital parts of the Lisbon strategy, see e.g. COM (2003) 6 final The future of the European Employment Strategy, and COM (2004) 239(01) Strengthening the implementation of the European Employment Strategy Proposal for a Council Decision On guidelines for the employment policies of the Member States Recommendation for a Council Recommendation On the implementation of Member States' employment policies in which Sweden is recommended to deal with its long-term sick in order to sustain labour supply. Also Jobs, Jobs, Jobs. Creating more employment in Europe, Report of the employment taskforce chaired by Wim Kok, November 2003. Joint report on social inclusion 2004, Employment and Social Affairs – Social Security and Social Integration, European Commission.

⁷ Denmark, Sweden, The Netherlands, Austria and the United Kingdom. Eurostat Yearbook 2008.

⁸ Eurostat Yearbook 2008, The Eurostat statistics refer to people between 15-74 years. According to Swedish official statistics Swedish labour market participation of the ages 20-64 was 81 % in 2007 and unemployment 5,4 % in 2006.

⁹ See government bill 2007/08:124, Från sjukersättning till arbete, p. 36 ff.

¹⁰ Eurostat, Eurostat Yearbook 2008.

The research framework

Research in the field of “activation” and activation policies in general is both numerous and profound. An overview of the most important publications on this field can be found at the ASPEN-site (<http://aspen.fss.uu.nl/en/index.php>).

Most *books* on activation policies describe the notion of activation and make typologies of the different activation concepts in Europe. Reflexions on the concept of “activation” and empirical observations from case studies of different active social policies in the EU can be found in Van Brekels/Hornemann Møllers’ publication “Active Social Policies in the EU”.¹¹ More recent publications focus on the individualisation¹² – or contractualism¹³ – in activation policies in the EU as a new form of welfare state governance. Another comparison book undertakes a typology of activation regimes in Europe¹⁴

This book is not just another study on different activation policies in Europe. Rather, our focus is on the normative implications of “employment support” and the different *legal* strategies in this field. Moreover, there is a different *perspective*: Despite the fact that “activation” is often broadly defined, the vast majority of comparative publications on activation is about the activation of the *unemployed* (or social assistance claimants). The present work, though, analyses the implications of “employment support” not only for the unemployed, but also for other groups of benefit recipients – such as recipients of sick or disablement benefits. Thus, rehabilitation measures and, more specifically, “work-focussed rehabilitation” are included here, as well. One could say that we look on the notion of “activation” from a different angle – encompassing a larger number of welfare recipients and including all strategies that increase employability diminishing causes of inability.

Outline of the book

The book consists of 12 chapters. Following on from the introduction, chapters two and three are concerned with Europe as a region and the ambitions to create a “Social Europe”. *Chapter Two* includes a legally based discussion on the impact of soft law regulation on national competence. In *Chapter Three* the European Employment Strategy, along with the chosen method of implementation (the Open Method of Coordination) as the basic European “soft law” instrument dealing with the activation paradigm, is presented and analysed.

¹¹ Rik van Brekel/Iver Hornemann Møller (Eds.), *Active Social Policies in the EU*, 2002.

¹² Rik van Brekel/Ben Valkenburg (Eds.), *Making it personal: Individualising activation services in the EU*, 2007.

¹³ Els Sol/Mies Westerveld (Eds.), *Contractualism in Employment Services*, 2005.

¹⁴ Amparo Serrano Pascual/Lars Magnusson (Eds.), *Reshaping Welfare States and Activation Regimes in Europe*, 2007.

The following chapters are devoted to detailed studies of how the aim of increasing employability through activation policies has been approached in Great Britain, Germany and Sweden respectively. The account of national strategies has been structured into three different sections, and each country is allocated two or three chapters.

The three British chapters provide a comprehensive overview of reforms in the field of activation. It is clear that although the calls for a more active welfare state now can be heard all over Europe, reforms implemented in Britain are marked by their distinctly national and historical characteristics and Europe is hardly mentioned. In *Chapter Four*, Neville Harris explains how the underlying ideologies and perceived social and economic imperatives have had impact on the developing legal and policy framework. He also highlights ways in which the policies that have been implemented, particularly in recent years, have interacted with long-standing principles within social security law, such as the notion of ‘voluntary unemployment’. In the following chapter, *Chapter Five*, Simon Rahilly reviews the work activation requirements within benefits for people of working age who are unemployed or sick (and in receipt of either jobseeker’s allowance or incapacity benefit). Rahilly claims that as many of these work activation provisions are supported by sanctions they also have the potential to further intensify the poverty of the benefit claimant. In *Chapter Six* Michael Adler concludes that developments in Great Britain have made it extremely difficult for anyone who is required to take part in welfare to work programs to complain about the advice and help they are given or about the sanctions they are subject to. At the macro level, the chapter explores the shift, from a contribution-based approach to a citizenship-based approach. At the micro level, the chapter explores the shift from a more bureaucratic and legalistic mode of decision making to a more professional and managerial one, and examines the implications of this shift for rights of redress.

The two German chapters both circle around the impact of the Hartz-reform on different core social security schemes, what has been gained and what might be at risk? In contrast to the British contributions, the analyses from Germany are much more profoundly embedded in a European context. In *Chapter Seven* Eberhard Eichenhofer describes some profound changes in the unemployment insurance and assistance scheme of Germany. The reforms were inspired by the ideal of the active welfare state, which is conceived as a means for self help to all those who risk social exclusion. The chapter tries to answer the question of whether the reform should be seen as a dismantling of the welfare state or the introduction of a new version of welfare.

In *Chapter Eight* Felix Welti explores different explanations for why the activation of disabled unemployed people in Germany often fails. Medical and vocational rehabilitation have a long tradition in German social policy and legislation as part of a work-focused activation strategy. “Rehabilitation not retirement” is the slogan that summarises this orientation. Still, years after the enforcement of SGB IX, there is a strong implementation deficit of the Rehabilitation and Participation Law. Vocational rehabilitation, in particular, has faced a crisis during the last years.

The two Swedish chapters bring to the fore the extensive interest that governments have shown during the last decades in increasing the employability of the sick and disabled. While active labour market policies been a longstanding landmark of the Swedish model, activation of new groups of benefit recipients is a more recent development. The chapters provide examples of different legal strategies evolved for this purpose.

In *Chapter Nine* Lotta Vahlne Westerhäll examines the legal position of the individual insured person and explores the individual's access to legal rights in connection to the rehabilitation process. The Swedish concept of work-focused rehabilitation covers all measures of a medical, psychological, social and occupational nature, which may assist those who have been ill or injured to regain maximum functional ability and restore the conditions required for a normal life. Different authorities, or principals, are responsible for the various areas. The main target group for work-focused rehabilitation is individuals who are sick-listed and receive sickness cash benefit.

In recent years an unquestionable shift towards disability anti-discrimination legislation can be observed in EC-law as well as in national legislation in many parts of the world. In *Chapter Ten* Andreas Inghammar argues that the anti-discrimination perspective will provide a shift of focus from the disabled as a group towards the disabled as individuals, and that this shift might change the perception of disability and disabled peoples' labour market integration, "from a given into a task". Disability anti-discrimination legislation in Great Britain, Sweden and Germany are examples of this development.

Chapter Eleven constitutes the comparative part of the book, exploring the normative implications of "employment support". It examines the normative impact of work-first welfare reforms in the three different European countries using the theory on basic normative patterns.

Finally, the concluding chapter summarises the legal questions and challenges of a "European Work-First Welfare State" and suggests legal strategies as a point of departure for future comparative studies.

Activation through law - National Social Security Law from a European Perspective

Thomas Erhag

Introduction

Direct activities for the promotion of social welfare at EU level are minimal. There are some common activities for fighting poverty and social exclusion but the budgets for direct actions are not comparable to the levels of national welfare budgets. The actions taken are also not of supra-national character hence it can be characterised as a soft-law or multi-level policy process where the main competence is kept on national level.

With starting-point in 1986 a new discourse was introduced in European policy with the Delors-commission introducing the concept of Social Europe. However, scrutinising the content of the Social Europe-policies, focus is rather on employment than on welfare and poverty. This work-line approach was already manifested in the preparing stages of the EES where the Council urged the member states to also adapt their social protection systems to support employability. The goal of a high employment level is after Amsterdam an overarching goal of the European Union to be integrated in all common policies (EC art 127).

Already by its launch the EES received some criticism which in essence pointed at the fact that the normative goal of the strategy did not coincide with that of the welfare regulation of the Member States', ie. the fight against social exclusion and (re)employment is quite different from the concept of an EU solidarity. Looking at the development of the EES within the Lisbon-process, it seems as if the EU has retreated from promoting social citizenship and moved towards a narrower work-line oriented conceptualisation of social security. This would mean that there is an expressed common EU normative structure within the OMC governance method, with a potential impact on national welfare policies.

This chapter examines the real and possible impact of the EES/OMC method in relation to other methods of Community integration.

Unpacking the concepts of “Europeanisation” and “European integration”

The concept “Europeanisation” is predominantly used to describe national adaptation and integration due to EU-membership, however there is no shared definition of the term. Instead, Europeanisation is used in a variety of ways to describe different phenomena and processes of change. It is often linked to other terms as globalisation and internationalisation aimed at describing an integrative development in politics, economy, culture and law.¹ Efforts to model its dynamics have proven that the term is not used without problems and the empirical evidence is uneven and often contested. Still, it has been argued that with some effort the term can be useful for the understanding of the evolving European polity.²

The term “legal Europeanisation” is also often used as an expression of the impact of EU law on the legal systems of the Member States. Shared institutions adopt legislation in the forms of directives, regulations (and more) on EU level and these legal acts are then implemented on the national level. In a broader perspective the term is also used to identify the shift of national policy paradigms and instruments to the EU level.³ This implies that the term refers both to the study of change at national level (top-down) and the study of how the domestic level initiates change at the EU level. Legal Europeanisation is then assumed to be a two-way process between the national and European levels.

“Europeanisation” and “European integration” are often used interchangeably although the uses of these two concepts are separated by the political scientists. Europeanisation refers to what follows from a process where European integration to an increasing degree is relevant and useful as a source of change and adaptation in national policy making and in the domestic way of law-making and organisation, put very briefly, domestic change caused by European integration.⁴ Obviously, the research agenda on Europeanisation relates strongly to the theories of European integration.

The meaning that we have given the concept of Europeanisation includes the rational adaptation that the EU brings. Thus, we are aware of that this use of the concept does not have the analytical precision to isolate it from other integrative cooperation. Target for our discussions on Europeanisation are the national reactions and adaptations to EU activities related to activation policies.

¹ Wallace (2000), pp. 369-82.

² Olsen (2001).

³ Howell (2002).

⁴ Ibid.

In the legal field, the development of European integration is often described as a linear progression towards a specified goal,⁵ often with reference to Balassa's integration "stair-case",⁶ where unification of law is the final step. The degree of integration is then a measure of to what extent law is unified and the concept of integration is then unpacked into separate concepts such as convergence and harmonisation. In the field of social law, focus is both on the way in which unification or harmonisation should come about (legal instruments) as well as to what extent further harmonisation is possible or wanted.⁷

Balassa described European integration as a process driven by the elimination of discrimination between national economies. The result of integration is characterised as a lack of discrimination in a variety of areas. The meaning of economic integration is not isolated to total unification but can be referred to various degrees or "steps" of integration; 1. free trade; 2. customs union; 3. common market; 4. economic union as distinct from the common market in that it combines restrictions on commodity movement with a certain degree of harmonisation of economic, monetary, fiscal, social and countercyclical policies, and; 5. total economic integration presupposing a unification of economic, fiscal, and social policies which also requires a supra-national authority whose decisions are binding for the member-states. Balassa makes a specific reference to social integration, reminding that there is a need for social integration to accomplish total integration, but also to some degree necessary to induce labour movements already in the stages 2 and 3.⁸

In the context of economic integration, harmonisation of economic policy is seen as a necessary complement to the liberalisation of trade in order to ensure the participants a level playing field. This liberalisation of trade and harmonisation are thus characterized by two different approaches concerning the order of the two elements:⁹

- a) harmonisation as a consequence of liberalised trade
- b) harmonisation as a condition for liberalised trade.

With reference to the Treaty of Rome from 1958 it is quite obvious that the a)-approach was strong during the 1950s.¹⁰ This is also reflected in the wording of the introductory article of the chapter on social policy in the Treaty. Article 136 in its modern wording states that harmonisation of fundamental social objectives will follow from the functioning of the common market, as a consequence of liberalised trade:

⁵ Steiner, Woods, Twigg-Flessner (2006).

⁶ Balassa (1961) p. 1-17.

⁷ See Eichenhofer (2006) Pennings (2005). See for a discussion on Europeanisation of European Private Law, Wilhelmsson (2005).

⁸ See Sapir, (1996) p. 543 f, and Watson (1980) p. 32 ff.

⁹ Sapir (1996) p. 543 f.

¹⁰ This is the "classical" neo-functional approach as described Haas (1958). Rosamond (2000) p. 50 ff.

Article 136

The Community and the Member States, having in mind fundamental social rights such as those set out in the European Social Charter signed at Turin on 18 October 1961 and in the 1989 Community Charter of the Fundamental Social Rights of Workers, shall have as their objectives the promotion of employment, improved living and working conditions, so as to make possible their harmonisation while the improvement is being maintained, proper social protection, dialogue between management and labour, the development of human resources with a view to lasting high employment and the combating of exclusion.

To this end the Community and the Member States shall implement measures which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Community economy.

They believe that such a development will ensue not only from the functioning of the common market, which will favour the harmonisation of social systems, but also from the procedures provided for in this Treaty and from the approximation of provisions laid down by law, regulation or administrative action.

My view is that free movement under all circumstances contains a social dimension. A realisation of the freedoms will therefore also trigger the question and need for discussing harmonized measures in the social area. With reference to spill-over effects it might be the case that economic integration should come before a common social policy, but will lead to a common, or at least strong common features of, social policy.¹¹

When promoting the b-strategy, harmonisation as a condition for liberalised trade, it might be argued that international differences in wage levels and other social advantages will be an unfair advantage for certain member states, with the side-effect that workers there have a lower social standard. Differences in social levels will lead to a distortion of competition putting labour cost in focus in order to increase competitiveness. A consequence will be lower wages etc.¹² Arguments like this are named social dumping and in order to avoid a dumping situation social circumstances should be harmonised before or together with a liberalisation of trade. The promoters of the a-strategy instead claim that differences in wages and social protection are reflection of differences in productivity and social preferences. It is obvious that the latter approach has been dominant in the development of the EU.¹³

No matter the strategy supported, we can note that integration theory provides us with a tool for explanation of what is happening in the process of European integration¹⁴ as the EU steadily has been expanding its powers. Neo-functionalists de-

¹¹ Pakaslahti (2000) p. 68.

¹² Mosley p. 147-163. Hervey (1998), p. 9 f. Compare the discussions after ECJ judgments in case C-341/05, *Laval v. Svenska byggnadsarbetareförbundet*, [2007] ECR I-xxxx C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, OÜ Viking Line Eesti*, [2007] ECR-xxxx, Joerges (2008).

¹³ Chassard & Quintin (1992)

¹⁴ Burley and Mattli, (1993), p. 41-76, esp. p. 43.

scribe this as a result of increasing interdependence between member-states.¹⁵ It will be more effective to solve problems on the supra-national level which means that further legislative competences will be transferred to the institutions of the EU in a growing number of areas. This phenomenon is called spill-over effect, and means in a longer perspective that citizen and policy-maker loyalty gradually will be transferred from the nation-state to the EU-level.¹⁶ With reference to Balassa we have seen an institutionalisation of economic policy via the completion of the internal market but also the Monetary Union and the Stability Pact introduced by the Maastricht Treaty. These changes have also been followed by EU competence in more policy fields and the development of more sophisticated regulatory procedures.

However, it must be questioned whether this process is to be considered as inevitable or if it can be controlled by policy-makers. Tension has been created between policy areas where decisions are taken on an EU-level (internal market) and other areas where policies are still a matter of national affairs (social security, labour market), a tension that in legal term are of a constitutional character.¹⁷ It is quite obvious that a “deficit” in competence in the field of social policy threatens the democratic legitimacy of the deepened integration project, a “truth” obvious already for the Delors Commission after presenting the 1985 White paper on the completion of the internal market. These conflicts are further complicated by the fact that the ECJ has the task of interpreter of the constitutional balance provided in the basic treaties. The dynamic and teleological method used by the ECJ in the attempt to fulfil the integrative goals set out in the treaties has meant that national interests have been put aside in favour of other market goals provided for in the EC-treaty.¹⁸

In general terms it can be said that in the area of the establishment of the internal market the EU has exclusive competence for law-making. Also the next level of integration, with reference to Balassa, was reached when the monetary union was made a reality. However, when it comes to the field of social policy and welfare there are only a few signs of common policy-making with a hard impact. Regulation of social welfare is still an area in which responsibility lies with each state, at the same time we have seen an increasing effect from other policy areas, e.g. the internal market, meaning that there is an indirect pressure on national competence in the social field.

Must we then create positive (integration) decision-making in the social field to balance this indirect pressure, i.e. EU social law using the traditional legal EU-method with directives based on a common welfare ideology? A demand for this should not be a surprise as most member states have developed welfare regulation as a response to the short-comings of the market. This pressure and need for correc-

¹⁵ Haas (1958). Lindberg (1963).

¹⁶ Weatherill (1995) p. 8. Pakaslahti (2000) p. 24 f.

¹⁷ Joerges (2008) and Joerges (2007:1)

¹⁸ E.g. C.120/95 Decker, C-158/96 Kohll on freedom of movement in relation to goods and services in the health care sector, see also the free movement of persons cases referred to in footnote 56.

tion can be expressed also on the European level. Without positive integration in the social field there is a larger risk for increasing conflicts between internal market and national social policy.¹⁹ The dividing line of law-making competence between member-states and the EU, that in theory should exist, is difficult to assess at the same time as it is not static. It is changing due to constitutional adjustments in the treaties and secondary legislation with an indirect impact (jack-in-the-box) but also due to the activities of the ECJ. Leibfried and Pierson in 1995 described the ECJ as a “market-police”, upholding the limits for national legislative competences.²⁰

Up until today the story has been one of steadily expanding powers, by an expansion of community competence at the cost of the room for exclusive national law-making competence. Lenaerts means that the member states have no powers to resist this development.²¹ However, in the areas where decision-making is still made with unanimous voting, the veto power makes the integrative forces less powerful. This is of course not the case where qualified majority voting has been introduced. The problem with indirect effects of integration is that when paving way for market integration by means of setting aside national hindrance to free movement, there are very small chances of balancing these decisions on the same regulatory level.

By establishing the doctrine of supremacy the ECJ has struck the constitutional balance between the EU and the member states.²² This principle regulates the priorities between national law and Community law from a national perspective. A direct consequence of the doctrine of supremacy of Community law is the doctrine of pre-emption that is directed towards the law-making powers of the Member States.²³

The EC-treaty also contains norms whose direct objective is to regulate the relationship between Community law and national law. Article 5 EC-treaty is an example of concrete action taken by the Member States to clarify the outer limits of the competences attributed to the Community. The principles expressed in art 5, legality, subsidiarity and proportionality, are concerned with the use of the attributed competences. The use of these principles can block the exercise of Community competence in an individual case. In addition, Member States must be loyal to the objectives of the Community by not taking any measures that violate Community law. By simplification, the principle of loyal cooperation in TEC art 10 may be understood as an obligation whereby national lawmakers must not maintain or introduce rules that violate Community law. When attributing new competences to the Community, new obligations to which Member States must comply are created. The ECJ has used the principle of loyal cooperation to increase Community law efficiency. The duty to comply has proved to be a general duty and does not depend only upon what material area of national law that violates Community law. Na-

¹⁹ Leibfried and Pierson (1995) p. 52 f.

²⁰ Leibfried and Pierson (1995) p. 65.

²¹ Lenaerts (1990), p. 220.

²² Case 6/64, *Costa v. Enel*

²³ Case 218/85 *CERAFEL*

tional lawmaking discretion can be circumscribed in areas where the Community has not been attributed competences.

In understanding the balance between Member State and Community competences the following picture emerges. There are areas where the Community has no competence and hence Member States have exclusive competence, there are areas where the Community has been attributed exclusive competence and finally, there are areas where the Community and the Member States share competence. Thus, it appears that the balance between Community and Member State competence is changed when the Treaties are changed. The doctrine of pre-emption answers the question under which circumstances that Member State lawmaking is pre-empted by the competence given to the Community, it determines when there is an actual or potential conflict.²⁴

When widening Community competences, the effect of Community law on national law has become more heterogeneous. By subjecting questions of Community and Member State relations to the jurisdiction of the ECJ a new institutional structure with the ECJ at the centre is created. Accordingly, Member States will seek new methods of integration that has little or no pre-emptive effect. The expansion of the use of soft law and the new techniques for governance can be seen as symbols of this development.²⁵

To summarise, the main argument in favour of harmonisation in the social field has been that harmonisation will prevent the distortion of competition on the common market; in addition harmonisation is necessary for the completion of the free movement of workers. In reality, the sovereignty of the Member States, i.e. hard law impact on the legal authority of the Member states, has only been restricted to small areas such as social security for migrant workers, health and safety at work and in the field of equal treatment. However, there are also indirect effects of European integration irritating the legal authority of the Member States in the field of welfare law and the most powerful actions in European Welfare law have been non-regulative. It can also be stressed that the hard-law regulation on social security, regulation 1408/71, merely co-ordinates and have no further intention of creating the same technical approach to social security or creating a similar ideology in relation to the national regulation of the same area. As a parallel process, the EU has since 1989 (Community Charter of Fundamental Social Rights for Workers, Council recommendation 92/442/EEC of July 1992 on the convergence of objectives and policies in social protection) worked with formulating legally non-binding standards that then have functioned as starting points for further discussion and actions by the institutions and Member States. The OMC has brought this dimension of non-binding norms to a higher level, however these soft procedures have no pre-emptive effects on Member State legal competence.

²⁴ Cross (1992).

²⁵ Pochet, (2005).

European framework - Balance between national and European competences in the social field

Although the welfare area is still described as an area where the member states retain primary competence and the influence from the EU is indirect or minor, the EC for many years have had legal competence to regulate aspects of employment. In general this has meant that more general welfare questions have been left to the Member States while as the question of labour market participation has been an area of EU-interest.²⁶ After Treaty revision in Amsterdam the Employment chapter of the EC-treaty was inserted, art 125-130. At the same time we saw a widening of the Treaty-scope on social policy as the social protocol was signed by the UK and moved from the Annex into the Treaty-text. The new wording of art 137, for the first in the history of European integration, attributes original legal competences in social security to the EU.²⁷ Szyszczak means that social policy has undergone a quiet revolution when being reformed in Amsterdam, as the employment strategy will have major repercussion for Member State competence in this area.²⁸ Here, I will give a short overview of the competences expressed in the employment and social policy chapter with focus on the OMC as a “new” governance method.

The EC treaty contains limited legal basis for the adoption of regulations and directives in labour law and health and safety at work (art 137), social security for migrant workers (art 42 and 137), free movement of workers and services (art 39 and 49). There also wide competences for providing secondary legislation in the field of non-discrimination on the basis of gender (art 141), ethnicity and functional incapacity (art 13). Art 137 h) also contains a specific legal basis for the adoption on the integration of persons excluded from the labour market. However, the width of the legislation adopted, actually or potentially, under this legal basis can by no means be compared to the comprehensive welfare state regulation of the Member States. As mentioned above, the neo-functionalists argued that negative integration, such as the removal of trade hinders for the functioning of the common market, would trigger pressure for common policies also in the social area. These measures have this far not been so significant that they can be described as creation a common EU social policy. On the other hand, negative integration has had large impact on national social law, “irritating” finely adjusted and comprehensive social regulation of the member states.²⁹ This legal pressure has been most noticeable in the ECJ judgments delivered in the area of free movement, although it is obvious that regulation 1408/71 has had much more far reaching consequences than what is ex-

²⁶ de Búrca (2005).

²⁷ Eichenhofer, (2000). Eichenhofer points out that the Treaty-changes together with the case-law development starting with the judgments in C-120/95 Decker and C-158/96 Kohll question whether social security can be upheld as an area of exclusive national competence.

²⁸ Szyszczak (2000), p. 197.

²⁹ Erhag (2002).

pressed in the regulation itself.³⁰ The free use of legal argumentation based on non-discrimination and hindrance to free movement together with the solidarity principle has led some (Nordic) lawyers to talk about an EC jack-in-the-box effect, making it very hard to predict the possible impact of EC law on national law.³¹

As mentioned, there were some changes in the Amsterdam Treaty which made it clear that social security falls within the framework of the Treaty and there is now in art 137 a hard legal basis for the adoption of EU social security law. This Treaty change came together with the introduction of the chapter on employment, art 125-130, forming Treaty legal basis for the adoption of the “soft” common employment policy. The turn from scarce instrumental regulation to broader soft governance has been characterized as a shift from deepening to widening of EU social policy, and it has been pointed out that seen together this also implies a much stronger role for the Council vis à vis the Commission and the ECJ in the area of social policy.³² The Council thus adopted the EES in 1997 using the open method of co-ordination, this was followed by the Social Inclusion Strategy in 2000 and Pensions Strategy in 2001.

The construction of the legal instruments forming the basis of these strategies, can be compared to that used in the earlier recommendations 92/441 and 92/442.³³ These recommendations are based on laying down common objectives which are measured by reporting social achievement in relation to structural indicators. The common objectives are executed through the adoption of national action plans, these are scrutinized by the Council and Commission and on the basis of this process a common employment report is presented. Finally, country specific recommendations are elaborated by the commission. However, the legal rules adopted are not intended to be legally binding and no economic sanctions are connected. Normal Treaty procedures for non-compliance can thus hardly be used.

It is important to see the introduction of the EES in 1997 together with the intentions of the negotiations before Maastricht, where the Member States decided to take the important integrative step of the Economic and Monetary Union. The EMU is such a comprehensive project that hardly any other national policy area can avoid being affected. It was apparent that the EMU would and will have effects of negative integration.³⁴

In the Commission report on social security in 1999,³⁵ the demands for consolidation of financial policy in the Growth and Stability pact is pointed out as a factor which has had a negative impact on the abilities of national governance of economic development together with demographic development, increasing female labour market participation, long-term unemployment, globalisation and technologi-

³⁰ An example is provided by the judgments in cases C-120/95, Decker, C-158/96 Kohll.

³¹ Andersson, (1997), p. 328. Wilhelmsson (1996) p. 45 ff.

³² Kvist (2004) p. 303.

³³ OJ No. L 245, 26/8 1992, p. 46, OJ No. L 245, 26/8 1992, p. 49.

³⁴ The social dimension of the EMU has been critically reviewed in literature, see eg. Guild, (1999) p. 22. Pacolet (1996). Pochet & Vanhercke 1998. Also Pakaslahti, (2000), s. 254 ff,

³⁵ COM (2000) 163 final.

cal development. The Commission notes that this will make Member States turn focus to social security as representing a large part of public expenditure. The need for active policy measures and lower non-wage labour costs was seen as essential factors for providing increased labour market participation.³⁶ The EES has come to rest upon these two concepts, active labour market measures and the justification of certain deregulatory measures.³⁷ But already in 1992 the Commission started to show interest in the financing of social security and made normative recommendations with reference to the EMU. The White Paper on growth, competitiveness and employment from 1993 presented the mentioned three policy areas as bound up together.

A more concrete example is that the Commission recommended that wage costs should be cut by 1-2 % within the EU.³⁸ This question was later discussed at the European Council in Essen in 1994 and was made a main question for the combat of unemployment. The question of lower non-wage labour costs as a method for increasing employment was then together with an emphasis on active labour market policies made central parts of the employment strategy,³⁹ and together serving the higher purpose of the Lisbon strategy ‘to make the European union the most competitive knowledge society in the world’.

Although much of the positive measures that are possible to take on an EU-level are soft law, it is apparent that this soft law has developed into less soft structures. From notes by the Commission in reports in the early 1990s, to an organised governance structure with a firm legal basis in art 128 where both Council and Commission are dominant actors. Additionally, the EC-treaty in art 137 expresses that questions on most aspects of working life are questions where the EU has (a limited) competence to legislate or at least use the OMC-method.⁴⁰ Seen together with the EMU the OMC can be seen as a complement to the traditional EU-method of hard law.⁴¹ But seen in relation to the diversity of national welfare states, e.g. the differences found in the construction of legal instruments (benefit levels, personal scope etc.), level of economic development and normative aspirations and institutional structures, there are minimal chances to be successful in harmonisation of European social policies. Pochet, when comparing the possible effects of the EES and social inclusion OMC, states that they too are different in character and very limited as to defining the contents or substance of national policies. The EES seems to be more focused towards centralisation but without further debate about the contents (top-down). The social inclusion OMC uses more of an experimental dynamic with the involvement of local and regional actors (bottom-up).⁴²

³⁶ COM (2000) 163 final, p. 8.

³⁷ Ball, (2001), p. 354.

³⁸ COM (1993) 700.

³⁹ E.g COM (2001) 428 final.

⁴⁰ Scharpf, (2007).

⁴¹ Scharpf (2002) pp. 662 ff..

⁴² Pochet (2005)

The OMC can thus only reach very limited efficiency and leaves the question of asymmetry between market integration and social protection (market-correction) unsolved.⁴³ The OMC has also been described as a legitimising discourse for action in politically sensitive areas, i.e. welfare and labour market, where use of the ‘classic’ Community method is not possible.⁴⁴

Although the EES OMC has connections to traditional EU-lawmaking it is a “neo-voluntary”⁴⁵ legal method which can be characterized as intergovernmental rather than a supranational procedure. There are supranational features in the sense that the Commission holds a central position and that the guidelines are decided upon with qualified majority voting in the Council. However, the member states have the last saying as it is up to them whether they want to follow the guidelines or not. This of course effectively limits the possible achievements of the open method of coordination. At the same time national policy choices are defined as matters of common concern and governments are willing to present their plans for joint discussion. Although the system is without sanction the joint discussions on national choice with the goal to set common indicators of achievement and objectives mean that the system is exposed to peer-review. This also strengthens the intergovernmental character of the legal procedure.⁴⁶ However, one should also note that the OMC development is joined with a, however modest, development of the “hard” Community competences in the field of social law. Substantially, the OMC cannot be considered to contribute to the development of a common social policy with a direct impact on national social law. But as a procedure it is new and complementary, and receives a position in law-making on the national level.⁴⁷

The normative basis of the EES – a “work-line” approach

What is then the normative message in the European Employment Strategy and what kind of impact can it be expected to have on the legal strategies for ‘return-to-work policies’ in the Member States?

A fundamental idea with the EES is that it is necessary to take action in several policy areas to be successful in activation, the goal to reach “full” employment. Coordination between policy areas is thus needed. Originally the EES was designed to assist the member states in efforts to reach higher levels of employment in ways that promote competitiveness and economic growth. In order to reach these goals the member states are guided by the policy guidelines and legal norms on employment issues.

⁴³ Scharpf (2002)

⁴⁴ Radaelli, (2003).

⁴⁵ Streeck, (1996).

⁴⁶ Intergovernmental cooperation is characterised by respecting national sovereignty and thus being voluntary (veto). Weiler, J.H.H. (1999).

⁴⁷ See Eichenhofer (2006). p. 274 f.

In art 125 of the Treaty it is expressed that the Member States should “work towards developing a coordinated strategy for employment and particularly for promoting a skilled, trained and adaptable workforce and labour markets responsive to economic change with a view to achieving the objectives defined in Article 2 of the Treaty on European Union and in Article 2 of this Treaty.” However, in art 126 it is stressed that the employment policies should be developed in a way consistent with the broad guidelines of the economic policies of the Member States and of the Community adopted pursuant to Article 99(2). Full employment should contribute to competitiveness and economic growth but “without abandoning the values of solidarity, social justice and social right upon which the Union is built.”⁴⁸ This means that the EES should be seen in relation to the broader social and economic agenda of the EU, thus it implies that a balance should be sought between economic, employment and social policies.

The Barcelona European Council in March 2002 identified "Active policies towards full employment: more and better jobs" amongst the three areas requiring specific attention. It underlined that full employment in the EU is at the core of the Lisbon strategy and constitutes the essential goal of both economic and social policies. In the launch of the “new start” for the Lisbon process it was made further clear that the fight against social exclusion means stimulating employment. Flexibility, work incentives in tax and benefit systems, vocational training for the young and active ageing combined with active labour market policies are the key features.⁴⁹

Already in 1997 the EES received some criticism. Spicker (1997) means that the fight against social exclusion and (re)employment is quite different from the concept of a European Union solidarity, where the latter has been said to be the basis of the Commission’s white paper on social policy from 1994. The concept of poverty has been taken out of the discussion and been replaced by social exclusion. (Re)employment is seen as the solution to the problems of social exclusion rather than discussing citizenship and solidarity as basic concepts on which welfare are built.⁵⁰ Hervey (1998), also at an early stage of the EES, pointed out that “such an employment-centred position may reveal an underpinning of commodification of human beings, and may be insufficiently flexible to deal with the complex social and economic structures which make those in certain groups more vulnerable to social exclusion.”⁵¹ When following the development of the normative message of the EES there are no signs of change in the line of what was asked for by Spicker and Hervey. Klosse (2005) argues that one way of coming around the side-effects of dominance by economic and financial targets is by using a “solid rights-based ap-

⁴⁸ COM (2000) 379 and COM (2001) 104.

⁴⁹ COM (2005) 24.

⁵⁰ See Joint Report on Social Inclusion 2004. Employment promotion is (of course) seen as a key element of promoting social inclusion.

⁵¹ Hervey (1998) p. 173. See also Scharpfs (2002) criticism towards OMC as creating constitutional assymetry that will have hard impact on the member states in forming their labour market and social policies.

proach”, referring in particular to the right of equal treatment expressed in the Treaty and the EU Charter of Fundamental Rights.⁵²

A common feature of the critique seem to be that social values such as solidarity, social justice and social rights are not expressed legally in a way that can counter-balance EU-hard law impact in the areas of market freedoms and the EMU, an imbalance between economic and social objectives that is also reflected in the EES.⁵³

Looking at the development of the EES within the Lisbon-process, it seems as if the EU has retreated from promoting social citizenship and moved towards a narrower work-line oriented conceptualisation of social security.⁵⁴ This would mean that there is an expressed common EU normative structure within the OMC governance method, having an impact on national welfare policies. Suggestions are made for specific action to provide for better integration of young people, immigrants and women in the labour market, promoting people to work longer and functional disorders by using active labour market policies. However, it must be stressed again that the commitments are free of clearly defined obligations for the Member States.

In non-discrimination law we see another kind of development. On the basis of Art 13 TEC⁵⁵, the EU Council of Ministers agreed on a Directive about equal treatment in employment and occupation in November 2000.⁵⁶ The Directive states that both direct and indirect discrimination on the grounds of disability is prohibited within the EU and was to be implemented by Member States at the end of 2006. However, this is an outcome of the emphasis on individual rights derived from the free movement and non-discrimination articles of the Treaty and it is questionable whether there is “solidarity” embedded in these Treaty articles.⁵⁷

In 2002, the Swedish Agency for Public Management (Statskontoret) presented a first evaluation of the impact of the EES on Swedish policy and politics. The result was striking as the general opinion among public servants in the Ministry and representatives from the labour market parties was that there was no such impact. Although they concluded that the basic ideas correspond well with Swedish employment policy there was no trace of a real impact or that this correspondence

⁵² Klosse (2005), p. 30.

⁵³ For further reflections on the responses to the social deficit of the European integration project, Joerges (2007:1)

⁵⁴ See e.g. European Commission November 2003. Also COM 2005 330 final.

⁵⁵ Introduced by Treaty revision in Amsterdam.

⁵⁶ Directive 2000/78/EC 27 November 2000 establishing a general framework for equal treatment in employment and occupation, OJ L 303/16, 2.12.2000. Another example of a broader approach in secondary legislation, responding to other values than purely economical in the Treaty is the adoption of directive 2004/38/EC, OJ L 158, 30.4.2004, p. 77; 1st corrigendum OJ L 228, 29.6.2004, p. 35; 2nd corrigendum (only for the English version) in OJ L197, 28.7.2005, p. 34. Verschueren (2006) means that the adoption of the latter directive together with the ECJ judgments in cases as, Case C-85/96, Martinez Sala [1998] ECR I-2691, Case C-184/99 Grzelczyk [2001] ECR I-6193, Case C-456/02 Trojani [2004] ECR I-7573, Case C-224/98 D’Hoop ECR [2002] ECR I-6191, Case C-138/02 Collins [2004] ECR I-270, Case C-209/03 Bidar [2005] ECR I-2119, “illustrate the switch in EC law from market-based citizenship to social citizenship.”

⁵⁷ Compare Paul Schoukens (2007).

would be a result of the EES.⁵⁸ The situation seem to be similar at the European level. The law professors Pieters and Schoukens have shown scepticism towards what can be achieved through using the OMC in the welfare area. When it comes to real effects their interviews with social security chief executive officers in Europe showed that there was no or very little impact of the OMC on national policy.⁵⁹

In recent Swedish reports and travaux préparatoires, it seems evident that the EES-guidelines have the same normative message as is provided in Swedish employment and social policy.⁶⁰ However, the same travaux préparatoires do not contain any direct references to the EES or other OMC methods. Still, in order to create what is called sustainable welfare systems a central feature for the Swedish government has been/is e.g. to increase the employability of people who have been sick for a long time.⁶¹ This “work-line” approach, which also has been expressed in the strategies for employment and social inclusion, has a long tradition in Swedish labour market policy and is also clearly expressed in the social security system. To this respect, full employment by using active labour market strategies is a well-known Swedish policy goal.⁶²

However, when exploring the impact of the EES and OMC more closely, there seem to be very little (if any) evidence of real legal impact on national legal reforms, even if the policy formation and debate is carried out in an institutionalised European context.

Final remarks

The EU has launched the Lisbon process in the context of globalisation. The challenge for Europe is to become more flexible in order to use the opportunities that globalisation brings and hence to overcome the threats by strengthening competitiveness on the global markets. Reform of the labour market and social policies is a key feature of these reforms. Historically there has been little real achievements in the field of European labour market and social law, at least on the European level. Since the 1990s several attempts have been introduced to strengthen EU competences in these fields. The EC-treaty now contains limited possibilities of introducing traditional hard law, measures also in the area of social security, discrimination law has been strengthened in order to promote participation on the labour market both by persons with functional disorders and among the ageing population. These traditional methods are accompanied by the introduction of new modes of govern-

⁵⁸ Statskontoret 2002.

⁵⁹ See Pieters and Schoukens, , www.eiss.be/whatsnew.php

⁶⁰ For sickness insurance reforms see regeringens proposition 2007/08:136 En reformerad sjukskrivningsprocess för ökad återgång arbete. Ds 2008:4 Ettårsgräns för sjukpenning och införande av förlängd sjukpenning. Ds 2008:3, SOU 2006:86. For unemployment insurance and labour market reforms see Ds 2007:47, prop. 2007/08:118,.

⁶¹ E.g government report (regeringens skrivelse) 2005/06:23 as a reflection of e.g. COM 2004 239 final. See also the mapping of policy inputs and legal framework in Ds 2008:16.

⁶² Socialförsäkringsutredningen (2006).

ance communicating a common normative message of full employment and the promotion of active labour market policies. Indeed, all these aspects of using different legal methods of European integration provides evidence of that there is really something happening in the evolution of Social law on a European level.

However, there are still four distinct welfare regimes present in Europe and even if the EES and OMC are attempts of redefining the social dimension in the EU towards a common agenda, the enlargements of the 21st century rather seem to have created more diversity in European welfare models. The Swedish, or perhaps Nordic model has always promoted both equity and efficiency. High benefit levels and a broad personal scope is combined with active labour-market policies and an emphasis on the “work-line”. This is however not a result of European integration. Additionally, when analysing the presented input of ideas in recent Swedish legal reforms a “European model”-impact is not to be found.

But there is something going on in Europe, where it will lead is however a question for the future. Today, we might only be able to conclude that the EES and the OMC in general is more a question of finding a legitimising procedure than of substance.

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The European Employment Strategy

Stamatia Devetzi

Since the 1990s' a new mode of governance differing from the classical community method has been at the centre of political developments at EU level. This new mode of governance is called "Open Method of Coordination" (OMC). The OMC has (formally) been introduced by the Lisbon European Council of March 2000. It rests on soft law mechanisms such as guidelines and indicators, benchmarking and the sharing of best practice. Meanwhile the OMC has been spreading fast to a large range of policy sectors such as social inclusion, educational policy, pension reform but also issues related to the knowledge economy. Before being baptised as "OMC", this mode of governance had already been introduced in the sector of European Employment policy – under the name of European Employment Strategy (EES). The EES could therefore be considered as the "mother" of the OMC.¹

The following chapter discusses the EES under two aspects. First, it gives an overview of its historical development (A). Secondly, it summarizes briefly the current scientific discussion on its merits and problems (B).

It is not the aim to review all the blossoming academic literature on the EES² nor to analyse in depth the discussion on "soft vs. hard law" or the notions of "governance" and "Europeanization". Nevertheless, it is important to discuss some of the scientific findings in order to be able to answer an overarching question linked to the implementation of the EES: Can we consider the EES to have a normative structure and has the EES had an impact on national normative structures? In order to discuss these questions on the comparative basis of the national reports, it is useful to have an overview of the current scientific analysis on the character of the EES itself.

The EES from a historical perspective

The developing of the EES under the shadow of the Economic and Monetary Union

The EES should be analysed within the history of European Economic integration, which accelerated in the 1990s with the advent of Economic and Monetary Union

1 Smismans, EU Employment Policy: Decentralisation or Centralisation through the Open Method of Coordination?, EUI Working Paper Law Nr. 2004/1, p. 2.

2 For that, see for example de la Porte/Pochet, The European Employment Strategy: existing research and remaining questions, Journal of European Social Policy 2004, p. 71-78.

(EMU).³ Indeed, the completion of the internal market and especially the monetary union had considerably reduced the member states' political margin of manoeuvre. For example, in employment, traditional policy tools, such as competitive devaluation, adjustments of national interest rates, public deficit policies, state aid, or widespread hiring in the public sector were mostly invalidated.⁴ The Delors White Paper on *Growth, Competitiveness and Employment* that was published in 1993 gave birth to the very idea of a European employment strategy⁵ by making explicit reference to ensuring that jobs and other social objectives were not ignored. The paper was a reflection on the need to revitalise the European project and to counter scepticism towards Europe's monetary integration project.⁶ The White Paper's ambition was to meet the convergence criteria for the EMU, the implications of which were deflationary, and yet to achieve higher levels of employment in Europe. To meet such a challenge, one of the means was to broaden the debate beyond negative flexibility to more active labour market policies. The objective was also to integrate employment policy with other policy issues (fiscal, social protection, environment, equality of opportunities for men and women, new family patterns, demographic changes).

From the 1993 White Paper a path can be traced to the Essen European Council meeting of December 2004. At this meeting the Member States set themselves five objectives with respect to employment promotion, making special mention of people on the margins of workforce. The five objectives were: a) to invest in vocational training; b) to increase the intensity of employment growth, particularly through a more flexible organisation of work and working time and wage restraint; c) to reduce non-wage labour costs; d) to develop active labour market policies through the reform of employment services, encouraging labour mobility and developing incentives for the unemployed to return to work; e) to fight youth and long-term unemployment. The whole was underpinned by a multilateral monitoring procedure. This procedure can be considered as a precursor of the EES.

The White Paper and the Essen Summit were important catalysts for raising the issue of employment on the European Agenda.⁷ The subsequent European Council meetings, notably those of Madrid in December 1995 and Dublin in December 1996, contributed to the development of the process. The former identified job creation as a central objective of the EU. The latter underlined the need to pursue a

3 Goetschy, *The EES, Multi-Governance and Policy Coordination: Past, Present and Future*, in: Zeitlin/Trubek, *Governing Work and Welfare in a New Economy*, Oxford 2003, pp. 59-87, p. 60.

4 Casey, *Building social partnership? Strengths and Shortcomings of the European Employment Strategy*, *Transfer* 1/05, pp. 45-63, p. 48; Goetschy, *The open method of coordination and the Lisbon strategy: the difficult road from potential to results*, *Transfer* 1/05, p. 64-80, p. 66.

5 Goetschy, *The European Employment Strategy: Genesis and Development*, *European Journal of Industrial Relations* 1999, p. 117-137.

6 The rise of euro-scepticism after Maastricht reflected widespread belief that economic integration was one cause of growing unemployment, and there were also increasing criticisms of the "demographic deficit" at the heart of the European Construction; Goetschy, *European Journal of Industrial Relations* 1999, p. 120.

7 Pochet, *The OMC and the Construction of Social Europe – A Historical Perspective*, in: Zeitlin/Pochet, *The Open Method of Coordination in Action*, Brussels, 2005, pp. 37-82, p. 48.

macroeconomic policy favourable to growth and employment. Based on the Commission's proposal, the Irish Presidency at the end of 1996 made a first draft of what was to become the Employment Title of the Amsterdam Treaty.

The gestation of the European Employment Strategy was encouraged by the accession of countries in which explicit or implicit form of social partnership and full employment pretensions predominated (Sweden, Finland and Austria) and the accession to power of center-left governments in existing Member States (France, Italy and the UK). Moreover, the director-generalship of Employment and Social Affairs at the Commission had passed to the hands of an official (Allan Larsson) from Sweden – a country that had a reputation for utilising “active labour market policy” to maintain high levels of employment. Larsson's argument was that economic, monetary and employment policies were to be intricately linked with each other to meet mutually supportive goals.

The EES itself was part of a global deal including the adoption of the Stability and Growth Pact. The new French Socialist government, led by Lionel Jospin, agreed to the Pact in exchange for adding a new Employment Title to the proposed Treaty.⁸ For most of the Member States and in particular Germany, the Pact was intended to be a key instrument for fiscal management after the selection of the members of the Eurozone. The Council agreed to the French proposal. At that time, little attention was paid to the softer side of economic policy coordination, which was set out as a complement to fiscal policy co-ordination. The “soft” coordination of economic policies was conceived to monitor the consistency of national economic policies with the economic objectives of the EU. In case of a deviation from the so-called “Broad Economic Policy Guidelines” (BEPGs), the Council could adopt a non-binding recommendation directed to the Member State concerned; there is no other formal sanction. A guidelines procedure, based on the idea of sharing of experience and reform experimentation – inspired by the idea of benchmarking often used in industry – allowed working towards common goals at European level without encroaching on national sovereignty.⁹ The sanctions for non-compliance with the BEPGs take “only” the form of peer pressure and public opinion.

During the Amsterdam Summit in 1997, agreement was eventually reached in the form that the employment strategy should take: the multilateral process associated with the coordination of economic strategy – the guidelines procedure – would be adapted to employment policy. An Employment Title was integrated into the Treaty. Although the Treaty was ratified by all Member states only in 1999, the Employment Title became already fully operational in 1997: A special “jobs summit” of EU heads of state and government was organised in Luxembourg in No-

8 Pochet, in: Zeitlin/Pochet, p. 48-49.

9 Wallace, *The Changing Politics of the European Union: An Overview*, Journal of Common Market Studies 2001, p. 581.

vember 1997; as a result of this summit, the European Employment Strategy was launched.¹⁰

The creation of such guidelines procedure was (thus) a compromise between two positions: on the one hand, the conviction that European Intervention based on the Community method and a real common European employment policy would be too intrusive into the member states' competencies; and on the other hand, the awareness that high and rising unemployment represented a major social and economic challenge for Europe.¹¹

The Employment Title in the revised Treaty stipulated that employment was a matter of "common concern" to the member states. It laid the basis for an EU role in coordinating member states labour market policies – with the BEPGs-procedure being a "role model", as mentioned above. This method subsequently received the title "open method of coordination" at the Lisbon summit in 2000.

The EES Process as designed by the Amsterdam Treaty is the following: Each year, following the Commission's proposal, the Council adopts common European Employment Guidelines by a qualified majority vote. Afterwards they have to be translated into national employment policies on which each Member State reports to the Commission and the Council in their yearly "National Action Plans" (NAPs). These are analysed by the Commission, who makes recommendations to the Member states. Since 2000 the national recommendations have been integrated in a so-called "employment package", along with proposals for new guidelines for the following year. The Employment Guidelines (EGs) are then endorsed by the European Council and formally adopted by the Council (of labour ministers). Thus the cycle recommences.

Though the recommendations to individual states, which are deemed not to have followed the guidelines, have no binding effect, they could however be politically powerful.

The EES from 1997 to 2002

Between the Luxembourg summit of 1997 and 2002, the annual Employment Guidelines were organised under four pillars:

- a) improving employability: aimed at improving the access of the unemployed to the labour market, it focused on the development of a "preventive approach" to avoid long-term unemployment as well as on the implementation of "activation policies";
- b) developing entrepreneurship: making it easier to start and run a new business and to hire people in it by reducing administrative constraints and rendering taxation more employment-friendly;

¹⁰ For that reason the EES is also often characterised as the "Luxembourg process".

¹¹ Smismans, EUI Working Paper Law No 2004/1, p. 2.

- c) encouraging adaptability both for employees and businesses: this entailed modernisation of work organisation;
- d) strengthening equal opportunity policies; this involved a gender mainstreaming approach for all four pillars, reducing the gender gap, reconciling work and family life, and facilitating re-integration into the labour market.

About 20 EU guidelines were formulated each year by the Commission under the four pillars described above. In practice, the changes made to the Employment Guidelines until 2003 were fairly minor. In 2001, six “horizontal objectives” (i.e. cross-cutting the four pillars) were added:¹² increase the employment rate; improve the quality of employment; define a global strategy for life-long learning; involve the social partners in all stages of the process; develop relevant social indicators; find a balanced approach to the four pillars. Especially the first “horizontal objective”, to increase the employment rate (rather than simply cutting registered unemployment), became the centre and the main goal of the EES.

Along with the guidelines, the EES also includes a series of indicators.¹³ The so-called “key indicators” measure progress in relation to the objectives of the guidelines. For example, there are indicators that measure the total employment rate, the employment rate for people aged 55-64, the share of young adults still unemployed after six months, the tax rate on low-wage earners, and several dimensions of the gender gap in employment. The resulting tables are made available annually and show the relative position of all Member states on these dimensions.

In the frame of the EES-development, the Lisbon European Council of 2000 can be considered as its climax. The EU launched the “Lisbon process” and a new strategic goal – “to become the most competitive and dynamic knowledge-based economy in the world capable of sustainable economic growth with more and better jobs and greater social cohesion”.¹⁴ This process gave the EES a new impetus by creating a ten-year plan to reach. Quantified objectives with target dates were agreed for the Union as a whole – to increase the European employment rate to 70% by 2010, the female employment rate to 60% and the employment rate among older workers (55-64) to 50%.

The EES from 2002 until today

Ten years after the Maastricht Treaty and five years after the beginning of the Employment Strategy much had changed in the European process. Despite the fact that the 1999-2000 transition to the single currency was a success, the central question at the beginning of the 1990s, regarding which economic and social model in the context of a centralised monetary regime is the best, remained unanswered.¹⁵ The objectives of the Stability and Growth Pact (especially the one not to exceed the ceiling of 3% for the

12 Watt, Reform of the EES after five years: A change of course or merely of presentation?, *European Journal of industrial relations* 2004, pp. 117-137, p. 119; Pochet, in: Zeitlin/Pochet, 2005, p. 51.

13 Currently there are 35 key indicators and 64 “context” indicators.

14 Conclusions of the Portuguese Presidency.

15 Pochet, in: Zeitlin/Pochet, 2005, p. 53-54.

budget deficit) initially were considered to be consensual and accepted by all key actors – i.e. the central bankers and the Ministers of Economics and Finance. But after the debate about whether or not to send an early warning to Germany and Portugal (whose public deficits were approaching the 3% deficit ceiling), the Pact itself became a much more disputed theme, leading the former President of the Commission Romano Prodi to call it “stupid”. Recently, proposals from the Commission were put under discussion at the Ecofin Council to modify the Stability and Growth Pact and make it more flexible.

If the Stability and Growth Pact is under revision, the softer side of economic coordination – the BEPGs – has proved to be inefficient in its principal goal of coordinating economic (and social) reforms. The real effectiveness of the economic policy coordination tools has been questioned; a study carried out for the European Parliament showed a lack of awareness of the BEPGs nationally and therefore a lack of integration into national policy processes.¹⁶ The (non) compliance by the Member States with the BEPGs recommendations seemed to be similar to their response to the European employment guidelines.

In the first half of 2002 Commission and Member States jointly carried out a comprehensive evaluation of the EES’ merits and shortcomings. Initially, the evaluation process was rather secretive. The national researches regarding the advantages and the limits of the method followed no common methodology. On the other hand, it was the first time that the Member states evaluated their employment policies at the same time. Under the pressure of the Commission’s discourse on openness, all Member states decided to publish the results of the national evaluations on the web. The Commission’s synthesis of the results of the evaluation and the policy conclusions it drew from this exercise were published in two Commission Communications.¹⁷ In the first Communication, the EES was judged a success in terms of both labour market outcomes (reference is made to 10 million jobs being created in Europe between 1997 and 2002) and policy-making: “there have been significant changes in national employment policies with a clear convergence towards the common EU objectives set out in the EES policy guidelines”. Challenges remained, however, in demographic trends, regional differences, restructuring, globalisation and enlargement. In addition, it was noted, though fleetingly, that EU unemployment and the number of long-term unemployed remained high.¹⁸

The policy conclusions drawn by the Commission in its second Communication were that the EES needed to be focused more clearly on implementation rather than procedure. Steps had to be taken to raise awareness of the EES and to improve its visibility and impact. Also, coherence between the various policy processes, and especially the BEPGs, needed to be improved. During the Barcelona Council in March 2002 it had been decided that the BEPGs and the EEGs should be synchronised in terms of yearly

16 TEPSA, *The Broad Economic Policy Guidelines, Final Report*, Project Nr. IV/2001/05/01 for the European Parliament, Directorate General for Research, 24 January 2002.

17 European Commission, *Taking Stock of Five Years of the European Employment Strategy*, COM (2002) 416 final, 17.7.2002; European Commission, *On Streamlining the Annual Economic and Employment Policy Coordination Cycles*, COM (2002) 487 final, 3.9.2002.

18 Watt, *Reform of the EES after five years: A change of course or merely of presentation?*, *European Journal of industrial relations* 2004, pp.117-137, p. 125.

scheduling, rather than having the EES take place in the autumn and the BEPGs in the spring. Following this decision the Communication designed a new policy cycle which would be built on two blocks: a) the “Guidelines Package” (every April), composed of the BEPGs, the Employment Guidelines and the employment recommendations and b) the “implementation package” (every January), which included the BEPGs implementation report, the draft Joint Employment Report and the implementation report on the Internal Market Strategy. This was called the “streamlined Policy Coordination Cycle”. An important change was that both BEPGs and EES focus on implementation in a longer cycle of three years.¹⁹

Following the 2002 evaluation, the Commission adopted a Communication on the future of the EES in January 2003.²⁰ The four-pillar structure (employability, adaptability, entrepreneurship and gender equality) which had underpinned the guidelines since 1997 was replaced by three overarching objectives:

- full employment
- quality and productivity at work
- social cohesion and an inclusive labour market.

From that point on, all of the Employment Guidelines in the following years were – more or less – based on these three objectives.

Yet, in 2003, a lot of the employment targets the EU had set in the previous years turned out to be unmet. For that reason – and also in order to identify specific measures geared to helping the Member States implement the revised EES – a Taskforce was established in March 2003. The Taskforce was headed by ex Prime Minister Wim Kok of the Netherlands. The first report was issued in November 2003 and had the title “Jobs, jobs, jobs: creating more employment in Europe”. The main ingredients of the Taskforce’s recipe were the following: a) increasing adaptability of workers and enterprises; b) attracting more people to the labour market; c) investing more and more effectively in human capital; and d) ensuring effective implementations of reforms through better governance. The notions of adaptability and flexibility are stressed in the report; particular attention is drawn to the “best practices” in Denmark and the Netherlands for creating a balance between flexibility and security. The report also stresses the importance of lifelong learning and of “active ageing”.

The Commission welcomed this report and used most of its messages for clearer Recommendations in the year 2004.²¹ In this year, the Member States presented their first triennial NAPs and the streamlining process was tested. Also in 2004, another

19 This means that, while remaining annual, guidelines would, in principle, only be fully reviewed once every 3 years. In intermediate years guidelines would only take account of major changes.

20 European Commission, The future of the EES – “A Strategy for full employment and better jobs for all”, COM (2003) 6 final, 14.1.03.

21 European Commission, Communication from the Commission „Strengthening the Implementation of the European Employment Strategy, Proposal for a Council Decision on Guidelines for the Employment Policies of the Member States, Recommendation for a Council Recommendation on the Implementation of Member States’ Employment Policies, COM (2004), 239 final, 7.4.2004.

important change took place: The ten new Member States of the EU prepared their first NAPs for employment along with the 15 other Member States.

After the first report, the Taskforce was asked to present a second report on the Lisbon strategy as a whole. It was published in November 2004 under the title “Facing the challenge”. It should not be swept under the carpet that the reason to establish the task force in the first place was the underperformance of national policies in respect to the Lisbon targets. Concerning policy priorities, the report highlights improved economic growth, increased employment and productivity. Other priorities, which concern especially the labour market, include (again) strategies for investment in human capital formation, lifelong learning, active ageing as well as improving the adaptability of workers and enterprises.

Inspired by the second Taskforce report, in February 2005 the Commission made a proposal for a revamp of the Lisbon strategy. This proposal was based on a very critical evaluation of the first five years.²² It was stated that without further action, the 2010 target of a 70% overall employment rate would not be achieved. Labour productivity growth has continued to slow down and quality of work and inclusive labour markets remain important challenges in many Member States. The Commission observes very critically that the poor progress made was “not just a question of difficult economic conditions since Lisbon was launched, it also results from a policy agenda which has become overloaded, failing co-ordination and sometimes conflicting priorities”. From now on, focus should be put on delivering stronger, lasting growth and more and better jobs.

The Lisbon strategy revamp has led to a complete revision of the EES.²³ Its guidelines will from now on be presented in conjunction with the macroeconomic and microeconomic guidelines and for a period of three years.²⁴ This new EES covers a three year period, from 2005 to 2008. In this frame, the former NAPs are now called “National Reform Programmes” (NRPs).

The Employment Guidelines – as part of the integrated package of EGs and BEPGs – are as follows (for the period 2005-2008):²⁵

- Guideline No 17: Implement employment policies aimed at achieving full employment, improving quality and productivity at work and strengthening social and territorial cohesion,
- Guideline No 18: Promote a lifecycle approach to work,

22 European Commission, Communication to the Spring European Council “Working together for growth and jobs – A new start for the Lisbon strategy”, COM (2005) 24, 2.2.2005.

23 European Commission, Delivering on Growth and Jobs: A new and integrated economic and employment co-ordination cycle in the EU, Companion document to the Communication to the Spring European Council 2005 (COM (2005) 24), SEC (2005) 193, 3.2.2005.

24 Despite the fact that the Treaty envisages separate annual guidelines for employment (Art. 128 EC-Treaty) and economic policy (Art. 99 EC Treaty).

25 Adopted Employment Guidelines 2005-2008, Council Decision of 12 July 2005 on Guidelines for the employment policies of the Member States (2005/600/EC).

- Guideline No 19: Ensure inclusive labour markets, enhance work attractiveness, and make work pay for job-seekers, including disadvantaged people, and the inactive,
- Guideline No 20: Improve matching of labour market needs,
- Guideline No 21: Promote flexibility combined with employment security and reduce labour market segmentation,
- Guideline No 22: Ensure employment-friendly labour costs developments and wage-setting mechanisms,
- Guideline No 23: Expand and improve investment in human capital,
- Guideline No 24: Adapt education and training systems in response to new competence requirements.

Some authors see the new phase after 2005 as the beginning of “realistic co-operation” between Member States and the EU.²⁶ As the limits of the EES had become obvious (the implementation, especially of the employment goals, was far behind the targets), the Commission now seems to accept the “national ownership” of the OMC process. This implies that the performances of the Member States will not be ranked even if the Taskforce had demanded such a ranking as a prerequisite for “naming, shaming and faming”.

Throughout the next cycle of the Employment Guidelines (2008-2010) the EES will focus especially on “flexicurity”, which strikes a balance between flexibility and security on the labour market.²⁷ Member States will be invited to use their National Reform Programmes to report explicitly on their flexicurity strategies and the Commission will report on the progress made at the end of the Lisbon Cycle.²⁸

The discussion on the EES

The scientific discussion on the EES is part of the overall discussion on the OMC as a new mode of governance in the European Union.²⁹ Literature on the OMC in general – and the EES in specific – wavers between excessive enthusiasm and doubts.³⁰ There are many different aspects that have been discussed, like issues of

26 Heidenreich/Bischoff, *The Open Method of Coordination. A way to the Europeanization of social and employment policies?*, JCMS 2008, Vol. 46, No 3, pp. 497-532.

27 European Commission, *Towards common principles of flexicurity – more and better jobs through flexibility and security*, COM (2007) 359; European Commission, *Communication to the Spring European Council “Strategic Report on the renewed Lisbon Strategy for growth and jobs: launching the new cycle (2008-2010) – Keeping up the pace of change”*, COM (2007) 803 final, p. 10.

28 European Commission, *Ten Years of the European Employment Strategy*, 2007.

29 Scott/Trubek, *Mind the Gap: Law and New Approaches to Governance in the European Union*, *European Law Journal* Vol. 8, No. 1 March 2002, pp. 1-18, p.1.

30 For the latter, see Raveaud, *The European Employment Strategy: Towards More and Better Jobs?*, JCMS 2007, Vol. 45 No 2, pp. 411-434.

democracy in general (in the sense of participation, transparency and openness)³¹, the participation of the social partners in the EES³² or the OMC as a new form of governance.³³ For the purposes of our comparative project, it should be useful to focus on the discussion on the aspects of “soft versus hard law” and on the impact the EES might have on the Member States’ policies: if we want to find out more about the normative character of the EES, then we should ask under what premises it can influence national normative structures.

The discussion on “soft” and “hard” law

Much of the controversy on the EES/OMC concerns the respective merits of “hard” and “soft” law in the construction of Social Europe.³⁴ A shift from “integration by law” to “Europeanization by figures” via benchmarking seems to have taken place.³⁵ Both those who favour the OMC as a mode of governance and those who question its desirability compare the OMC, implicitly or explicitly, with the Community Method. The Community Method is thought of as “hard law” because it creates uniform rules that Member States must adopt, provides sanctions if they fail to do so, and allows challenges for non-compliance to be brought in court. In contrast, the OMC, which has general and open-ended guidelines rather than rules, provides no formal sanctions for Member States that do not follow the guidelines, and is thought of as “soft law”. Proponents of the OMC argue that it can be effective despite – or rather because of – its open-ended, non-binding, non-justiciable qualities. Opponents question that conclusion. They not only argue that the OMC cannot do what is needed to construct Social Europe but also that “hard law” is essential. They also fear that the OMC might become the dominant method of regula-

31 Cohen/Sabel, *Sovereignty and Solidarity: EU and US*, in: Zeitlin/Trubek (eds.), *Governing Work and Welfare in a New Economy: European and American Experiments*, Oxford 2003, pp. 345-375; Borrás/Jacobsson, *The open method of co-ordination and new governance patterns in the EU*, *Journal of European Public Policy* (11) 2004, pp. 185-208.

32 Casey, *Building social partnership? Strengths and shortcomings of the European Employment Strategy*, *Transfer* 1/2005, pp. 45-63; Watt, *Reform of the EES after five years: A change of course or merely of presentation*, *European Journal of industrial relations* 2004, pp. 117-137.

33 See Borrás/Jacobsson, *The open method of co-ordination and new governance patterns in the EU*, *Journal of European Public Policy* 11:2 2004, pp. 185-208; de la Porte/Nanz, *The OMC – a deliberative-democratic mode of governance? The cases of employment and pensions*, *Journal of European Public Policy* 11:2 2004, pp. 267-288; Mosher/Trubek, *Alternative Approaches to Governance in the EU: EU Social Policy and the European Employment Strategy*, *JCMS* 2003 Vol. 41 No. 1, pp. 63-88; Eberlein/Kerwer, *New Governance in the European Union: A Theoretical Perspective*, *JCMS* 2004, Vol. 42 No. 1, pp. 121-142.

34 Trubek, D./Trubek, L., *Hard and Soft Law in Construction of Social Europe: the Role of the Open Method of Coordination*, *European Law Journal* 2005, Vol 11., No 3 pp. 343-364; Trubek/Trubek, *The Open Method of Coordination and the Debate over “Hard” and “Soft” Law*, in: Zeitlin/Pochet (eds.), *The Open Method of Coordination in action – The European Employment and Social Inclusion Strategies*, Brussels, 2005, pp. 83-103.

35 Bruno/Jacquot/Mandin, *Europeanization through its instrumentation: benchmarking, mainstreaming and the open method of co-ordination ... toolbox or Pandora’s box?*, *Journal of European Public Policy* 13:4 2006, pp. 519-536.

tion on issues which are subject to little or no EU competence and, more seriously, on issues which are subject to hard law, thus demoting the Community Method.³⁶

Some authors³⁷ point out that – in drawing the dichotomy between hard law and soft law – it is often forgotten that the EC has used a combination of these measures, not only in social law, but also in areas such as environmental law. They argue that hard and soft law should not necessarily exclude each other. Instead they underline the possible utility of hybrid solutions.³⁸ Some others argue that, if in its ideal-typical format the OMC can deliver “better governance”, then it is not a second-best option to hard legislation: it is a better way forward, because it fosters learning and provides flexibility to the policy process.³⁹

Regardless of what advantages or disadvantages soft law might have, a unanimity on the character of the OMC (and the EES as a prominent example of it) as “soft law” surely exists. Consequently – and beyond the theoretical discussion on what is better for the European Integration – the next step is to ask what kind of impact soft law might really have *in practice* on the Member States’ policies and legislation.

The discussion on the impact of EES on Member States’ policies

Did the EES influence the employment policies of the Member States? And if yes to what extent? This is an important question in the current scientific debate on the EES. The key-words are the “European Social Model” and “policy learning”.

A good deal of policy-makers and academics look at the OMC (and the EES as part of it) as an instrument to build “Social Europe”. From a reform perspective, the EES can be seen as an additional instrument with which to enhance the social dimension to the European Union. Others, however, remain sceptical of its real added value to compensate the European Social Model for the liberal bias of EU integration.⁴⁰ Again others question how one can speak of one “European social model” when evidence from employment policy points to a conflict upon models, to such an extent that the real politics of the EES is all about finding out which models are under pressure. This question becomes even more complex if one takes research into account which demonstrates that: (a) The EU “social model” is more a discourse sponsored by some political elites in some countries than reality; and (b) EU social policy has been so far more “American” in style than “European”, in the sense that the US style approaches (by way of the British government) have greatly influenced the social and employment policy (keywords: workfare and la-

³⁶ Hatzopoulos, Why the Open Method of Coordination is Bad for You: A Letter to the EU, *European Law Journal* 2007, Vol. 13 No. 3, Pp. 309-342, p. 322.

³⁷ Trubek/Trubek, *ibid.*

³⁸ Scharpf, The European Social Model: Coping with the Challenges of Diversity, *Journal of Common Market Studies*, Vol. 40 No. 4 2002, pp. 645-670.

³⁹ Radaelli, The Open Method of Coordination: A new governance architecture for the EU?, *Sieps* 2003, p. 8, 22 and 52.

⁴⁰ See de la Porte/Pochet, The EES: existing research and remaining questions, *Journal of European Social Policy* 2004, pp. 71-78, p. 75 for the literature overview.

bour market flexibility).⁴¹ Also it has been argued that the EES is characterised by Third Way type ideas, including equity and activation.⁴² The guidelines on employment reflect the political options of New Labour;⁴³ as such they are not necessarily adapted to the macro-economic reality of other countries. Other authors differentiate more. They conclude that the employment policy model behind the EES is a compromise between the liberal and the Nordic models: on the labour demand side the EES, with its attention for entrepreneurship and adaptability, is inspired by the liberal model emphasising labour market deregulation and tax reductions; whereas on the labour supply side the EES is inspired by the Nordic model focusing on employability via training and active labour market policies.⁴⁴ In any case, it can be affirmed that most of the pressure to converge towards the EU's objectives under the EES – of which activation is an important component – is on countries with Continental and Southern European welfare state arrangements, with dominance of “passive” policies.⁴⁵

When it comes to the notions of “policy learning” and “policy transfer”, almost all authors agree that an assessment is difficult to make. One reason is that, when measuring the national impact of the EES, it is not easy to disentangle the effects of EU structural reforms from national structural reforms which would have been carried out anyway. Also, it is not easy to evaluate the respective merits of structural reforms and the macroeconomic situation when trying to explain, for example, the improving or worsening employment results.⁴⁶ Some authors state that “there is (...) some evidence that (...) OMC processes have contributed to specific changes in individual Member States’ policies. Such evidence is most abundant for the EES”.⁴⁷ But on the other hand, they agree that “the possibilities for mutual learning on behalf of the Member States seem to be rather limited; there are relative few examples of direct policy learning and cross-national policy transfer”.⁴⁸ Critics of the “change has happened because of the EES”-position claim that “we only know that some change took place but there is no empirical data which proves that the change really happened as a result of the EES”.⁴⁹

It has also been stated that the OMC process has transformed from a discursive operation to learn from each others’ best practices and to implement change, to a

41 Radaelli, *The Open Method of Coordination: A new governance architecture for the EU?*, p. 29.

42 Begg, *Hard and Soft Economic Policy Coordination under EMU: Problems, Paradoxes and Prospects*, Working Paper Series No. 103, Center for European Studies, Harvard University, Cambridge 2003.

43 De la Rosa, *The Open Method of Coordination in the New Member States – the Perspectives for its Use as a Tool of Soft Law*, *European Law Journal* 2005, Vol 11, No.5, pp. 618-640, p. 636.

44 Smismans, *EUI Working Paper Law Nr. 2004/1*, p. 15.

45 De la Porte/Pochet *op. cit.* note 2 *supra*.

46 Goetschy, *The open method of coordination and the Lisbon strategy: the difficult road from potential to results*, *Transfer* 1/2005, pp. 64-80, p. 69.

47 Zeitlin, *The Open Method of Co-ordination in Action: Theoretical Promise, Empirical Realities, Reform Strategy*, in: Zeitlin/Pochet (eds.), *The Open Method of Co-ordination in Action – The European Employment and Social Inclusion Strategies*, Brussels 2005, pp. 447-503, p. 451.

48 Zeitlin, *ibid.*, p. 472.

49 Hartlapp, *Über Politiklernen. Überlegungen zur Europäischen Beschäftigungsstrategie*, WZB-Discussion paper 116, Berlin, 2006, p. 8.

sort of “beauty contest” showing one’s successes but omitting one’s failures.⁵⁰ Examinations of the peer review procedure – as one component of the EES – show that, whilst a learning process has been established, its impact has been limited. Although the EES has established labour market targets, the evidence reveals that Member States will rely on home-grown means – administrative, institutional and legal – to meet them. The peer review procedure was, at best, a learning process for a limited community of labour market technicians and experts. There were no significant efforts at emulation.⁵¹

Empirical evidence for a subtle, but nevertheless quite effective influence of the EES on the employment strategies of Germany⁵² and France has also been presented. Yet learning does not mean a transfer of concepts. In the German case learning consisted more of a mutual “irritation” of European and national patterns of perception and behaviour; and the French case is characterised by a mostly symbolic conformity to the European objectives.⁵³

Other researchers argue that the EES has been acting as a *framer* of employment policy in the Member States.⁵⁴ By doing so, the supranational level has restrained several dimensions of employment policy and labour market policies in the Member States mainly by: (a) defining and (reinforcing) what problems domestic policy-makers should attack to increase member state competitiveness; (b) pointing out and/or reinforcing the idea that a policy line is good or bad; (c) restricting and limiting the policy options and courses of action that domestic policy-makers should develop and (d) providing courses of action that allow policy makers to “learn” about ways to solve the problem in question. Under the influence of the EES, member states have been experiencing a “Europeanisation of labour market problems and solutions”.⁵⁵

The impact of the EES from a comparative law perspective: an outlook

Almost all of the above cited literature on the impact or influence of the EES/OMC on the Member States belongs to the field of political science or social policy. In fact, the concept of policy transfer or policy learning is well established in the political science literature. Lawyers have been slow to argue that the OMC is capable of offering a normative dimension to European integration processes or even to national structures. It has been seen as a *pre-legal* process or an *alternative* or as a

50 V. Maydell et al., *Enabling Social Europe*, 2006, p. 109.

51 Casey/Gold, Peer review of labour market programmes in the European Union: what can countries really learn from one another?, *Journal of European Public Policy* 12:1 2005, pp. 23-43, p. 36.

52 For the German case, see Eichhorst/Rhein, *Der Beitrag der gemeinsamen EU-Beschäftigungsstrategie zur Verbesserung der Arbeitsmarktlage*, *Bundesarbeitsblatt* 11/2004, pp. 4-11.

53 Heidenreich/Bischoff, *The Open Method of Coordination. A way to the Europeanization of social and employment policies?*, *JCMS* 2008, pp. 497-532.

54 López-Santana, *The domestic implications of European soft law: framing and transmitting change in employment policy*, *Journal of European Public Policy* 13:4 2006, pp. 481-499, p. 482.

55 *Ibid*, p. 494.

complementary political process.⁵⁶ Yet the role of the EES should not be underestimated: the framing of a policy through Guidelines, Indicators and Benchmarking is (as discussed) not a soft or neutral process, but rather it shapes – and restricts – the framework within which national actors work. As a prominent Belgian politician put it: “The open method of coordination” is both a cognitive and a normative tool. (...) It is a normative tool because, necessarily, common objectives embody substantive views on social justice”.⁵⁷ Member States are no longer free to determine national policy but must act within officially recognised Community Guidelines which have taken a normative status..⁵⁸

In a comparative welfare law approach, it will be certainly interesting to see to what extent the EES really has had an impact on national normative structures; or, in other words, to see to what extent “soft” law at the European level might prove to be “harder” at the national level. For that purpose, the comparative analysis of a specified aspect of the EES – such as the activation policies – certainly promises to be fruitful. Instead of asking *in general* what impact the EES might have on national employment *policies* or on reducing unemployment, it seems more rewarding to single out concrete laws, legal practices and questions in the Member States and compare them with each other. Even if we should come to the conclusion that the normative impact of the EES is not that significant in practice, the comparison itself may lead us to more “learning from each other”. It is exactly this goal that has been at the heart of comparison law for many years, long before the EES and OMC were invented.

56 Szyszczak, *Experimental Governance: The Open Method of Coordination*, *European Law Journal* 2006, pp. 486-502, p. 500.

57 Vandenbrouke, *The EU and social protection: What should the European Convention propose?* Paper presented at the MPI for the Study of Societies, Köln, 17 June 2002, p. 9.

58 Szyszczak, *The Evolving European Employment Strategy*, in: Shaw (ed.), *Social Law and Policy in an Evolving European Union*, Oxford 2000, p. 211.

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From Unemployment to Active Jobseeking: Changes and Continuities in Social Security Law in the United Kingdom

Neville Harris

Introduction

The notion that worklessness is immoral was inherent in the English Poor Law's tradition of setting the poor to work. While the causes of unemployment are no longer regarded as confined to or even primarily derived from personal moral failure – since structural factors to do with economic changes and the demand for labour, particularly diversely skilled labour, are acknowledged to be the principal causes – the idea that being in employment is a personal responsibility retains a continuing influence over social security provision for the unemployed. Indeed, it is reflected in the growing individualisation of the relationship between the state and unemployed citizen, as part of the managerialistic governance of welfare that places an emphasis on strict controls with contractual underpinnings.

This is certainly true of the principal benefit for those out of work in the UK today, the jobseeker's allowance (JSA). In essence JSA is a simple benefit, providing contribution-based entitlement during the first six months of unemployment and thereafter (or from the first day, if the insurance contribution record is inadequate) means-tested entitlement of unlimited duration. This benefit replaced unemployment benefit (UB) in 1996. Like UB and the benefits that preceded it, dating back to the National Insurance Act 1911, one of the principal conditions of entitlement is that of being "available for employment". Since 1989 claimants have also had to be "actively seeking employment", but there is a basic continuity in the principles of social security law relating to this area. However, over the past two decades the conditionality of this benefit has increased, in two main areas: first, in the requirements concerned with worksearch, some of which are now linked to specific government schemes for arranged work and training (under various "New Deal" programmes); and secondly, in the sanctions that must or may be applied to those who do not take up employment or participate in activation measures, which are underscored by the terms of an express agreement between jobseeker and government agency.

These developments are part of a broader “welfare to work” strategy that the UK Government has been pursuing over the past 10 years and which is now targeted not only at those claiming JSA but also those perceived to have a looser attachment to the labour market due to sickness, disability or family responsibilities. It is linked to a wider employment policy which is based around the aim of achieving an 80% employment rate – in other words, that 80% of the population of working age should be in employment and that the 20% who are not should be made up exclusively of “those who have a good reason to be outside the labour market”, namely people who have retired early, have full-time caring responsibilities or who have a severe disability or illness that makes them incapable of work (HCWPC: paras 19 and 20). Since 1971, the social security system has also tried to incentivize the take-up of employment through the provision of means-tested in-work benefits or, since 1999, tax credits, so that the prospect of low wages does not deter people from moving from benefit to work.

This chapter examines the continuities and changes in social security law that have shaped the current system of benefits for the unemployed. It explains how the underlying ideologies and perceived social and economic imperatives have impacted upon the developing legal and policy framework. It highlights ways in which the policies that have been implemented, particularly in recent years, have interacted with long-standing principles within social security law, such as the notion of ‘voluntary unemployment’.

From Poor Relief to the ‘Labour Exchange’ and Unemployment Insurance

Activation strategies have a long history in the UK. They can be traced back to the Elizabeth Poor Law, which adopted the principle of setting the poor to work as a condition for relief. As early as the Poor Relief Act 1576 there was a local duty to provide materials for the able-bodied poor to work (Fraser 1984, 32). The Poor Law Act of 1601 continued the principle of providing and requiring work for the able bodied within each parish, including children whose parents could not support them, while maintaining a harsh regime of accommodating the incapable poor in almshouses or “poor-houses” and sending those considered to be capable of work but unwilling to engage in it to “houses of correction”, a form of punishment. While it is not necessary to recount the history of the Poor Law, it is important to reflect on the underlying philosophy of self-support and the deterrence of idleness that underpinned it, since it has had a continuing influence on social security and is even reflected in many of the central provisions of the modern law.

The Poor Law still offered the principal form of poverty relief for the unemployed by the turn of the 20th Century, a time when unemployment was growing. In London, “distress committees” provided assistance to unemployed workers (Beveridge 1930). Bureaucratic control had been and remained a feature of the

Poor Law administration, but by registering and classifying the unemployed and investigating their circumstances the distress committees of early 20th Century London were perhaps a precursor to the strict administrative controls of later years. The distress committees were established under the Unemployed Workmen Act of 1905, a year which also marked the establishment of the Royal Commission on the Poor Law. When this Commission reported in 1909 there were Majority and Minority Reports. While they disagreed on the subject of how much state involvement in welfare provision was desirable or needed, the reports agreed on two fundamental mechanisms: the introduction of a national scheme of unemployment insurance and the establishment of labour exchanges, which were places where the unemployed could register their interest in employment and might be found work. The exchanges in fact preceded the unemployment insurance scheme, although they became inextricably linked. The Labour Exchanges Act 1909 gave the Board of Trade, a government ministry, a power to establish and maintain labour exchanges in locations where they were needed and empowered the making of regulations concerning the management of exchanges, which were later known as employment exchanges. The exchanges maintained separate registers for adult and juveniles. The numbers registering doubled once the unemployment insurance scheme which was introduced in 1912 under the National Insurance Act 1911 made registration for work at an exchange a necessary condition of entitlement for unemployment benefit (Gilbert 1966, 262). However, only unemployment from a limited number of prescribed trades was covered by the scheme (see below).

Two particular features of the scheme of unemployment benefit under the 1911 Act have come to represent continuities in this area of social security law. These elements were not only present in the unemployment insurance scheme, which was a contributory scheme, but were later to also become features of the principal social assistance scheme, known as unemployment assistance. The first of the features was a basic test as to whether or not continuing unemployment was preventable – a work-test condition. The second comprised a penalty for those whose unemployment was avoidable. Under the work test condition (in section 86(3) of the National Insurance Act 1911), the claimant could only secure entitlement to benefit if “capable of work but unable to obtain suitable employment”. The penalty comprised a period of disqualification for benefit of six weeks where the unemployment arose from “misconduct” or the claimant “voluntarily [left] his employment without just cause” (section 87).

These features of unemployment insurance, its contributory basis and the fact that the scheme was limited to particular trades such as sawmilling and shipbuilding where unemployment was cyclical and therefore largely short term, reflected the actuarial basis to the scheme. The work test and disqualification period helped to protect the collective insurance fund against unwarranted claims in the same way that avoidable losses (or losses capable of mitigation) would not be compensated (or fully compensated) under commercial insurance arrangements. The 1920s saw the gradual extension of the unemployment insurance scheme to cover more trades, provide benefit of longer duration and make provision for claimants’ dependants. In

addition, new schemes such as “extended benefit” were introduced for those who had exhausted their entitlement to unemployment benefit. Later, there was “transitional benefit” for people who could not meet all the contribution conditions (Fraser 1984, 187). Despite the increasing generosity of the unemployment insurance scheme, the conditions of entitlement remained tight and were intensified in response to continuing concern to avoid abuse.

The Unemployment Insurance Act 1920 embodied the notion of availability for work, which remains a condition of entitlement today. The above-mentioned work test condition became, under the 1920 Act (section 7(1)(iii)), one of being “capable of *and available for* work, but unable to obtain suitable employment” (emphasis added). However, the disqualification period in respect of voluntary employment ceased to be a fixed period of six weeks. Instead an element of officer discretion was introduced: it became “six weeks or such shorter period being not less than one week...” (section 8(2)). The work test condition was further tightened up just one year later when the proportionment of benefits to contributions – which it was assumed would prevent abuse, as “the malingerer... could only cheat himself since unnecessary claims would reduce entitlement to benefit when it was really needed” (Fraser 1984, p 187) – was abandoned. Thus the Unemployment Insurance Act 1921 provided that “No person shall be entitled to benefit... unless he proves that he is... genuinely seeking whole-time employment but unable to obtain such employment” (section 3(3)). Therefore mere availability for work was insufficient. The claimant now had to be “genuinely seeking” it and had the onus of proving that he or she was doing so. A further amendment, made by Unemployment Insurance (No 2) Act 1924 (section 3) confirmed two separate conditions related to this work test: first, the claimant had to be “capable of and available for work” and, secondly, had to be “genuinely seeking work but unable to obtain suitable employment”.

Significant numbers of claims were refused as a consequence of the more onerous conditions from 1921. According to Fraser (1984, 188), in the period from March 1921 to March 1930, three million claims were turned down for failure to meet the “genuinely seeking work” condition. There is an interesting contrast with the less strict work test condition that was attached to “extended benefit” (the benefit for those who had exhausted their entitlement to unemployment benefit) when entitlement to it was made of unlimited duration in 1924. The claimant was entitled to the extended benefit if, among other things, “he is making *every reasonable effort* to obtain employment suited to his capacities and is willing to accept such employment” (Unemployment Insurance (No 2) Act 1924, section 1(3)(d), emphasis added). Extended benefit was later replaced via the Unemployment Insurance Act 1927 by a means-tested and discretionary benefit known as “transitional benefit”, noted above, which later became “transitional payment”. It was replaced in 1934 by “unemployment assistance” – the forerunner of successive means-tested assistance schemes: “(national) assistance” (1948-66), “supplementary benefit” (1966-87) and the two current schemes, “income support” (1987-) and “income-based jobseeker’s allowance” (1996-date).

The “genuinely seeking work” condition of entitlement to unemployment benefit was abolished under section 6 of the Unemployment Insurance Act 1930. It had been considered to be well nigh impossible to prove “genuineness” (Lundy 2000, 302). Such a test was not to reappear until nearly 60 years later (below). The 1930 Act also increased basic rates of benefit and has been viewed as the most generous of the unemployment insurance measures before economic slump and mass unemployment forced the Government into cutting benefits and tightening conditions of entitlement, leading to some one million claimants being excluded from entitlement (Davison 1938, 8, 15; see Harris 2000, 81-82). Nonetheless, the 1930 Act introduced some further work test conditions which are still with us today. Indeed, today’s social security lawyers in the UK would instantly recognise the terminology employed in section 4 of the Act. This provided for disqualification from benefit “for a period of six weeks or for such shorter period and from such date as may be determined by a court of referees or the umpire” where the claimant: (i) had “without good cause” refused or failed to apply for a vacancy notified to him by an employment exchange or other recognised agency; or (ii) had

“without good cause refused or failed to carry out any written directions given to him by an officer of an employment exchange with a view to assisting him to find suitable employment (being directions which were reasonable having regard both to both the circumstances of the claimant and to the means of obtaining that employment usually adopted in the district...)”.

These tighter conditions remained despite the extensions to provision that occurred as national economic conditions improved.

The Poor Law idea of “setting the poor on work” was not adopted. But although there was no inter-war equivalent of the New Deal programmes introduced by the post-1997 Labour Government, there were industrial transference schemes under which unemployed workers were in effect compelled to move from areas of labour surplus into those where work was available (Harris 2000, 80-81). Under the Unemployment Insurance Acts of 1920 and 1930, juveniles could be required to attend a course at an instruction centre or face disqualification from benefit. Subsequently, in exploring ways in which work incentives might be maintained, William Beveridge proposed not only the maintenance of a gap between basic benefits and wages, but also the discouragement of idleness through benefit sanctions, which were already a feature of the unemployment insurance scheme, and requirements to attend courses of training as a condition of receipt of benefit. The Beveridge Report, which formed the blueprint for the UK’s welfare state which was developed after the second world war, argued that safeguards were needed in case “men... settle down to” life on benefits; it proposed attendance at a work or training centre for six months (Beveridge 1942, para 131), although in the event this reform was not implemented because it was considered impracticable.

However, both the work test that was attached to the basic conditions of entitlement and the six weeks’ maximum disqualification continued on into the National Insurance Act 1946 that embodied the social insurance reforms proposed in

the Beveridge Report. As the insurance and assistance schemes evolved, these features were present within both of them. There was a requirement on the claimant to register as available for work, a requirement that did not for example apply to women caring for a child or persons who were physically or mentally incapable of work. This is important, as the same basic work test conditions applied to all unemployed claimants apart from those exempt from them. Insurance benefits declined in importance particularly by the 1960s and 1970s (Wikeley 1989) because they were not sufficiently up-rated and because unemployment became more long term and increasing numbers of young people who had no insurance contributions claimed benefit on leaving school. These factors led to an increasing demand for means-tested (and non-contributory) assistance, known by then as supplementary benefit, and a much reduced demand and qualification for insurance-based unemployment benefit.

So we can see that in the period from the National Insurance Act 1911 until the Unemployment Act 1934 the basic framework was established and that despite some changes, including the extension of the maximum disqualification period, its features represent an important continuity in social security law. However, although unemployment in the UK in January 2008 stood at exactly the same level as in 1935, at 1.6 million (Ministry of Labour Gazette, December 1935, 480; <http://www.statistics.gov.uk/cci/nugget.asp?id=12> (accessed 26 March 2008)), those claiming benefit today face much tougher work test conditions, linked to significant administrative controls. So, moving on from the continuities, what transitions have occurred, and why?

Tightening the screw – the Conservatives’ reforms post-1979

By the 1980s there was perceived to be crisis in the welfare state in the UK. The benefit system had become unsustainably expensive, overly complex and condemned for stifling individual endeavour. These problems were anathema to a Government committed to monetarist economic policy and a neo-liberal approach to state welfare. According to the Conservative Governments’ policy document (Green Paper) on social security reform in 1985, social security had “lost its way” (HM Government 1985, Vol 1, para 1). The Conservatives, who had been returned to power in 1979, instituted a review of the social security system. However, it was principally concerned with means-tested benefit, especially supplementary benefit and housing benefits, which were the most complex and expensive to administer. Essentially the basic general conditions of entitlement to unemployment benefit were not affected by the proposed changes that resulted from this review. However, the Social Security Act 1986 effected an increase in the maximum period of disqualification for ‘voluntary’ unemployment and related matters (above) from six to 13 weeks. The Secretary of State for Social Security was also given a power by the Act to increase this period using delegated legislation. It was not long before the power was exercised. In 1988 the maximum disqualification period was extended

to 26 weeks, where it remains. However, the Secretary of State had and continued to have (Social Security Act 1989, section 12(2), Jobseeker's Act 1995, section 19(3)) no power to increase it beyond 26 weeks, it can only be reduced unless Parliament votes otherwise. There was, however, no tightening up in the basic availability for work condition, save for the introduction of limitations which claimants were permitted to place on their availability (see Wikeley 2002, p 341). These limitations were greatly increased once JSA was introduced in 1996/97 (see below).

There was a return to the idea that the law should place some onus on the claimant not merely to indicate availability for work but also a sincere intention to obtain it. Previously, as noted above, claimants had had to show they were "genuinely seeking work". Under the Social Security Act 1989 (section 10) that condition was effectively reintroduced through a requirement to be "actively seeking employed earner's employment". The Act also enabled the "steps which a person is required to take in any week if he is to be regarded as actively seeking employed earner's employment in that week" (section 10) to be prescribed by regulations. Concerns were, however, expressed that the new condition was demeaning, since those who remained unemployed despite seeking work would regularly be confronted with their own demoralising sense of failure (Buck 1989). They were also considered to be harsh given the paucity of job opportunities, the extent of unemployment at the time and the unreliability of the evidence cited by the Government to confirm that claimants in general made inadequate efforts in the search for a job (Wikeley 1989).

In 1990, when Parliament was debating a new Social Security Bill, an unsuccessful attempt was made by an opposition MP to have the "actively seeking" work condition abolished, on the grounds that it was unfair and was designed to depress wage levels by forcing the unemployed to accept low paid work (House of Commons Debates, 3 April 1990, col 1086), a charge which in fact is less potent today in view of the introduction of the minimum wage in the late 1990s. It was reported that in the first seven weeks after the implementation of the Social Security Act 1989, 700 unemployment claimants per week were being given written warnings about their job-seeking activities and nearly 600 of them "subsequently had their benefit suspended when their claims were referred to adjudication officers" (col.1088). The Government confirmed that between 9 October 1989 and 26 January 1990, 11,400 claimants were issued with warning letters for failing to seek work actively, and that there was "a rising trend in the number of claimants warned about inadequate job search" (col 1093, Mrs G Shephard MP, Under-Secretary of State). Approximately 15% of the claimants who were warned had to be referred to adjudication officers for consideration of disallowance (col.1093).

By this stage the Government could point to the development of training and employment assistance programmes, both for adults and specifically for young people (Harris 1989). Among these was the Youth Training Scheme (YTS). Young people leaving school and finding themselves unable to secure employment did not have the contributions record to enable them to qualify for unemployment benefit, but they could qualify for means-tested supplementary benefit. However, if they

unreasonably refused or failed to avail themselves of a training place on the YTS they faced a 40% reduction in their weekly benefit. In the nine months from December 1983-September 1984 over 10,000 young people were subjected to this reduction on the grounds of non-participation in the YTS (House of Commons Debates, Vol 69, cols 165-166, 4 December 1984). The Government went one important stage further in the Social Security Act 1988, when it raised the minimum age of entitlement to social security for most claimants from 16 to 18 (see Harris 1988).

For older people there was the Employment Training programme, which paid an allowance marginally higher than the relevant rate of benefit. Under the Social Security Act 1975 (section 20) those who refused to participate in training approved for the claimant by the Secretary of State faced benefit disqualification. Eventually training was covered by a number of separate disqualification grounds, introduced by the Employment Act 1988 (section 27), and later consolidated in 1992 legislation (Social Security Contributions and Benefits Act 1992, s 28), related to failing to apply for or take up a training place, voluntarily leaving a training place or losing one's place due to misconduct. In most cases there was a defence of having "good cause" for the action or inaction in question. As with the employment-related grounds of disqualification, those who claimed basic assistance (which from 1987 changed from supplementary benefit to "income support") during the period of disqualification were also subjected to a reduction in the rate of this benefit. The reduction, amounting to 40% of the personal allowance element of the benefit, ensured that the disqualification had "a financial bite" (Mesher and Wood 1995, p 126).

So, by the early 1990s there was in place a detailed and wide-ranging statutory regime for the enforcement of worksearch and availability for work. There was once again a test to be satisfied of being actively engaged in the search for employment, although as Lundy points out, it had already been held that the basic test of availability for work implied "some active step by the [claimant] to draw attention to his availability" (Commissioner's Decision R(U)5/80, para 14, cited in Lundy 2000, n.60). Although some of disqualification grounds required an absence of "good cause" – for example, for failing to apply for a position notified to the claimant – the factors that should be taken into account in determining "good cause" were tightly defined by the regulations, as amended in 1989; a person could not, for example, normally claim that travel to work time constituted good cause unless it was more than one hour each way (Social Security (Unemployment, Sickness etc) Regulations 1983 (SI 1983/1598), reg 12E). Disqualification could now be imposed for up to 26 weeks and the grounds on which it could be instituted had been extended to include participation in training programmes.

The Jobseekers Act 1995 and activation

The most recent legislative reform of real significance occurred in 1996 with the introduction of jobseeker's allowance (JSA) under the Jobseekers Act (JA) 1995.

The current framework is still based around this Act. JSA combines two separate schemes: (1) Contribution-based JSA (CBJSA), which replaced unemployment benefit; and (2) Income-based JSA (IBJSA), which replaced income support (but only for those who are required to be available for work) and which, like income support, is a means-tested benefit. Approximately 80% of the people entitled to JSA received IBJSA, since individual entitlement to CBJSA runs for only six months and once it is exhausted a claimant will in effect be forced to seek entitlement to IBJSA, as will a person who does not meet the contributions requirement for CBJSA.

As Lundy explains, “JSA was introduced with the express intention of reinforcing the link between the receipt of social security and the search for work” (Lundy 2000, 291). The notion of an obligation to work that underpins JSA may be in furtherance of traditional values, religious and moral, attached to the work ethic. But it also has a strong contractarian association in the context of social security and with the reciprocal obligations of citizenship. The latter are reflected in the long-standing principle of universal insurance but have been given additional emphasis by government in recent years as political justifications for making welfare entitlement increasingly conditional, particularly at a time when levels of unemployment had begun to fall and the availability of work increased.

In 1994 the Government set out its proposals for JSA, stating three main aims to the new benefit (Department for Employment/DSS 1994). First, JSA would “improve the operation of the labour market by helping people in their search for work, while ensuring that they understand and fulfil the conditions for receipt of benefit”. Secondly, it would result in a better deal for taxpayers, since it would offer “streamlined administration, closer targeting on those who need financial support and a regime which more effectively helps people back into work”. Thirdly, it would provide a better service to claimants by virtue of there being a “clearer, more consistent benefit structure, and by better service delivery”. What was contemplated was a more active, managed process of ensuring that the unemployed retained a firm attachment to the labour market. This meant a shift in the balance between state and individual responsibility. Claimants would only enjoy a maximum period on contribution based benefit of just six months rather than 12, a change which reflected a further diminution of the insurance principle (Buck 1996). There would also be increased pressure to engage in the search for work or to participate in activities which enhance the prospects of securing full-time employment. The new measures included a requirement to enter into a “jobseeker’s agreement” with the relevant government agency, currently called “Jobcentre Plus”. There would be an even wider range of sanctions for non-cooperation or non-compliance.

JSA is a complex benefit, made the more so by a legal structure based largely on secondary legislation that is subject to frequent amendment. Although the Labour Government post 1997 has developed a new programme of activities designed to provide a welfare-to-work pathway, notably the various New Deal programmes offering work experience and/or a programme of training or educa-

tion (such as the New Deal for Young People, New Deal 25 Plus and New Deal for Lone Parents), it has not significantly altered the basic architecture of the JSA scheme. It should be borne in mind that because of the attempt to individualise and personalise the relationship between the claimant and the advisory team in the jobcentre, it is important to judge the system with particular reference to the way that the process is managed on the ground. For example, in 2005 the Department for Work and Pensions (DWP) introduced a series of pilots involving quite different regimes affecting those claiming JSA who had entered the so-called “gateway” when they have to attend the jobcentre every fortnight for a “jobsearch review”. This process of attendance is still known by its traditional name of “signing on”. Under the pilots, some claimants were able to sign on by telephone. Others were excused signing on for the first 7 or 13 weeks but were telephoned at random to discuss their worksearch activities. Some fortnightly reviews were conducted in groups. Piloting of this kind is complemented by a constant process of review and evaluation, designed to maximise efficiencies while retaining adequate controls. The evaluation of this particular pilot turned out to be mostly inconclusive but recommended against a national roll-out of the 13 week and telephone signing on arrangements, since they were less effective at getting people into work. Moreover, it was found that the extra benefit payments that were required were “likely to be greater than the administrative savings” (Middlemas 2006, para 10.7).

The structure of JSA

One of the fundamental aims of the JA 1995 was to establish a single benefit for the unemployed. However, it is basically two different benefits albeit within a common framework and a joint name. As noted above, there are two types of JSA:

1. Contribution-based JSA. This is payable for a maximum of 182 days (six months). Entitlement is dependent upon (among other things) having paid or been credited with sufficient national insurance contributions (per section 2 of the Act).
2. Income-based JSA. This is payable to persons who do not meet the contribution conditions for CBJSA or who have exhausted their entitlement to it, provided, in either case, that they satisfy a mean test.

The detail of the JSA scheme, including the rate at which weekly JSA is to be paid,¹ is set out in secondary legislation, in the Jobseeker's Allowance Regulations 1996 (SI 1996/207), as amended (the JSA Regs).

General conditions of entitlement

The general conditions of entitlement for both types of JSA are (JS Act, section 1(2)-(2D)), all of which must be satisfied, reflect the purpose of this benefit as a means of support for those who are not in work but who nevertheless would be expected to have an attachment to the labour market by virtue of their age, physical or mental capacity for work and the fact that they are not engaged in full-time education. The conditions require the claimant to demonstrate that attachment to the labour market through, for example, an active engagement in the search for work. The conditions, all of which must be satisfied, are that the claimant is: in Great Britain; under pensionable age; "available for employment"; "actively seeking employment"; signed up to an extant jobseeker's agreement; capable of work; not engaged, nor his or her partner engaged, in "remunerative work" (defined as 16 hours per week on average, or 24 hours per week in the case of the claimant's partner); not receiving relevant education (basically non-advanced full-time education); and meets the relevant contribution conditions for CBJSA or the income based conditions for IBJSA.

The JSA scheme retains the minimum age of entitlement of 18. However, the regulations (regs 57-61) prescribe exceptional cases when a young person (aged 16 or 17) may nonetheless be eligible for JSA. In addition, a 16 or 17 year old who is not entitled to JSA and is registered for training but not being provided with any may be awarded a "severe hardship payment", under section 16 of the 1995 Act. However, even that may be revoked if the young person rejects a reasonable training opportunity or job vacancy or interview or opportunity to apply. Severe hardship JSA can also be reduced by 40% of the personal allowance element of the benefit in some circumstances, such as where the young person has given up a place on a training scheme or has failed to attend the scheme or has lost their place on it through misconduct (JS Act, section 17; JSA Regs 1996, reg.63).

¹ The current rates of weekly benefit (until April 2009) of CBJSA are

Aged under 18 £47.95

Aged 18-24 £47.95

Aged 25 or over £60.50

– minus deductions:

£1 per £1 for amounts of occupational or personal pension in excess of £50 per week; £1 per £1 for the claimant's earnings (subject to prescribed disregards).

The calculation of IBJSA entitlement, on the other hand, is very complex due to it being a means tested-benefit with separate and very detailed income and capital limits and calculation rules. The basic rates of personal allowance are the same as for CBJSA, but claimants may be entitled to various premiums in respect of disability or other factors, which will increase entitlement (JSA Regs, regs 82-86D). There are separate rates for couples.

The availability and job search conditions

Available for employment

The basic test of availability per se, which has remained the same for over 30 years, is that the claimant must be “willing and able to take up immediately any employed earner’s employment” (JS Act 1995, section 6(1)). This requirement of immediacy is strict, although there are limited exceptions: for example, it is sufficient for a person who has caring responsibilities to be willing and able to take up employment within 48 hours; and in the case of a person engaged in volunteer work the take-up time is extended to one week, provided he or she is prepared to attend for interview for employment within 48 hours (JSA regs 1996, reg.5). The employment that the claimant must be willing and able to take up must be of at least 40 hours per week. The claimant can limit the amount that is acceptable to a set amount of 40 *or more* hours provided his or her “pattern of availability” affords him or her reasonable prospects of securing such employment (JSA Regs, regs 6 and 7). The claimant must also be available for work on all days during the benefit week; unavailability on one day (even if he or she nevertheless remains available for more than 40 hours in total in that week) means loss of a week’s benefit. Normally there is no provision to award JSA for part only of week (Commissioner’s Decision R(JSA)3/01, para 4).

The claimant has in fact long been permitted to set some restrictions on the kinds and place of work he or she is willing to accept, while remaining “available for work”. There is what has become known as a “reasonable restrictions test”, which is tightly regulated and less flexible than in the past (see JS Act 1995, section 6(2) and (3), JSA Regs, regs. 7, 8, 9 and 13). In addition to the limited right to restrict availability to 40 hours or more per week, mentioned above, a claimant may limit his availability with reference to the nature or terms of conditions of employment (including the rate of pay) or the locality of the work, provided he can show he or she has “reasonable prospects of securing employment notwithstanding those restrictions” and other prescribed restrictions on his availability. However, any allowed restrictions related to pay will cease to have effect once the claimant has been in receipt of JSA for six months. The claimant may also restrict the nature of the employment he or she is willing to undertake with reference to a sincerely held religious belief/conscientious objection “provided he can show reasonable prospects of securing employment notwithstanding those restrictions”. A claimant may also set restrictions which are “reasonable in the light of his physical or mental condition”. In some circumstances a claimant who is a carer is permitted to restrict his or her total hours of work availability to an amount below 40 in any week, again subject to the same “reasonable prospects of employment” condition. The law sets out the factors to be taken into account in assessing whether a person has “reasonable prospects of securing employment”, which it will have been seen is a condition

linked to several of the permitted restrictions.² The onus lies with the claimant to show, for this purpose, that he or she has reasonable prospects (JSA Regs, reg.10).

For a short period at the start of the claim the claimant may in any event be permitted to restrict his or her availability to his or her usual employment, work that pays no less than the amount he or she is accustomed to receive from work, or both. Those restrictions may only be set for a limited period of not less than one week nor more than 13 weeks; the actual permitted length will be determined with reference to a range of factors essentially designed to reflect any specialism and the degree of experience – such as the nature of his or her usual occupation, the claimant's skills, the length of training for the occupation, the length of time he or she worked in such employment and the time that has elapsed since he or she worked in it (JS Act 1995, section 6(5) and JSA regs 1996, reg.16). Thus a qualified accountant who becomes unemployed after 20 years may be granted a longer period in which to restrict his or her availability to that job than an unskilled former shop assistant with no training would be permitted to confine his or her availability to shop work.

Actively seeking employment

A person will be classed as actively seeking employment in any week “if he takes in that week such steps as he can reasonably be expected to have to take in order to have the best prospects of securing employment” (JS Act 1995, s 7(1), JSA Regs, reg.18). But the claimant will have to take *more than two such steps* in any week unless taking fewer two steps is reasonable for that person to do that week. The expected steps might include oral or written job applications; seeking information on the availability of employment from job ads, employment agencies and employers; getting specialist advice; drawing up a curriculum vitae; and seeking a reference or testimonial from previous employer. Various factors must be taken into account in determining what would be reasonable steps for the particular claimant to be expected to take. Some relate to claimant him or herself, such as his or her skills, qualifications and abilities and physical or mental qualifications; some relate to his or her actions in trying to secure work, such as the steps taken in the previous week and their effectiveness; and others relate to the availability or location of any vacancies.

The law is so concerned to prevent possible abuse of the system that it stipulates that steps taken are to be ignored where the claimant, while taking them, “acted in a violent or abusive manner”; or he or she spoiled a job application; or “by his behaviour or appearance... otherwise undermined his prospects of securing the employment in question” (see Wikeley 1996). The claimant will, however, be excused this conduct if “the circumstances were due to reasons beyond [his or her] control”.

² JSA regs, Reg.10(2). They include the claimant's skills, qualifications and experience; the type and number of vacancies within daily travelling distance from his or her home; the length of time he or she has been unemployed; the job applications which he or she has made and their outcome; and his or her willingness to move home to obtain employment.

Attendance, information and evidence

The above provisions are reinforced by administrative controls exerted via a power to require the claimant to attend at a place and at such time as an officer may specify, and to provide information and evidence “as to his circumstances, his availability for employment and the extent to which he is actively seeking employment” (JS Act 1995, section 8). The officer/adviser may notify time and place of attendance, and may require a claimant to provide a signed declaration as to his or her availability and active search for work (JSA Regs, regs 23, 23A and 24). The attendance requirement is capable of strict enforcement (see regs 25 and 26), as entitlement to benefit will normally cease if the claimant fails to attend on the day specified in the notification, or at the stipulated time, or if the claimant fails to provide a signed declaration that he or she has been available for or actively seeking employment.

These are strict conditions, clearly designed to ensure that claimants conform to the expected pattern of behaviour in return for benefit. The agency seems to apply the attendance condition particularly firmly: in 2005-06, for example, there were 154,800 referrals to a “Sanctions Decision Maker” in such cases and in 74% of them (115,050) a benefit sanction (a reduction of the personal allowance element of the benefit, by 20%) was applied (HCPAC 2007). The sanction is not to be applied, however, where the claimant shows that there was “good cause” for the failure (regs.27-30), provided he or she shows it within 5 days of the failure to comply. A range of factors may be considered in determining whether there was good cause. Inadequate notification by Jobcentre Plus is specifically identified as one of them.

The jobseeker’s agreement

As noted above, one of the primary conditions of entitlement to JSA is entry into a jobseeker’s agreement. This is “[a]n agreement which is entered into by a claimant and an employment officer and which complies with the prescribed requirements in force at the time when the agreement is made...” (JS Act 1995, section 9(1)). It must be in writing and signed by both parties, and it can be varied by agreement (sections 9(3) and 10). The contractual element reflected in the notion of “agreement” implies mutuality and voluntariness, but the jobseeker’s agreement is very one-sided. As Lundy (2000, 304) argues, “The official’s hand which shakes on this agreement is truly a hand of velvet masking a fist of steel, since failure to sign up to the agreement will result in the claimant being denied benefit”. Entry into an agreement can, in this regard, be seen as part of the process of “responsibilization”, involving state governance of behaviour intended to make people behave as “responsible” citizens (Ican and Basok 2004, 130-133). In that sense, it epitomises the attempt under both the Conservative and now the Labour Government to rebalance rights and responsibilities by placing a greater emphasis on the latter (Lister 2003; Lund 2008).

The required contents of the agreement are specified by regulations. They include the claimant’s name; the stated hours of availability; any agreed restrictions

on availability; the type of employment sought by claimant; the action the claimant will take to seek employment and to improve his/her prospects of finding employment; the start and finish dates of any permitted period during which the claimant does not have to be available for up to 40 hours per week; and a statement of the claimant's rights to challenge a determination or direction by the Secretary of State.³

Sanctions

As we have seen, sanctions have long been a feature of this area of social security law. They were originally designed to prevent abuse of the system and to protect the insurance fund from unjustified claims. While these remain part of the continuing justification for them, their intensification under JSA, and therefore the tighter control of behaviour that they impose, signifies a greater intolerance of any shortfall in the claimant's commitment to the labour market and a concern to further the state's interest in minimising public reliance on the benefits system and to re-emphasise the responsibility of citizens to support themselves through work. As a review of social security sanctions by the Social Security Advisory Committee says, one of the main objectives of JSA sanctions is to "induce individuals to act in accordance with their job-search responsibilities as part of the 'rights and responsibilities' agenda" (SSAC 2006: 54).

One of the major features of the sanctions regime, as shown in Michael Adler's paper in this collection, is that there is a significant element of officer (or office) discretion in many cases. The SSAC has highlighted the inconsistencies in the administration of sanctions, in terms of the "significant differences" between district offices in the numbers of sanctions imposed (or in referral of cases for possible sanctioning). As the SSAC states, the discrepancies result in "inequity, as where a claimant lives may determine whether they are sanctioned" (SSAC 2006: 69).

In addition to the sanctions of discretionary (variable) length, which represent a continuity with the old unemployment benefit rules, there are now sanctions related to the worksearch conditions that are primarily of fixed length. Tables 1 and 2 in the Appendix contain statistics on the number of referrals for a sanctions decision and the number of fixed period and discretionary length sanctions imposed between 2000 and 2006. It will be seen that while only one quarter of referrals in discretionary length sanction cases result in the imposition of a sanction, the rate of sanctioning is twice as high in fixed term cases. The statistics also reveal a decline in the numbers of referrals and sanctions. However, discretionary length sanctions fell much more sharply than fixed term sanctions (and, in fact, at a much steeper rate

³ Under JS Act 1995, s 9(6), the officer must, if asked to do so by the claimant, refer the proposed JS agreement to the Secretary of State for him to determine whether, (i) if the claimant complies with the agreement and its terms he would satisfy the statutory requirement to be available for or actively seeking employment, or (ii) it is reasonable to expect the claimant to have to comply with the agreement. On such a reference, the Secretary of State is to give such directions regarding the terms of the agreement as he considers appropriate: section 9(7).

than the fall in jobseeker numbers). From representing nearly 75% of all sanction cases in 2002, the proportion of cases that were discretionary length cases fell to around 67% in 2006.

In the case of either type of sanction the period of sanction eats into the 182 day period of entitlement. This is because JSA *entitlement* continues during the sanction period, even if payment does not. In addition, as noted earlier, claimants can have their claim for benefit disallowed for failure to attend a regular interview with the personal adviser at Jobcentre Plus.

The sanctions are identified in the JS Act 1995, sections 19-20B. It will be seen that in some cases a sanction may not be imposed because the claimant had a “good cause” for acting as he or she did. It is a matter of judgment for the relevant official as to whether a person had “good cause”, but the JSA Regulations prescribe factors that should be taken into account for the purposes of determining this question.⁴

Sanction of discretionary (or variable) length

A sanction of *discretionary length* may be applied where the claimant has lost his or her employment due to misconduct; or voluntarily left it “without just cause”; or where without “good cause” he or she failed to apply for or accept a vacancy notified by the jobcentre or in any event “neglected to avail himself of a reasonable opportunity of employment”. The period of sanction must be set at between one week and 26 weeks. The precise length of the period in an individual case is to be determined by the Secretary of State – in practice, an official acting on his/her behalf. There is some limited guidance in the regulations as to particular matters that should be taken into account in determining the length of the sanction. For example, account should be taken of “any mitigating circumstances of physical or mental stress” connected with the employment which the claimant has left or neglects to pursue (JSA Regs, reg.70) Otherwise there is a need to refer to the substantial body of case law that has developed over the years in which these various sanction grounds have been in operation, particularly those relating to misconduct and voluntarily leaving without just cause. The case law confirms, for example, that a person who came close to establishing justification for leaving voluntarily may expect a short period of sanction (see Wikeley 2002, ch 9).

⁴ For example, a claimant would have good cause for non-participation in a training programme if he or she has a condition or personal circumstance such that participation would be detrimental to his/her health; or where non-participation resulted from religious or conscientious objection; or if caring responsibilities make it unreasonable to participate: JSA Regs, reg.73. Other factors may also be taken into account in determining whether or not there was good cause. In the case of a claimant’s failing or refusing to take up a particular job or to comply with a jobseeker’s direction, the above mentioned factors are among those which should be taken into account by the officer, but they do not automatically give rise to good cause: see reg.72. Other factors to be taken into account include excessive travelling time and the disproportionality of expenses incurred by the claimant in undertaking the job or complying with the jobseeker’s direction.

Sanctions of prescribed length

The sanctions of *prescribed length* apply where there is a failure/refusal, without good cause to carry out any jobseeker's direction which was reasonable in his circumstances or to participate in (or attend or remain on) a training scheme or employment programme (such as under one of the New Deal programmes) notified to him or her; or has lost his or her place on such a scheme through misconduct (note there is no "good cause" excuse here). The statute empowers the length of the prescribed length of the sanction to be somewhere between one to 26 weeks. The sanction for refusal or failure to carry out a jobseeker's direction is a fixed period of *two weeks*. If there is a further breach within 12 months of the first, the sanction is *four weeks*. If the sanction is applied for a failure to take up or apply for a training scheme or employment programme or for the circumstances in ground (c), the sanction is a fixed period of *two weeks*. Again, if there is a further breach within 12 months of the first, the sanction is *four weeks* (reg.69). However, it is *26 weeks* if the failure etc relates to an act or omission in respect of one of the specified New Deal options or in relation to the Intense Activity Period (for 25-49 year olds, lasting 52 weeks) and in either case there have been two or more sanctions for such a failure in relation to these options by the claimant, the most recent being within the previous 12 months.

Hardship

A claimant may be entitled to some JSA notwithstanding disqualification under the above provisions, but it can be made payable at a reduced rate or for a prescribed period. In essence, the claimant will have to show that he or a member of his household will suffer *hardship* during the period of the sanction. The regulations prescribe when a person is in hardship (for example, a woman is pregnant, or person has a long term medical condition restricting functional capacity, or a person is caring for another who is receiving disability benefits) and the date from which a payment is to be made (JSA Regs, regs 140-141). If the claimant is entitled under these hardship rules, his or her benefit is reduced by 40% of the personal allowance for a single person or by 20% if the claimant or any member of his her family is either pregnant or seriously ill (regs145 and 146A-H).

The impact and effectiveness of sanctions

Although there is constant evaluation of welfare-to-work policies such as Pathways to Work and the role of the advisers working in Jobcentre Plus who deal with jobseekers, there has until recently been no attempt to review the operation of the benefit sanctions and the traditional structures which still underpin the statutory regime governing benefits for the unemployed. However, in the 2004 the Government promised a review of the JSA sanctions for non-compliance "to ensure that the penalties for failure to carry out responsibilities are timely, fair, practical and

effective” (Chancellor of the Exchequer 2004, para 4.31). In 2006 the Department for Work and Pensions published two reports based on research into the benefit sanctions. One of the reports, by Joyce and Whiting (2006), is based on research into the effects of sanctioning regime operated by Jobcentre Plus on lone parents, in connection with failure to attend work-focused interviews (WFIs). These are regular claimant interviews with an adviser, intended to explore routes into work and review progress; a lone parent on income support would be required to attend such an interview when the youngest or only child reaches the age of five years and three months. At the time of Joyce and Whiting’s report the interviews were annual, but from 30 April 2007 they have become six-monthly and will be extended to lone parents with children under five from 28 April 2008.⁵ The report relates to means-tested income support entitlement. A lone parent can qualify for this benefit (to which jobsearch and availability conditions per se are not attached) while they still have a child under the age of 14, although this age is set to fall (see below). The other report (by Peters and Joyce 2006) reviews JSA sanctions, based on a sample of over 3,000 interviewees.

Joyce and Whiting found that claimants generally understood the principle behind the sanctioning regime but not the specific details of the amount by which their income support would be reduced or the length of the period for which their reduction in benefit would run. Claimants tended to have negative feelings about the invitation to attend a WFI. Some felt they were being coerced and would be forced into taking a job when they attended rather than having the opportunity to discuss career options. Some had difficulties attending because they had health problems or there were childcare difficulties. There were, however, some who welcomed the opportunity to discuss their options. There was evidence that sanctions had caused hardship, since many claimants had already been struggling on the rate of benefit they received. They reported that their children often lost out, as pocket money or treats were denied. Some had become indebted to friends or family, who would need to be repaid out of future benefit. Stress and anxiety had been exacerbated.

The researchers considered possible changes that could be made to the sanctioning policy and process in the light of suggestions from claimants and Jobcentre Plus advisers. There was a view that sanctions should be considered a last resort and that claimants should be given a “second chance” before they were applied. Another option could be to reduce the rate of the sanction from 20% to less or to abolish sanctions altogether and instead provide an incentive of additional benefit for attendance.

⁵ The Social Security (Work-focused Interviews for Lone Parents) Amendment Regulations 2007 (SI No 1034/2007). Note that those living in an area in which one of the New Deal welfare-to-work programmes operates, namely the New Deal Plus for Lone Parents, who have been continuously entitled to income support for at least 12 months and whose youngest child is aged 11-13 could be required to undergo a work-focused interview every 13 weeks.

The JSA research by Peters and Joyce was based on a much bigger sample than the lone parents research and incorporated significant quantitative as well as qualitative elements. The research found that there were no significant differences between sanctioned and non-sanctioned claimants in terms of gender, ethnicity or illness/disability, or on the basis of their qualifications, literacy or numeracy. But sanctioned claimants tended to be younger. This was attributable to young claimants' more relaxed attitude towards sanctions, which was possibly due to the fact that they tended to live with parents who could provide some financial support. Claimants to whom sanctions were applied were also more likely to have a learning difficulty, particularly those who were sanctioned over participation in the New Deal programme.

Most claimants reported some understanding of the rules on claiming JSA. Among the others, those with literacy problems or who were of non-white ethnicity or new claimants had the least understanding. Generally the acquisition of knowledge appeared to be linked to the level of experience of the jobcentre. Those who were sanctioned for "voluntarily leaving" their employment tended to have low levels of knowledge. Typically, there was an erroneous view that sanctions only applied to persons who worked while claiming benefit. As with the lone parents research, claimants lacked a detailed knowledge of how sanctions operated. Only 2% of those questioned identified "voluntary leaving without just cause" as a sanction ground.

The research found that challenging a sanction would not generally be contemplated. Those subjected to a sanction would probably not ask for a reconsideration or bring an appeal, a tendency that is perhaps reflected in the very low number of appeals on sanctions coming before tribunals. Reasons for not appealing varied, although some respondents simply lacked awareness of the right to appeal or thought the appeal process would be overly complicated, drawn out or likely to end in failure. In some cases claimants had been discouraged from appealing by their adviser or had found a job.

It is interesting that the supposed deterrent effect of sanctions, for example in relation to voluntarily leaving one's employment, is not borne out by the views expressed by claimants, a majority of whom either did not know they would be sanctioned or did not feel that it could have been avoided. However, once they had experienced a sanction, many claimants seemed to be concerned to avoid one in the future. DWP statistics cited in the report show that of those sanctioned, 73% had only been sanctioned once, although the paucity of second or subsequent sanctions might partly be attributable to the take-up of employment. It is also interesting that a substantial majority of claimants, even those who had experienced a sanction, agreed with the *principle* of sanctioning for those who did not comply with the conditions attached to claiming JSA, although they were much less likely to think that it was fair to sanction *them*. Some Jobcentre Plus advisers said that sanctions "could have a destructive effect on the relationship and rapport between advisers and their customers which might inhibit their ability to work effectively with customers in the future". Needless to say, this research also found that sanctions had a

significant impact on claimants' finances and strained family relationships and friendships.

The research also asked claimants whether they would prefer a regime of "fixed fines" rather than sanctions. The Government appears keen to explore their viability. Overall, the responses seem to have indicated a slightly greater concern about fixed fines than sanctions; the former were perhaps more likely than sanctions to influence behaviour. The SSAC has suggested that if fines replaced the current sanctions regime it would have the advantage of a reduced financial impact on claimants (SSAC 2006: 69).

Overall, the JSA research concluded that the sanctions regime was "broadly effective" and did influence behaviour to some extent, but was not as well understood as it could be. The researchers conclude that, among other things, the major policy challenge is to raise awareness levels and detailed understanding of the processes among claimants, perhaps through simplification of the system. The SSAC has similarly recommended improved communication "at all stages of the sanctions process" (SSAC 2006: 68). It has also suggested that because the sanction for voluntarily leaving employment is not well understood by claimants, and therefore has a reduced disincentive effect, one possible reform that should be considered is easement so that a sanction would only be imposed on the second or subsequent occasion that a person left a job voluntarily (SSAC 2006: 69); information could be given on the first occasion that would serve as notice and a warning.

Forthcoming reforms: an "active" benefits system

Jobseekers will face a more intensive regime of activation under forthcoming reforms. The DWP talks of "raising expectations of what a jobseeker should contribute" (DWP 2007a: 49). There will be more clearly defined stages in the administration of the regime facing a jobseeker. They will start with a widening of jobsearch expectations after three months on benefit. After six months there would be entry to a "Gateway" stage, with a formal review of the jobseeker's agreement, the drawing up of a back-to-work plan involving mandatory "agreed" activities – with sanctions for failure to comply – and a skills "health check" with the offer of any necessary training. After 12 months, the claimant would be referred to a specialist return-to-work provider. The provider would be paid by results to find work for the claimant. What is particularly interesting and also controversial about that stage is the potential involvement in the JSA regime of voluntary and private sector providers (as recommended by Freud 2007), and thus harnessing of the profit motive. The Secretary of State for Work and Pensions has recently argued that "[w]e should not be ideological about who provides the service, we should just work out who is best at providing it" (quoted in Webster 2008). The DWP has published a "Commissioning Strategy" in respect of this provision (DWP 2008a), which is indicative of its potential spread within the benefits system. Those still not in work after these stages have been completed would be required to undertake work experience (DWP

2007a), which the Government has recently indicated would be for a minimum of four weeks.

As Dorsal (2008) has recently pointed out, there has been and remains a crucial dualist feature of the UK's social security system: those required to maintain an attachment to the labour market and (since 1989) be actively engaged in the search for employment are distinguished from those of working age but not expected to seek work because they are caring for young children (as lone parents) or whose mental or physical condition makes them incapable of work (see also Rahilly's chapter in this collection). In some cases claimants can cross the boundary between the two categories (Kemp and Davidson 2007). With the numbers in receipt of incapacity benefit reaching over 2.5 million (as compared with approximately 800,000 receiving JSA as at February 2008) and the arguments that with the extension of in-work benefits and other support (including after-school childcare) the exemption of all non-working lone parents with children under 16 from work-search requirements seen by government as increasingly less justifiable, there is growing pressure to shift the boundary so that more claimants are subjected to a JSA-type regime.

In the case of people on incapacity benefit (or incapacity credits for people receiving income support), despite the trumpeted success of the Pathways to Work programme for encouraging and supporting people back into work the Government has embarked on a restructuring of benefits in order to place a particular emphasis on the possibility of working rather than on incapacity for work. The idea is to reduce by at least one million the numbers who receive benefit on the basis of incapacity for work (Rahilly 2006). The new benefit, entitled Employment and Support Allowance – which, according to the familiar rhetoric, is being “built on the principle of rights and responsibilities” and will involve the claimant's participation in WFIs and signing up to an action plan, with sanctions for default (DWP 2006) – will be introduced in October 2008, under the Welfare Reform Act 2007. The regime will be tougher than many incapacity benefit claimants currently face, particularly because many claimants will be required to undertake a “work-related activity”. It is estimated that as a consequence there will be approximately 20,000 additional appeals per annum made to the appeal tribunal, 14,000 of which will result in a hearing (DWP 2008b). There are also fears that if Jobcentre Plus offices are set job-entry targets the degree of tension between the enabling and enforcing roles of personal advisers, which has been falling (Knight *et al* 2005), may increase.

Meanwhile, changes to the position of lone parents are being introduced and the regime for those claiming JSA is being further intensified. Despite an improving employment rate for this group, which has risen from 44.7% in 1997s to 57.2% in 2007 (Chancellor of the Exchequer 2007), the DWP has set an objective of increasing this rate to 70% by 2010, which would mean that a further 300,000 lone parents enter employment (HCWPC 2007: para 226). The Government has endorsed a recommendation of the independent review it commissioned on the welfare-to-work strategy, by David Freud, that lone parents of children younger than 16 should be expected to seek work if they are to continue to receive out of work benefits. Freud

recommended that lone parents should only enjoy their current exemption until the child is 12 years old and that they should be required to participate in regular WFIs (Freud 2007). Part of the rationale is that their benefit position was out of line with that in states such as France, Germany and the Netherlands, where a work test may be applied once the lone parent's child reaches the age of three (or five in the case of the Netherlands). It was also considered to be inconsistent with the intended position that many other claimants in the UK would face once the Employment and Support Allowance (above) is introduced. The Government has endorsed Freud's recommendation and proposes to implement progressively, starting in October 2008. From October 2009 it will be extended to lone parents whose child is aged 10. From 2010 the exemption will not apply where the child is aged 7 and over (DWP 2007a and 2007b).

The independent statutory advisory body, the Social Security Advisory Committee (SSAC), has concerns about the fact that lone parents "will simply be transferred onto the current JSA regime with its relatively intensive work-focused conditionality" (SSAC 2007: para 3.3). There is in fact evidence that increasing the conditionality of benefits may be less successful in maximising jobsearch, take-up and retention of employment among lone parents than intensifying the involvement of personal advisers and providing a more active encouragement to participate in work-related programmes such as the New Deal for Lone Parents (HCWPC 2007; DWP 2006). Indeed, support for lone parents making the transition to work has been introduced, such as a £250 job grant for those entering work after 26 weeks or more on income support and a discretion for personal advisers to extend the payment of benefit for up to four weeks after a lone parent starts work and is waiting for their first salary payment. Lone parents are also going to be offered a financial incentive to undertake an activity which helps to prepare them for entry into the labour market, in the form of a "Work Related Activity Premium" (DWP 2007a: 44).

Improvements to the system of means-tested tax credits, a form of support paid to people on low incomes in work, have also been recommended as particularly useful in the realization of these goals for lone parents. There is considered to be a need to increase their flexibility and to reduce the likelihood and impact of the overpayment of credits, which is a feature of the system's method of (in effect) recalculating entitlement at the end of the fiscal and benefits year (Millar 2008). The House of Commons Work and Pensions Committee has found in its recent inquiry that more flexibility in the JSA regime is needed to facilitate a pattern of work that is consistent with the burden of family responsibilities that lone parents have to discharge; there were "real concerns that JSA conditionality cannot be adapted to reflect the complex realities of lone parents' lives" (HCWPC 2008: paras 227-235). However, the Government has argued that there is already flexibility in terms of the work pattern lone parents may be expected to follow in the light of their particular circumstances, but it plans to increase the discretion available to advisers (DWP 2007b: 41-42). Another constant barrier to employment among lone parents is the unaffordability or unavailability of suitable childcare. There is a childcare tax credit to meet some or all of the cost, but the DWP has had to acknowledge that that does

not guarantee that affordable childcare will be available to all claimants. The House of Commons Work and Pensions Committee has recently argued that “[c]onditionality should be linked to the availability of childcare and before and after school care” (HCWPC 2008: para 252). The Government, while committing itself to improve childcare provision, has undertaken to avoid penalizing a claimant who either fails to take up or leaves a job because of the unavailability of appropriate and affordable childcare (DWP 2007b: 35); the Work and Pension Committee says that the burden of proof to show that childcare is available to a claimant should rest with the DWP, not the claimant (HCWPC 2008: para 252).

Conclusion

The aim of this review of the development of the legal structure surrounding the principal benefit concerned with unemployment has been to show the continuities and changes and how they have shaped both the form and operation of this benefit. The intensification of the activation policy that the post-1995 system in particular represents and which has included, since the start of Labour’s administration in 1997, a range of welfare-to-work policies and programmes – principally the various New Deal schemes targeted at different groups and offering, variously, a period of work experience, training or education – is not merely a response to particular economic or social pressures. While it might be assumed, for example, that a greater concentration on measures to increase employability by ensuring participation in training or employment experience means that it has become more difficult for citizens of working age to find work, that is only partially true, in that while particular skills may be in greater demand now, there is nonetheless a fairly high overall demand for labour, certainly compared with earlier years. But at the same time, the greater opportunities for employment have given political justification to the imposition of a greater squeeze on the unemployed through the benefits system, a system that the Government is trying to turn into an “active” one under which those not in employment are moved away from being “passive recipients of benefit” (or, as stated in the same document, “recipients of passive benefits”!) to become “participants” or “jobseekers” who are “actively seeking and preparing for work” (DWP 2007b: 10 and 103). However, as Dostal (2008: 34, 35) points out, while trying to convey the impression that it is significantly tightening up the benefit regime, the Government’s “actual policy change has been limited in scope and has mostly focused on the renaming of existing policy instruments such as the interview regime between Jobcentre staff and their clients”, while “the policing of the system in terms of benefit sanctions has remained similar to that operating in the pre-Labour and pre-New Deal period”.

The continuities in the law illustrate Clasen’s point that the developments in social security policies are not merely a response to social, economic and political pressures, but also national traditions and institutional structures (Clasen 1994). There is a long tradition of penalising those deemed to be workshy through reduc-

tions in benefit or disqualification from entitlement. The recent reviews of the operation of the sanctions regime suggest that traditions may sometimes need displacement not merely in pursuit of ideological goals but for reasons of practicality and, more importantly, fairness (see White and Cooke 2007). Moreover, on the basis that there is an economic case for benefit conditionality as reflected in the JSA regime, there must also be concern that, as a witness to the HCWPC's recent inquiry commented, JSA has "possibly the most out-of-date set of entitlement rules in the whole benefits system, much of it unchanged since 1911 and not designed for the modern economy" (HCWPC 2008: Minutes of Evidence, Q153).

Appendix

STATISTICS ON J.S.A. BENEFIT SANCTIONS, GREAT BRITAIN, 2000-2006

(Source: House of Commons Written Answers, 12 March 2007, cols 165W-166W)

Note: figures are rounded to the nearest 10.

Table 1: Fixed Length Sanctions		
Quarter ending, in which decision was made	Number of referrals	Number of referrals which resulted in a sanction
April-May 2000	11,120	5,650
August 2000	16,610	8,380
November 2000	17,930	8,470
February 2001	17,140	8,330
May 2001	17,890	8,620
August 2001	17,790	8,380
November 2001	17,160	7,790
February 2002	15,250	7,040
May 2002	18,480	8,530
August 2002	18,480	8,630
November 2002	17,550	8,250
February 2003	15,540	7,660
May 2003	16,590	8,250
August 2003	16,890	8,530
November 2003	15,900	7,760
February 2004	14,340	7,010
May 2004	14,470	7,170
August 2004	15,390	7,580
November 2004	15,430	7,530
February 2005	13,840	7,020
May 2005	15,120	7,680
August 2005	14,500	7,520
November 2005	13,590	7,040
February 2006	13,310	6,960
May 2006	15,700	8,340
August 2006	17,020	8,750

Table 2: Discretionary period (variable length) sanctions		
Quarter ending, in which decision was made	Number of referrals	Number of referrals which resulted in a sanction
April-May 2000	75,350	18,090
August 2000	124,530	29,070
November 2000	127,780	28,480
February 2001	117,740	28,320
May 2001	117,160	29,140
August 2001	122,310	29,990
November 2001	113,330	28,230
February 2002	102,750	26,230
May 2002	114,480	29,700
August 2002	114,580	30,080
November 2002	121,200	31,290
February 2003	106,920	28,480
May 2003	95,710	26,520
August 2003	88,410	24,500
November 2003	89,840	23,890
February 2004	87,120	23,340
May 2004	84,470	23,200
August 2004	82,340	22,120
November 2004	83,000	21,320
February 2005	74,130	19,690
May 2005	76,000	20,620
August 2005	71,590	19,190
November 2005	68,770	17,950
February 2006	61,630	16,000
May 2006	64,370	16,080
August 2006	59,790	14,730

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Activating benefit claimants of working age in the U.K.

Simon Rahilly

The main aim of this chapter is to review the work activation requirements within benefits for people of working age who are either unemployed or sick (and in receipt of benefits such as jobseeker's allowance or incapacity benefit). In the case of unemployed claimants, conditions which are designed to ensure that benefit claimants take active steps to find work have been in place for some time. These have more recently been extended with the introduction of education, training and employment programmes within several "New Deal" schemes. Conditions which will require claimants who are sick or disabled to show that they are taking steps to improve their chances of a return to work are about to be introduced nationally following initial pilot "pathways to work" projects. Many of these work activation provisions are supported by sanctions and therefore have the potential to further intensify the poverty of the benefit claimant.

One of the central difficulties within U.K. social security is its "all or nothing" nature- claimants are either considered to be unemployed or in work. Alternatively, they are either incapable of work or they are capable. This makes it difficult to allow for part time work as a part of an activation policy. The chapter will conclude with a brief consideration of the provisions which allow for part-time work, work trials, "therapeutic work" etc. and of incentives introduced to ease the transition from benefit to work and to "make work pay".

Introduction

Until recently activation policies within UK social security have been limited in scope and extent. Whilst unemployed claimants have always been required to be available for work, it is only in the last decade or so that the labour market conditions required of this group have been considerably extended. Benefit conditions are now also being progressively introduced for other claimants of working age. This can be seen as part of a project to move towards a more common earnings replacement benefit for all claimants of working age, which incorporates a degree of labour market conditionality. This chapter will review these conditions for the most significant earnings replacement benefits for claimants of working age- the unemployed, those who are incapable of work because of sickness or disability and carers.

This project to extend labour market conditionality must be seen as a part of two other agendas. Firstly, there is the commitment to reduce child poverty and tackle social exclusion. Neighbourhood statistics demonstrate the close correlation between poverty and deprivation and numbers of social security benefit claimants (DWP, 2006,a)¹ and the key policy instrument to tackle poverty is to move people from benefits to employment, from “welfare to work”.

Secondly, demographic changes have resulted in a decline in the proportion of the population in paid work which has caused concern as to the sustainability of pension provisions for those no longer in work. As a result the government has adopted an aspirational 80% employment rate for those of working age. This can only be achieved by extending the welfare to work agenda to people who have traditionally been considered to be outside the labour market, such as lone parents and those who have been classified as incapable of work because of illness or disability. The focus of concern has moved from unemployment to worklessness (Grover, 2007) and has been reinforced by the publication of a government commissioned review of its Welfare to Work policies (Freud, 2007). Government green papers have set targets to reduce the number of people claiming incapacity benefits by 1 million (DWP, 2006,a) and to reduce the numbers claiming benefits because they are lone parents by 300,000 (DWP, 2007,a). One of the key ways in which it hopes to realise these targets is by extending benefit conditionality to these groups in much the same way as it has required conditions of the unemployed benefit claimant.

U.K. Benefits for claimants of working age:

Jobseeker’s allowance (JSA) replaced unemployment benefit as the benefit for unemployed claimants in 1996.² JSA was intended to reinforce the link between benefit entitlement and the search for work and thereby improve the supply of labour to meet the needs of a more flexible and de-regulated labour market. Whilst unemployed claimants have always been required to be available for work and to seek and accept any reasonable opportunity of work, the introduction of JSA was intended to represent a step change in these requirements. This intention was exemplified in the choice of name for the new benefit for the unemployed.

Incapacity benefit (IB) is a contributory benefit for those people incapable of work because of sickness or disability. Its origins can be traced back to the sickness benefits first introduced by Part I of the National Insurance Act 1911. It is a work related benefit and can be compared and contrasted with benefits paid because of extra costs associated with disability (eg attendance allowance and disability living allowance), and benefits paid as compensation for loss or injury (such as industrial injuries benefits). Entitlement is determined by a medical assessment and by a test

¹Executive summary, para.6.

² For details see paper by Neville Harris in this collection.

of functional ability, now known as the “Personal Capability Assessment” (PCA). Those people who are incapable of work but do not satisfy the contribution conditions may be entitled to the means tested income support (IS). At the beginning of 1996 the government issued a Green Paper (*A New Deal for Welfare: Empowering People to Work*) in which it set out proposals to reform sickness benefits (DWP, 2006,a). These proposals built upon many of the initiatives within the “Pathways to Work” pilot programme that had been introduced within selected geographical areas in October 2003. Following a period of consultation on its proposals a Bill was taken through parliament and this has now been enacted as the Welfare Reform Act 2007. A new benefit to be called employment and support allowance will replace IB and IS for claimants who are incapable of work. For the first twelve weeks, incapacity for work will be determined by the claimant’s own doctor, and benefit will be paid at the same rate as for JSA. This is to be known as the assessment phase and is the period within which a PCA will be completed to determine entitlement to the new allowance. There will also be an additional assessment of the claimant’s capability to undertake activities designed to improve their capacity to work (see Rahilly, 2006).

The other significant group of working age claimants of earnings replacement benefits are those who are caring for children or disabled adults. Lone parents who live on their own with dependent children may have an entitlement to IS. Those who are caring for someone who is severely disabled can also claim a non-contributory benefit, carers allowance. Whilst there have been no attempts to make benefit for the latter group of carers conditional upon labour market activity, the government has been very concerned to encourage lone parents to move from benefit to work. Although the rate of employment amongst lone parents in the U.K. has risen to 57% over the past 10 years, it remains amongst the lowest in Europe, and a target of a 70% rate of employment has been set (DWP, 2005).

Labour market conditionality:

The labour market conditions will be considered under three headings: interviews, an agreed plan of action, and work-related activities.

Interviews

Unemployed claimants have always been required to “sign on”. This usually entails a fortnightly visit to the benefit office (now known as Jobcentre Plus) and a signed declaration that they continue to be availability for work and that there has been no change of circumstances. There is also an interview to check on the progress that is being made in the job search. Additional (“restart”) interviews are arranged after 13 weeks unemployment, then after 6 months, 12 months and 24 months. Traditionally, conditions have only been attached to the benefit claimant, but mandatory work-focused interviews (WFIs) have recently been introduced for partners. Ini-

tially this was just for those claimants with no dependent children, but it is now a requirement of all partners.

WFIs with personal advisers at the JobCentre have also been introduced as an additional condition for other benefits. Lone parents have been required to attend an interview at the commencement of their claim since April 2001, with further interviews after 6 months and a year. Those who have been on benefit for at least 12 months and whose youngest child is 14 are required to attend an interview every 13 weeks. The Green Paper suggested further extensions of these interviews, so that they are held at 6 monthly intervals for those with children under 11 and quarterly for those whose children are all aged 11 or over (DWP, 2006,a).³

From April 2000 claimants who are incapable of work have also been required to attend an interview with a personal adviser at the start of their claim as an additional condition of benefit. Additional interviews have been required in the Pathways to Work areas for all new claimants. The first interview is arranged after eight weeks on benefit and there are then a further five follow up interviews at monthly intervals.

Agreed work plan

Since 1996, unemployed claimants have been required to sign up to an agreed job-seeker's agreement. This is discussed at the initial interview and sets out the hours that the claimant is available for work, and any restrictions as to the work that the claimant is prepared to do (the claimant must be able to show there is still a reasonable prospect of work notwithstanding any restrictions) together with any steps to be taken to help improve the chances of finding work. A jobseeker's direction can be issued to require a claimant to undertake specified activities to improve their job prospects.⁴ The government has announced its intention to reduce from 6 to 3 months the period before which unemployed claimants are expected to broaden their job search (DWP, 2007,a).

Similar requirements for a plan of action are now to be introduced for claimants who are incapable of work. For the majority, information about their capacity to undertake work-related activities will be fed into a personal action plan (PAP) which will need to be agreed by the claimant and their personal adviser at the Job-Centre. Payment of an additional employment support component within their benefit will then be conditional on the claimant undertaking agreed job related activities.

Whilst work related activity has been voluntary for lone parents, the government has introduced a financial incentive by way of a work related activity premium within their benefit. This is to last for a period of 6 months and be paid in return for claimants undertaking an agreed plan of action including work tasters, improving their employability and job-search assistance. The intention now is to pro-

³ ch.3.

⁴ For details see paper by Neville Harris in this collection.

gressively migrate lone parents from IS to JSA, with all the associated job-seeking conditions (DWP, 2007,a).

Steps to improve the chances of work

The Social Security Act 1989 amended the requirement that unemployed claimants should be “genuinely seeking work” to require them to be “actively seeking work”. This is defined within the Jobseeker’s Act 1995 as taking such steps as can reasonably be expected to provide the best prospects of obtaining work.⁵ This might include activities such as making job applications, registering with an employment agency, drawing up a C.V. etc. When elected in 1997 the Labour government introduced the New Deal employment programmes. These were first introduced as compulsory programmes for claimants under the age of 25 who had been unemployed for 6 months and was then extended to claimants aged between 26 and 49 who have been unemployed for more than a year. These claimants are given employment counselling and guidance for a “gateway” period. The aim is to help tackle any personal barriers to work that the claimant may have. After this period claimants must choose from one of four options, firstly, six months work in the private sector (with subsidies paid to employers), secondly, six months voluntary work, thirdly, six months work with the Environmental Task Force or, fourthly, a full time education or training programme for up to twelve months.

Other versions of the New Deal have since been introduced on a voluntary basis for other claimants of working age. In 1997 the New Deal for Lone Parents was introduced as a pilot programme for lone parents whose youngest child is over the age of 5, and was extended to the whole country in 1998. The government claims that 750,000 lone parents have voluntarily signed up for this New Deal programme and that about half have been helped into work (DWP, 2006,a).⁶ The New Deal for Disabled People (NDDP) is also voluntary and was first introduced on a pilot basis in 1998. It also incorporates a personal adviser service and a range of work schemes with a national network of job brokers who are paid by their results in helping clients into work. About a third of the NDDP participants are on IB because of their mental health and another third because of musculo-skeletal difficulties and initial evaluations have shown some success in terms of claimants moving into sustained work (Adelman et al, 2004). Finally, in 2000, the government introduced a further New Deal programme for claimants over the age of 50. The intention is to convert what was a voluntary programme into a compulsory one (DWP, 2006,a).⁷

When IB is replaced by ESA claimants will not only be assessed as to their incapacity for work, there will be an additional assessment as to their ability to undertake work related activities which would improve their capacity to work. The payment of an additional employment and support component will become conditional

⁵ J.S.A. 1995 s.7.

⁶ ch.3.

⁷ ch.4.

on the claimant satisfactorily undertaking any activities which have been agreed in the personal action plan. Claimants will be able to choose between a range of interventions designed to help them move from benefit to work. These could include the NDDP, voluntary work, training programmes, job-searches with assistance from personal advisors from the private and voluntary sectors and “Condition Management Programmes” designed to help claimants manage their health condition. These might seek to “stabilise” life activities in key areas such as health, finances and housing (DWP, 2006,a).⁸

The government’s hope is that the introduction of conditions for interviews with personal advisers and for work-related activities will convert the benefit into an active “instrument of rehabilitation” (Bolderson, 1974), but this might depend upon the nature and quality of the advice (Bryson, 2003) and concerns have been raised about the adequacy of the resources and the capacity of the department to deliver given the context of reduced departmental expenditure and the government’s commitment to reduce jobs within the public sector.⁹ It is now clear that most of the “services” to be provided to help improve the job prospects of incapacity claimants will be provided by the private sector.

Sanctions

Sanctions within benefits for the unemployed have been used to enforce “industrial discipline” for some time.¹⁰ They are now being progressively extended to other benefits for claimants of working age. Entitlement to JSA ends if a claimant fails to sign on or attend an interview unless they can show good cause within 5 days. Claimants of other benefits who fail to attend their initial work-focussed interview (WFI) without good cause will, similarly, not be entitled to benefit. Failure to attend any subsequent work-focussed interviews without good case will result in a benefit reduction until the interview takes place.¹¹ Research suggests that these sanctions have not often been invoked in the Pathways to Work pilots, where claimants who fail to attend a WFI are first sent a reminder and, in some cases, a home visit is made before the imposition of a sanction which is then lifted as soon as the claimant attends an interview (Blyth, 2006).

A review of the research evidence on WFIs by the Social Security Advisory Committee (SSAC) led it to conclude that compulsion and greater intervention have not necessarily resulted in better outcomes as far as the move from welfare to work is concerned. This is especially true for the “harder-to-help” claimants (SSAC, 2006). The early evaluations of the pathways to work pilots for incapacity

⁸ ch.2, fig.2.5.

⁹House of Commons Committee on Work and Pensions, Committee, Incapacity Benefit and Pathways to Work, Third Report, HC 616-I (Vol.I Report), Session 2005-2006, paras.402 and 406.

¹⁰ For details see paper by Neville Harris in this collection.

¹¹ This is similar to the sanction available for jobseekers who fail to attend an interview- 20% of the single personal allowance.

benefit show that they are having the greatest impact upon those who are motivated to return to work, and that others see the interviews as interfering and punitive. It is entirely possible that those claimants who are more motivated and able to return to work would have done so without any WFIs.

Claimants who are considered to have voluntarily left their employment without just cause, or to have been dismissed because of misconduct are disqualified from JSA for a period of up to 26 weeks. A variable sanction period of up to 26 weeks can also be imposed when a claimant fails to apply for or accept a job without good cause, or where they neglect to avail themselves of a job without good cause. Losing a place on a training or New Deal scheme without good cause, or failing to comply with a jobseeker's direction without good cause, results in a fixed term sanction. This is a two week benefit disqualification on the first occasion and a four week disqualification on any further occasion within a 12 month period. Whilst a claimant is disqualified from JSA they may be entitled to a hardship payment if they fall within a number of "vulnerable groups", or if they can show that they would suffer hardship, but these hardship payments are paid at reduced levels compared with JSA.

When ESA replaces IB, payment of the additional employment and support component will be conditional on a personal action plan. Furthermore, it can be progressively reduced by "a series of slices"¹² if the claimant fails to undertake agreed work-related activities. Although there will be no sanction for failing to take up work or a New Deal option (as in JSA), there will be a sanction for failing to take steps to improve the chances of work. The sanction proposed in this event is a reduction in benefit rather the wholesale removal of entitlement (as for JSA).

The changes being introduced within ESA are derived from the "Pathways to Work" pilots, but the evaluation and analysis of these pilot programmes was undertaken after they had only been running for a very short time. Initial findings indicated a 21% take-up of the voluntary package of work support and an 8% increase in off-flow from benefit (Blyth, 2006). The Government was quick to proclaim the success of what were voluntary arrangements within the Pathways, but in its Green Paper it proposed to make these "choices" compulsory. This had been predicted by David Bonner (2000) when discussing earlier reforms to IB made as a result of the Welfare Reform and Pensions Act (1999): "If the carrots do not produce the effect of encouraging more claimants into work, will a regime of sanctions on the JSA model prove too tempting to resist?"

Lessons can be learned from similar developments which have taken place in Australia, which has already integrated income security and labour market services using both private and voluntary sector agencies which are paid on results. Terry Carney (2005) found that these agencies tended to use standard contracts with little

¹² DWP, n.1 above, ch.2, para.87. In his evidence to the Select Committee on Work and Pensions the Secretary of State suggested that "at the moment" the intention was only to impose a sanction for failure to attend work-focused interviews and to prepare an action plan and not for any failure to undertake work-related activities: House of Commons Work and Pensions Committee, Incapacity Benefit and Pathways to Work, Third Report, HC 616-I (Vol.I Report), Session 2005-2006, para.162.

evidence of negotiation or of personalised plans. The integration of benefit administration with job search assistance is always liable to result in tensions in the roles of the personal adviser who is expected to both enable and to enforce (Bryson, 2003), and Carney found that there was both a 310% increase in the use of sanctions over a 3 year period and a greater use of discretion, with a reduction in the number of decisions being challenged by external review. Perhaps as a result of this experience, the government dropped its proposals that would have enabled private companies contracted to supply assistance with the return to work to have the power to make decisions on benefit entitlement and sanctions.

Permitted work

JSA claimants are only allowed to work part time.¹³ However any income from this work is deducted from benefit entitlement apart from a small disregard.¹⁴ The effect of this rule is to provide practically no financial incentive to undertake part time work. For lone parents on IS the rules are similar: work for up to 16 hours is permitted but earnings are taken into account in full apart from a disregard of £20. These rules provide a perverse incentive to work “informally”- i.e. outside the tax and national insurance system and employment regulation- and not declare any earnings. Recent Joseph Rowntree research suggests that claimants do indeed combine benefits with informal work in response to their poverty. The research provided evidence of the disincentives within the tax and benefit system to take up formal work and that it can be easier for people with few skills and qualifications to access informal work (Katungi et al, 2006).

The Government has claimed that up to a million of those people on IB would like to work (DWP, 2006,a), but this is another example of benefit rules providing perverse incentives: claimants undertaking paid work may no longer be considered sufficiently incapable to satisfy the test of entitlement to benefit. Claimants may have similar fears about undertaking voluntary work , but whilst entitlement to JSA may be compromised by voluntary work if it interferes with the claimant’s availability for (paid) work, there is no such difficulty within the rules of entitlement to IB. Indeed, the government is encouraging volunteering amongst IB claimants in the sensible belief that it will be good for them as well as being good for the community (DWP, 2006,a).¹⁵ Benefit rules have allowed for a small amount of paid work in recognition of the fact that it may help to improve the claimant’s health, although the extent to which paid work is allowed is severely limited to reflect the fact that IB is an wages replacement benefit. This has come to be known as “permitted work”. Claimants are able to work for up to sixteen hours per week for earn-

¹³ i.e. less than 16 hours per week.

¹⁴ £5 for contribution based JSA, either £5, or £10 or £20 for income based JSA depending upon whether the claimant is a single person, one of a couple or a lone parent.

¹⁵ ch.2, para.104.

ings up to a prescribed ceiling,¹⁶ and then only for a year.¹⁷ After this they are only able to work for wages up to a much lower earnings limit.¹⁸ It is only those claimants who have been assessed as having more severe health conditions who are allowed to work under medical supervision or in a supported environment for an indefinite period, but there is a limit to the extent to which their earnings are disregarded for benefit purposes.¹⁹

Research suggests little knowledge and understanding of these permitted work rules (Dawson et al, 2004). Any improvements in working ability that have been gained in the year that claimants can work for up to 16 hours may be lost if they are not able to move off benefit and into work and have to give this permitted work up. Although part time work may be the best route back into full time work, the rules provide only small financial incentives but significant administrative difficulties. This is particularly true for those claimants who are incapable of work but are only entitled to the means tested IS.²⁰

Transition to work: incentives

Claimants are worried that an unsuccessful attempt to undertake paid work may then result in a return to benefit at a lower rate.²¹ JSA claimants who have been on benefit for a minimum of 13 weeks have a limited opportunity to return to JSA without sanction if the job proves not to be satisfactory. The rules require them to have worked in the employment for at least 4 weeks and to leave it before the end of the 12th. week.

Initially, IB is paid at a “lower” rate. This is increased after 6 months and then increased again up to its “higher” amount after a year. Any claimant considering a return to work may be worried about the possibility of having to return to the initial lower rate should they have to reclaim benefit. To address these concerns, linking rules were introduced in 1988, but they only applied when claimant returned to benefit after less than a year in work. Of the 24,500 claimants who left an incapacity benefit to return to work in 2002/03, 2,700 of them returned to benefit within one year, but the rules required them to make a specific application for the linking rules to be invoked so that they could be paid benefit at their previous rate.²² Qualitative research suggested that these rules were not widely appreciated (Dickens et

¹⁶ Currently £81 per week (or about 15 times the minimum wage).

¹⁷ The Social Security (Incapacity for Work) Amendment Regulations 2006 (SI 2006/757) introduced the present version of these rules on April 10 2006. The numbers making use of the permitted work facility have doubled from 8,500 in May 2003 to 17,900 in May 2005. (Mrs. McGuire M.P., H.C. Debs, vol.442, col.259W (January 30, 2006).

¹⁸ currently £20 per week.

¹⁹ 22,400 people were doing so in May 2005. (Mrs. McGuire M.P., H.C. Debs, vol.442, col.259W (January 30, 2006).

²⁰ In this case it is only the first £20 of any earned income that is disregarded.

²¹ Mr. Pond M.P., H.C. Debs, vol.431, col.104W (February 21, 2005).

²² Maria Eagle M.P., H.C. Debs, vol.426, col.121W (November 1, 2004).

al, 2004) and from October 2006 the linking became automatic without the need to apply and was extended to a period of two years.

The “unemployment trap” is a more fundamental concern. Government social security policy has long sought to ensure that people are better off in work than on benefit. One approach is to reduce the levels of benefit payable,²³ but the present government has been at pains to argue for the need for “security for those who cannot (work)” and has recognised the need to provide financial security to those with health difficulties (DWP, 2006,a).²⁴ Claimants will be no worse off on ESA when it is introduced to replace IB, (apart from the initial 12 week assessment period before the agreement of the personal action plan).²⁵ The emphasis has rather been upon “making work pay” by means of the introduction of a minimum wage and the payment of in-work benefits to supplement low pay. The recent origins of this approach in the UK can be traced back to family income supplement which was introduced in 1970 but with a very low take-up. Disability working allowance was introduced in 1992 as the first in-work benefit for disabled people. It too had very limited success. The government’s initial estimate had been for 50,000 claimants, but by 1997 there were only 12,000 (SSAC, 1997). Both have since been replaced by tax credits paid by the Inland Revenue. The prototypes (working families tax credit and disabled persons tax credit) have now been merged as the working tax credit, and whilst it may be true that it is rarely the case that people suffer from the unemployment trap, the loss of means tested benefits as income rises means that there continues to be a significant poverty trap in which many people in low paid work remain only marginally better off than on benefits.

The availability and affordability of childcare represents one of the key barriers to work for lone parents. For the first time, the government has accepted some responsibility in the provision of childcare and has produced a National Childcare Strategy. The Childcare Act 2006 has provided new duties for local authorities to ensure that there are sufficient childcare places available in their area. A proportion of any costs borne by lone parents for registered childcare up to a ceiling, can be paid as a part of working tax credit; whilst the proportion has recently been increased from 70% to 80%, the ceilings have remained at round about £170 for one child and £300 for more than one child, with the result that, often, tax credits can not fully accommodate childcare costs. There is an additional problem; parents will usually want to do what they think is best for their child. Duncan and Edwards (1999) have contrasted the “economic rationality” that government welfare to work policies assume as the basis of claimant decision making with a “gendered moral rationality” that better describes the actual basis of decision making.

The Pathways to Work pilots introduced additional work incentives (DWP, 2003).²⁶ Firstly, there was a year long return to work credit of £40 per week for

²³ See, for example, DHSS, 1985, *The Reform of Social Security*

²⁴ para.20.

²⁵ During which benefit will be paid at the same rate as for jobseeker’s allowance.

²⁶ ch.4.

those people coming off incapacity benefits and taking up work for at least sixteen hours per week with a gross annual pay of less than £15,000. This credit is disregarded for the purposes of assessing entitlement to other benefits. The Green Paper proposed that this return to work credit should be rolled out to other areas (DWP, 2006,a).²⁷ Secondly, personal advisers in the Pathways areas have been able to provide financial assistance towards any initial expenses accrued by claimants who move into work. The maximum payment was initially £300, but this has been reduced to £100. A similar approach has been adopted for lone parents on a pilot basis. In certain areas they have been paid an additional in-work credit for the first £ months of their return to work and the government has suggested that it might extend this provision (DWP, 2007,a).

The loss of assistance with housing costs has been recognised as one of the most significant barriers to work (Rahilly, 2004). Housing benefit “run on” (whereby assistance is continued for 4 weeks when the claimant moves into work) was initially introduced for claimants leaving the means tested IS and JSA, and has now been extended to claimants leaving IB.

Whilst the overall trend may be towards the progressive introduction of incentives to work, the abolition of the back to work bonus in 2004 bucked the trend. This had enabled claimants of means tested benefits who moved from part time work to full time work to be paid a lump sum calculated as half of their earnings over the previous 12 months which had served to reduce their benefit entitlement.

Conclusion

The welfare to work agenda in the U.K. has been advanced by means of a series of “pilot” programmes in selected geographical areas. This power to introduce pilots and local variations to a national scheme had been introduced with the Jobseeker’s Act 1995. Whilst it is now difficult to keep up with all these initiatives, there is some evidence of their success. The number of young people claiming benefit because of unemployment has significantly declined (Finn, 2005), the number of IB claimants has been falling for the first time, and the employment rate of lone parents has improved by 12 percentage points to 56.5% since 1997 with a 25% reduction in the number claiming benefits (DWP, 2007,a). It is of course hard to tell how much this is due to changes within the conditions of entitlement to social security and how much is due to the influence of external factors on the demand for labour. The government’s approach is to concentrate on measures to improve the availability and suitability of the supply of labour, but in the absence of any continuing increase in demand there is a real possibility that many of the measures become a meaningless bureaucratic exercise. As Trevor Buck (1996) wrote of earlier measures: “there may develop a commonality of interest between the front line decision-

²⁷ ch.2, para.108.

makers and the majority of claimants to collude in a bureaucratic exercise which bears littler relevance to the economic realities of the job market.”.

Linking rules may reassure those who would otherwise be worried about becoming worse off if they can not sustain full time work and need to return from work to welfare, but there is also a real concern as to the quality of work that people on benefit are being encouraged to take up, and of the possibility that they may become trapped in low status, low income employment. The options for education for those on benefit are limited to employment related skills training programmes, and for many claimants full time education ends benefit entitlement. The importance of employers to the welfare to work agenda is recognised within the 2007 Green Paper (DWP, 2007,a), in which the government sets out plans for local employment partnerships. Employers are to be encouraged to recruit from benefit claimants in return for the government’s investment into improving their work skills. There is also a recognition of the need to provide in-work training to continue to improve skill levels and thus aid retention and progression.

The growing use of sanctions to enforce conditionality runs the risk of exacerbating social exclusion rather than tackling it. The evidence suggests that it is those who are most vulnerable and who are least “job-ready” who most run the risk of sanctions (SSAC, 1997; Dean et al 2003), and that it those people who are already motivated to work who most benefit from the work-focussed interviews and choice options. More could be done to reduce the barriers to work. Notwithstanding the adoption of a national child-care strategy and the incorporation of assistance with the cost of childcare within Working Tax Credit, inadequate child-care provision remains a real barrier. The Disability Discrimination Acts have so far done little to reduce the discrimination suffered by disabled people in employment.

Over thirty years ago Helen Bolderson (1974) was arguing that an earnings replacement benefit (for incapacity) placed “obstacles to rehabilitation and fosters notions of malingering and exploitation”. The increased provision of skills training, work-seeking assistance and health management programmes etc. may improve the employability of benefit claimants, but claimants may continue to fear that the steps that they are required to take to “improve the prospects of work” or to “actively seek work” may be taken as evidence of either their capacity for work, or of their non-availability for work. The government is of the view that there should “no longer be an automatic assumption that just because someone has a health condition or is disabled that they are incapable of doing any kind of work” (DWP, 2006,a).²⁸ Work experience may well be the most significant factor in improving the employability of claimants, but the fundamental difficulty with earnings replacement benefits remains their inability to promote part time work as a step on the welfare to work journey. This is particularly true of those income based benefits that are means tested. In addition there is a significant administrative difficulty presented by the requirement to report any change of circumstances, so that benefit entitlement

²⁸ para.81.

can be adjusted accordingly. This does not fit well with the demands of a flexible labour market.

The most obvious way to make benefits more compatible with part time work is to significantly increase the disregard of income for benefit purposes. In-work benefits for those considered to be in full time work, together with short term measures to ease the initial move into work, may make the case on paper that (full time) “work pays”, but the financial difference is often marginal. Increasing the disregard applied to income from part time work would, in turn, require additional support to be provided to those in full time work to maintain any financial incentive to move to full time work. Whilst these changes would add significant costs to the social security bill, they could be significantly offset by helping to remove one of the main reasons for the existence of an informal economy.

The government has proclaimed the success of many of its welfare to work initiatives, but even with the move to convert what have been largely voluntary opportunities into conditions enforced by sanctions, it is most unlikely that they will achieve the targets that have been set. The main way in which the government is likely to be able to reduce the numbers of people claiming incapacity benefits is by introducing a new operational definition of incapacity through its amendments to the PCA. Thinking here has been heavily influenced by the American insurance industry, which has itself been developing a “claims management” response to the increasing number of claims. Incapacity is seen as a growing social and cultural phenomenon which can be distinguished from disease. The most significant growth in claims has been because of mental health factors and there is to be a new assessment of mental health for the purposes of entitlement to ESA, drawing upon the work of a Technical Working Group which was advised by representatives of the American insurance company UNUM (DWP, 2006b and DWP 2007b). The likelihood is that this will result in what Deborah Mallett (2003) has referred to as a “sharpening” of the test of medical conditionality, with significant numbers unable to claim ESA and having to claim JSA instead.

Similarly, with lone parents the target is to reduce the number claiming benefits by 300,000. At present the benefit claimed is IS, which has none of the work-seeking requirements of JSA. However, from October 2008 and in line with the recommendations of the Freud report (2007), lone parents whose youngest child has reached the age of 12 will be required to claim JSA instead of IS, and this age will be reduced to 7 years from 2010 (DWP, 2007,a).²⁹ In both cases the government’s policy intention is to increase the conditionality attached to groups who have not traditionally been considered to be unemployed for benefit purposes. These developments are consistent with the Green Paper’s vision for a “single gateway to financial and back-to-work support for all claimants” (DWP, 2006,a),³⁰ and represent a move towards a common earnings replacement benefit for all those of working age who are not in full time work (Smith, 1999) in which there will be a

²⁹ Para. 34

³⁰ Executive Summary, para.49.

blurring of the distinction between benefits for the unemployed and for those previously considered unable to of work. In the meantime the aim seems to be to make all claimants of working age subject to work-related conditions which need to be agreed in action plans after compulsory interviews with personal advisers.

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The Justice Implications of ‘Activation Policies’ in the UK

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Introduction

This chapter is divided into three parts. The first part analyses the development of social security provisions for the unemployed in the UK and describes the shift away from a more *passive approach*, in which the main function of social security was to prevent hardship, towards a more *active approach*, in which the main function of social security is to get unemployed people back into work. This shift has involved the integration of social security policies and employment policies, which were formerly relatively autonomous policy areas in the United Kingdom. The passive approach was in the ascendancy for the first 40 years after World War 2 while the active approach has increased in importance over the last 15-20 years. The first part of the chapter concludes by describing the two main elements of the active approach, the Jobseekers Allowance, which was introduced by the Conservatives in 1996, and the New Deal, a set of programmes that have been introduced by New Labour after its return to government in 1997 and are one of its flagship welfare reforms. These developments are analysed at a macro and a micro level. The second part of the chapter focuses on these developments to the macro level. It refers to the government’s dissatisfaction with the emphasis in the passive approach on rights and its neglect of responsibilities. It explores the shift away from a *contribution-based approach to citizenship*, in which rights to benefit are derived from work and the payment of insurance contributions, first to a *status-based approach to citizenship*, in which rights to benefit apply to everyone who qualifies on income grounds, and then to a *reciprocity-based approach to citizenship*, in which rights to benefit

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are dependent on the individual's behaviour. The third part of the chapter focuses on these developments to the micro level. It explores the shift away from a more *bureaucratic* and *legalistic* type of decision-making towards a more *professional* and *managerial* one, and examines the implications of this shift for rights of redress and accountability.

The development of social security provisions for the unemployed in the UK and the shift from a passive to an active approach

The Beveridge Legacy

The Beveridge Report¹ proposed and the post-war Labour government introduced, with some modifications, a universal scheme of contributory social insurance against a range of misfortunes that people encounter in the course of their lives.² In return for what were initially flat-rate, but soon became earnings-related, contributions, people received flat-rate benefits when they were no longer able to support themselves financially, e.g. as a result of an accident at work or through unemployment, sickness, disability or old age. The aim was to prevent want (or poverty) by providing a decent level of income as of right and without resort to a means test.

Beveridge had assumed that, in peacetime, men would go out to work and earn enough to support their wives and children, while their wives would stay at home and look after the family. However, to contribute to the costs of child rearing, the government introduced flat-rate family allowances financed out of taxation³. Men who were unable to work could claim social insurance benefits, which were intended to meet the needs of everyone in the household. Thus, men could claim allowances for their wives and dependent children. Although successive governments did not abolish means-tested social assistance, it was widely believed that, over time, the number of people who were forced to rely on it would decline to a bare minimum. This optimistic prognosis followed from two assumptions. The first of these was that, by introducing a free National Health Service, the health of the population would improve and the number of people who would not be able to work on grounds of sickness would decline. The second was that, through Keynesian demand management, full employment would be achieved and the number of people unable to find work would be very small indeed. Although an employment service was set up, its main functions were to provide careers advice, particularly for young people, and to match potential employers with potential employees – it

¹ Beveridge (1942).

² The legislation introduced by the post-war Labour Government did not implement the Beveridge Report in full. For an account of the ways in which the legislation differed from Beveridge's proposals, see, for example, Glennerster (1995, chapters 2 and 3).

³ These were originally for the second and subsequent children. Grants were also introduced to contribute to the costs of important 'life cycle' events such as birth and death

was certainly not to pressurise the unemployed back into work. Policy makers assumed that everyone would prefer work to unemployment.

As it turned out, both the assumptions referred to above turned out to be false. In spite of a free National Health Service, the demand for health care continued to rise and, after a period of near full employment, unemployment began to rise too. Both of these developments had major implications for social security and, contrary to the optimistic prognosis outlined above, the number of benefit claims from sick and unemployed people did not decline. In this chapter, I shall focus on the implications of rising unemployment for social security.

As unemployment began to rise in the 1960s, people experienced longer spells of unemployment and many of them exhausted their rights to contributory unemployment benefit. Although Beveridge had recommended that unemployment benefit should last until the unemployed person had found another job, the post-war Labour government had limited the payment of unemployment benefit to 12 months. After that, the increasing numbers of long-term unemployed had to rely on means-tested social assistance. In addition, because many young people were unable to find employment, they did not acquire the contribution records that would have entitled them to unemployment benefit. They, and others who experienced intermittent spells of unemployment, also had to rely on social assistance. The number of single parent households headed by women, most of whom had not paid contributions and were therefore not entitled to unemployment (or any other contributory) benefit also increased. Thus, by the 1960s, it was clear that more and more people were falling through the social insurance net and becoming dependant on social assistance. However, instead of increasing the scope and coverage of social insurance, as it might have been expected to do, the incoming Labour government⁴ decided instead to strengthen social assistance, which was 're-launched' as supplementary benefit (the forerunner of today's income support and the social fund) in 1966.

These developments had a number of consequences. As far as the unemployed were concerned, it institutionalised a two-tier structure of social security provisions, comprising unemployment insurance for those who met the contribution conditions for 12 months and supplementary benefit for those who did not.⁵ Those who were dependent on supplementary benefit, comprised school leavers and other young people who had not been in work long enough to fulfill the contribution requirements and the 'long-term' unemployed who had exhausted their entitlement to unemployment benefit.

Until 1966, unemployment (and sickness) benefit were paid at a flat rate that did not take into account previous earnings. However, in 1966, earnings-related supplements (ERS) to these benefits were introduced – in the case of unemploy-

⁴ After 13 years of Conservative rule, Labour was returned to office in 1964. In opposition, Labour had been antipathetic to means testing. See Atkinson (1969).

⁵ Although supplementary benefit was paid at two rates, a lower rate for the first 24 months and a higher rate after that, the unemployed were not paid at the higher rate. They were the only claimant group who were excluded from the higher rate.

ment benefit, the earnings-related supplement lasted for six months. Unemployment (and sickness) benefits were not taxable and those who were unemployed for short periods often received tax rebates and were subject to less tax if/when they returned to work.⁶ By the end of the 1960s, the average replacement rate for the first 13 weeks of unemployment was 87% and, for 35.2% of the unemployed, it was higher than 90%.⁷ The government soon began to express concern that this situation might reduce the incentive for the unemployed to move into paid employment.

This phenomenon, known as the *unemployment trap*,⁸ had been recognised by Beveridge who had argued, in his 1942 Report, that ‘it is dangerous to allow benefit during unemployment or disability to equal or exceed earnings during work... ..[and that]... the gap between income during earning and during interruption of earning should be as large as possible’⁹. This was achieved by keeping benefit levels for the unemployed low and, for low paid workers, by resorting to the *wage stop*, which limited the amount of social assistance an unemployed person could receive to what that person would be earning if he/she had been in work. However, because the government was, in due course, persuaded that it was wrong for the social security system to pay benefits at less than subsistence level during periods of high unemployment, the wage stop was used less and less and it was eventually abolished in 1975.

The government introduced a series of measures to deal with the disincentive effects of the unemployment trap. These involved a mixture of carrots and sticks. During the 1970s, it introduced a range of means-tested benefits, which were designed to boost the incomes of people in low paid employment. These included Family Income Supplement (the forerunner of today’s Tax Credits) – introduced in 1971¹⁰ – for families with dependent children, and rent and rate rebates (the forerunners of today’s Housing and Council Tax Benefit) – introduced in 1972 – which provided assistance with rent and rates. Between 1979, when the Conservative Party (led by Margaret Thatcher) returned to office, and 1988, a plethora of policy changes,¹¹ which included abolishing the earnings-related supplement and making benefits liable to taxation, led to a substantial reduction in the incomes of the un-

⁶ The size of the rebate and the reduction in tax liability depended on when in the tax year the person had become unemployed.

⁷ See Dilnot, Kay and Morris (1984, p. 58).

⁸ The unemployment trap refers to the lack of financial incentives for unemployed people to return to work. It is caused by high replacement rates, i.e. by incomes for people who are unemployed that approach (and in some cases exceed) incomes they did or could obtain from work. Income out of work included unemployment benefit, supplementary benefit, child benefit, housing benefit and tax rebates while income in work comprised wages, child benefit and housing benefit net of income tax and national insurance contributions. The calculations assume that people claim all the benefits to which they are entitled.

⁹ Beveridge (1942, p. 154, para 411).

¹⁰ After six years in opposition, the Conservatives were returned to office in 1970.

¹¹ Atkinson and Micklewright claim that a total of 38 significant changes to unemployment benefit and to supplementary benefit and housing benefit for the unemployed were implemented in the 10-year period from 1979 to 1988. A small minority of these changes favoured the unemployed, a few were neutral but the large majority were unfavourable. See Atkinson (1989), chapter 8.

employed. By the early 1980s, the average replacement rate for the first 13 weeks of unemployment had fallen to 60% and, for only 2.9% of the unemployed, was it higher than 90%.¹² However, the increased reliance on means-tested benefits created another problem, known as the *poverty trap*.¹³

During the 1980s, some low paid workers faced marginal tax rates of more than 100 per cent.¹⁴ This meant that an increase in earnings could actually leave them worse off than they were before unless their earnings rose substantially and this fuelled demands for substantial wage increases. By reducing tax rates and altering the rates (known as 'tapers') at which means-tested benefits are withdrawn, the number of people experiencing marginal tax rates of 100 per cent was reduced, although the numbers experiencing marginal tax rates of 60-80 per cent actually increased. More recently, the introduction of a national minimum wage in 1997 has undoubtedly reduced the severity of this problem.

The Balance between Help and Control

Policies towards the unemployed have always involved a mixture of *help* and *control*.

Help has taken two forms. First, social security benefits have provided a substitute income that, however inadequate it may have been, has prevented destitution; second, employment services have provided help, which has sometimes included training, in finding new employment.

Control has taken a number of forms. From the start of the contributory unemployment benefit scheme in 1911, unemployed persons could be disqualified from benefit if:

- **they left work 'without good cause',**
- **they were dismissed for 'misconduct', and**
- **they refused to accept suitable offers of work or training.**

The justification for these penalties is that they were needed to protect the integrity of the national insurance fund. In private insurance, people who are deemed to be responsible for their own misfortune do not receive insurance payments. In social insurance, the rules are not quite so strict but it has always been argued that those who bring their misfortune on themselves should not be able to make a claim on the

¹² See Dilnot, Kay and Morris (1984, p. 58).

¹³ The poverty trap refers to the situation in which a low-paid worker could find that, if his/her earnings were to increase, he/she would not only have to pay more in income tax (then 30p in the £1.00) and national insurance contributions (then 9p in the £1.00), but would also experience a withdrawal of their means-tested benefits (housing benefit at between 28p and 33p in the £1.00, FIS at 50p in the £1.00, as well as an unspecified amount of 'passport' benefits). Thus, for a low paid worker, an increase in earnings of, say, £1.00 might well lead to, say, 80p being lost due to a combination of increases in taxation and reductions in benefits. This would be equivalent to an effective 'marginal rate of taxation' of 80 per cent – far higher than anything experienced by those with higher earnings.

¹⁴ This assumes that they claimed all the benefits to which they were entitled when they were out of work.

fund in the same way as those who experience misfortune through no fault of their own.

Although unemployed persons could be disqualified from unemployment benefit for periods of up to six weeks¹⁵, they could still claim means-tested social assistance, although this was reduced to below subsistence level (the deduction was 40 per cent of the value of the personal allowance for a single claimant of their age).

The Paradox of Control

During the years of low unemployment, from the 1940s until the 1960s, the control function was relatively unimportant. However, during the years of high unemployment, from the 1970s until the 1990s, it became much more important. There is something of a *paradox* in this: one might think that, as far as the unemployed are concerned, controls against abuse of the benefits system would be greater when work was easy to obtain (because unemployment was low) than when work was hard to find (because unemployment was high). In fact, the reverse is the case.

In the early 1970s, the government decided that the employment service was too closely associated with the system of unemployment benefits – unemployed persons ‘signed on’, they were assessed for benefit, and they sought information about employment opportunities in the same place. The following quotation, from a Department of Employment publication¹⁶, makes it clear why a change of policy was thought to be necessary.

‘The majority of workers who register with the employment office are those claiming unemployment benefits. For this reason, the service is regarded by many workers as a service for the unemployed – and mainly for manual workers at that. ... The task facing the service is to break out of the situation where employers do not use it because they doubt – somewhat rightly – whether it has suitable people on its books and where workers seeking jobs do not visit the local employment office because the vacancies they want are not notified by the employer.’

The Government decided that, if the employment service was to be an active force in the labour market, its links with the benefit system would have to be weakened. In accordance with this philosophy, it set up a network of Job Centres, run by the Manpower Services Commission. Many of these Job Centres were located in shop fronts in the main shopping areas of our towns and cities where they still are today. However, one consequence of this divorce was that, because employment service staff were reluctant to get involved with the control mechanisms referred to above, social security staff were instructed to enforce them more strictly.

¹⁵ The 1911 National Insurance Act imposed a blanket six-week disqualification but the 1920 National Insurance Act replaced this by a period of ‘up to six weeks’. This provision was carried forward into the National Insurance Act 1946 and remained the statutory position until it was increased, first to 13 weeks in 1986 and then to 26 weeks in 1988. See Section 1.5 below.

¹⁶ Department of Employment (1971), cited in Hill (1990, p. 135).

In the late 1980s, the policy was put into reverse. The Manpower Services Commission was abolished and its functions were taken over by the Department of Employment. A quotation from a later Department of Employment publication¹⁷ makes the thinking behind the policy reversal clear.

'Many of those who are genuinely unemployed have lost touch with the jobs market. That is why the separate management of the Job Centre network and the Unemployment Benefit Service no longer makes any sense. Over recent years, unemployed people have continued to attend benefit offices, but their contact with Job Centres has often been limited to occasional scrutiny of the self-service displays. There has been no opportunity for Job Centre staff to advise them regularly and individually about the jobs, training and other opportunities available. It is in no-one's interest that unemployed people remain out of touch with the jobs market and become passive recipients of unemployment benefits.'

Thus, the wheel came full circle. The last 15-20 years have seen the increasing integration of help and control for the unemployed, with the two functions now discharged by a single agency, Jobcentre Plus. This agency administers the payment of benefits for the unemployed but its main function is to 'persuade' the unemployed, using a mixture of carrots and sticks, to get back into the labour market, either directly by finding a job or indirectly by undertaking training to improve their employability.

The establishment of Jobcentre Plus in 2002 reflected a new mode of governance for social security. The Employment Service, which had been part of the Department for Education and Employment (DfEE), was transferred to the Department of Social Security (DSS) and the DSS was renamed the Department for Work and Pensions (DWP). This change was associated with the introduction of an individualised service in which Personal Advisers meet claimants to discuss their work aspirations and options; assist them in searching for jobs; explore their training needs and the availability of training programmes; advise them on childcare and the availability of specialist services, such as services for those with drug or alcohol dependency; and make indicative calculations about whether or not they would be better off in work or on benefit.¹⁸ It was made possible by the transfer of front-line staff from the Employment Service, who had a more 'professional' orientation to their work than their counterparts from the Benefits Agency, whose orientation was more 'administrative'.¹⁹ In parallel with this change, the role of the Treasury changed from that of providing resources for the DSS to enable it to implement its

¹⁷ Department of Employment (1988), cited in Hill (1990, p. 136).

¹⁸ Stafford (2003, p. 221).

¹⁹ Employment staff were, for example, expected to have an in-depth knowledge of local labour markets, to understand the employment needs of employers, to be able to offer specialist help and advice to employers on training, rates of pay, equal opportunities and employing people from overseas, to be well informed about disability and equal opportunities issues, to be able to identify those who would benefit from training, to be able to match applicants with jobs. Their work involved the application of this knowledge to the needs of jobseekers. By contrast, the work of most Benefits Agency Staff involved the application of rules to the circumstances of claimants and was more routinised.

agenda (which had been its role in the past) to that of monitoring the services provided, on a quasi-contractual basis,²⁰ by the DWP and its agencies.²¹

Active and Passive Intervention

It is sometimes said of the Beveridge scheme of social insurance that it was essentially passive.²² By this is meant that the post-war social security system that was inspired by Beveridge was designed to respond to the circumstances of people's lives but not to influence them.

This *passive approach* implies that the main function of social security is to prevent hardship. It does so by providing a replacement income for the male breadwinner who loses his job. Unemployment benefit was initially regarded as a temporary expedient that would only be required for a short period (it lasted for 12 months) until the unemployed man found a new full-time job. Although single women were eligible for unemployment benefit, married women were regarded as being outside the unemployment benefit scheme because their role was that of wife and mother and, if they worked, they only did so on a part-time basis when the children had left home.

When unemployment began to increase and the two-parent household began to break down, the inadequacies of unemployment benefit became apparent. The number of long-term unemployed persons and the number of single parents started to increase and social assistance became the main source of support for them. In an attempt to prevent hardship, the government responded by introducing higher benefit rates for the long-term unemployed who were dependent on supplementary benefit (the forerunner of income support), and additional payments to lone parents in receipt of child benefit and income support. However, this approach did not last for long and soon gave way to the more active approach that has been adopted in the last 15-20 years.

The *active approach* implies that the main function of social security is to change people's labour market behaviour – mainly by placing much greater emphasis on getting unemployed people into work and discouraging them from relying on benefits. This involved reducing benefit levels, tightening up on the eligibility rules for unemployment insurance, increasing the use of means-tested unemployment assistance and attempting to change people's lifestyle choices, e.g. by reducing bene-

²⁰ These comprised a Public Service Agreement, in which the Department set out its policy objectives for the next three years, and a Service Delivery Agreement, in which it specified how these objectives would be met and the indicators against which its performance would be measured.

²¹ Carmel and Papadopoulos (2003, p. 40).

²² This characterisation has been vigorously challenged, in particular by my Edinburgh colleague, Adrian Sinfield, who has argued that social security policy in the UK, and elsewhere, has always involved a mixture of 'active' (labour market) and 'passive' (income replacement) measures. See, for example, Sinfield (2003). I accept that this is the case but would, nonetheless, argue that the balance between these of 'active' and 'passive' measures has changed and that is the argument I attempt to advance in this section of the paper.

fits for single parents with the aim of making life as a lone parent less attractive and encouraging them to take work, live with relatives or find a new partner.

The first approach, which is the one put forward in the Beveridge Report, was the dominant one for more than 40 years while the second approach has been increasing in importance over the last 15-20 years. It began to take hold in the late 1980s under the governments of Margaret Thatcher and John Major and should not only be associated with Tony Blair and Gordon Brown.

Following the example of the Reagan administration in the USA, the first two Conservative governments led by Margaret Thatcher²³ adopted an increasingly neo-liberal approach to policy – employment rights were reduced, wages councils abolished and benefit levels reduced. After the 1987 general election, the government's approach to the unemployed and the welfare state government changed quite dramatically. The overall aim of policy became that of reducing welfare dependency by restricting benefit eligibility and policing the job-seeking behaviour of the unemployed more closely. The Department of Employment was given the primary task of re-motivating and improving the employability of those who had given up looking for work.

By the end of the decade, new legislation had re-defined the position of those without work. Most unemployed 16 and 17 year olds lost the right to Income Support, in return for which they were offered a place on a Youth Training Scheme (YTS), and the claims of those above that age, in particular the longer-term unemployed, were scrutinised more rigorously. The previous requirement that claimants should be 'available for work' was replaced by a stronger requirement that they should be 'actively seeking work'. In addition, everyone who had been unemployed for six months was offered a 'voluntary' Restart interview, in which they were given advice and information about training and encouraged to agree on a course of action that would get them back into work.

By 1995, a much stricter benefits regime was in place. Compulsory conditions were imposed on those who failed to find employment and the use of sanctions for those who did not meet them was stepped up. However, 'carrots' were used as well as 'sticks'. The Department of Employment became involved in promoting in-work benefits, and claimants were increasingly given in-work benefit assessments alongside the reviews of their job-seeking activities. These in-work benefits (involving assessments of entitlement to Family Credit, for those with dependent children, Housing Benefit, for tenants, and Council Tax Benefit) were intended to ameliorate the unemployment trap and encourage the low-paid to take jobs that were increasingly being generated in the deregulated labour market.

When the Labour Party was returned to government in 1997, it did not attempt to put the clock back but set out to develop a new 'Third Way' which incorporated some of the neo-liberal ideas that had been put in place by the Conservatives, while maintaining its social democratic commitment to social justice.²⁴ Its centrepiece

²³ Elected in 1979 and 1983.

²⁴ See Giddens (1998).

was the New Deal, a set of policies that the new government announced in its first budget in 1997. The avowed aim of these policies was to get young people, single parents and the long-term unemployed into work, in the belief that, for those who are able to work, work is the best guarantor of welfare. A distinction was made between those who were able to work, who were to be helped and/or cajoled into work by one of six New Deal programmes – the New Deals for Young People (under 25), the Over 25s, for Over 50s, the Partners of Unemployed People, Disabled people, and Lone Parents – and those who were not able to work, who would continue to receive ‘unconditional’ support from social security. A number of separate ‘businesses’ were set up to deliver benefits and services, one of which (Jobcentre Plus) has agency status and provides benefits and services to everyone, except disabled people and their carers, who is of working age.²⁵

Initial funding for the New Deal was provided by a £5 billion ‘windfall tax’ on the profits of recently privatised public utilities. The key feature of the New Deal, which distinguished it from previous initiatives, was the provision of support tailored to the needs and circumstances of its client groups. Programmes are specific to target groups (such as young people or lone parents), a range of provision is offered within each programme, and, most importantly, each participant has a New Deal Personal Advisor (NPDA) whose role is to provide individualised and continuous support during the period of participation in the New Deal.²⁶

Although the periodic, work-related interviews (known as ‘Restart interviews’), which were introduced for the longer-term unemployed in 1986, were compulsory, in the sense that claimants’ benefits could be reduced or withdrawn if they refused to attend ‘without good cause’, and attendance at work-focused training courses such as ‘Employment Training’ was a condition of entitlement to benefit, New Labour chose to emphasise the punitive elements of the Conservative legacy.²⁷ Under compulsory New Deal programmes,²⁸ increased sanctions, including the ‘full family sanction’, which allows for the reduction of all the benefits claimed by the household, were introduced and the extent of compulsion has increased.

Jobseekers Allowance and the New Deal

Jobseekers Allowance (JSA), which replaced the combination of contributory unemployment benefit and means-tested income support by a single benefit with uni-

²⁵ The others are the Child Support Agency, which is also an executive agency and is responsible for running the child support system; the Disability and Carers Service, which is part of the Department for Work and Pensions and administers benefits for disabled people under pension age and their carers; and The Pension Service, which is also part of the DWP and provides a dedicated service for present and future pensioners.

²⁶ It has been argued that the provision of support that is tailored to the needs and circumstances of different client groups distinguishes the New Deal from activation programmes in other liberal welfare states, e.g. in Australia and the USA. See Carney (2005).

²⁷ See Bryson (2003, p. 82).

²⁸ The New Deals for Young People and for the Over 25s are compulsory, while those for Lone Parents, Disabled People, the Over 50s and Partners are voluntary.

fied rules, was introduced in 1996. It was designed to emphasise the responsibility of the unemployed to take advantage of every opportunity offered to them to return to work.²⁹ Since then everyone in receipt of JSA has been required to enter a 'Jobseekers Agreement' specifying the detailed weekly steps that they are expected to take in looking for work. These activities are monitored at fortnightly intervals. In addition to imposing sanctions for misconduct, voluntarily leaving work without just cause and refusal or failure to apply for or accept a job vacancy, JSA officials were given a new discretionary power to issue a 'Jobseekers Direction', which requires those in receipt of JSA to look for jobs in particular ways, take specific steps to 'improve their employability' or take part in a training scheme.

The duration of the sanction for misconduct, voluntarily leaving work without just cause and refusal or failure to apply for or accept a job vacancy is a discretionary matter and claimants can now be disqualified from benefit for a period of up to 26 weeks.³⁰ By contrast, claimants who breach a 'Jobseeker's Direction' are disqualified from benefit for a fixed period of two-weeks or, in the event of a further breach within the next 12 months, for four weeks.³¹ Since the introduction of the New Deal, the sanctions that formerly applied only to work have been extended to cover prescribed training schemes and employment programmes.³² Table 1 below lists the number of cases between 2000 and 2005 referred by Jobcentre staff, who had doubts about a claimant, to a Sector Decision Maker who decided whether the doubts were sufficiently well founded for a sanction to be imposed.

²⁹ It contains a contribution-based element, which lasts for 6 months (contributory unemployment benefit lasted for one year), which does not contain any dependent's allowances, and an income-based or means-tested element, which is intended to cover the needs of the unemployed person and his/her household. JSA is paid at different rates for different age groups – there is a very low rate for those exceptional cases of people under 18 who are entitled to it, a reduced rate for those aged 18-24, and a standard rate for those aged 25 or over. Considering that average earnings for full-time adult employees were £457 pw in April 2007, that median earnings for men in full-time employment were £498 pw for men and £394 pw for women, and that the standard rate of means-tested JSA is £60.50 pw, it is clear that Jobseekers Allowance provides very inadequate protection for most people. It is uprated annually in line with prices rather than wages and, in recent years, has fallen further behind the average increase in wages.

³⁰ For details see Wikeley and Ogus (2005, p. 373, n. 324).

³¹ See Wikeley and Ogus (2005, p. 375).

³² Like the sanctions for breaching a 'Jobseeker's Direction', the training-related sanctions are non-discretionary. Claimants are disqualified for two weeks for a first breach, for four weeks for a second breach within 12 months and for of 26 weeks for another breach within 12 months of the second breach. The latter penalty is particularly draconian. For a detailed account of the sanctions themselves, see Wikeley and Ogus (2005, pp. 375-6). For a review of the sanctions regime, which includes an account of its impact on claimants, see Peters and Joyce (2006).

Table 1: Sanctions imposed on Unemployed Claimants, April 2000 – August 2005

Type of decision	Cases referred for decision	% leading to adverse decision	Sanctions imposed
Variable length:			
Leaving employment voluntarily	1,385,590	32	443,388
Refusal of employment	439,490	40	175,796
Lost employment through misconduct	358,490	26	93,207
Neglect to avail of an opportunity of employment	1,100	25	275
Discharge from H M Forces	230	15	35
Fixed length:			
Giving up a place on a training scheme or an employment programme	36,990	55	20,345
Losing a place on a training scheme or an employment programme	67,510	62	41,856
Refusal of a place on a training scheme or an employment programme	4,600	66	3,036
Neglect to avail of a place on a training scheme or an employment programme	3,930	51	2,004
Failure to attend a place on a training scheme or an employment programme	197,950	61	120,750
Refusal to carry out a Jobseekers Direction	41,510	64	26,566

Source: Peters and Joyce (2006, Table D2).

From the above, it is clear that, although most referrals do not result in the imposition of sanctions, this is a commonplace event. 927,458 sanctions were imposed over the period April 2000-August 2005, corresponding to an annual rate of 173,898 sanctions per year. Of this total, 133,631 (76.8 per cent) related directly to the circumstances in which a claimant left their previous employment or the refusal of an offer of employment, while 40,266 (23.2 per cent) were fixed-term sanctions imposed on those who did not fulfill their training or job search responsibilities. Claimants who disagree with the imposition of a sanction can ask for the decision to be 'reconsidered' and it is reported that approximately 20 per cent of the sanctions imposed for leaving work voluntarily are lifted in this way.³³ However, no

³³ Peters and Joyce (2006, p 67). In some of these cases, the claimant may have applied additional information which was not available when the original decision was made.

systematic data is available. There is likewise no systematic data on the number of appeals against the imposition of sanctions or the outcome of these appeals although anecdotal evidence suggests that appeals against sanctions are now relatively uncommon.³⁴

Although most people appear to support the government's commitment to securing employment for those who are out of work, and there is some evidence that the measures introduced by the government have contributed to the high employment rate and the relatively low levels of unemployment in the UK,³⁵ there is a danger that its approach may become excessively authoritarian. The government's obsession with social security fraud and the widespread use of television advertisements,³⁶ which encourage the public to treat those in receipt of social security with suspicion, reinforce the efforts of social get claimants off benefit and into work. As a result, claimants who are not really capable of work may be pressurised into seeking work and subjected to sanctions when they fail to obtain it and this emphasis on work may lead to the stigmatising of people on benefit. The application to recipients of Incapacity Benefit of many aspects of the regime that was developed for recipients of Jobseekers' Allowance, e.g. frequent attendance at work-focused interviews with a Personal Adviser, was intended to produce a further shift in the boundary between those who can and those who cannot work, and to result in further reductions in the number of people on benefit.

Under the Welfare Reform Act 2007, the process is being accelerated with the aim of getting 1 million of the 2.7 million claimants who are currently in receipt of Incapacity Benefit back into employment. Incapacity Benefit, and Income Support paid on the grounds of incapacity, will be scrapped in October 2008 and replaced by a new Employment and Support Allowance (ESA), which will have a new, stricter test of disability than the test that was used for Incapacity Benefit.³⁷ Those who cannot engage in work-related activity will receive a 'support component'. Those who can engage in work-related activity will receive a 'work-related activity component' but may be required to undertake a work-focused health-related assessment aimed at providing additional information about their functional capacity; to attend a work-focused interview to discuss what steps they can take to move towards work; or to undertake activities, such as work trials, training, or attending a programme designed to help them manage their condition, which would increase their likelihood of getting a job.

Claimants who are assessed as not being able to take part in any work-related activity (the minority who are most severely disabled) will not be expected to take part in work-focused activities unless they want to and will not be subject to any sanctions. They will receive a minimum of £89.50 a week and will be given a guar-

³⁴ Wikeley (personal communication).

³⁵ The evidence is summarised in National Audit Office (2006).

³⁶ In particular, 'Targeting fraud' and 'We're onto you'. See Grover (2005)

³⁷ The revised disability test aims to assess what an individual can do, rather than what an individual cannot do and will look at things such as a person's ability to use a computer keyboard or mouse. Some 20,000 people a year are expected to come off benefit as a result of the change. See DWP (2007).

anteed income of £102.10 a week. Everyone in this group will benefit since the long-term rate for Incapacity Benefit is currently £84.50 a week but the poorest will benefit most. Claimants who are assessed as capable of taking part in some form of work-related activity (the majority who are less severely disabled) will be entitled to claim ESA at £84.50 a week, i.e. at the same rate as Incapacity Benefit. They will be required to attend work-focused interviews, which are intended to help them overcome barriers to work and support them into sustainable employment, and their benefit may be cut if they do not do so.³⁸

The shift from a contribution-based approach first to a status-based approach and then to a reciprocity-based approach to citizenship

The Balance between Rights and Responsibilities

Underpinning the New Deal is a shift in the way government perceives the relationship between the state and the claimant. The government referred to this as ‘a change in the contract between the state and the individual’,³⁹ which involved new rights for the claimant in return for the acceptance of new responsibilities. The new rights included the right to expect government to guarantee the availability of good quality job-search advice, training opportunities and employment (in a normal, unsubsidised job or in a job subsidised by the state). The new responsibilities involved an obligation to take full advantage of these opportunities. A ‘hand-up’ rather than a ‘hand-out’ became the new mantra: work rather than benefits became the main route to social security, and the New Deal was central to the new strategy.⁴⁰

This new approach reflected, in part, the government’s dissatisfaction with the emphasis in the passive approach outlined above on rights and the neglect of responsibilities. In order to understand its concern, it will be helpful to clarify the meaning of rights and responsibilities and their relationship to citizenship.

A right is an enforceable claim and individuals who have rights can enforce their claims against other individuals, corporate entities or the state. *Moral rights*, which are enforceable by appeals to morality, can be distinguished from *legal rights*, which are enforceable by appeals to the law, if necessary through appeals to the courts. If we were to say that everyone has a right to a job then, in the absence of any commitment by government to enforce this, we would be asserting a moral right. However, if, by acting as employer of last resort, the government

³⁸ DWP (2008)

³⁹ Department of Social Security (1998).

⁴⁰ The new strategy contained a number of other components, e.g. the introduction of a national minimum wage and much greater emphasis on in-work benefits delivered through tax credits. For accounts of the new strategy, see Millar (2003) and Adler (2004).

were prepared to guarantee that jobs could be found for everyone, e.g. by acting as employer of last resort, we would be asserting a legal right. What is at issue here are legal rights that people might wish to enforce against the government, for example the right to social security, and whether these rights should entail responsibilities for the rights holder.

Citizenship as a Contested Concept

Citizenship is one of a set of moral and political concepts known as 'essentially contested concepts'⁴¹. As such, it can be defined in relatively uncontentious, uncontroverial way but is open to a range of interpretations. Thus, it can be defined in terms of the rights and duties that people enjoy as a result of being members of a community. However, this leaves open the nature of the rights and duties, the balance between them, and the identity of the community (which may be a nation state but may equally be the international community) referred to in the definition. Disagreements over these issues are unlikely ever to be finally settled and it is this fact that, in my view, makes citizenship an 'essentially contested concept'.

The traditional view of citizenship, which is associated with the writings of T. H. Marshall⁴², is that social rights, which include the right to social security, are an essential component of citizenship. Marshall defines citizenship as 'a status that is bestowed on everyone who is a full member of a community' and draws attention to the tension or contradiction between the idea of citizenship and the operation of markets in a capitalist society. This is because citizenship is an egalitarian concept while capitalism inevitably involves economic and social inequalities. Marshall believed that citizenship could not only co-exist with and ameliorate these inequalities but could also legitimate them and make them more acceptable, and that the post-war welfare state provided the institutional means for resolving the conflict between individual choice, freedom, markets and capitalism on the one hand, and collective welfare, equality, politics and socialism on the other.

Marshall argued that citizenship comprises *three clusters of rights*: civil rights, political rights and social rights.

- *Civil rights* refer to rights which are necessary for individual freedom (freedom of movement, freedom of assembly, freedom of speech and freedom of religion), the right to own property and conclude valid contracts, and the right to justice (habeus corpus, i.e. freedom from arbitrary arrest, the assumption of innocence until proven guilty, and the right to a fair trial)
- *Political rights* comprise the right to participate in the exercise of political power both as a voter and as a candidate

⁴¹ Gallie (1964).

⁴² Marshall (1963).

- *Social rights* embrace the right to ‘a modicum of economic welfare and security and to live the life of a civilised person according to the standards of society’.

Each of the three clusters of rights is associated with a different set of institutions. Thus, civil rights are intimately bound up with and, in theory, protected by the courts; political rights are linked to parliament; while social rights are – at least in Britain – associated with the social services, i.e. with the provision of benefits (like social security) and services (like health care and education) by the state.

According to Marshall, citizenship as such did not exist in feudal society. The formative period for civil rights was the 18th century (more exactly the period between the Reformation and the first Reform Act in 1832), for political rights it was the nineteenth century and for social rights it was the twentieth century, although there was clearly some overlap. Thus, the process was both *sequential* and *evolutionary* (civil rights came first, political rights next and social rights last) and the welfare state was to be understood as the culmination of this evolutionary process.

Although Marshall’s thesis has been very influential, it has also generated a great deal of criticism. It has been criticised by comparative scholars (like Michael Mann⁴³) on the grounds that it is entirely about Britain and other countries do not fit the British model and because the evidence from other countries suggests that citizenship is not necessarily built up in the sequence Marshall describes. The experience of other countries makes it clear that capitalism does not necessarily lead to the welfare state

This criticism has enabled right-wing liberals (like Norman Barry⁴⁴) to criticise Marshall for presenting a left-wing justification for the welfare state. These critics argue that citizenship is made up of civil and political rights only and that ‘social rights’ are not really a component of citizenship because they can only be achieved at the expense of other, more fundamental, rights, in particular property rights. Thus, for example, a ‘right’ to social security pre-supposes a social security system paid for out of taxation but the principle of taxation is inconsistent with respect for property rights.

It has also been criticised by internationalists (like Yasemin Soysal⁴⁵) for adopting a national conception of citizenship and for ignoring its international dimension, i.e. the rights (and responsibilities) people have in common as citizens of states that are governed by international treaties and conventions. Soysal develops a more universal conception of citizenship, based on ‘universal personhood’ rather than ‘national belonging’, that finds expression in international treaties and conventions like the UN Declaration on Human Rights, the European Convention on Human Rights, and numerous agreements of international bodies like the ILO, the WHO and other UN agencies. Although some of these interna-

⁴³ Mann (1987).

⁴⁴ Barry (1990).

⁴⁵ Soysal (1994).

tional treaties and Conventions, e.g. UN Declaration on Human Rights, lack any means of enforcement and are merely aspirational, others, e.g. the European Convention on Human Rights, can be enforced and clearly do add an extra dimension to the meaning of citizenship.

Another criticism has come from feminists (like Ruth Lister⁴⁶) who criticise Marshall for focusing on the effects of citizenship on class inequalities and for ignoring its effects on other forms of inequality, in particular gender inequalities. Marshall conceived of the citizen as an independent, autonomous male actor who participates as an individual in the labour market and in the political process and receives benefits and services on the basis of individual entitlement. However, this conceptualisation does not fit the circumstances of women with dependent children who are often excluded from full participation in the market, whose participation in politics is frequently limited by their caring responsibilities, and for whom the receipt of benefits may reflect their dependent status within the household.

It has also been criticised by communitarians (like Amitai Etzioni⁴⁷) for its emphasis on rights and its neglect of responsibilities. These critics argue that citizenship should take account of responsibilities as well as rights and that it should attempt to seek a proper balance between them. Such a balancing act could provide the basis for an active form of citizenship in which people are required to do things for society as well as expecting society to do things for them.

It is the fifth criticism that concerns us here. The passive approach to social security regards social security as an unconditional right, i.e. as something which those who are citizens should be able to claim 'as of right' and without any conditions attached. The active approach to social security is critical of this one-sided emphasis on rights, arguing that a 'something for nothing' approach results in people making demands against the state without feeling any obligation to contribute anything to society, that it leads to 'welfare dependency' which is not only costly for society because it involves supporting people who ought to be able to support themselves, creates 'perverse incentives', undermines the work ethic and the nuclear family, and is conducive to anti-social behavior.

Contribution-Based, Status-Based and Reciprocity-Based Conceptions of Social Citizenship

In a series of articles, the political theorist Raymond Plant⁴⁸ has argued that, over a long period, the British welfare state has oscillated between two contrasting notions of social citizenship and has analysed recent reforms to the social security system associated with welfare to work programmes and the New Deal in terms of these contrasting notions.

⁴⁶ Lister (1997).

⁴⁷ Etzioni (1993).

⁴⁸ Plant (1998, 1999 and 2003).

The first of these notions regards citizenship as a status that is not fundamentally altered by the virtue (or lack of it) of the individual and is not concerned with whether (or not) the individual is making a recognised contribution to society. On this view, *status* and *membership* are the crucial issues rather than whether the person lives a life which others approve of or makes a positive contribution to society as a whole. This notion of citizenship is associated with negative rights (rights not to be interfered with) and positive rights (rights to what Plant calls ‘the socio-economic conditions of citizenship’, i.e. to health care, education and welfare). Thus, whether or not a person lives a life that is approved of by others, as long as that person does not interfere with others, he or she should be secure in his or her rights, both negative and positive.

The second of these notions places less emphasis on rights and focuses instead on *virtue*, *contribution* and *reciprocity*. According to this view, citizenship is not a pre-existing status but is, rather, something that people earn by fulfilling their obligations to society. Citizenship is, therefore, an *achievement* rather than a *status*. It follows that individuals do not have a right to the resources of society unless they have contributed to it by working or by engaging in some other socially valued activity, assuming that they are in a position to do so.

Plant argues that these two notions of citizenship have informed the development of the British welfare state. According to him, the Poor Law, which was the earliest form of public provision for those who were unable to provide for themselves, was based neither on contribution nor on contract but on mere membership of the community and it is in this sense it embodied the first notion of citizenship. This is a somewhat unusual claim in the sense that three of the key features of the Poor Law were punishing the ‘able bodied’, i.e. those who were capable of work, in ‘houses of correction’; requiring households to exhaust their own resources before providing relief; and depriving those in receipt of relief of their civil and political rights. However, the Poor Law did provide relief, of sorts, for those who were deemed to lack virtue, whose lives were not approved of, because they were unwilling or unable to support themselves. This approach stands in complete contrast with an insurance-based approach, in which the benefits that people receive when they are no longer able to work are based on the contributions they pay when they are able to do so. In this approach, which embodies the second notion of citizenship, benefits are earned by those who fulfill their obligations to society by working.

Beveridge embraced the contributory principle and made a sharp distinction between insurance and assistance, believing that social security should be based on participation in the labour market and the payment of insurance contributions when in work. As he wrote in his famous report, ‘[b]enefit in return for contributions, not free allowances from the state, is what the people of Britain desire’⁴⁹. He believed that citizenship had to be earned and was a strong exponent of the achievement view. During the 1960s, 1970s and 1980s, i.e. during the heyday of

⁴⁹ Beveridge (1942, p. 11, para 21).

what critics have termed the 'entitlement society', the distinction between insurance-based and tax-financed benefits became rather blurred as the status view came into its own. This was, in part, due to the fact that, because insurance benefits did not provide an adequate level of income support, increasing numbers of people, many of whom had been in employment and had paid insurance contributions, were forced to claim assistance and this development made it impossible to sustain the rigid distinction between insurance and assistance. It was also partly due to the impact of the 'welfare rights movement', which sought to uphold and strengthen the social rights of poor people, many of whom were dependent on social assistance, in order to promote their citizenship. However, the return of a Labour government in 1997, after 18 years in opposition, soon called into question the idea of an unconditional right to benefit. It made its preference for an reciprocity-based notion rather than a status-based notion of citizenship clear.

Plant lists seven reasons for this change in emphasis:

- The government was concerned about dependency and the ways in which recipients of benefits can cut themselves off from 'the disciplines, the sociability, the growth of knowledge and the confidence' that come from being in the labour market.
- It feared that the 'moral hazard' of claiming benefits as of right would foster the 'habits of mind and character' that trap individuals in poverty and prevent them from rejoining the labour market.
- It was concerned with the broader issue of 'free riding', in which non-contributory benefits for some are funded from the taxes that are paid by those in work, many of whom are themselves low paid. It took the view that people should not be free to choose a life on benefit since the costs fall on others who take their obligations to work more seriously.
- It did not believe that taxpayers were prepared to fund benefits at a level that would lift recipients out of poverty.
- It did not believe that taxpayers should fund benefits at this level since, because of globalisation, they have to compete with workers in countries with lower taxation.
- It placed a great deal of emphasis on the development of human and social capital in order to improve their chances in the labour market and help them find a way out of poverty.
- It was committed to promoting equality of opportunity, rather than equality of outcome, and wished to improve the employability of the worst off.

This reasoning, which showed how much the government had been influenced by right wing, free-marketting critics of state welfare,⁵⁰ led the government in the

⁵⁰ In particular by Charles Murray and Larry Meade. For accounts of their arguments, see Lister (1996) and Meade (1997).

direction of policies that emphasised reciprocity and obligation. However, it is important to point out that this did not involve endorsing contributory benefits. This is because, in order to prevent large-scale dependence on social assistance, such a strategy would have called for a massively expanded social insurance scheme and the large-scale crediting in of people with insufficient contributions, with all the attendant problems that would have entailed. In any case, contributory benefits, which create rights to benefit, involve a retrospective, *ex ante*, form of reciprocity based on the contributions that an unemployed person paid when he/she was in work, and the government wished to promote a more contemporaneous, current or *ex post*, form of reciprocity in which, in the case of an unemployed person, looking for a job, undertaking training to enhance employability, or undertaking social beneficial activities secure the right to benefit. In a system of contributory benefits, virtue is established through prior attachment to the labour market and the payment of national insurance contributions. In a system of non-contributory benefits, virtue is established through the concurrent fulfillment of reciprocal, work-related obligations. In both cases, the enjoyment of citizenship rights, in this case the right to social security, depends on the establishment of virtue.

As far as welfare to work schemes and the New Deal are concerned, Plant warned that, if work were to become the passport to economic and social citizenship, stringent work tests to distinguish those who can work from those who genuinely cannot would be required. Likewise, there would have to be a very strong commitment to equipping those currently outside the labour market with the skills that employers want. Plant pointed to the limits of what could be achieved with the ‘one-off’ windfall tax and argued that, to ensure that there was work for everyone who is looking for it, the state would need to act as ‘employer of last resort’. He thought this was essential if the government was to keep its side of the bargain but, because it would be very expensive, he thought it was most unlikely that it would be prepared to commit itself to that. Events have proved him right. He also argued that, unless the government was careful with its rhetoric, there was a real danger that those who were not able to work, and thus not able to satisfy the pre-conditions for contribution-based citizenship, would become an increasingly stigmatised group.

The account of changes in notions of social citizenship presented here is somewhat more nuanced than that proposed by Plant. While Plant identified two contrasting notions of social citizenship – a contribution-based notion and a status-based notion – we contend that there are actually *three* contrasting notions – a contribution-based notion, a status-based notion and a reciprocity-based notion. Thus, rather than arguing that the British welfare state has oscillated between a contribution-based notion and a status-based notion, we contend that it has evolved first from a contribution-based notion to a status-based notion and then from a status-based to a reciprocity-based notion of social citizenship. Although the contribution-based notion and the reciprocity-based notion both make social citizenship rights conditional, in the first case on prior attachment to the labour

market and the payment of national insurance contributions and, in the second case, on the concurrent fulfillment of work-related obligations, they represent very different forms of conditionality.

The shift from a more bureaucratic and legalistic type of decision-making to a more professional and managerial one

Normative Models of Administrative Decision-Making

We now turn to an examination of the implications of the New Deal for the accountability of officials and the rights of redress that are available to the claimant. We do so by identifying and comparing a number of models of administrative decision-making and by developing an approach that was originally put forward by the American public lawyer Jerry Mashaw.⁵¹

In his pioneering study of the American Disability Insurance (DI) scheme,⁵² Mashaw detected three broad strands of criticism leveled against it: the first indicted it for lacking adequate management controls and producing inconsistent decisions, the second for not providing a good service and failing to rehabilitate those who were dependent on it, and the third for not paying enough attention to 'due process' and failing to respect and uphold the rights of those dependent on it. He claimed that each strand of criticism reflected a different normative conception of the DI scheme, i.e. a different model of what the scheme could and should be like. The three models were respectively identified with *bureaucratic rationality*, *professional treatment and moral judgment*.

Mashaw defined 'administrative justice' (i.e. the justice inherent in routine day-to-day administration) in terms of 'those qualities of a decision process that provide arguments for the acceptability of its decisions'.⁵³ It follows that each of the three models he described is associated with a different conception of administrative justice. Thus, there is one conception of administrative justice based on bureaucratic rationality, another based on professional treatment and a third based on moral judgment. According to Mashaw, each of these models is associated with a different set of *legitimizing values*, different *primary goals*, a different *organisational structure* and different *cognitive techniques*. Mashaw's analytic framework is set out in the Table 2 below.

⁵¹ This account of Mashaw's approach to administrative justice and the ways in which it has been developed is based on Adler (2003 and 2005).

⁵² Mashaw (1983).

⁵³ *Ibid*, p. 24.

Table 2: Models of Administrative Justice – Mashaw’s Analytic Framework

Model	Legitimizing Values	Primary Goal	Structure or Organisation	Cognitive Technique
Bureaucratic Rationality	accuracy and efficiency	Program implementation	hierarchical	information processing
Professional Treatment	service	client satisfaction	interpersonal	clinical application of knowledge
Moral Judgment	fairness	conflict resolution	independent	contextual interpretation

Although this is very helpful, the association of fairness with one of the models (the moral judgment model), and the implication that the two other models are ‘unfair’, is unfortunate. In addition, the characterisation of the three models reflects an exclusively internal orientation to administrative justice in that it does not refer to external mechanisms for redressing grievances. With these considerations in mind, Table 1 has been modified and a revised analytic framework is set out in Table 2 below.

In Table 3, the three models have been re-named – they are referred to as a bureaucratic model, a *professional* model and a *legal* model, the ways in which they are characterised have been revised, and redress mechanisms, which include external as well as internal procedures for achieving administrative justice, highlighted. This is important because internal and external procedures should not be seen as alternatives and are, in practice, often combined.

Table 3: Models of Administrative Justice – Revised Analytic Framework

Model	Mode of Decision-making	Legitimizing Goal	Mode of Accountability	Mode of redress
Bureaucratic	applying rules	accuracy	hierarchical	administrative review
Professional	applying knowledge	public service	interpersonal	complaint to a professional body
Legal	asserting rights	legality	independent	appeal to a court or tribunal

Mashaw claimed that each of the models is coherent, plausible and attractive and that the three models are *competitive* rather than *mutually exclusive*.⁵⁴ Thus, they can and do coexist with each other. However, other things being equal, the more there is of one, the less there will be of the other two. His insight enables us to see both what trade-offs are made between the three models in particular cases and what different sets of trade-offs might be more desirable. His approach is a *pluralistic* one, which recognises a plurality of normative positions and acknowledges

⁵⁴ Ibid. p. 23

that situations, which are attractive for some people may be unattractive for others.⁵⁵

The trade-offs that are made, and likewise those that could be made, reflect the concerns and the bargaining strengths of the institutional actors who have an interest in promoting each of the models, typically civil servants and officials in the case of the bureaucratic model; professionals and 'street level bureaucrats'⁵⁶ in the case of the professional model; and lawyers, court and tribunal personnel and groups representing clients' interests in the case of the legal model. They vary between organisations and, within a given organisation, between the different policies delivered by that organisation, and between the different stages of policy implementation. They also vary over time and between countries.

Although, in my opinion, Mashaw's approach is a very imaginative and fruitful one, it has been subjected to a number of criticisms. Although Mashaw believed that the three models described above, and only these three models, are always present in welfare administration, this claim can be disputed since the bureaucratic, professional and legal models have, in many countries, been challenged by other models of decision-making, in particular, by a managerial model associated with the rise of new public management, a consumerist model which focuses on the increased participation of consumers in decision-making, and a market model which emphasises consumer choice.

A second criticism is that, in assessing the relative influence of the three models, Mashaw ignored their absolute strengths. Consider two situations in which the strengths of three models are given weights of 30, 20 and 10 units and 3, 2 and 1 units – although they are identical in a relative sense, they are quite different in absolute terms and clearly refer to what are, in reality, very different situations'. 'Strong' balances are very different from 'weak' ones in ways that Mashaw's analysis does not bring out very well.

A third criticism is that Mashaw takes the policy context for granted. However, just as different orientations to administration, i.e. to how programmes should be run, can be understood in terms of a number of normative models which are in competition with each other, so different orientations to policy, i.e. to what programmes aim to achieve, can also be understood in this way. In a study of penal decision-making,⁵⁷ I attempted to demonstrate that Mashaw's approach can be applied to competing models of policy as well as to competing models of administration. Each of several competing models of policy may, in theory, be combined with each of several competing models of administration. The resulting 'two-dimensional' model is necessarily more complex but its characteristics are similar in that it not only makes it possible to understand the trade-offs that are made between different

⁵⁵ Mashaw's pluralism can be contrasted with the version of pluralism adopted by other writers on justice, most notably by Michael Walzer, who assumes a degree of normative consensus in a given community that stands in stark contrast with Mashaw's assumption of normative conflict. See Walzer (1985, especially chapter 1).

⁵⁶ Lipsky (1980).

⁵⁷ Adler and Longhurst (1994).

combinations of policy and administration in particular cases, but also makes it possible to see what different sets of trade-offs might be more desirable.

In light of the criticisms above, Mashaw's analytic framework can be extended in a number of ways. A revised and extended analytic framework is set out in Table 4 below.

Table 4: Models of Administrative Justice – Revised and Extended Analytic Framework

Model	Mode of Decision-making	Legitimizing Goal	Mode of Accountability	Mode of redress
Bureaucratic	applying rules	accuracy	hierarchical	administrative review
Professional	applying knowledge	public service	interpersonal	second opinion or complaint to a professional body
Legal	asserting rights	legality	independent	appeal to a court or tribunal (public law)
Managerial	managerial autonomy	improved performance	performance indicators and audit	none, other than adverse publicity
Consumerist	consumer participation	consumer satisfaction	consumer charters	'voice' and/or compensation through consumer charters
Market	consumer choice, matching supply and demand	economic efficiency	to owners or shareholders (profits)	'exit' and/or court action (private law)

A brief explanation of this extended analytic framework is called for. During the post-war period, most public welfare services in the United Kingdom were shaped by the bureaucratic and professional models outlined above, although the trade off between them varied from one policy domain to another. However, by the mid-1980s this pattern of administration came under attack. It was variously criticised for lacking neutrality and being biased against certain groups; for having a vested interest in the maintenance and expansion of existing empires and for not promoting the 'public interest'; and, as a 'monopoly provider' for being insulated from competitive pressures to become more efficient and more responsive to the demands and preferences of consumers. New and better forms of management were championed as the most appropriate response to these criticisms. Managerialism, as this approach came to be known, challenged the powers and prerogatives of bureaucrats and professionals in the name of managers who demanded the 'freedom to manage' the attainment of prescribed standards of service. It gave priority to achieving efficiency gains, introduced different forms of financial and management

audit to assess how well the prescribed standards of service had been met, rewarded staff who performed well and, in theory at least, sanctioned those who did not.⁵⁸ Inevitably, the introduction of these new managers frequently led to struggles for power and control within welfare organisations. Managerialism can thus be characterised in terms of managerial autonomy, enhanced standards of service, the development of performance indicators and the use of audit. However, it lacks a redress mechanism and, apart from drawing attention to poor standards of service in order to put pressure on management, there is little that a dissatisfied service user can do.

Consumerism has, likewise been a central reference point in the drive for public sector reform from the mid-1980s onwards.⁵⁹ Like managerialism, it has been taken up as a response to criticisms of the bureaucratic and professional and the reshaping of welfare services around consumer choice has been visible in a number of reforms, in particular in the introduction in the UK of the 'Citizen's Charter'. Consumerism embodies a more active view of the service user who is seen as an active participant in the process rather than a passive recipient of bureaucratic, professional or managerial decisions. It can thus be characterised in terms of the active participation of consumers in decision-making, consumer satisfaction, the introduction of consumer 'charters', and the use of 'voice'⁶⁰ together with the possibility of obtaining compensation if the standards specified in the charter are not met as available remedies.

Markets constitute the final model in the extended analytic framework and have many of the characteristics of the managerial and consumerist models (although the reverse is not necessarily the case). Decision-making in the market involves consumer choice and the matching of supply and demand. Consumers are viewed as rational economic actors who choose what best satisfies their wants or preferences while producers are profit maximisers who compete with each other. The legitimating goal of the organisation is economic efficiency and the prevailing mode of accountability is to the owners or shareholders. In contrast to consumerism, where the consumer can use 'voice' as a remedy, and can obtain compensation through the consumer charters if the specified standards have not been met, markets provide the possibility of 'exit'. In addition, an aggrieved individual may be able to raise a court action for compensation where he or she suffers some measurable loss from an administrative decision. Internal or quasi-markets⁶¹ have some but not all of the characteristics of the market model just outlined.

Decision- Making and Appeals in Social Security

The origins of the system of administrative decision-making in social security can be traced back to the introduction of social insurance under the National Insurance Act of 1911. This established two important principles. The first of these involved

⁵⁸ Clarke and Newman (1997).

⁵⁹ *Ibid.*, chapter 6

⁶⁰ Hirschman (1970).

⁶¹ Le Grand (1991), Le Grand and Bartlett (1993).

the separation of responsibilities for making decisions under the law from the administrative tasks associated with the processing of claims and the second gave claimants the right of appeal against these decisions.⁶² These appeals were not to the civil courts but to specially constituted tribunals, comprising a legally-qualified chair, a member representing employers and a member representing trade unions, that were set up to hear them. By the early 1930s, a three tier system of adjudication had evolved. Initial decisions concerning entitlement to benefit were taken by 'insurance officers', appeals from them were heard by 'referees' (the forerunners of national insurance local tribunals) in the first instance, and from them, on points of law, to 'umpires' (the predecessors of the national insurance commissioners), who were lawyers of standing and whose decisions acted as precedents that first and second-tier decision makers were expected to follow. However, there was no right of appeal on purely administrative matters that were deemed to be the responsibility of the Minister. The Beveridge Report recommended the continuation of these arrangements, which were written into the post-war legislation and continued in existence until the early 1980s.

The system of administrative decision-making and appeals in social assistance was very different and can be traced back to the Unemployment Assistance Act of 1934, which created a national assistance scheme for the unemployed.⁶³ This provided for the right of appeal from the decision of an official to a local tribunal. However, unlike insurance officers, unemployment assistance officers were not expected to make independent decisions but were, rather, expected to carry out the policies of the Unemployment Assistance Board. Unemployment assistance tribunals (which were later renamed national assistance tribunals) were lay bodies that lacked the independence of national insurance tribunals. Since there was no further right of appeal, their decisions were final. The Beveridge Report recommended the continuation of these arrangements and this was written into the National Assistance Act 1946. However, under the impact of the welfare rights movement, the successors of national assistance tribunals, known as supplementary benefit appeal tribunals, were subjected to a great deal of criticism in the mid-1970s.⁶⁴ They were widely criticised for their lack of 'fairness, openness and impartiality'⁶⁵ and for fail-

⁶² These arrangements were intended to protect Ministers from being held to account, and answerable in Parliament, for the huge number of decisions concerning entitlement to benefit.

⁶³ See Lynes (1975).

⁶⁴ See Bell (1975) and Adler and Bradley (1975).

⁶⁵ These three principles were put forward in the Report of the Franks Committee (1957). However, Franks regarded National Assistance Appeal Tribunals as *sui generis* and exempted them from its strictures and recommendations that applied to all the other tribunals it considered. For an account of its thinking, see Bradley (1975).

ing to control the exercise of discretion by the Supplementary Benefits Commission,⁶⁶ which replaced the National Assistance Board in 1966.

These criticisms led, first, to a series of piecemeal reforms and, then, to a complete overhaul of the system of decision-making and appeals.⁶⁷ Under the Health and Social Services and Social Security Act (HASSASSA) 1983, this involved introduced a unified three-tier system of adjudication comprising Adjudication Officers (who replaced insurance officers and supplementary benefits officers), a unified social security appeal tribunal (which replaced national insurance appeal tribunals and supplementary benefit appeal tribunals), the social security commissioners (whose jurisdiction covered supplementary benefits as well as national insurance benefits). Thus, the principle of independent adjudication was extended, for the first time, to social assistance. The legislation also established the new post of Chief Adjudication Officer (CAO), who was given the job of providing advice and guidance to Adjudication Officers and monitoring standards of decision-making. These arrangements continued until 1998 although, since the establishment of the Social Fund in 1986, challenges to decisions concerning discretionary grants and loans have been handled separately, outside the appeal tribunal system.⁶⁸

The Social Security Act 1998 did away with the principle of independent adjudication and brought to an end the notional independence that adjudication officers had enjoyed since 1911. Adjudication Officers were replaced by 'decision makers' acting on behalf of the Secretary of State.⁶⁹ The 1998 Act also abolished the role of the Chief Adjudication Officer and transferred the CAO's role to the Chief Executives of the various agencies that were responsible for the provision of benefits and service to various client groups. These senior managers lack the independence of the CAO, who repeatedly drew attention to the poor standards of social security decision-making, since they have an interest in playing down the poor standards

⁶⁶ According to David Donnison, who was Chairman of the Supplementary Benefits Commission, discretionary additions to the basic rate of benefit (known as 'exceptional circumstances additions') and discretionary grants (known as 'exceptional needs payments') were inappropriate in circumstances where the caseload was rising, there were no commensurate increases in staffing, and discretionary decisions were increasingly challenged through appeals to tribunals. See Donnison (1997 and 1982, chapters 5 and 6).

⁶⁷ For more detailed accounts, see Bradley (1985) and Sainsbury (2000).

⁶⁸ Applicants who wish to challenge the decision of a social fund officer may request an internal review of that decision by the officer who made the decision and by a manager in the local office. Applicants who wish to take the matter further may then request a further review by the Social Fund Inspectorate, which operates from a central office in Birmingham. The work of the inspectors is monitored by the Social Fund Commissioner. For a fuller account of the operation of the Social Fund, which includes an account of the role of the Social Fund Inspectorate and the Social Fund Commissioner, see Buck (2000).

⁶⁹ For accounts of the impact of the 1998 Act on first instance and appellate decision making in social security, see Wikeley (2000) and National Audit Office (2003).

achieved by decision-makers for whom they are responsible.⁷⁰ The Act also attempted to speed up and streamline appeal procedures by, for example, relaxing the requirement that tribunals should comprise a chair and two members in all cases but these changes do not really concern us here.⁷¹ However, a further change that does concern us, and which pre-dated the 1998 Act, was the requirement that, unless appellants specifically opted for an oral hearing, the tribunal would consider their case ‘on the papers only’, with no one present.

The ‘success rate’ of paper hearings is much lower than that of oral hearings⁷² and the introduction of paper hearings was at first associated with a fall in the appellant success rate. In 1995, the year immediately before the introduction of paper hearings, 43.9 per cent of hearings were decided in favour of the appellant⁷³ and this fell to 34.5 per cent in 1997, the year immediately after their introduction.⁷⁴ However, in the period 2000-2005 (inclusive), the overall success rate has again been 43.9 per cent.⁷⁵ During this period, the proportion of paper hearings has averaged 26.2 per cent.⁷⁶

We are now in a position to consider the implications of these changes in terms of the models of administrative decision-making discussed in Section 3.1.

Changes in the Form of Decision Making

In a study of the adjudication in social security in Britain,⁷⁷ John Baldwin, Nick Wikeley and Richard Young characterised the role of Adjudication Officers in the late 1980s as what I have called ‘bureaucratic’ and that of social security appeal tribunals as what I have called ‘legal’ (see above).⁷⁸ However, I think this is too simple. Readers will recall that Jerry Mashaw pointed out that his three models of administrative justice were competitive rather than mutually exclusive and that they could and did coexist with each other. He also pointed out that, although one model

⁷⁰ To ensure public confidence, the Comptroller and Auditor General was asked to monitor the new arrangements. However, in his assessment of the Secretary of State’s Report on Decision Making in 2002 and 2003 (which was published in 2006), he reported that he was ‘unable to confirm that a substantial part of the information set out by the Secretary of State is fair or balanced’ and concluded that ‘unless all such performance data is subject to satisfactory quality assurance processes as to its robustness, the resultant report will be of limited utility as a measure of the Department’s success in improving the accuracy of decision making’. See Department for Work and Pensions (2006, p. 20)

⁷¹ For a fuller account of these changes, see Sainsbury (2000).

⁷² In 2005, the last full year for which data are available, the appellant success rates for paper and oral hearings were 52.1 per cent and 22.5 per cent respectively. Figures based on statistics accessed at <http://www.dwp.gov.uk/asd/qat.asp>

⁷³ Department of Social Security (1997, Table H 5.03).

⁷⁴ Department of Social Security (1999, Table H 5.03).

⁷⁵ Figures based on statistics provided by Gillian Ferry, Client Statistics Team, DWP Information Directorate.

⁷⁶ It has hardly fluctuated, ranging from 25.7 per cent in 2000 to 26.6 per cent in 2004 and 2005.

⁷⁷ Baldwin, Wikeley and Young (1992).

⁷⁸ In a subsequent article, Wikeley (2000, p. 499) claimed that, as a result of the 1998 Act, the bureaucratic model has ‘complete hegemony at the first-tier level’ and that the judicialisation of tribunals was ‘driven ... by the policy imperatives of managerialism’.

tended to be dominant, it could co-exist with the other two models. I think this was the case with first-instance decision makers and appeal tribunals when Baldwin, Wikeley and Young carried out their research.

I accept that, when Baldwin, Wikeley and Young carried out their research, many Adjudication Officers did very little adjudication and that they simply authorised, with their signatures, decisions that had, in practice, been delegated to clerical staff.⁷⁹ I also accept that they were increasingly required to give priority to meeting performance targets over fulfilling statutory requirements and that there were strong pressures on them to regard speed as more important than accuracy.⁸⁰ Nevertheless, I do not think their characterisation of Adjudication Officers attaches sufficient importance to their independent status or to the fact that claimants could appeal against their decisions to an independent appeal tribunal. I can see elements of the 'bureaucratic' and the 'legal' model of administrative decision-making in their activities and would have characterised them in terms of a trade-off between these two models. I accept that the 'professional' model was important for some Adjudication Officers, especially for those who were responsible for the administration of discretionary provisions within the social security legislation, but that it was less important for most of them. Social Security Appeal Tribunals could likewise be characterised in terms of a trade-off between the 'bureaucratic' and the 'legal' model of administrative decision-making although, in this case, the latter was clearly dominant.

We are now in a position to consider the impact of some the changes outlined in this chapter for the trade-offs between the different normative models outlined in Section 3.1 above and thus, for administrative justice in social security. Since there is little evidence, as yet, of user involvement in shaping the delivery of social security⁸¹ and Jobcentre Plus has almost exclusive responsibility for implementing the New Deals,⁸² the discussion will not consider the consumerist or market models and will focus instead on the bureaucratic, professional, legal and managerial models.

When Baldwin, Wikeley and Young undertook their fieldwork in 1989, the key decision-maker in the Department of Social Security was undoubtedly the Adjudication Officer in whose name all the decisions about whether or not claimants were

⁷⁹ This was in large part due to the HASSASSA Reforms of 1983 which, in theory, extended the principle of independent adjudication to supplementary benefit but, in practice, diminished its impact as the existing body of Adjudication Officers became responsible for a greatly increased number of decisions. According to Wikeley (personal communication), the old tradition continued to be evident in some offices but had been swept away in others where pressure of work had forced Adjudication Officers into doing 'spot checks' and signing off decisions relating to supplementary benefit that were made by clerical staff.

⁸⁰ Baldwin, Wikeley and Young (1992 pp. 40-41) noted that officers responsible for determining claims to national insurance benefits gave much higher priority to accuracy than officers responsible for determining claims to unemployment benefit and income support, who gave higher priority to speed.

⁸¹ Lister (2001).

⁸² There has been some small-scale experimentation with private and voluntary sector involvement in the New Deals (Stafford, 2003, p. 226) and more can be expected in the future (National Audit Office, 2006, para. 34).

entitled to benefit were made. However, this is no longer the case. Adjudication Officers were abolished under the Social Security Act 1998 and, when Jobcentre Plus was established in 2002, one of its aims was to create a unified workforce from staff who previously worked for the Benefits Agency and the Employment Service. It is my contention that the key decision-maker in Jobcentre Plus is now the Personal Adviser, who manages a caseload of jobseekers and has considerable discretion in carrying out this task. The decline of the Adjudication Officer and the rise of the Personal Adviser reflect a shift from a predominantly bureaucratic to a much more professional model of administrative decision-making.⁸³

Although Adjudication Officers were, at least notionally, independent, they were, in practice, increasingly accountable to their line managers. Accountability has increased greatly in recent years and Personal Advisers are now subject to various forms of performance management and are expected to give priority to meeting a variety of nationally and locally set performance targets.⁸⁴ This change reflects the increase in importance of the managerial model of administrative decision-making. At the same time, the ending of the Adjudication Officers' independent status and the abolition of the role of the Chief Adjudication Officer in 1998 have undoubtedly led to a reduction in the importance of the legal model of decision-making. The weakening of claimants' appeal rights, which resulted from the removal of social fund decisions from the jurisdiction of appeal tribunals and the introduction of 'paper' hearings, have had a similar effect.

The changes described above suggest that, on the one hand, the bureaucratic and legal models of decision-making have decreased in importance while, on the other hand, the importance of the professional and managerial models of decision-making has increased. The final section of the chapter considers the implications of these changes for rights of redress and accountability.

The Implications of Changes in the Form of Decision Making for Rights of Redress and Accountability

In their study of adjudication in social security, Baldwin, Wikeley and Young described what happened when a claimant attempted to challenge a decision relating to their claim to benefit.⁸⁵ The claimant could either request a review of the initial decision or lodge an appeal. Reviews were conducted either by the officer who

⁸³ In Australia, where activation measures have been contracted out to private and voluntary sector providers, Carney (2005) has identified a shift from a bureaucratic mode of decision making, which emphasises rules and procedures, to a market mode of decision making, which emphasises discretion.

⁸⁴ In an attempt to reduce the burden that performance measurement places on Personal Advisers, Jobcentre Plus replaced its former Job Entry Target with a Job Outcome Target in April 2006. However, Job Outcome Target data will be collected at district level and will not make it possible to attribute job outcomes to individual offices and advisers. Jobcentre Plus has also developed a set of alternative performance measures for Personal Advisers that focus on the content and quality of their work. See National Audit Office (2006, paras. 44 and 45).

⁸⁵ Baldwin, Wikeley and Young (1992, pp. 65-67).

made the initial decision⁸⁶ or by a specialist officer⁸⁷, while appeals were heard by an independent social security appeal tribunal. However, in practice, the receipt of an appeal would trigger off an informal review to establish whether the initial decision should stand and this would often lead to a formal review. If, after a formal review, the claimant's case was met in full, that would be the end of the matter, but, if it was only met in part or not at all, the case would proceed to a tribunal.⁸⁸

These two procedures (reviews and appeals) constitute the characteristic modes of redress associated with bureaucratic and legal models of decision-making (see right-hand column in Tables 2 and 3 above).⁸⁹ The characteristic modes of redress associated with professional and managerial models of decision-making are much less well-developed. In discussing this issue (in Section 3.1 above), we suggested that the characteristic mode of redress associated with the professional model was a second opinion or a complaint to a professional body. However, although these mechanisms are usually available when the decision maker is a professional, this is rarely the case when the decision-maker is a semi-professional⁹⁰ or a 'street-level bureaucrat'⁹¹. In such cases, it is unlikely that a second opinion will be an option or that there will be a professional body to complain to. We also suggested that there was no effective mode of redress associated with the managerial model and that the only option available to someone who wished to make a complaint was to create adverse publicity.

It is the contention of this chapter that the shift away from a situation in which bureaucratic and legal models of decision-making were dominant to one in which professional and managerial models of decision-making have greatly increased in importance has made it extremely difficult for anyone who is required to take part in any of the New Deal programmes to complain about the advice and help they are given or about any sanctions that may be imposed on them.⁹² In Jobcentre Plus, Personal Advisers have many characteristics associated with semi-professionals

⁸⁶ In the case of contributory (social insurance) benefits.

⁸⁷ In the case of means-tested (social assistance) benefits.

⁸⁸ When Baldwin, Wikeley and Young carried out their research, tribunals could consider the claimant's situation at the time of the hearing. However, under section 12 (8) of the 1998 Act, they were precluded from taking into account circumstances that did not apply when the appealed-against decision was made and, under section 36, they could no longer consider issues that arose for the first time on appeal.

⁸⁹ If a claimant wants the decision-maker to look again at a decision, he/she can ask for it to be reconsidered. Decisions may be revised if they are incorrect or superceded in light of fresh evidence. For the latest data on revisions and supercessions, see Department for Work and Pensions (2006).

⁹⁰ A semi-professional is someone, like a librarian, who works in an occupation which has some but not all the characteristics of a profession. The domain in which a semi-professional can make independent decisions is smaller than that in which a professional can. See Etzioni (1969).

⁹¹ A 'street-level bureaucrat' is an official, like a policeman on the beat, who works without direct supervision and is required to take 'on-the-spot' decisions by exercising his/her judgment. See Lipsky (1980).

⁹² In Australia, Carney (2005) has noted that it has likewise become difficult to challenge the imposition of sanctions and the quality of the activation measures that are provided.

and street level bureaucrats.⁹³ They wield a great deal of power – they meet claimants to discuss their work aspirations and options, assist them in searching for jobs, explore their training needs and the availability of training programmes, advise them on childcare and the availability of specialist services, such as services for those with drug or alcohol dependency, and make indicative calculations about whether or not they would be better off in work or on benefit. Many of them, undoubtedly, do their jobs very well and levels of user satisfaction are reported to be high.⁹⁴ Although they are involved in the assessment of claims to Jobseekers Allowance (JSA), standards of decision have not, until recently, been monitored on a national basis.⁹⁵

As described in Section 1.5 above, Jobcentre Plus staff can impose a range of sanctions, not only on claimants but also on their families, on those who fail to attend work-focused interview with them, on those who cannot demonstrate that they are ‘actively seeking work’, on those who fail to attend a work interview and on those who turn down offers of ‘suitable’ work’. However, tribunals hear very few appeals against the imposition of sanctions and the staff who impose them are therefore effectively immune from challenge. The culture of independent adjudication and appeal has pretty much disappeared. Thus, staff are not really accountable, through internal or external audit, for their performance or to members of the public for the decisions they make.

Conclusion

It is the contention of this chapter that, however laudable the aims of the New Deal may be, each of the shifts that it has entailed – from a more *passive* type of intervention to a more *active* type of intervention; from a *contribution-based approach*, first to a *status-based approach* and then to a *reciprocity-based approach to citizenship*; and from a primarily *bureaucratic* and *legalistic* type of decision-making to a primarily *professional* and *managerial* one – is fraught with problems. The first shift is problematic because there is a real danger that those who are not really fit for work will be required to look for work and will be penalised – and feel a sense of failure – when they are unable to find it. The second shift is problematic because, by refusing to become the ‘employer of last resort’, there is a very real

⁹³ Wright (2003) has used Lipsky’s theory of street-level bureaucracy to analyse the ways in which the staff in a Jobcentre placed claimants into administrative and moral categories and traced the consequences of these processes for the services they received. Her study which was carried out in 1998, i.e. before the merger of the Benefits Agency with the Employment Service into Jobcentre Plus, drew attention to the discretion exercised by staff. She notes that the, as a result of subsequent policy developments, the importance of discretion has undoubtedly increased since then.

⁹⁴ According to the National Audit Office (2006, paras. 21 and 31), Jobcentre Plus’ customer survey shows that 77 per cent of jobseekers and 90 per cent of employers are satisfied with its performance.

⁹⁵ Department for Work and Pensions (2006, p. 11). According to this report, a monitoring scheme was introduced in 2005 and will provide the basis for future reports on standards of decision making in Jobcentre Plus.

danger that if, and when, unemployment starts to rise, the government will lose credibility by not being able to deliver. The third shift is problematic because, although Jobcentre Plus staff exercise a great deal of power over those who are looking for work, it is increasingly difficult for job-seekers to challenge what the staff do or do not do for them. Although 'Welfare to Work' is a fine ideal, it should not be implemented without due regard to justice and fairness.

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Hartz' Reforms – Hard reconstructions?

Eberhard Eichenhofer

Introduction

Between 2002 and 2005 the unemployment insurance and assistance scheme of Germany had been altered profoundly. The Volkswagen manager Peter Hartz directed a governmental commission which submitted in 2002 a plethora of reform proposals. They should help to overcome the unbearably high unemployment rate of more than 10% in the whole country, up to officially 25 % of the entire working population in some areas of eastern Germany. Many of these reform ideas had been taken over from other countries – predominantly from the Netherlands, Denmark and the United Kingdom. In the context of the European Employment Strategy they were identified as “good practices”.

Summarising the 2003/4 re-enactments of social protection for the unemployed in Germany, the far reaching changes encompassed the main elements of unemployment protection: the organisation, the relationship between the unemployed and the administration, the leading principles of protection and the main instruments of placement and integration. In this respect one might say: the Hartz commission's reform proposals implemented a contractual approach to tackle with the challenge of unemployment.¹ Since this period job seeker's agreements play a pivotal role to outline strategies for the unemployed on how to re-integrate themselves into the labour market.

The reforms were inspired by the ideal of an activating welfare state, which is conceived as a means for self help to all of those who risk social exclusion. The chapter gives at first an overview on the changes implemented in the last legislative period between the years 2002 to 2005, afterwards it illustrates the achievements of the reform and, finally, it tries to answer the question on whether the reform can be assessed as a dismantling of welfare or a new version of the welfare state.

This chapter tries to illustrate the main targets and changes made in order to pursue an in-depth reform of the unemployment protection of Germany. It sketches the main reform steps (II) and tries to inquiry, to which extent the changes had been inspired by initiatives of other EU countries or had been formally approved as a good practice in the context of the European Employment Strategy (III).

¹ Els Sol/Mies Westerveld (Eds.), *Contractualism in Employment Services*, Kluwer Law International, 2005.

Outlines of the Reform

Mandate of the Reform Commission

In February 2002, a governmental commission had been nominated to make proposals on “Modern Services for the Labour Market”². The commission had 15 members, among them managers, trade unionists, politicians and academics. The chair had been taken by Peter Hartz. This manager had made a series of unconventional alterations and arrangements becoming effective in the Volkswagen Company, in order to conserve the once substantially jeopardized jobs. The commission’s proposals were addressed to the public; their main emphasis was put on the reduction of unemployment and the reorganisation of the German employment service.

The commission’s formation was the political reaction towards a scandal in the employment service, which had been unveiled by the press. It turned out that an employee in a local employment office for years whitewashed his figures on placements induced by him- without any notice taken by other instances of the employment service. This scandal indicated evident shortcomings in the monitoring and effectiveness of the German employment service. Additionally, immediately after the New Economy hype came to an end in late 2000, the figures on the unemployment rate rose substantially. The official doctrine of the government as to combat poverty was “to enhance and to demand” (Fördern und Fordern!) a modern version of a carrot and stick policy. The financial subsidies to the unemployed are granted to make them seeking work in the labour market successfully; so, all help is to be combined with the demand for a successful re-entry into the labour market. The imminent Federal Election’s date in late September 2002 gave a further momentum for the government, to issue new proposals to solve the most ponderous problem of the German internal policy of these years till nowadays– the high rate of unemployment.

Main topics of Interest

Competition in Placement

The reform commission raised the question on how a quick, effective and sustainable integration of the unemployed into the labour market can be achieved. It articulated the assumption that both the unemployment insurance and assistance and above all the placement of job seekers should be reorganised profoundly. Placement should be made more flexible, accountable and effective. The leading idea behind the reform of placement was to give competition between public and private placement agencies the broadest room ever. This should bring about a more client-oriented employment service. The reform intended to replace the bureaucratic ori-

² Bericht der Kommission, *Moderne Dienstleistungen am Arbeitsmarkt*, Berlin 2002.

entation, still prevailing in employment service by an entrepreneurial approach: The heads of the organisations should no longer be appointed as public functionaries on the basis of a lifelong tenure, but work on the basis of a temporal work contract as managers - i. e. higher paid than their predecessors. In order to put a much greater emphasis on competition in placement services, a free access to placement services should be given ; additionally, the public employment service should be made mandatory to issue vouchers for private placement services, if those were unable to find a job for the unemployed within a reasonable period of time (3- 6 months) . The main task of placement services should be the acquisition of jobs and job seekers and not the administration of unemployment benefits. Benchmarking and quality assessments and also competitions between the various local entities of employment services within the employment service should create a general climate committed to overcome the unemployment by improved endeavours to placement in as many respects as possible. The benefit should not pamper the recipient to stay unemployed, but be frugal enough to give an incentive to take over also badly paid work.

Structural reforms in unemployment insurance

Additionally, the reform commission listed a whole series of structural changes of the unemployment insurance scheme. The leading motivation, upon which the proposals were brought forward, was summarised in the saying: “induce initiative – safeguard security!” (Eigeninitiative auslösen - Sicherheit einlösen!). This maxim illustrated the activating strand the labour market reform proposals of the commission were built upon. The process of labour market integration should be accompanied by consultation, support and financial protection. The local employment services – traditionally called “Arbeitsamt” (work office) – should be called with the artificial American word: “JobCenter “.

Each of these entities should dispose of a budget on its own discretion out of which it should finance the appropriate instruments for integration. The reform should coax the local employment offices to spend the main in the most effective and appropriate manner, based on the discretion of the local entities without any interference of the federal or regional authorities. In the long run, the unemployment insurance – till restricted to dependent workers – should be transformed into an income protection system for both wage earners and the self-employed. The new centres should not only focus on placement and re-integration of the job seeker into the labour market, but also assist the individual in the plethora of social hardships and handicaps of the unemployed persons by rendering services and assistance as to their health, drug, sanitary, addiction, debt, housing or education problems. All social work activities should be concentrated in the job centres. Within these centres, however, the placement work should be separated from the other activities of social work. The latter should be devoted to special services which should densely collaborate with other services of the centre.

Placement should be made effective as quickly as possible. So, both employee and employer should be imposed the commitment to indicate a job vacancy as fast as possible. Each violation of this commitment should be sanctioned severely. The criteria for job offers should be enlarged in the sense – that for each job seeker each lawful and adequately – i. e. in line with the existing collective agreements – paid should be acceptable. In the formation and definition of the re-integrative strategy an integration agreement should play the key role. This should be elaborated by the case manager of the centre and the job seeker and figure out the strategies to be carried out by the job seeker in order to regain a paid work.

Further proposals for changes were addressed to unemployed persons over 55 years or physically or mentally handicapped persons. For them work should be found on the basis of contacts for services concluded between the job centre and an employer, who not become the employer of the unemployed, but should hire their services on a contract concluded between the employment administration and the employer. In the contract the price for hiring the unemployed temporarily should be fixed. Unemployed should also be empowered to start their own business by utilizing their beneficiaries' rights to temporal income support and social protection also while earning at the commencement of their work a small income as a self-employed.

Merging two systems of assistance to one

Before the reform had taken place unemployed persons, who exhausted their beneficiaries' rights under the unemployment insurance scheme were entitled to a means tested benefit, if they – as regularly - did not dispose of substantial means of their own to afford their adequate living. In case of unemployment there were two competing systems of means tested benefits: the unemployment assistance (Arbeitslosenhilfe) and the social assistance (Sozialhilfe). For those who got unemployment insurance benefits before the assistance did not depend on needs but on the previous income of the unemployed. For the unemployed who were not covered by the unemployment insurance immediately before becoming dependent they received a benefit, which was determined according to the need of the unemployed individual and her/ his family. This duplicity of assistance schemes lead to inconsistencies, contradictions and a twofold protection. The assistance for the needy unemployed was too complex to be conserved. So, the ultimate proposal of the reform commission was to merge the two systems and make a unique scheme out of it.

Making Hartz Reform Work

Not all, but most of the proposals were implemented by four legislative acts. In the public debate they were abbreviated as "Hartz I to Hartz IV". Each piece of legislation assumed various elements of the reform commissions' proposal. The changes proposed had been conceived as a profound desecration of the inherited principles of the welfare state. So, the phase of legislation and implementation was accompanied by a series of protests and public manifestations - above all in high unem-

ployment areas of East Germany Monday's manifestations in remembrance of the manifestations' traditions which once brought down the East German communist regime.

Improved placement (Hartz I)

In the First Law on Modern Services on the Labour Market³ the deficits in the placement service should be altered. The employee had been made mandatory to indicate an imminent redundancy immediately after the redundancy was declared. This reform step should abbreviate the period of unemployment by implementing the job research at the most early moment possible. Additionally, an institution was established, which meanwhile was already dissolved because of lacking efficiency. The employment service should also be active as an employment business. It should not only indicate job seekers but should also offer the working capacity of unemployed persons on the basis of a contract for work. In order to fuel the efficiency of public employment services already in 2002 the instrument of placement vouchers had been introduced⁴; in 2003 this instrument had been enlarged as to training services. In order to strengthen the market mechanism and to empower the beneficiary, she or he was entitled to demand services from private training providers on the costs of the public employment service.

Part-time work, self-employment and household work(Hartz II)

The Second Law on Modern Services on the Labour Market came into force at January, 1st, 2003⁵. It made the small jobs of a low monthly income more attractive by lowering the overhead for taxes and social contributions to 25 %. To combat moon light work in households a tax-deduction for housekeepers' wages had been implemented. And finally, unemployed persons can receive subsidies when starting their own business. Both initiatives became a success both the so called "mini-jobs"- so the official "German" word – as the support given to persons keen on starting their own business had been accepted by many unemployed persons.

Restructuring employment service (Hartz III)

The Third Law on Modern Services on the Labour Market⁶ became effective on January 1st, 2004. It reorganised the more than ninety thousand employees in six hundred offices of the Germany wide operating unemployment and placement office "Bundesanstalt für Arbeit" into a more service oriented agency. It is from that time onwards called "Bundesagentur für Arbeit". This change from "Anstalt" -

³ of December 23, 2002, BGBl. I S.4607 BT-Drucksache 15/25.

⁴ Regina Konle-Seidl, New Delivery Forms in Germany, in Els Sol/ Mies Westerveld (Eds), Contractualism in employment services, Kluwer Law International 2005,187, 190 ; Oliver Bruttel, New Private Delivery Arrangements in Germany, *ibid.*, 209, 222.

⁵ BT-Drucksache 15/26.

⁶ BT-Drucksache 15/11515.

which reminds to a state institution - into an agency, which sounds like a private enterprise should symbolise the conceptual change of this enormous administration. The changes brought about a new logo, a new approach towards utilising the internet and other communication services to improve the cooperation between the employment agencies and the beneficiaries, which had since then be called “clients”. The contract management within the organisation had been implemented. A reduction of the ratio between case-mangers and beneficiaries was intended in order to reduce the efficiency of placement.

Merging two systems of assistance for able-bodied (Hartz IV)

As the most profound change was conceived the Fourth Law on Modern Services on the Labour Market⁷, meant to reorganise the financial support of those unemployed persons, who have exhausted their benefits rights. The traditional division between unemployment assistance and social aid had been replaced by a new system in 2005. After the reform the assistance scheme had been transformed on drawing a new – but in the history of social policy a quite old distinction⁸ – between the able-bodied and those needy persons being incapable to do gainful work. The first piece of legislation was incorporated in Social Code (Sozialgesetzbuch) II, the latter in Social Code XII. The first is financed predominantly by the national budget, the latter by the municipalities.

So, systematically spoken, the “merging” of unemployment assistance and social assistance did not touch the duplicity of assistance schemes in Germany, but brought about a new borderline between two still existing schemes. The limit is based upon the traditional distinction between the non work-able and the work-able poor – a borderline, which was in quite old days conceived as the frontier between the deserving and the non- deserving poor.

The new law made necessary to find a solution on the administrative responsibility. Two proposals had been made – one was to make the employment service responsible also as to the social services for the many handicaps and short comings of the unemployed persons. The other proposal was to make the municipalities, originally competent to administer social assistance benefits – also to act as a part of the employment service. The law provides for the general competence of the employment office; but 69 municipalities got the right to administer the whole new scheme by their own administrations. Till 2011 the final assessment shall be made based on the experiences of the competing organisations. Already today, however, it is obvious, that the employment service, which has to collaborate with the various social services of the municipalities is not an appropriate organisation, because the limits of action are not clear cut and the direction of such a unit turned out to

⁷ BT-Drucksache 15/1516; Eberhard Eichenhofer, Sozialrecht, 2007 (6. Aufl.), Tübingen, Textziffer 482; Johannes Münder (Hg.), Sozialgesetzbuch II, Grundsicherung für Arbeitsuchende, Baden-Baden 2007 (2. Aufl.); Herbert Renn/Dietrich Schoch (Hg.), Grundsicherung für Arbeitsuchende (SGB II), Baden-Baden 2007 (2. Aufl.).

⁸ Eberhard Eichenhofer, Geschichte des Sozialstaats in Europa, München 2007, S. 38 ff.

become extremely complex, because of the lack of a transparent internal organisation⁹.

The law brought a redefinition of the elementary needs. The payments monthly transferred to the recipient were increased for 16% compared to the previous legislation on social assistance. On the other hand, single benefits to meet single needs (winter coat, heating materials, school meals or excursions, TV set) were now longer paid by social assistance. For the recipients of the former unemployment assistance the change mattered deeply because the former system was income based. So, the unemployed persons, who had lost a well previous paid job, lost more than those with lower incomes out of paid work. Under the new scheme all recipients are integrated into the social insurance to protect them in cases of old age, invalidity and sickness. The protection as to pension rights, however, is definitely modest. This is due to the expenses necessary for the acquisition of protection under the German pension scheme. So, for one year of unemployment benefits' receipt a pension right matures, which gives an entitlement for 4 €(from 2007 onwards only 2, 15 €). This is definitely low, because an ordinary worker earns with work paid on the average basis a pension right of over 25 € a year. So from one year of subsistence payments matures a pension right of less than one month of a worker who earns an average income.

The new assistance scheme for the needy unemployed persons introduced a series of unprecedented elements. The benefit is defined upon a family unit (Bedarfgemeinschaft); it encompasses all needy family members, irrespective of their legal status. They count as a unit of both need and as resources. Also in the absence of legal maintenance obligations – so among unmarried couples – they deemed to support one another. In this construction a potential for increasing benefit rights by restructuring one's family life opened space for unexpected effects on increasing the number of family units and, hence, the amount of cash transfers, e. g. parents once lived with their children in a flat rented a part of their flat to their children. So they were conceived as a family unit of their own with an entitlement to further benefit rights¹⁰.

The beneficiary with working potential is obliged to contribute actively to her/his integration into the labour market. Each one has to agree on an integration agreement (Eingliederungsvereinbarung), which has to determine the ways and means pursued by the unemployed to achieve re-integration into the labour market. This change coincides with an alteration in the understanding of reasonable alternative employment¹¹. The formerly respected right of being acknowledged as employable on fields of activity, on which the individual has proven to be skilled by her/his previous occupation had been altered by the new rule: each unemployed

⁹ Ombudsrat. Grundsicherung für Arbeitsuchende Schlussbericht Berlin 23.6.2006; The Federal Constitutional declared in late 2007 this construction based on an integrated administration of federal and local entities as unconstitutional.

¹⁰ Ombudsrat, Grundsicherung für Arbeitsuchende, Schlussbereich, Berlin 23.6.2006.

¹¹ Ingwer Ebsen, Contracting Between Social Services and their Clients in the German Concept of Fördern und Fordern, in Sol/Westerveld, 231, 241.

person is expected to pursue each lawful and lawfully paid occupation available on the labour market. The contract notion points out that under the law of unemployment protection a reconciliation between the beneficiary and the administration takes place, which might correct and limit the wide scope of optional occupations – assessed to be reasonable by law - what occupation is appropriate is not primarily a matter of general principles but is to be specified under the very concrete auspices of matching on the local labour market¹². Integration of the unemployed persons aged under 25 years became imperative.

The benefit is given as a subsidy and understood as a basic income (“Grundsicherung”), payable in lack of other support, above all on the basis of a work contract or an unemployment insurance entitlement. It is based upon the assumption, that member of the family, which do not belong to the household of the beneficiary are not mandatory to support the unemployed, e. g. the children of the elderly unemployed persons. The federal budget covers the cost for the living allowance and the contributions for the unemployed to their pension and health insurance; the costs for housing are borne by the municipality of the place of residence. A subtle debate emerged on how to deal with income earned as a beneficiary. The law provided for a partial reduction of the benefit in case of income reception: 15 % of an earned income till 400 €, 30 % of an income between 401 € and 900 € and 15% of an income of more than 900€ a month remained free of deduction. These percentages and limits were highly controversial. Critics argued the high deduction would act as a disincentive to reintegration into the labour market. However, if the deduction would be less restrictive, the whole system would attract to many persons to become unemployed. This example shows clearly, that the incentive structure of unemployment protection schemes can be analysed under different angles. At the moment, once again a revision is in the making, directed towards making small extra- incomes becoming more deductible than before to avoid that unemployed stick too long and to frequently at the state of unemployment and by reducing higher extra-incomes less than before in order to make the take-over of extra- work more attractive

A further highly controversial issue related to additional public work which is offered to those unemployed persons who are not likely to get a job on the labour market easily or even at all. They can do public work for an additional remuneration of 1€ per hour. So, these opportunities were called “1 € jobs”(German: Ein Euro-Job). They offer income for non marketable services. The political debate focussed on whether it could be fair “to offer jobs for such a low salary”. The critics did not take into account, that these jobs are not meant for being done on the labour market, so that those workers would and should not compete with regularly paid workers, who do earn at least 4- 5 € an hour. Additionally, the critics are not aware of the fact that the basic needs are met by the social benefit, so that the 1€ job brings extra money which is to be added to the benefit covering the elementary needs.

¹² Ebsen, 245.

Good practices of other countries – dubious practices in Germany?

Reform fits into the European Employment Strategy

For the framers of the reform the European Employment Strategy and examples given by other EU member states were taken into account. This intention was quite often and explicitly articulated in the reform process¹³. So, all the suggestions were understood as authentic interpretation and conclusion from the European Employment Policy Guidelines on which the EU and the member states agreed upon in the framework of the European Employment Strategy. The lesson one can draw from the German reform experience already after a while is : the labour market is divided into those persons who are adequately – above all intellectually – qualified, and who quite normally do find a suitable occupation after having been unemployed beforehand, and of those, who do not dispose over sufficient qualifications. They have severe handicaps to regain a job at all, because the labour market – with its high costs imposed on labour – is not open for the creation of low skill jobs, which allows the employee to acquire a still decent income out of work – above all an income which exceeds the income from social benefits¹⁴. In these days, the German public realizes more than ever of being challenged by an increasingly growing low income population living at the brink of social exclusion. Above all in the high employment regions of East Germany a growing part of the population is jeopardized by sinking prospects in an ever possible future re-integration into the labour market.

Examples for good practices

So, in some of the proposals examples given by other member states can be discovered quite easily. The organisational reform drew many lessons from the Dutch reform on *werk boven inkomst*. Also the *contrat d'insertion* of France and the British Job seeker's Agreements gave a sort of blueprint for the integration agreement. The measures taken to integrate those under 25 years have strong resemblances with the British New Deal approach and the Danish emphasis on facilitating the unemployed person with training and other efforts to increase their employability, also these traces can be detected in the proposals made and submitted. As the examples quoted the German reform put more power of discretion to the employment administration. In this respect the reforms marked an end on the bureaucratic and authoritarian traditions still prevalent in the German employment service and replace

¹³ Bericht p. 20, 341 et sequ.; look also Bruno Caruso/Maximilian Fuchs (eds.), *Labour Law and Flexibility in Europe – The Cases of Germany and Italy*, Baden-Baden/Milano 2004; Christian C. Steinle, *Europäische Beschäftigungspolitik*, Berlin 2001.

¹⁴ Ombudsrat, *Grundsicherung für Arbeitsuchende*, Schlussbericht, Berlin 23.6.2006.

this model by a more managerial approach. This change had been appreciated by both the personnel as the clients. But it is dubious on whether it is more than a model of conduct and became indeed a part of reality.

Tough reconstructions?

Because of the profound changes – above all the ones made in the context of reforming the assistance to the unemployed - there was a massive uproar against this reform – above all in the East German regions, where poverty and unemployment are most spread. There the main argument was the reform ends in a drastic cut back of benefits.

After some years, after the reform got traction, it turned out, that the new system is more costly to the public than the previous one. The protest of the period of debate and deliberation reverberated: What was criticized once as the most drastic social cutback ever, turned out to be much more expensive than the previous system had been ever! So, this experience ushered in new questions, stemming from the opposite side of the political spectrum. The question is raised: Is the scheme too generous? Is it more attractive than ever? Should more emphasis to be given to a combination of income from social transfer and work by restructuring the rules on deducting social transfers for those earning small amounts of work income? Predominantly, the increase is due to an unexpected increase of beneficiaries. This might be the consequence of definitely unfavourable conditions on the labour market, an increasing tendency of persisting, long term unemployment and the making public of poverty, which had been hidden in the past. In any respect, if one should characterise the reforms made in Germany during the last years in the system of unemployment protection one could not assess it as a series of cutbacks, but it can be more precisely understood as a means to put Germany in line with the European development – above all of those member states who changed their system of protection most profoundly in the direction of the activating welfare administration. Also under a social perspective the lessons from Germany might attract attention outside this country: because the consequences of the German reform process can show, that an activation policy is embedded in social circumstances – which are not alike in all countries and parts or regions of country due to remarkable social and economic differences : matching on the labour market is easier under low unemployment rates, however far from effective at all, if the unemployment rate is so enormous, that there are more unemployed than employed persons. Different activation models, hence, react differently, when they are established and embedded in different economic environments and under distinct social circumstances.

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Work Activation and Rehabilitation of disabled people in Germany in the framework of European strategies – problems of coherence and policy mismatch

Felix Welti

Introduction

In social policy and in law there are different approaches to the subject of employment and activation of people who are disabled or have any form of health problem following the basic lines of economic and social integration and of freedoms, equality and solidarity. These different approaches lead to different political and legal instruments. In social and employment policy and even more in a legal system they have to be brought in a coherent system. Negative interaction and mismatch problems between goals and instruments have to be minimized. On the European and even more on the national German level some problems of coherence have not been solved yet.

Employment policy as economic policy and the individual right to work

European Basis

The first approach to the problem is to subsume it under the greater strategy of employment and labour market and the related individual rights (Oppermann 2004; Haines 2004; Welti 2004). The goal is to promote throughout the Community a harmonious, balanced and sustainable development of economic activities and a high level of employment which shall be based on the close coordination of Member states economic policies according to Article 2 and 4 of the European Treaty and to realize what Article 15 of the charter of fundamental rights of the European Union calls the right of everyone to engage in work and to pursue a freely chosen or accepted occupation. Since the beginning of modern history and modern welfare there have been designed legal instruments for the activation of the poor to work. They always required the distinction of those who were able to work and those who

were not. It is in special for this reason that health condition comes into the focus of general employment policies. On a higher level of reflection and evaluation policy and law makers will also find, that disability and health problems correlate with unemployment and with employment on a low level of qualification and payment. Then special instruments of support and activation might be developed.

Germany: The “Hartz-Laws”, especially SGB II

In Germany the laws for modern services for the labour market, known as the Hartz reforms, have been the last big attempt to increase employment and to activate the unemployed, especially by creating a new system of steering the Federal Agency for work and a new system of basic security for job-seekers in the Social Security Code Book II (SGB II), in force since the beginning of 2005.

The definition of ability to work

Integrating two former systems of social welfare and of work promotion in the responsibility of the Federal Agency on the one hand and of the local social welfare on the other hand, a new definition of the ability to work had to be found. It is now defined in § 8 of the SGB II: Able to work is everyone from 15 to 65 – and in a few years up to 67 - who is able to work under normal labour market conditions at least three hours a day. Specialists of Social Medicine say, this is really difficult to decide.

The normal labour market condition is the ideal labour market condition - which in many parts of Germany is far away from the real labour market condition. Official unemployment in 2005 amounted to 12% in Germany as a whole and to 19% in Eastern Germany. This definition declares a lot of even severely disabled people able to work. In 2002 the Federal Agency had found out that one quarter of all unemployed were limited by health condition. It can be taken for granted that those who came out of the social welfare system were even worse off in their health status.

The system is dichotomous: You are either able to work or you are not. In the Social Security Code Book VI (SGB VI) the same definition is used (§ 43), but there is to be found also the category of partially unable to work for those who can work from three to six hours a week. They are entitled to half of a invalidity pension. But this does not help most of the unemployed, because they have at least marginal claims to invalidity pensions. The definition of work-ability had been very important, because after the reform the unemployed have to be paid by the Federal Government and the invalid have to be paid by the local authorities and the Länder.

A first look: Poor results

So the systems covers a lot of disabled people and you should expect some highly developed instruments for dealing with these persons. But the Hartz Commission was not really concerned with this problem. Their subject had been wording and

building a new bureaucratic structure – which meanwhile in 2007 has been found to be in contradiction to the constitutional guarantee of local self-government by the Federal Constitutional Court (BVerfG, 20.12.2007, Az. 2 BvR 2433/04) - and politics were occupied with discussing the amount and conditions of the basic payment and about those unemployed supposed being not willing to work. So the German employment policy today has to face poor results on behalf of unemployed people with disabilities and in bad health condition (Weber 2002, Welte 2004). Around three millions of Germans between 15 and 65 are recognised as severely disabled and only a few more than one million are official part of the labour market, including nearly 200.000 unemployed. Nearly 250.000 are occupied in sheltered workshops outside the labour market, with an increasing tendency. A special campaign had decreased the number of unemployed severely disabled in 2002 to 150.000; in the last years it has been increasing again. Only around 25% of severely disabled in 2005 left the official unemployment status for employment, 10% for qualification and most of them shifted outside the system.

Some explanations

For the disabled people themselves the strict demarcation between the status of being a job-seeker able to work and of being a fully invalid welfare client has created a non-activating effect. The rigid workfare regime of the Social Security Code II is not designed for the needs of people who struggle for their ability to work. It is more attractive for them to be classified as fully invalid and to get the right to work in a sheltered workshop and some more individual support (Welte 2005a). If You first prove to be able to work for more than three hours and afterwards loose Your employment, You are worse off than before. In Social Security Code II case management is an administrative task, in Social Security Code XII - the social assistance - it is a task for social workers.

The steering mechanism inside the federal agency and the newly designed local bodies for the basic security combined from federal agency and local community also has produced some questionable effects. The federal agency hast started with the first parts of the Hartz reforms in 2003 to invent new criteria for vocational re-training and education. To improve their quality and effectiveness they demanded high quotas up to 70% of immediate reintegration of the participants in the labour market. The number of disabled participants decreased significantly, because their special integration problems had not been taken into account. This can be seen as discrimination (Davy 2002, Welte 2004).

Now the federal agency, financed by special contributions of employees and employers, has to pay an amount to the federal budget for every person being unemployed for longer than one year and then being paid out of the federal budget. This should be an incentive to bring the unemployed into work. But as the agency cannot bring all into work in fact it is an incentive to care especially for those who easily can be brought into work. Disabled people mostly do not belong to this

group. There is no incentive to do something for people with severe problems whose reintegration may take a longer time than one year.

Federal Agency, federal government and local authorities disagreed over the responsibility for vocational rehabilitation of unemployed in the system of the Social Security Code II. It could not be implemented to have the local bodies carrying out Social Security Code II responsible for vocational rehabilitation, so now the Federal Agency is responsible for it (§ 6a SGB IX). In the result, there is a divided responsibility for their case management (Welti 2007).

Rehabilitation and the right to integration and participation

European Basis

The second approach to the problem is more specific. It covers the traditions of vocational and medical rehabilitation which have been developed in Europe and Germany in the last 100 years especially in the context of pension and work accident insurance and of war victim support. This special policy has the double justification of avoiding the costs of social disintegration, at first of invalidity pensions, and of social integration as a reason for its own sake. In the treaty this goal is called a high level of social protection and, more precise, in the treaty for establishing a European constitution the combat of social exclusion and discrimination and the promotion of social justice and protection. The Charter of Fundamental Rights of the European Union states in Article 26 that the Union recognises and respects the right of persons with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community. The “respect”-formula is taken in the charter being conscious that there is a long and manifold tradition of such measures in each of the member states.

The German system and the SGB IX

“Rehabilitation has priority over pension” has been the legal slogan in this field over many decades in Germany. This is activation policy *avant la lettre* and it has worked well and still works well for some groups, especially for those whose workability is endangered by accident or by illness after long years of workplace integration (Eichenhofer 2005). Responsibility for the rehabilitation of potentially working people in Germany is shared between the bodies of pension insurance, accident insurance, federal agency for work and the integration office, which formerly was an exclusive agency for war victims and now has to promote the workplace integration of all severely disabled people. Some responsibilities are also imposed on the employers who have an employment quota of 5% severely disabled in relation to their total workforce and some duties for adapted employment.

In 2001 the system of rehabilitation and workplace participation has been regulated in a new legal system in the Social Security Code Book IX (SGB IX). The

aim of this legislation was to achieve more cooperation, coordination and convergence of the different bodies involved into the rehabilitation system including the sickness insurance and the local social welfare bodies. For the first time the obligations of all social security authorities in the field of rehabilitation and also of employers were regulated in one law (Kohte 2005). A common legal concept of disability has been established which is derived from the International Classification of Functioning, Disability and Health of the World Health Organisation (Seger et al. 2004). Disability is defined as a lack of participation in society caused by a health problem. This is an advanced definition which includes the individual condition and the social context. In Germany we say “Menschen sind nicht nur behindert, sie werden behindert.” (People are not only disabled, they are being disabled), which means: Disability is not only a personal disadvantage but also a relation between a person and its environment. This concept of disability does not fit in the concept of work-ability which does not regard the ability to work in the real labour market but in an ideal labour market.

Activation and employment instruments in SGB IX

Also the instruments have been revised and improved: “Rehabilitation has priority over pension” has been generalized to “Rehabilitation has priority over each kind of benefit in cash.” (§ 8 SGB IX) This means, that all social security authorities are obliged to examine in each case of application for any benefit in cash, if any kind of rehabilitation of any authority can be taken into account. So for example after an application for sickness allowance the sickness insurance has to examine not only if medical rehabilitation as a benefit in kind from itself or from the pension insurance should be given but also if vocational rehabilitation from the pension insurance or from the federal agency could be successful. On the other side the federal agency has to take in account medical rehabilitation, if disabled people apply for job-seekers allowance. This would be some kind of revolutionary for the strictly segmented German system of welfare (Gagel/ Schian 2002; Gagel 2004). Unfortunately the new law is not properly executed in wide parts of the administration. There is no incentive for the administrative bodies to do so. Especially in the federal agency and in the sickness insurance there is a lack of competence in the direction of the other parts of the social security system

A second instrument of the Social Security Code Book IX is the new institution of common service units (Gemeinsame Servicestellen, § 22 SGB IX), for all the authorities dealing with rehabilitation. Citizens and employer should have to deal only with one single unit to get all the possible and fitting benefits in kind of medical, vocational and social rehabilitation. The common service units should also do case management. This would be a real progress in the segmented system. Unfortunately the first evaluation of the common service units found out that they are still not ready to serve their management functions and only work as normal advice centres, sometimes they are just “one-more-stop-agencies” (Shafaei 2008).

The Social Security Book IX also brought a few inventions for the rehabilitation services themselves. Strongly disabled people now can profit from a personal workplace assistance (Arbeitsassistenz, § 102 Abs. 4 SGB IX) which really is helpful for example for blind or deaf people. Also new Integration Services for special needs (Integrationsfachdienste, § 109 SGB IX) were invented. They are financed by the fund financed from the countervailing charge employers have to pay if they do not employ enough severely disabled people. Due to reforms and economic crisis the fund is lacking money although employment of disabled people has not increased. So also the services are facing a financial crisis.

At least the employers responsibilities were made more clear than before in the Social Security Book IX. The employers are obliged to carry out a Company Integration Management (Betriebliches Eingliederungsmanagement) in every case of an employee being absent from work more than six weeks a year (§ 84 Abs. 2 SGB IX). This corresponds to the beginning of sickness allowance payments after six weeks and marks a first step to a new balance of responsibility between employers and social security after two decades of a policy of early retirement and workplace disintegration carried out nearly cooperative between companies and social security system (Welti, 2006a). There are no direct sanctions if employers miss their responsibilities for a Company Integration Management, but they may face problems when trying to dismiss employees for sickness reasons (Deinert 2007). Also some companies, especially from the bigger ones, realize that it is more reasonable for them to end the policy of disintegrating employees with health problems, because for demographic reasons even today skilled workforce is more and more difficult to hold. The Company Integration Management is also an important link to workplace security and workplace environment as another main area of European social and employment strategy. It seems that Company Integration Management may work as far as it can be carried out in internal responsibility of the companies, but the link to the social security system, which should be built by the common service units, does not work properly. Employers often miss one person being the responsible partner for rehabilitation in the sense of case-management.

Systemic problems

Five years after enforcement of Social Security Code IX the outcome of implementation is not very satisfying. It should not be forgotten that Germany still has in many parts an efficient rehabilitation system. But the tasks and incentives for the responsible authorities are not promoting innovation in this field. Incentives for the federal agency as mentioned had a result of creaming the unemployed. The bodies carrying out the sickness insurance are in competition with each other and so try to avoid the “bad risk” of doing a good job and being attractive for disabled and chronically sick people (Welti 2006).

Equality and Non-Discrimination

The European Basis

The third approach to the problem follows the principle of non-discrimination. According to Article 21 of the Charter of fundamental rights any discrimination on the ground of disability shall be prohibited. This goal of achieving equality not only before the law but also in society corresponds with both fundamental goals of the European Union: Building a common market requires a common society based on the equality of market participants, deepening the market means involving everyone in it. Building an integrated European society means giving everyone access to his fundamental needs even if markets do not satisfy these needs.

The items mentioned especially for non-discrimination in the European and national law are not equal in function and impact. Regarding the equality of sex, race, colour, language or religion in most cases we call the state as well as the actors in society to be like the goddess of justice with a blindfold on: just to ignore prejudice regarding these special topics. Regarding the equality of disabled people in many cases we want the goddess of justice to be the goddess of equity and to have a good look on the special conditions people are living and suffering with. The concept of considering disability in equality means not a formal equality of rules but a material equality of chances and even of results.

In European Law this concept of non-discrimination is broadly accepted and can be found in the Council Directive 2000/78/EC establishing a general framework for equal treatment in employment and occupation (ECJ 11/7/2006, C-13/05, Chacón Navas; Welti 2008). Going beyond the right to positive action stated in Article 7 in Article 5 of the Directive the member states are obliged to provide reasonable accommodation in relation to persons with disabilities. This means that employers shall take appropriate measures, where needed in a particular case, to enable a person with a disability to have access to, participate in, or advance in employment or to undergo training, unless such measures would impose a disproportional burden on the employer. The member states have the opportunity to make this burden proportional by helping the employers within the framework of their disability policy.

German Implementation

In Germany this directive has been implemented with the Social Security Book IX (§§ 80-84 SGB IX) on behalf of severely disabled people and on behalf of other disabled people with the General Equal Treatment Law of 2006 (Allgemeines Gleichbehandlungsgesetz, AGG). Concerning reasonable accommodation it can be doubted that the implementation is complemented but it is possible to understand German Law in conformity with European Law.

It is prohibited for employers to discriminate anyone on the ground of his or her disability when making decisions about employment, advancement and dismissal and employers have to provide reasonable accommodation for disabled people which is proportional for them because integration office and moreover sickness, pension and accident insurance authorities support the reasonable accommodation. So some jobs for disabled people can be secured, but according to the general lack of employment chances especially for the lower qualified even an equal chance would be a little chance in many parts of Germany.

A substantial equality of chances has to start earlier for providing disabled and health impaired people with good and sustainable qualification and at the same time taking in account their special needs. In Germany between 5 and 7% of every age cohort visit special schools and are not integrated in the general education system (Cloerkes 2003). The social security system in the past provided basic qualification for many of them, compensating deficits of the educational system based on an outdated segregated school system. After the Hartz reforms vocational training and rehabilitation has changed and does not serve this basic qualification functions to the same extent.

The employment framework directive 2000/78 according to its Article 3 covers not only the conditions of employment, but also the access to all types and all levels of vocational guidance, vocational training, advanced vocational training and re-training. Germany has now in the context of the General Equal Treatment Law 2006 (AGG) implemented this principle in several parts of the Social Security Code (§ 19a SGB IV; § 33c SGB I; Welti 2008). In German social and employment policy there is a contrast between elaborated instruments of a special disability and rehabilitation policy and some kind of ignorance in the mainstream of labour market and activation policy. But the principles of equality and non-discrimination need to be integrated in the mainstream of society and legal system (Schiek 2002; Welti 2005; Welti 2006).

Conclusion

European law and European coordination already have had a positive impact on German disability policy. But European and German law and policy making will have to take even more in account that the general employment strategy and the special strategy for integration and equality of disabled people have to be brought into convergence. Studying the European documents through the years it seems that also on this level the links between both areas not have been tightened.

As a first step we should discuss seriously in Germany about the impact of the employment framework directive 2000/78 on social security system and we should not repeat the mistake of disability-blind reforms in our educational system. Social security and education have to prove their performance not for those who are already healthy, wealthy and wise. Also on the European level we may need more awareness that the employment situation of disabled people is situated at the inter-

face of the employment, the social security and the educational system. Disabled people should find their place not on the fringes but in the middle of a dynamic and open and integrative German and European society.

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“From a given – into a task”

Andreas Inghammar

*Aspects of labour market integration and employment strategies in relation to reasonable accommodation regulations and the individualized perspective of anti-discrimination legislation.*¹

Introduction

Since the introduction of disability anti-discrimination law, the legal and socio-political debates in the field has been circling the very idea of access to employment through equal treatment legislation.² The European Community adoption of this strategy is very obviously apparent in the directive 2000/78/EC.³ Since the disability part of the Directive already is, or is supposed to be, implemented, a number of national legislations or amendments to national legislation have been passed lately. This development represents an interesting and important shift in attitude to disability at work, from what could be argued to constitute a more paternalistic perspective of positive measures, subsidies and sheltered employment – to a more individualised perspective, where the disabled individual will be promoted to compete in a free labour market, regardless of irrelevant attitudes towards disability. Disability might, however, have significant impact on the ability to perform the employment tasks, and if the description of the current development is correct, the focus on competitiveness and equal treatment of “equals” might leave many disabled individuals outside the scope of the “equal” labour market. The individualised perspective could, with parallels to the words of Bauman, be described as resulting in the establishment of a “*de jure* autonomy (although not necessarily a *de facto* one)”.⁴ Disability discrimination law does, to some extent, react to this situation by stipulating an employer duty to make reasonable accommodations in order to make more disabled employees or applicants available for the “equality-test” of discrimination law.

¹ This article consists of aspects and perspectives developed among other things in my doctoral thesis at Lund University, Inghammar, *Funktionshindrad – med rätt till arbete*, Juristförlaget i Lund, 2007.

² I would say that this is particularly valid for the development in the UK, the European country most experienced with disability discrimination law.

³ The development of disability law within the European Community is described in Waddington, *From Rome to Nice in a Wheelchair, The development of a European Disability Policy*, Europa Law Publishing, Groningen 2006.

⁴ Baumann, in, Beck, Beck-Gernsheim (ed), *Individualization*, SAGE Publications, London 2002, p. XV.

Disability discrimination law as we have seen it develop in Europe over the past 10-15 years have been described as elitist,⁵ de facto focusing the most competitive disabled employees and job-applicants, leaving, I would say, a majority of persons with disabilities with no increased prospect of labour market integration. The very core idea of equal treatment has to do with a merit-based labour market selection, neither a means-tested nor a, for insufficient reasons, misguided selection based on irrelevant aspects like disability.⁶ Individual capacity and individual ambition seem to establish the individual employee or job-applicant at the heart of the labour market and the discrimination legislation provides incentives, in form of damages for violation of the legislation, for employees or applicants to take legal action.⁷ This market oriented perspective could be argued to relate very closely to a development into a more individualised – and flexible – notion of employment relations. But then again, disability discrimination law also includes a specific feature – the duty to make reasonable accommodations.

In this article it is argued that the duty to make reasonable accommodations constitutes the most fundamental opposition to an otherwise rather elitist perspective of non-discrimination law, but that this duty is still very much in line with the underlying individualisation of the labour market. The article pinpoints some differences in the duties to make reasonable accommodations under national anti-discrimination law, and discusses how these differences influences the possible outcome of the disability discrimination legislation.

Duty to make reasonable accommodations under EC-directive 2000/78/EC

Article 5 of Directive 2000/78/EC clearly stipulates that reasonable accommodations shall be provided or at least taken into account in order to guarantee the compliance of the equal treatment principle. Employers shall be obliged to take such appropriate measures as to enable persons with disabilities access to and participation in employment, as long as this does not result in a disproportionate burden for the employer. Support or subsidies provided as parts of the national disability strategy will influence the perception of the proportionality of the employer's duty. As argued in section 21 of the preamble to the directive, factors like financial resources and the scale of the organisation shall be taken into account, but at large, the very

⁵ See for instance Inghammar, *Discrimination of People with Disabilities*, in Numhauser-Henning (ed) *Legal Perspectives on Equal Treatment and Non-Discrimination*, Kluwer Law International, The Hague 2001, p. 348.

⁶ As long as the disability is an "irrelevant" aspect and does not interfere with the performance of the duties under the employment contract.

⁷ This constitutes indeed a shift from earlier generations of disability labour market "rights" which were almost impossible for the individual disabled person to claim, I discuss this issue more in depth in, Inghammar (forthcoming) 2007.

definition of reasonableness and proportionality will be dependent on future EC, and national, case law.⁸

...in Sweden

The Swedish Disability Discrimination Act, (SFS 1999:132) includes a duty for employers to make reasonable accommodations.⁹ There is no statutory indication to tell what would be considered reasonable or unreasonable, and so far, since coming into force in May 1999, this aspect of the law has not been subject to any significant guidance by case law from the Swedish Labour Court.¹⁰ At a first glance the duty to make reasonable accommodations under the Swedish act from 1999 seemed to correspond rather well to the EC-directive. However, since the discrimination law was introduced to a legal environment where accommodations to the workplaces used to be handled under the Safety at Work legislation (SFS 1977:1160), any accommodation for employees under an existing employment contracts was kept out of the Disability Discrimination Act. The regulatory field of adjustments was divided, and accommodations in respect to disabled *job-applicants* and *employees applying for promotion* formed part of the discrimination perspective, while similar accommodations for already employed disabled persons fell under Safety at Work provisions. Only under the discrimination law the individual could take legal action and call for damages in terms of loss of income or injury to feelings under private (labour) law proceedings. Safety at Work issues were, and are still, a part of a public/administrative law area, where the individual employee are left with only indirect representation and administrative proceedings and no damages could be paid to the individual employee in these cases.¹¹ Voices were raised implying that since accommodation is already to some extent obligatory under Safety at Work legislation any similar duty under disability discrimination law would be overlapping.¹²

In December 2006, only days before the implementation of directive 2000/78/EC was overdue, the Swedish parliament changed this situation by including employees and not only job-applicants and employees seeking promotion under the reasonable accommodation section of the disability discrimination law.

⁸ See also Waddington, Hendriks, The Expanding Concept of Employment Discrimination in Europe: from Direct to Indirect Discrimination to Reasonable Accommodation Discrimination, in, *The International Journal of Comparative Labour Law and Industrial Relations*, Kluwer Law International, 2002, p. 403-427.

⁹ 6 § act law (1999:132) on disability discrimination.

¹⁰ As a matter of fact the Labour Court have only tried the disability discrimination law on five separate occasions. In three cases the Court found that the employer had discriminated against the employee or the job-applicant, these were cases where the plaintiff suffered from early stage Multiple Sclerosis, Diabetes or Allergic reactions to some food.

¹¹ The former Swedish government made a proposal to rearrange these matters in order to better comply with the EC-directive, but the proposal was postponed until after the Election in September 2006 and how, and when, the new majority in Parliament will react to this is still unclear.

¹² See further for instance Proposition 1997/98:179 p. 53.

I would argue that what we experience in the described legislative discussion is a collision between on one hand an individualised disability discrimination aspect and on the other a collectively oriented perspective expressed in the Safety at Work legislation. As we will see below, this collision is not a situation isolated to Sweden.

...in Germany

Since long, legislation on integration and labour market participation in German labour law has been focusing severely disabled.¹³ Regulations covering a variety of instruments, such as the Quota-system, are still actively promoting the integration of persons with (severe) disabilities.¹⁴ This legislation does, however, only to a minor extent generate specific individual rights for the (severely) disabled, rights under which the disabled person could bring charges against a neglecting employer.

In August 2006, German Bundestag finally passed new discrimination legislation, the General Equal Treatment Act (*Allgemeines Gleichbehandlungsgesetz*, AGG).¹⁵ The legislation is supposed to implement the EC-directive 2000/78/EC and outlaw discrimination in relation to, among other things, disability in the labour market.¹⁶ To a large extent the definitions within the EC-directive are implemented, most importantly is the old German concept of special protection for severely disabled *not* adopted in the discrimination act but a broader, more inclusive, definition of disablement is used.¹⁷ Regardless of what is explicitly said, the German Act does not fully implement the EC-directive. The lack of a duty to make reasonable accommodations under the discrimination act is one of the most appalling examples of this.¹⁸

Despite article 5 of the directive 2000/78/EC, the German legislator shows reluctance to introduce any duty to make reasonable accommodations under the discrimination and equal treatment legislation and neither the AGG nor the former

¹³ In general, this perspective has influenced the field of law since 1923, the current legislation is since 2001 found in the Ninth Social Book of Law, *Sozialgesetzbuch IX* (SGB IX). For a thorough analysis of the legislation see, Welti, *Behinderung und Rehabilitation im sozialen Rechtsstaat*, Mohr Siebeck, Tübingen 2005.

¹⁴ SGB IX.

¹⁵ The legislation was announced in the *Bundesgesetzblatt* 17 August 2006 and the law came into force the day after that. For an early discussion about the AGG, see Bauer, Thüsing, Schunder, *Das Allgemeine Gleichbehandlungsgesetz – Alter Wein in neuen Schläuchen?*, in *Neue Zeitschrift für Arbeitsrecht*, 2006, Heft 14, p. 774-778.

¹⁶ § 1 AGG, the second part of the Act focuses relations on the labour market.

¹⁷ There is no legal definition of disability under the Act, but disability is explicitly covered, see, § 1 AGG. (“Ziel des Gesetzes ist, Benachteiligungen aus Gründen [...] einer Behinderung [...] zu verhindern oder zu beseitigen”).

¹⁸ The other important example is the exemption of dismissal cases from the discrimination legislation, see further, § 2 Abs. 4 AGG. This exemption does not cover disability alone, but all other ground for discrimination. The legislator obviously relies heavily on general employment protection legislation on unfair dismissal, see, *Kündigungsschutzgesetz*.

disability equal treatment regulations in § 81 Abs. 2 SGB IX correlates to such duties.¹⁹

However, this is not the full picture of employer duties to accommodate disabled individuals. A separate regulation already in the SGB IX generates a somewhat similar duty for the employer to actively try to adjust the workplaces to severely disabled employees.²⁰ To some extent, this statute might regulate the same or similar situations, but in some vital aspects this would not be the case. First of all would the duties under § 81 Abs. 4 SGB IX only relate to persons with severe disabilities. This definition will exclude a great number of people with less than severe disabilities, individuals with even better opportunities (than severely disabled) to compete under discrimination law in the open labour market. Secondly, the definition will comprise employees only, leaving job-applicants without opportunity to raise the question of workplace adjustments. Thirdly, an employee bringing charges against his employers in this regard will not be able to follow the discrimination “route to justice”, with the concept of shared burden of proof, but will have to argue in the private law concept under § 823 Bürgerliches Gesetzbuch (BGB).²¹ At least the two first arguments, and possibly even the third, could undermine the implementation of the Directive in German labour law.

...in Great Britain

The British Disability Discrimination Act 1995 already from the beginning established the idea of reasonable accommodations and turned out to be a role model for at least the Swedish legislative process in 1999. A significant number of cases from Tribunals, and recently even from Court of Appeal and House of Lords, has monitored the importance of this duty and the potential progression of disability law lying embedded in this very idea.²² The British concept of the duty to make reasonable accommodations is, in my opinion, the only of the three national concepts that from the very beginning corresponded to article 5 of directive 2000/78/EC.²³ There are no limitations in regard to the disabled individual’s status as job-applicant or

¹⁹ Prior to the introduction of the AGG in August 2006, a discrimination statute was attached to the legislation on severely disabled in § 81 Abs. 2 SGB IX between year 2001 and August 2006. The structure of that legislation, with the focus on severely disabled, was subject to legitimate criticism, see Schiek, *Gleichbehandlungsrichtlinien der EU – umsetzung im deutschen Arbeitsrecht*, in: *Neue Zeitschrift für Arbeitsrecht* 2004, p. 873-884.

²⁰ § 81 Abs. 4 SGB IX, see Kossens, von der Heide, Maas, *Praxiskommentar zum Behindertenrecht* (SGB IX), C.H. Beck, München 2002, p. 367-368.

²¹ See BAG 10.7.1991 AP Nr 1 zu SchwBG 1986, as well as Neumann, Pahlen, Majerski-Pahlen, *Sozialgesetzbuch IX. Rehabilitation und Teilhabe behinderter Menschen*, 14. Aufl. C.H. Beck, München 2005, p. 211 f. and Palandt, *Bürgerliches Gesetzbuch*, 62. Aufl. C.H. Beck, München 2003, p. 1245 ff.

²² British employment cases are brought through Employment Tribunals and Employment Appeal Tribunal, with possibilities for appeal in the Court of Appeal and eventually House of Lords.

²³ Whether the DDA 1995 definition of disability – with the “normal day-to-day activities” parameter – is sufficient or not is really another story.

employee, and no separate disability definition applied to this duty.²⁴ Nevertheless, or maybe for that reason, have the questions of reasonableness and potency of the duty been subject to discussions in case law and the duty's "element of more favourable treatment", has, indeed, been recognised.²⁵

Accommodating the individual

If disability discrimination law can be described to be a part of an ongoing individualisation of employment legislation, providing legal rights for the achievement of equal treatment, how would that correspond to the *reasonable accommodation* perspective? When discrimination law, as described above, focuses the equality of opportunity and in fact the rights for persons with disabilities to compete without regards to irrelevant attitudes to their disablement, what role is there for reasonable accommodations to play? In respect to that role, do the national standards for reasonable accommodation fulfil these purposes?

The reasonable accommodation duty is obviously something different from a fundamentalist definition of equal treatment. The employers might need to take into consideration and even make expensive adjustments in order to accommodate the disabled individual, resulting in some sort of more favourable treatment.²⁶ In relation to the variety of positive measures for labour market integration, this more favourable treatment represents, I would say, a somewhat different perception of people with disabilities. Where most positive measures regulate favourable treatment for disabled persons as a group, that could be quota-system, extraordinary employment protection, sheltered or supported employment, the rights for persons with disabilities developed under the duty to make reasonable accommodations focus the individual, providing an opportunity for the individual disabled job-applicant or employee to state his or her special, individualised, requirements, leaving to the employers – and in the end to the courts or tribunals – to examine the reasonableness and proportionality of the adjustments. From my perspective this is something different from other regulations. The legal construction will, as discussed above, even if it does not perfectly relate to the equal treatment paradigm, most certainly form a good alliance with the concept of individualisation – which is strongly advocated through discrimination law.

²⁴ For a detailed description on the reasonable accommodation section, see for instance Doyle, *Disability Discrimination. Law and Practice*, 4th edition, Jordans, Bristol 2003.

²⁵ *Archibald v Fife Council* [2004] IRLR 651 HL (House of Lords), citation by Baroness Hale of Richmond, p. 657. See also *Northampton County Council v Meikle* [2004] IRLR 703 CA (Court of Appeal).

²⁶ See *Archibald v Fife Council* [2004] IRLR 651 HL, especially p. 657.

Finally

The Swedish and German disability discrimination legislations both, in the own individual ways, though, showed reluctance to implement a general and consequent duty to make reasonable accommodations all over the labour market. Only after some debate and in under the threat of not properly implementing the EC-directive Swedish legislation was given a wider target in December 2006. The German legislation is however still not changed in this regard. The ambiguous applications of the duty in these two countries could be said to maintain a more absolute idea of equality of treatment or at least keeping more favourable treatments, such as accommodation of the workplace, separated from discrimination law, which is especially true about the German legislation. To what extent this will be in accordance to EC-law will be a question for future decisions by the ECJ, but it certainly would turn out a little surprising if this explicit part of the discrimination directive could be more or less voluntary for the Member States to implement. The duty to make reasonable accommodations also relates perfectly well to an individualised concept of employment expressed in discrimination law, even though any accommodating strategies might challenge the overall competitive perspective of equal treatment. Herein lies a deep and contradiction in the legislation. As part of the individualised concept the reasonable accommodation regulation could be argued to contribute to a strategy were employment for disabled persons are turn from “a given – into a task”, with the notion that individual disabled will have to take on that “task” and be competitive enough to see the changes come through.

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The Individual's Rehabilitation – Possibility or Right?

Lotta Vahlne Westerhäll

Background

The Swedish word *rehabilitering* (rehabilitation) is a general term covering all measures of a medical, psychological, social and occupational nature which may assist those who have been ill or injured to regain maximum functional ability and restore the conditions required for a normal life. Different authorities, or principals, are responsible for the various areas.

The public health authorities are responsible for medical rehabilitation, while the municipal/social services are in charge of the social aspects. Responsibility for occupational rehabilitation is shared by the labour market authorities, the social insurance office and the employer. The responsibility for coordination rests with the social insurance office.

Occupationally oriented rehabilitation refers to the measures required to assist an absentee to regain his or her capacity for work, thereby making it possible to support himself/herself through gainful employment.

The employer is primarily responsible for identifying and determining the need for rehabilitation, for ensuring that rehabilitative action is taken, and for financing such measures. Financial responsibility is, however, limited to measures that can be taken within, or in conjunction with, the framework of the company's operations. The employee should be offered continued employment by the employer, and other alternatives should be explored only when this possibility is exhausted.

This chapter will examine the legal position of the individual insured person from the point of view of the insured person's possibility of being, or right (in the legal sense, i.e. where there is a possibility of review) to be, the object of a rehabilitation programme and also from the point of view of her/his obligations in connection with the rehabilitation process. I will begin by studying the concept of "possibility".

The “possibility” concept

Under Chapter 22, Section 1, of the National Insurance Act an insured person who is registered with a social insurance office or who is entitled to sickness allowance under Chapter 3, Section 1, second paragraph, has the “possibility of rehabilitation” and the “right to rehabilitation allowance” under the provisions of Chapter 22 of the Act. In other words no lawful right to rehabilitation is written into the current wording of the Act. The right is limited to apply to the actual benefit during rehabilitation, which is described below. It is important to keep this distinction in mind.¹

Occupational rehabilitation is very closely connected to the question of the right to benefit. The close link between the right to rehabilitation allowance and the possibility of rehabilitation, which has meant that the basic concepts of sickness and incapacity for work have become very relevant to the possibility of obtaining rehabilitative assistance and rehabilitation allowance, is very apparent.

What is meant by “possibility”? There is no explanation in the legislative material for the choice in the formulation of the Act of the word “possibility” for what is available to the individual.² In ordinary language the term “possibility” is taken to mean “an opportunity/a chance”.³ The concept is then seen almost as a situation that arises at random without the influence of the individual. But the legal meaning of the term “possibility” has to be seen as vague. It is difficult to determine from the term alone what the legislator intended. Questions which inevitably arise are which insured persons are to be given the possibility of rehabilitation and in which situations the possibility becomes reality.

In practice it has turned out that many of those who need some form of rehabilitation do not obtain it. It has been possible to ascertain that factors such as which officer the insured person encounters and the individual’s own attitude are crucial to whether attempts to rehabilitate will be made or not, and to how successful these will be. Surveys also show that the type of measure offered depends on such factors as gender, age, place of residence, and occupation. Research so far carried out shows that older people and immigrants become the object of rehabilitative measures to a lesser extent.⁴ The fact that the unemployed sick are discriminated against in the rehabilitation process is shown in a thesis dealing with occupational rehabilitation for the unemployed sick in a Swedish rural area.⁵ In practice it therefore appears that the allocation of rehabilitation is not characterised by the principle of

¹ National Social Insurance Board general advice 1991:12 p 5 prescribed however that with the rehabilitation reform of the early 1990s the individual has the right to demand that rehabilitation resources are made available to the person concerned. This is not consistent with the wording of the Act.

² Government bill 1990/1991:141 and SOU (Swedish Government Official Report) 1988:41.

³ Nationalencyklopedins ordbok, andra bandet [National Encyclopedia Dictionary, Volume Two], bokförlaget Bra Böcker 1996.

⁴ SOU 1998:104 s 143 ff.

⁵ Marnetoft, Sven-Uno (2000), Vocational rehabilitation of unemployed sick-listed people in a Swedish rural area.

equality and similar treatment. In addition it is very difficult to determine which factors are relevant to whether the insured person is included in the offer of rehabilitative measures or not.

The regulations contain little to indicate that the legislator wishes to see the insured person as active at an initial phase, in the sense of taking the initiative in arranging rehabilitation and determining that it should come about. One thing that may appear to point in such a direction in the legal text is the provision that imposes on an employer an obligation to carry out a rehabilitation enquiry when the insured person requests it under Chapter 22, Section 3, of the National Insurance Act. However the employer has the right to omit to carry out such an enquiry if it is considered unnecessary.⁶ The fact that the decision on rehabilitation is now regarded as appealable in certain respects (see below) may be seen as a step towards the possibility of an increased activity on the part of the individual, which may indicate a growing wish to see the individual become more active.

The fact that the insured person has a possibility of rehabilitative assistance and not a right to it might almost be interpreted as meaning that rehabilitation is to be initiated without the collaboration of the individual. As from 1 July 2003 the employer has a duty to carry out a rehabilitation enquiry (in three stated situations). But it is only when the employer or the social insurance office presents a rehabilitation programme that the individual is expected to take a positive part and cooperate actively. This state of affairs may of course be criticised, and so it has been. It has been asked whether it is right that the insured person should be at the mercy of the opinions of outsiders (e.g. the rehabilitation officer's or the employer's opinion) on the need for her/his own rehabilitation, and have no opportunity of initiating action herself/himself. This circumstance is not compatible with the prevailing view that great weight should be attached to the individual's particular situation, needs and commitment, and that these should guide the rehabilitation process. The criticism is lent extra weight by the fact that the insured person is also expected to be active and to participate when the process has started (and then by someone other than the insured person herself/himself).

Moreover there is today no consensus regarding the criteria on which the determining of priorities in rehabilitation activities should be based. This naturally makes it very difficult for the insured person to work out in advance when he or she actually has a possibility of rehabilitation. This being so, a report on occupational rehabilitation (SOU 2000:78) presented an entirely new proposal for an ethical platform, which would form the basis for setting priorities among rehabilitation projects.⁷ The report did not lead to any legislation.

⁶ SOU 1998:104 s 74.

⁷ SOU 2000:78 p 317 ff.

Appeal against decisions on rehabilitation

The fact that Chapter 22, Section 1, of the National Insurance Act speaks of the individual's prospects of obtaining rehabilitation as a *possibility* used to be interpreted in previous adjudications as meaning the individual could not appeal against a decision not to plan or take rehabilitative measures. Decisions on rehabilitative measures were regarded as non-appealable decisions while being made and not as social insurance decisions under the National Insurance Act.

The individual depended on either the employer or the social insurance office to be of the opinion that there was a need for rehabilitation and to choose to finance the measures decided upon. All that the individual wishing to receive such rehabilitative assistance as was available could do was to express a wish for a particular necessary action to be taken. If those in power decided that such action should be not taken, the individual had a problem, because he/she had no means in law of forcing rehabilitative measures to be taken.

In the mid-1990s, however, it was laid down that certain decisions concerning rehabilitation may in fact be appealed against by the individual. A landmark decision of the Swedish Supreme Administrative Court examined whether a decision on rehabilitation was to be reviewed under Chapter 20, Section 10, of the National Insurance Act. The Supreme Administrative Court decided in this case (22 November 1996, case no. 10057-1995) that a social insurance office decision not to buy an occupational rehabilitation service for an insured person should be reviewed under the National Insurance Act, provided that this was requested by the insured person and the decision was appealable in the sense that it had gone against the individual.

As grounds for the decision it was stated that at the time of making the decision the social insurance office had a duty to ensure that rehabilitative action was taken when there was a need for such, for which reason a decision on the rehabilitation concerned was statutorily a decision in an insurance case under the National Insurance Act. For this reason it was considered that the decision could be reviewed if requested by the insured person.

This judgement has implications both for the individual insured person and for the handling of rehabilitation cases by the social insurance offices. Where the social insurance office does not intend to buy a particular occupational rehabilitation service which the insured person claims, the office now has to issue a decision giving instructions for application for a review. Whether the insured person really demands that the office buy the disputed rehabilitation service, or is only discussing various alternative forms of rehabilitation, is, according to the information issued by the then National Social Insurance Board, to be considered in the individual case. However there should be a clear and distinct proposal, preferably in writing, of a specific action.

Refusal to take part in rehabilitative programme

The obligation to take part in a rehabilitative programme may undoubtedly be of a character that encroaches on personal freedom or integrity. The question of the extent to which an insured person is obliged to submit to rehabilitative measures is taken up in the preparatory material to the current National Insurance Act.

Most people who are potential candidates for rehabilitation are already in a difficult situation, with sickness and incapacity for work interfering with the normal pattern of life. This may naturally tend to make it seem very dubious whether the situation may be allowed to be “aggravated” by the fact that the process also entails specific obligations. The rehabilitative measures suggested by, for example, the social insurance office or the employer are not infrequently of such a kind as to be seen as an infringement of integrity, if they are contrary to the individual’s wishes.

Occupational rehabilitation may involve very varied measures. There may be requirements for the individual to undergo extensive examinations or treatments, receive physiotherapy etc. Implementation of rehabilitative measures of a medical nature may put the individual in an exposed position, both mentally and purely physically, where she/he may be in a position of dependency and subordinate to health care personnel. Other rehabilitative measures, too, that may be considered conducive to occupational rehabilitation may contain elements which are felt to be very “personal”. This may infringe personal integrity. The measures may be of such a nature as to lie within the area where the individual herself/himself ought to be allowed to decide.

A withdrawal of benefit presupposes that the insured person is at the time of withdrawal entitled to financial benefit in the form of sickness allowance or rehabilitation allowance. This implies that the consideration of the requirement for sickness or incapacity for work in accordance with Chapter 3, Section 7, of the National Insurance Act has previously taken place and that on the occasion of this consideration the insured person has been regarded as satisfying the requirements in this respect. Despite the fact that the person is entitled to financial compensation under the sickness insurance scheme following the customary assessment of sickness and incapacity for work, the financial benefit is withdrawn on the grounds that the insured person is not meeting the requirements laid down for “active participation”. Herein lies the element of sanction.

A number of test judgements⁸ emphasise that caution should be observed in withdrawing an insured person’s rehabilitation allowance.⁹ These instructive cases therefore indicate some restriction on the social insurance office’s freedom to apply the sanction in Chapter 20, Section 3, of the National Insurance Act. The rehabilita-

⁸ Since 1 July 1995 the Swedish Supreme Administrative Court has been the highest forum for matters of sickness insurance and rehabilitation.

⁹ See for example FÖD [Swedish Superior Insurance Court] 19 December 1994 Case no. 1729/92:9.

tive action proposed to the insured person must for example be definite and unambiguous in substance,¹⁰ benefit may not be withdrawn as long as the attempt at rehabilitation continues,¹¹ reminders about the sanction must be given in an acceptable manner¹² etc.

However these restrictions that have arisen in the application of the law do not prevent withdrawals occurring. The interventionist nature of the rehabilitative measures as described above ought therefore to be considered in relation to the fact that the consequences of a refusal to participate actively in rehabilitation may affect the insured person quite severely. Losing one's sickness allowance may undoubtedly have serious consequences for the individual and rule out any possibility of self-support. At worst, withdrawal of benefit may result in having to resort to an application for financial assistance under the Social Services Act. It is not unusual for the person concerned to find herself or himself in a grey zone between different authorities. The situation may be such that the individual has no chance of obtaining, for example, labour market support, study assistance or other possible benefit.

One of the ultimate aims of sickness insurance – giving financial assistance to persons who as a result of sickness have suffered a reduction in their working capacity – becomes obscured in a withdrawal situation by another aim – namely that of promoting active rehabilitation from the point of view of the individual. The result of a withdrawal under Chapter 20, Section 3, of the National Insurance Act as a result of inadequate participation in a rehabilitation programme is that the person who does not take an active part in the attempts at rehabilitation is no longer picked up by the social insurance scheme either.

In the social policy debate the question has often arisen of what requirements it is reasonable to impose on the individual to whom social benefits are granted. The financial benefit may be regarded here as a tool with which to motivate, control or influence citizens. The authorities set out certain demands and have the threat of sanctions as a means of countering undesired behaviour.¹³

For natural reasons this approach may make for more efficient administration. The threat of losing the financial benefit may have the effect of putting powerful pressure on the individual to take the course desired by the administration. However there is a risk that the autonomy and personal integrity of the individual suffer from serious encroachment owing to the position of dependency in which the individual often finds herself or himself in such situations.

¹⁰ FÖD 22 November 1993 Case no. 2667/90:7.

¹¹ FÖD 29 October 1992 Case no. 1041/89:3.

¹² FÖD 19 December 1994 Case no. 1729/92:9.

¹³ Kjönstad, Asbjörn m fl (1993), *Sosial trygghet og rettssikkerhet – under sosialtjensteloven og barneverntjensteloven*, p 115 ff.

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Employment support – a normative step backward, forward or nowhere?

Sara Stendahl

The tramps called it The Mountain, the establishment where they were brought when convicted to forced labour for begging and tramping the roads. It was a hard place. A “harshfarm” in Sånge county. Apart from farming it had a stone-quarry. There, surrounded by constables, the tramps pondered about why one, but not the other, ended up in this place.

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Introduction

This chapter is concerned with the normative implications of “employment support”. The concept is used as a comprehensive label to include different *legal strategies* elaborated with the aim of moving recipients of social security cash benefits from benefits into paid work.² Employment support described in this way is an essential aspect of what has been called the active welfare state or the work

¹ Martinson, 1950. The year is 1898 and the former cigar maker Bolle, betrayed in love and in disgust of what industrialisation does to humans and to craftsmanship, decides to look for freedom in tramping the countryside of Sweden. Still, fear of the authorities is ever present as vagabonding is forbidden. The penalty is a one year sentence to forced labour. Martinson was awarded the Nobel Prize in 1974.

² The concept of legal strategies is used to capture the way legal constructs (rules, principles, practices) function as building blocs in the implementation of social policies, and how the different usage and combination of these will determine different modes of governance. Legal strategies are worked out and determined on different levels – locally, nationally, regionally and internationally. Thus, although national legislation (statutory law) would be a prime example of where to look for legal constructs, this is not an exclusive source. In the area of welfare law there is increasing awareness of the pluralistic elements of legal systems and the notion of legal strategies does not exclude such a perspective. Thus, legal strategies are not always coherent, they do not necessarily point in the same direction, not even on the ideal, normative, level.

first welfare state.³ Depending on the strategy chosen, employment support measures can be designed in many different ways, and they can be targeted at different groups of welfare recipients.⁴

The aim of this chapter is twofold, the first aim is to serve as a concluding chapter reflecting upon the different contributions made to the present volume highlighting important themes. The second, interlinked, aim is to explore the normative impact of work first welfare reforms in three different European countries using the theory of *basic normative patterns*.⁵ The empirical input is limited to the nine country reports constituting chapters in the present volume. My ambition at this point is neither to draw conclusions nor to explain the normative route taken by European countries in their pursuit of work first welfare, but rather to formulate questions that could be worthwhile to pursue in future comparative legal studies.⁶ As stated by Cox, “welfare reform is more a struggle over identity of a society than over the size of the public budget”,⁷ and what is suggested in the present text is that an analysis of legal strategies could offer this sought after knowledge of the normative patterns of different societies.

The material analysed, the previous chapters, was written in response to a request asking the researchers to:

... contribute by describing and discussing legal strategies used to increase labour market participation. By legal strategies we refer to the legislator’s choice of method to implement a specific policy, e.g. the creation of rights, the choice between using hard law/soft law, public/private law, statutory law/collective bargaining etc. The national analysis could thus include reflections on legal strategies for implementing activation policies for persons being sick, disabled or unemployed.

³ The concept of “work first” has mainly been used in a North American context (the US and Canada) to label welfare reforms that aim to move welfare recipients from benefits to private-sector jobs. In 1995, the Democrats introduced a Work First welfare reform bill for debate in the Senate and programs in this spirit have since then been institutionalised in the different states. The American way of activation through work first programs has become associated with “work fare”, with an emphasis on work requirements that “lack training elements and options, and that implies inferior working conditions” see Kildal, 2001. It is probably fair to say that the concept of work first is normatively biased, to the extent that it is commonly linked to a specific ideological package: “employability-based approaches to supply-side intervention in the labour market”, Peck and Theodore, 2000. The choice to use the concept here, in a European context, is a choice to underline that the implementation of what seems to be a common and fairly uncontroversial goal of “activation” is normatively impregnated.

⁴ There are at least three different types of methods to effectuate employment support: 1) through the offer of active services, ii) through requirements of conditionality and iii) through economic incentives. Another categorisation of employment support use the distinction “measures to stimulate demand” and “measures to create productivity”. In the first category we find measures such as lowered levels of benefits, while an the offer of labour market education belongs to the second category, see for instance Swedish Government report ”Nya förutsättningar för arbetsmarknadsutbildning” [New conditions for labour market education], 2007.

⁵ Christensen, 2000, pp. 285-324, Stockholm.

⁶ Although this chapter is an explorative exercise, based on a limited number of texts and on observations made by a limited selection of researchers, it is an exercise that invites further reflections for comparative studies on the normative impact of work first welfare. Such a study is also in the making within the framework of the research project “Rehabilitation and the EU”, funded by FAS.

⁷ Cox, Robert Henry, 2001, p. 498. And to further underline the importance of this kind of knowledge Cox continues: “Reform proposals that do not invoke an accepted idea of legitimacy stand little chance of success, while a sense of legitimacy can facilitate truly dramatic change” (ibid).

The researchers approached were mainly legal scholars (Eischenhofer, Welti, Harris, Westerhäll and Inghammar) but also researchers with a socio-legal background (Adler and Rahilly). For the purpose of providing a scholarly framework, references are in the following also made to the work of other researchers in the field and in particular to the work of Johansson and Hvinden, as the latter contributed actively in our symposium.⁸

The question of Europeanization will not be in the forefront as I proceed. Rather than exploring the possible impact of community policies on national activation programs this text probes into the enforcement of employment support using a slightly different angle. The examples from Britain, Germany and Sweden, picked up from the previous chapters, serve as a basis for reflections on the normative challenges raised by a strong emphasis on employment support. Thus, rather than approaching the question of convergence or divergence, this chapter aims to reflect on what is at stake. If the question of Europeanization is concerned with direction, whether or not European states move in a similar manner or not or if they respond in similar ways to regional directives or not, this chapter has the ambition of illuminating some implications of these strategic choices. What are the normative challenges of a work first welfare state?⁹

Based on an analysis of laws regulating the social dimension (the social sector, working life and family life) Anna Christensen developed a theory of basic normative patterns and processes of legal change.¹⁰ The basic idea underlying her work is that the law of the social dimension reflects fundamental moral values and conceptions prevailing in society and thus that the study of law can provide access to knowledge about the normative setting of societies.¹¹ She also claimed that such basic values formed patterns of some consistency and endurance. Christensen mentions three main “basic normative patterns” in her own work and focuses on two of them: the protection of established position and the market functional pattern. The

⁸ See preface.

⁹ The present text is thus situated in a long standing tradition of welfare state writing that has the ambition to interpret the constant changes that is a characteristic of welfare policies, trying to discern consistent patterns on a more fundamental level. To explicitly frame such approach in terms of the normativity of the welfare state project is a bit more rare but has lately be done by for instance Kildal and Kuhnle, 2005.

¹⁰ Christensen, 2000. Hydén has based some of his writing on Christensen’s work, see Hydén, 2000 and more extended, 2002. I will later return to the work by Hydén.

¹¹ The theoretical and philosophical literature on the relationship between law and morality and between law and prevailing values in society, is far too extensive to connect to for the purpose of this chapter. This delimitation could arguably be defended by the fact that the aim of this text is distinctly interlinked with the implementation of welfare reforms. Legal literature combining an interest in hands-on welfare law regulation and in the relationship between law, society and basic normative values - is less abundant. Christensen’s work provides one such rare example. Still, maybe it should be emphasised, given that the UK is one of the countries discussed in this volume, the topic of the relationship between law and morality, although often problematised in civil law countries, is also under debate in common law countries, see for instance Cotterell, 2000.

third pattern – just distribution – is less developed in Christensen’s work.¹² According to Christensen the different patterns either attract or repel legal regulation and in her work the patterns tend to appear in a bipolar fashion, balancing each other. Through the identification of different, coexisting clusters of values, policy reforms can be discussed in terms of how they interact with these clusters. The framework allows for a discussion of change and has explanatory value in identifying conflicts and developments that exist on a basic normative level.

In previous work I have discussed reforms of the Swedish sickness insurance using three clusters of values to describe the normative setting of potential change: *social stability*, *individual freedom* and *social equality*.¹³ Each cluster contains interacting, and possibly conflicting, conglomerates of values that are (or have been) important for the development of the Swedish welfare state.¹⁴ Values linked to *social stability* preserve status quo, support established positions and focus on those with positions to lose. It supports the idea of ownership of social positions acquired through paid work. The extent to which “the protection of established position”, through legislation in the social dimension, has marked the Swedish welfare state has been shown by Christensen. Your wage, your trade or profession becomes an established position that is protected by the welfare state. This cluster is conservative as it preserves achieved positions and it forms a hindrance to reforms and changes that challenge the present order. Values linked to *social equality*, on the other hand, are concerned with the distribution or redistribution of wealth, with solidarity and with equal respect. Redistribution in this sense is about levelling the injustices caused by differences in capabilities people should be given access to resources that to some extent – at a basic level – will compensate for original or acquired differences.¹⁵ To achieve social equality there is a need for a strong state capable of creating (re)distribution of resources and, in its prolongation, a democratic society constituted of people able to make autonomous decisions. Such a broad - participatory and democratic - approach to welfare is firmly rooted in the value cluster of *social equality*. The third cluster is values linked to *individual freedom*, favouring the rationalities of the autonomous individual as well as the market economy.¹⁶ The individual is a key actor demanding a welfare state allowing for individual choices and adaptation to specific circumstances, but also one that takes responsibility for risk-management. Compared to the value cluster favouring social stability

¹² For a study that has explored the notion of “just distribution” further, see Stendahl, 2004. See also Olson 2007, Olson has identified what he calls the “conceptual crisis” of the welfare state – “leaving the welfare state without a clear normative understanding of the goals it should be pursuing in modern society” (ibid, p.4). The answer Olson provides is “reflexive democracy”, understood as politics rooted in practices that support capability promotion, equal opportunities and participatory politics. Thus, in the terminology used in this chapter, an extrapolation of values linked to “social equality”.

¹³ Stendahl, 2004.

¹⁴ The “clusters” I use are strongly influenced by the notions of patterns introduced by Christensen, although while she looked for the normative content of patterns in legal sources only, the identification of clusters feed from a broader input. The aim is similar though, to identify shifts and movements in the moral foundation that finds its way into the construction, interpretation and practise of law.

¹⁵ Sen, 1999.

¹⁶ This cluster corresponds to some extent to Christensen’s market functional pattern. To this pattern Christensen linked the concept ownership, the freedom of association and the freedom to enter agreements.

these are values promoting dynamic shifts and social positions are no longer status positions (to be owned and protected) but rather understood as changeable, flexible, contractual positions.

Hydén uses Christensen's theory as a platform for discussing normative movements over time.¹⁷ According to Hydén, increased or decreased strength in the way that the normative patterns work their way in law could be signs of a dialectic development leading towards paradigmatic changes. Thus, Hydén argues that the protection of established position is likely to be strong in certain periods of time, until pressure for change grows too strong and other values, less conservative, are prioritised. Still, in the new phase other positions will be considered established and worthy of protection and so there will be a shift again. This analysis underlines the bipolar character of the normative field, a bipolar situation where basic values remain fairly intact but where emphasis and context change as societies develop. Hydén describes a continuing historical flow where different types of societies grow and decline in what he illustrates through the use of S-curves. In transition periods, where one type of society is in decline and the new society has not yet matured, there will be less protection of established positions.

In addition to the rise and decline of protection of established position Hydén identifies a number of other cyclic changes in law depending on the maturity of societies. Thus, Hydén claims that in periods of change law will become more formal, more individualistic and more repressive, while the need for repressive law diminishes in a mature society, in favour of substantive justice. Hydén writes:

If we apply the reasoning on legal changes, in the form of movements between bipolar points in the normative field, we would find ourselves today at a point in time heading towards a new phase of increased repressive elements /.../ Apart from the fact that a change of social system in itself means a shift of social codes and thus shifting assessments of what is right and wrong between those who base their assessments on the normative pattern from the old society and those who use the normativity of the new developing society, it is today it is about globalisation and all that it carries with it in terms of influences from different directions.¹⁸

In my conclusion I will return to the normative clusters introduced above as a way to structure my reflections on national responses to activation policies.

The modern notion of employment support and the old fear of idleness

The notion of employment support, or activation, is interesting as it simultaneously reflects conceptions that are deeply rooted in the historic legacy of different states of Europe, yet seems to contain elements that are distinctly challenging to the welfare models as we know them.

¹⁷ Hydén, 2000, 2002.

¹⁸ Hydén, 2000, p. 153 f. Translation to English made by author.

All three countries in focus share a tradition of fear of idleness. The social security models worked out in Sweden, Germany and Britain are all based on a demarcation between the deserving and the undeserving.¹⁹ What is characteristic of the undeserving could be understood as a position of self-inflicted poverty, a choice of not working to the best of one's ability. The fear of encouraging the idle or the malingerers has provided social security systems with elaborated regulations and tests to secure that benefits do not support what is conceived of as deviant behaviour. The economic relief provided through social security has in these countries not been conceptualised as charity given to all poor or needy, but as a right that somehow has to be earned. The individual citizen earns a moral right to become a beneficiary through fulfilling the obligation to work towards becoming self-supporting. Against this background the strong impact of a new policy of activation is understandable. It rolls along smoothly on an already paved road.

Still, the different reforms launched during the past decade, be it the German Hartz-reform, the British Welfare to Work programs or the Swedish efforts to create efficient work-focused rehabilitation, all contain elements that raise the question of shift or change on a more fundamental level. What is the role of the state in the work first welfare state? And how should the rights and obligations of citizens be characterised in this new setting? It seems as if the activation agenda, if pursued strictly, also leads to new crossroads.

The academic debate on whether or not European welfare states are facing a paradigmatic shift has been quite vivid at least since the beginning of the 1990s and the economic downturn of that decade. The response to the "new crisis" of the 1990s was discussed in terms such as dismantling and retrenchment,²⁰ but as the decade came to an end, and the economy stabilised, conclusions also pointed at persistence.²¹ Although there were also sceptics, more gloomy in their assessment of the future warning about a creeping disentanglement that would lead to increased poverty over time,²² the welfare state as we knew it seemed to have survived.²³

One of the responses to the crisis of the 1990s was an increased emphasis on activation, and also, as one aspect of the implementation of the active welfare state – on employment support. The looming discomfort that the present mode of activation policies seem to feed, not least among academics, could at least partly be explained through the distinctions made between workfare and welfare, as well as the distinction between de- and re-commodification.²⁴

Workfare is, according to Kildal, a quite distinct form of activation policies originating in the US.²⁵ The concept became popular during the 1990s, and in the

¹⁹ See the chapters by Neville Harris and Eberhard Eichenhofer in this collection.

²⁰ Kautto (et al.) 1999, p. 5 f. with a reference made to Pierson, 1994.

²¹ van Kersbergen, 2000, p. 20 f., see also Kautto (et al.) 1999, p. 7.

²² van Kersbergen, 2000, p. 28.

²³ See for instance Kauto (et al.) eds. 1999, p. 7.

²⁴ Examples of concerned writing that use these concepts in their analysis of the ongoing changes of the welfare state are Dingelday 2007, Handler 2004, and Ryner 2002.

²⁵ Kildal, 2001.

process less distinct, but in an effort to distinguish again a more precise content Kildal defines workfare programs with the help of four criteria: “Workfare programs 1) oblige able-bodied recipients 2) to work in return for their benefits 3) on terms inferior to comparative work in the labour market, and 4) are essentially linked to the lowest tier of public income maintenance systems.”²⁶ Apart from workfare policies, Kildal also identifies two other types of activation policies: active labour market policies and welfare to work policies. The workfare option differs from the other two by a lack of training elements as well as lack of options for the individual.²⁷ It seems as if the categorisation used by Kildal is based on two main variables: one concerns the inclusion or exclusion of training and education aspects within the programs: the other focuses on the autonomy of the welfare recipient and on the possible mix of rights and obligations bestowed upon them.

The concept of de-commodification has been widely spread as it was used by Esping-Andersen as a way to distinguish what he identified as a strong characteristic of the social-democratic welfare regime.²⁸ The concept has been defined in terms of “the extent to which individuals and families can uphold a normal and socially accepted standard of living regardless of their performance on the labour market.”²⁹ A de-commodifying welfare state provides the individual with a relative freedom as an actor in the labour market: “citizens can freely and without potential loss of job, income, or general welfare opt out of work when they themselves consider it necessary.”³⁰ Thus, a de-commodifying strategy functions in way that empowers the individual (through providing an opt-out choice) at the same time as it puts pressure on the supply-side of the labour market to offer positions that are attractive to potential employees. The 1990s crisis, the tightening of benefits, along with a growing interest in activation made way for analyses that challenged the alleged de-commodifying attributes of the social-democratic welfare regime and underlined the re-commodifying function.³¹ Thus, the state no longer offered an opt-out position, but a temporary solution, facilitating transfer from one social position to another, expecting individuals to adapt, re-train, rehabilitate and re-educate themselves.

This fear of an ongoing paradigmatic shift, that would lead to a dystopian two thirds society, was raised by researchers during the crisis years, but as the economy turned, employment figures rose, and activation policies strengthened their position in the social security systems, the message somehow appeared less alarming.

²⁶ Kildal, 2001, p. 3.

²⁷ Kildal, 2001, p. 4. See also Dingelday who makes a distinction between workfare policies and enabling policies where workfare stand for the negative aspects of activation ambitions (an emphasis on obligations, conditionality, pressure and even compulsion) while enabling policies stand for the positive aspect (expansion of individualised services in order to improve employability). She also concludes, based on a comparative study, that different welfare state types contain both kind of policies, although mixed differently. Dingelday, 2007, p. 823 f.

²⁸ Esping-Andersen, 1990.

²⁹ Lindqvist, 1987, p.12.

³⁰ Drøpping, et al., 1999, p. 157.

³¹ Ryner, 2002.

Maybe now it is time to reflect again on where we are heading.³² Considering the long history of shunning idleness in the countries in focus one might wonder if activation policies are best understood as a step backwards, a return to the normative roots or the result of a circular movement? Or do they indicate a direction forward, towards a new interpretation of welfare? Or are maybe things more or less the same because activation policies mean nothing in terms of a deep set change but are more to be understood as rumblings on the surface?

In the previous chapters scholars from Germany, Britain and Sweden bring forward their reflections on activation policies and measures of employment support from a national perspective. To me they seem to raise a number of themes and issues related to the questions asked above.

One clear and common feature linked to the introduction of activation policies in all three countries is an increased pressure on *new groups* that are expected to be at the disposal of the labour market. While pressure traditionally, in all three countries, has been quite distinct and harsh on those categorised as unemployed, we now see an increased focus on the sick and disabled (in Sweden and the UK), on lone parents (the UK), and on the older part of the workforce (Sweden and Germany). The issue of employability, given whatever hindrances there might be in the individual case, is the main target.

A second theme concerns the *driving forces behind the behaviour of benefit recipients* that somehow lingers below the different policy reforms aimed to “make work pay”. In all countries, and certainly in Sweden and in Britain, the methods used to fight idleness are based on a conception of recipients as potential cheats (and resources are made available to scrutinise and survey the behaviour of citizens). Sanctions of different kinds are common (for instance benefits are made conditional on active participation in different programs). It appears to be acceptable to base arguments on the assumption that people avoid work if possible, and to create policies that make it less attractive, less possible, to be outside the labour market. There is also, as one side of the moral pressure interwoven with the ideology of activation, a moral failure to be carried by those who in the end do not find a way to secure their own subsistence through work on the open labour market.

A third theme that the topic of employment support raises is the role of law as a method of governance in the work-first welfare state. Does the implementation of reforms lead to a welfare state where law is more or less prominent? Some arguments could be made for a development of a more legal rights-based approach to social security, but again, arguments could also be made for claiming that administrative discretion has increased. Do we see a process of juridification in the social sphere linked to a process of individualisation? Or, is the main strategy for imple-

³² In an article published in 2008 Taylor-Gooby contributes to this discussion by claiming that we are heading towards a new welfare settlement (after a period of uncertainty). Still in spite of the shared vision of an active welfare state, the character of this new settlement is still in the making and according to his study states seems to prefer “negative activation” to the detriment of “positive activation” (deregulation and restrictions rather than investments in programs to increase skills and safeguard social mobility). Taylor-Gooby, 2008.

menting the work first welfare state to move out of law? Below these themes will be further elaborated and discussed.

New groups targeted (new conception of risk developed?)

It used to be that a number of social risks excused those subjected to them from the obligation to work and support themselves. Examples of such risks were sickness, disability and the assumption of care responsibilities. The content of the protection provided by social insurance, the risk insured against, was perceived as an economic back-up for individuals who had legitimate reasons to withdraw from the labour market.

As the work-first welfare state develops one of its most obvious characteristics is the diminishing scope for legitimate opt-out of paid work. Where prevailing conceptions would previously have excused those with impaired health, older or those responsible for the care of small children or disabled relatives, from the obligation to work in the labour market, it seems now as if concern for these groups is translated from the opt-out solution into efforts to increase their employability, discarding opt-out as a solution. In Germany recent reforms have included a new definition of “ability to work” and according to Welti the new definition “declares a lot of even severely disabled people able to work”.³³ It has been estimated that as many as 25 per cent of the German unemployed have limiting health problems.³⁴ Hvinden and Johansson have made similar observations³⁵ and also Rahilly, Adler and Harris provide examples of how activation policies have had the result of expanding the obligation to work to new groups.

What is happening is thus to some extent a process of redefinition. That unemployed citizens have a duty to be active is well established, what is new is who is included in the definition of being unemployed. From Britain, Rahilly reports how demands faced by unemployed claimants have progressively been introduced for new groups.

*Whilst unemployed claimants have always been required to be available for work, it is only in the last decade or so that the labour market conditions required of this group have been considerably extended. Benefit conditions are now also being progressively introduced for other claimants of working age.*³⁶

³³ Welti, p 146, above.

³⁴ Welti: “In 2002 the Federal Agency had found out that one quarter of all unemployed were limited by health condition. It can be taken for granted that those who came out of the social welfare system were even worse off in their health status.” p 146, above.

³⁵ Johansson and Hvinden write, “However, while the Nordic governments originally had portrayed the male working class as the primary target for active labour market policies, the activation programs introduced after 1990 explicitly embraced a broad range of groups: men and women, people with impairments, single mothers, immigrants and young people with low qualifications. Hence all unemployed Nordic citizens receiving social benefits now have a general duty to be ‘active’ according to the interpretation that the public authorities give the term.” See, IJSSP, Vol. 27, No. 7/8, 2007, p. 340.

³⁶ Rahilly, p. 79, above.

Adler points to the fact that in order to make life as a lone parent less attractive, benefits have been lowered and lone parents encouraged to "... take work, live with relatives or find a new partner".³⁷ Also Harris identifies the questioning of the right of non-working lone parents to be exempted from the work-search requirement as part of a new approach: "there is growing pressure to shift the boundary so that more claimants are subjected to a JSA [Job Seekers Allowance]- type regime."³⁸

While poverty used to be the ultimate social risk, what is most shunned in the work-first welfare state seems to be a state of worklessness. While the risk of poverty could be avoided through distribution and redistribution of resources, lack of work, reframed as a risk of social exclusion, can only be avoided through individual participation in the labour market.³⁹

As a way to make paid work a more attractive lifestyle choice, compared to dependency on state benefits, benefits are lowered, sanctions implemented and work ethics strongly promoted. All three British contributions report a risk of increased poverty and social stigmatisation for groups previously protected by the welfare state. Adler fears stigmatisation of people on benefit.⁴⁰ Rahilly puts out a warning: "Many of these work activation provisions are supported by sanctions and therefore have the potential to further intensify the poverty of the benefit claimant."⁴¹ Harris writes:

*There was evidence that sanctions had caused hardship, since many claimants had already been struggling on the rate of benefit they received. The reported that their children often lost out, as pocket money or treats were denied. Some had become indebted to friends or family, who would need to be repaid out of future benefit. Stress and anxiety had been exacerbated.*⁴²

As the traditional conception of social risks is subordinated to the new work ethic, there is also a trend towards creating new organisational structures, so called "one-stop-shops" or, at least, an emphasis on coordination and cooperation. In Britain as well as in Germany such reforms could be noted.⁴³ Although Sweden has so far not followed this trend, at least not on a national scale, Johansson and Hvinden make clear that in a Nordic perspective this kind of change on an institutional level is well represented.⁴⁴ As common entrances, in a physical sense, are created the distinction between the sick, the disabled, the lone parents, the older or youngsters is

³⁷ Adler, p. 103, above.

³⁸ Harris, p. 69, above.

³⁹ See for instance Erhag in this collection.

⁴⁰ Adler, p. 107, above.

⁴¹ Rahilly, p. 79, above.

⁴² Harris, p. 66, above.

⁴³ Welti: "So for example after an application for sickness allowance the sickness insurance has to examine not only if medical rehabilitation as a benefit in kind from itself or from the pension insurance should be given but also if vocational rehabilitation from the pension insurance or from the federal agency could be successful. On the other side the federal agency has to take in account medical rehabilitation, if disabled people apply for job-seekers allowance. This would be some kind of revolutionary for the strictly segmented German system of welfare." See p. 149, above. See also Eichenhofer, p. 132 f., above.

⁴⁴ Johansson and Hvinden, IJSSP, Vol. 27, No. 7/8, 2007, p. 343 f.

diminishing. Access to state benefits is available only to those willing to knock on the door to the world of activation, once inside there are different kinds of, more or less, individualised services created in order to help each and everyone to overcome the obstacles that create hindrances to labour market participation.

Benefit recipients - active and responsible or idle and in need of “responsibilization”

Another strong and recurring theme in the chapters to follow, and maybe especially in the chapters concerned with Britain and Sweden, is the ambiguous image of the benefit recipient that several authors comment on. At one and the same time there are programs built on the notion of an active individual, participating in a cooperative process together with the authorities towards a shared goal of increased employability, but there are also frequent descriptions of practices that reflect harsh, authoritarian procedures where individuals are penalised for not accepting the activation agenda laid down by the administration.

From a Nordic perspective Westerhäll is in this context concerned with the integrity of individuals pushed into different measures with no real option to decline.⁴⁵ Westerhäll finds examples of this kind of practices in sickness insurance and Johansson and Hvinden broaden the scope to also include practices linked to the distribution of unemployment insurance and social assistance.⁴⁶

It seems as if below a surface level of correctness, where the tone is more respectful, the notion of the unwilling, idle, benefit recipient lingers as strongly as ever. In social policies words such as “user-participation”, “co-determination” and “choice” are used frequently along with the introduction of a notion of a contract. Recipients and the authorities agree and sign a contract, a plan, where recipients put their names under a commitment to be active in their search for work. Still, the freedom to choose, embedded in the notion of the contract, might from an individual perspective appear to be non-existent, as access to cash benefits is made conditional on participation.⁴⁷

From a British perspective a similar trend is emphasised by all three authors. Harris makes a connection between an image from the old days where unemployment was a moral failure to present times where being in unemployed is a personal

⁴⁵ Westerhäll: “The rehabilitative measures suggested by, for example, the social insurance office or the employer are not infrequently of such a kind as to be seen as an infringement of integrity, if they are contrary to the individual’s wishes.”

⁴⁶ Johansson and Hvinden, *IJSSP*, Vol. 27, No. 7/8, 2007. Giertz claim (on the basis of a study on Social Assistance and Activation programs in Sweden) that activation policies for the poor would more clearly brake with the old tradition of workhouses if the unemployment insurance became more inclusive (not excluding those now on social assistance (Giertz, 2004). Thus there seem to be clear empirical indications that the present system of activation differentiate between categories of unemployed, and for those at largest risk for marginalisation and social exclusion elements of “responsibilization” increases and employment support measures become more workfare-like.

⁴⁷ On the process of creating individual action plans, see for instance Hvinden and Johansson, 2007b, p. 217.

responsibility.⁴⁸ As welfare systems are increasingly guided by a method of governance described by Harris as “managerialistic”, we have seen an increased use of contractual arrangements and control measures.⁴⁹ In Britain this is a development not too far from the Beveridgean heritage, “...in exploring ways in which work incentives might be maintained, Beveridge proposed not only the maintenance of a gap between basic benefits and wages, but also discouragement of idleness through benefit sanctions /.../ and requirements to attend courses of training as a condition of receipt of benefit.”⁵⁰ That sanctions, in line with a long tradition, is widely used in the British interpretation of a work-first welfare state is noted by Harris, along with reflections on the efficiency of this strategy.⁵¹

The impression that there is a mismatch between the setting of the stage and what is actually performed is strengthened by the reflections made by Harris:

*The contractual element reflected in the notion of “agreement” implies mutuality and voluntariness, but the jobseeker’s agreement is very one-sided. As Lundy argues, “The official’s hand which shakes on this agreement is truly a hand of velvet masking a fist of steel, since failure to sign up to the agreement will result in the claimant being denied benefit”. Entry into an agreement can, in this regard, be seen as part of the process of “responsibilization”, involving state governance of behaviour intended to make people behave as “responsible” citizens.*⁵²

As legal rights to benefits are made conditional and sanctioned, the strength of having “legal social rights” is deteriorating.⁵³ There is a right to benefits, but it cannot be claimed. Both Harris and Adler voice a fear that as “activity” as such is made the prime target, quality of work is not safeguarded. In some cases this means that instead of an expected right to benefit the insured will have a duty to work in “in low status, low income employment.”⁵⁴

The question put at the beginning, asking whether employment support is a step backwards or forward, is based on the recognition of a long history of acknowledging the primacy of work, but there may also be something in the present methods, in the mix of sticks and carrots, and where sticks tend to outnumber the carrots, that provide some resemblance to a long-gone period of Poor Laws. Or maybe it is in

⁴⁸ Harris, p. 50, above.

⁴⁹ Harris, p. 50, above. This is also a trend noted by Eichenhofer who writes in positive manner about the increased scope of discretion in the administration and a shift from an authoritarian and bureaucratic tradition to a more managerial approach, see p. 139, above..

⁵⁰ Harris, p. 53, above.

⁵¹ Harris, p. 63 f. and p. 71 f., above.

⁵² Harris, p. 62, above, with a quotation from Lundy, L. 2000, ‘From Welfare to Work? Social Security and Unemployment’, in Harris, N., *Social Security Law in Context*, Oxford: Oxford University Press, p 304, and a reference to Ican, S and Basok, T, ‘Community Government: Voluntary Agencies, Social Justice, and the Responsibilization of Citizens’, 2004, 8 *Citizenship Studies* pp 130-133.

⁵³ Westerhäll: Despite the fact that the person is entitled to financial compensation under the sickness insurance scheme following the customary assessment of sickness and incapacity for work, the financial benefit is withdrawn on the grounds that the insured person is not meeting the requirements laid down for “active participation”. In here lies the element of sanction. See p. 169, above.

⁵⁴ Rahilly, p. 90, above.

the moral undercurrents of the argument to invest in methods to expose cheaters and to increase efforts to change an alleged culture of benefit dependency.

The primary role of the state in the workfirst welfare state is to facilitate transfer from periods of unemployment back in to employment. Some of the strategies evolved for this purpose aim to create incentives, to make work pay, to make it hard not to be working. As Eichenhofer writes in his description of the German reforms: “The benefit should not pamper the recipient to stay unemployed, but be frugal enough to give an incentive to take on also badly paid work.”⁵⁵ For those discarded by the market, living conditions tend to become harsh. For those traditionally defined as unemployed this tends to always have been the truth, but in the work-first welfare state all should work to the best of their capacity.

There seems to be some differentiation, based on social risk, on the use of sanctions. Thus, how severe the demand for activation is, how forceful the emphasis on obligatory participation, is made dependant of the cause for non-participation on the labour market.

There is an inbuilt dilemma in the pursuit of strategies for the implementation of work-first welfare that morally, legally and economically are to the disadvantage of those in most need. The moral blame falls hard on the individual, failing, not wanted by the market and penalised by the state (in order to ascertain that staying out of work is not an option). The dilemma is that while work (for as many as possible) is a way to combat poverty and social exclusion, the implementation, if not attentive to the needs of those discarded by the market carries the risk of creating a new group of welfare state outcasts – the unemployable.

The role of law, the role of the state

The third theme to be picked up from the selection of texts in this volume has already been touched upon, but could be explored further. There are indications that law, at one and the same time, is becoming both *more* and *less* important as a regulator in the field of social protection, as activation makes its way. Arguments can be raised for both increased and decreased juridification.

It could be argued that the emphasis on implementing non-discrimination legislation to safeguard the position of the disabled in the labour market is an example of how a legal approach is relied upon. Individuals are granted a claimable legal right not to be discriminated against and employers are, in addition, given a duty to make reasonable accommodations at the place of work. Thus, as individuals with a disability are expected by the social protection system to be active in the labour market, legal rights are bestowed upon them in order to deter employers from discriminating behaviour that would exclude the success of such a strategy. Still, the chapters written by Inghammar and Welti, in which the situation of the disabled is in focus, cast some doubt on the real strength of this approach. As emphasised by

⁵⁵ Eichenhofer, p. 135, above.

Welti, in order to reach the goal of non-discrimination towards the disabled, there is need for positive action in order to even out possible effects of disability status:

The items mentioned especially for non-discrimination in the European and national law are not equal in function and impact. Regarding equality of sex, race, colour, language or religion in most cases we call the state as well as the actors in society to be like the goddess of justice with a blindfold on: just to ignore prejudice regarding these special topics. Regarding the equality of disabled people, in many cases we want the goddess of justice to be the goddess of equity and to have a good look at the special conditions people are living and suffering with. The concept of considering disability in equality means not a formal equality of rules but a material equality of chances and even of results.⁵⁶

What is needed is thus not only the avoidance of discrimination but efforts, investments, resources, to even out the effect of the hindrances to labour market participation that exist as a consequence of a disability situation. According to Inghammar, the non-discrimination regulation does not really provide for such claims from the perspective of a majority of the disabled, and to a large extent those with more severe hindrances are in reality excluded from the protection provided by law:

Disability discrimination law as we have seen it develop in Europe over the past 10-15 years has been described as elitist, de facto focusing on the most competitive disabled employees and job-applicants, leaving, I would say, a majority of persons with disabilities with no increased prospect of labour market integration.⁵⁷

According to Inghammar anti-discrimination law in itself is thus not the legal instrument that makes a difference for these groups, except for the one positive obligation put on employers, namely the duty to make reasonable adaptations. This legal right of the disabled, and duty of the employer, can, depending on how it is implemented, make a difference in individual cases where rights are claimed.

In the chapters by Westerhäll and Adler, the scope of law is again a theme of its own. As work-first policies are implemented, there is an increased sphere of services provided by authorities created in order to support employability. While cash-benefits in most cases are legally secured through distinct legislation and with corresponding rights to appeal for individuals, the existence of rights in the new sphere of services is less prominent. Westerhäll writes about the concept of “a right to a possibility” introduced in Swedish legislation and Adler notes the increased sphere of administrative discretion in the British setting:

⁵⁶ Welti, p. 151, above.

⁵⁷ Inghammar, p. 158, above, with a reference to Inghammar, *Discrimination of People with Disabilities*, in Numhauser-Henning (ed) *Legal Perspectives on Equal Treatment and Non-Discrimination*, Kluwer Law International, The Hague, 2001, p. 348.

What is meant by “possibility”? There is no explanation in the legislative material for the choice in the formulation of the Act of the word “possibility” for what is available to the individual. In ordinary language the term “possibility” is taken to mean “an opportunity/a chance”. The concept is then seen almost as a situation that arises at random without the influence of the individual. But the legal meaning of the term “possibility” has to be seen as vague. It is difficult to determine from the term alone what the legislator intended.⁵⁸

Westerhäll points to the possible disadvantages of letting activation policies be implemented through the discretionary practises of local social security officers and questions the selection processes claiming there are discriminating practices.⁵⁹

It seems as if there is in all countries a growing “individualisation of the relationship between the state and the unemployed citizen”⁶⁰ and although juridification, through the exploration of individual legal rights, tends to contribute to such developments, it seems as if there is no simple conclusion that the legal position of individuals in the work-first welfare state has been strengthened. At least not in general.

As has been noted above, there is in the three countries a long history of making distinctions between the deserving and the non-deserving. These processes of demarcation, used to identify who are legitimate beneficiaries and who are not, are surrounded by more or less detailed legal safeguards. As the effects of the administrative decision-making, exclusion or inclusion in the social security schemes, have a major impact on the life conditions of the individual, the guarantee of making decisions legitimate has often included an element of juridification. Often what has been at stake has been some kind of cash benefit, a replacement or compensation for loss of income. Decisions on entitlement to cash-benefits are in all countries defined as conditional rights. If requirements are met, the individual has legally based rights to benefits, and decisions can be challenged. There is a possibility of redress.

Still, as concluded by Adler, it seems as if along with an increased emphasis on active interventions the possibility of redress has become substantially weakened⁶¹. To effectuate the ambitions of the work-first welfare state, new programs, new actors, new institutional arrangements have been created. The payment of cash benefits is not at the heart of the work-first conceptualisation of welfare, at its heart we find different interpretations of activation. There are differences, of course, between the different mixes and designs of employment support elaborated in Germany, Britain and Sweden, but there are also common tendencies. For those

⁵⁸ Westerhäll, p. 166, above, with a reference to Government bill 1990/1991:141 and SOU (Swedish Government Official Report) 1988:4 and Nationalencyklopedins ordbok, andra bandet [National Encyclopedia Dictionary, Volume Two], bokförlaget Bra Böcker 1996

⁵⁹ Westerhäll In practice it has turned out that many of those who need some form of rehabilitation do not obtain it. It has been possible to ascertain that factors such as which officer the insured person encounters and the individual’s own attitude are crucial to whether attempts to rehabilitate will be made or not, and to how successful these will be. Surveys also show that the type of measure offered depends on such factors as gender, age, place of residence, and occupation. See p. 160, above.

⁶⁰ Harris, p. 50, above

⁶¹ Adler, p. 126, above.

deemed to benefit there is an increasing range of services offered (educational programs, professional or social skills programs, training opportunities and so forth), there is also an effort to provide more individualised support – as exemplified by the personal advisor in the British system. There is also, at least in Sweden and Britain, a tendency to increased local variations, programs may be launched in selected regions or local authorities may be given the responsibility to work out programs that respond to the specific needs of a very local labour market.

While cash benefits are usually legally embedded and secured, the same cannot be said about the wide variety of services that are a vital part of the work-first welfare state. The decision about who is to benefit from these investments in re-education and skills training is mainly within the discretion of the local officer. The lack of national homogeneity in the implementation of activation underlines this sense of de-juridification. There seem to be indications, noted by several of the authors in this volume, that the legal scope is diminishing in the effectuation of the work-first welfare state.

Conclusion

The question asked in the title of this chapter is concerned with normative developments. Will the choices made to implement the work-first welfare state cause tensions between different sets of core values embedded in the welfare state project? If Anna Christensen's notion of basic normative patterns is imposed on the different themes brought to the fore above, a couple of different scenarios appear.

A first impression is that the implementation of work-first welfare distinctly provokes the bipolar tension between the protection of established position and a more market functional approach. Through the implementation of policies that change our conception of who is unemployed, in a direction that entails an obligation on more individuals to change profession, occupation, place of residence, level of income etc. in a process of (re)gaining a position in the labour market, the protection of established position is deteriorating. At the same time responsibility for self-support is individualised, rights and obligations are made contractual, sanctions are harsh and the role of the state is becoming increasingly preoccupied with surveillance. All in all it seems as if the predictions made by Hydén are being fulfilled. In that case what is at stake is a transition, a paradigmatic shift, from one type of society to another. In Hydén's words, the welfare state of the industrial society is reformed in order to accommodate to the demands of information society.⁶²

A possible objection to the seemingly obvious fact that the protection of established position is becoming weaker in the work-first welfare state, is that it is not clear if the demands for re-adaptation hit everyone in an equal manner. Policies and regulations are formulated in a neutral way but are the well-to-do, the middle-class, the university educated, facing the same demand for re-adaptation and flexibility as

⁶² Hydén, 2000, 2002

those in blue-collar work? It seems as if in order to speak of a paradigmatic shift – of a normative step forward to something new – the overall impact of work-first policies needs to be determined. The answer is not provided here but seems to be important in order to understand the normative impact of employment support. If there are exceptions, in practice, from the re-conceptualised obligation to work, then it could be argued that the protection of some established positions has increased at the expense of others. This is not a new society, just an extrapolation of already existing differences that can be understood as rescue project in defence of social stability. The cost is increased social inequality.

There are other possible interpretations that could be supported by the different chapters in the present book. In order to discuss them I would like to shift from the bipolar analysis of Christensen and Hydén and return to the three clusters of values *social stability*, *social equality* and *individual freedom*.⁶³

In a Swedish setting, different legal strategies within the field of social security law have created a tradition of strong protection for *established position*, in combination with an extensive and fairly generous universal system responsive to demands of *social equality*.⁶⁴ Somehow, the redistributive state, providing basic social protection for all citizens, made the conservatism linked to policies securing social stability possible. If what we witness is a development that favours the dynamics of a market economy more than the stability of the status quo, the question remains, what happens to the values linked to *social equality*?

The demarcation made by Kildal between employment support measures defined as workfare, welfare to work measures or active labour market policies is one indication that the normative challenge for the active welfare state is visible in the capacity of the state to secure redistribution of capabilities.⁶⁵ From a reading of the texts included in this volume it would seem that some of the core tensions in present reform policies circle around this issue.

The three themes discussed in the present chapter all raise questions that could be discussed within the framework of a theory of normative patterns. The first theme was concerned with a notion that social risks, as they are usually conceptualised, are being reframed. In law this development is visible as changes in the construction and interpretation of the legal criteria used to control entry into different social security schemes. As different cash benefits tend to be linked to a mix of rights and obligations, the elaboration of the criteria that regulate access is at the core. Choices of legal strategies in this field have, as has been stated, a clear impact on whether the system as such protects stability and status quo on the one hand or the promotion of re-adaptation and re-education on the other. Still, both positions could be enforced with more or less concern for *social equality*. In law, concern for *social equality* can be looked for in efforts made to safeguard individual autonomy as well as in positive actions created to diminish differences in capabilities.

⁶³ See above p. 174.

⁶⁵ Kildal, 2001. See also Taylor-Gooby, 2008.

The second theme was based on the identification of a tendency to effectuate the implementation of activation policies through different disciplinary measures. In law such developments are identifiable, for instance, in constructions that allow for sanctions and where access to what is labelled legal rights is linked to more or less far-reaching obligations. To the extent that this is a pattern that, in reality, has the effect that state administrations deliver non-negotiable dictates leaving little room for individual choice or participation in decisions regarding activation measures, this pattern is quite contrary to values linked to individual freedom and to social equality. There is also, as noted above, a concern that the character of activation policies differs between groups and that the risk of being the target of responsabilization processes is not equally distributed among benefit recipients. To the extent that employment support measures similar to workfare are provided mainly to those furthest away from the labour market, this could lead to a segmentation of present systems rather than the opposite.

The third theme was concerned with the role of law and the role of the state and one reflection made was that in implementing activation policies the scope of law may be strengthened and weakened at the same time. To have legally protected rights, and access to means to enforce them, is evidently something that strengthens the individual in case of a conflict with the administration. In this respect strong legal rights can be a means to safeguard the autonomy of the benefit recipient. Still, if what is strived for is individualised solutions, specific to both person and local environment, detailed regulation could be a hindrance. In this respect, given that administrative practices are non-discriminating and include positive action, lack of detailed regulations could make the system less rigid, more dynamic, and more able to respond to individual needs. It could also be argued that reliance on individual legal rights as a means to secure the quality of decisions made in the administration of social security is to hand over to individuals a responsibility that could be more efficiently dealt with by other means (less burdensome for the individual). This said, it should also be emphasised that without distinct legal backing, individuals who feel abused by the system have small chances to challenge decisions made. Thus, knowledge about the scope of law, clarifying if law is constructed in ways that provide individuals with tools to claim their rights or if such constructions are lacking, provide essential information on normative preferences.

Based on the assumption that law offers an opportunity to study the underlying normative structures of society, Anna Christensen's theory constitutes a promising point of departure for comparative studies on normative change. Following the reasoning above it can be concluded that a legal study of the normative implications of work-first welfare can be found in the regulations surrounding employment support. In order to respond to the three clusters of values referred to above as social stability, social equality and individual freedom, such a study should pay attention to choices of legal strategies that have an impact on ownership, individual autonomy, legal rights, legal obligations and access to justice.

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Is there a European Work-First Welfare State? In search of a legal answer

Concluding remarks

Thomas Erhag, Sara Stendahl

Work has become the centre of most modern welfare policies. It is the primacy of work, as the proposed key-aspect of welfare sustainability, which has created notions of *work-first welfare*. A main political concern of most European countries in the last years has been to develop strategies that will increase the level of labour market participation of the workforce.

Comparative welfare state research has provided us with knowledge of some of the systematic, structural, differences existing between western welfare models. Still, in spite of differences, a widely spread concern for the economic sustainability of social security systems seem thus to have led to a common response: an ambition to turn passive recipients of benefits into active participants on the labour market. We used the notion of “employment support” as an overarching notion to describe this phenomenon. One of the main goals of this study was to find a *legal* answer to the question on whether there is a specific response in European states to this challenge. Is there a “European work-first welfare state”? What are the normative implications of it – both on the EU and on the national level? Can we identify legal strategies and normative patterns that would enable us to compare the impact of “employment support” in different legal systems?

”Work-first” in EU-law?

An important question dealt with our research project was about the possible effects of the interplay between national and EU employment and welfare legislation in Europe. Although much of the positive measures that are possible to take on an EU-level in the area of welfare are soft law, it is apparent that this soft law has developed into less soft structures. From notes by the Commission in reports in the early 1990s, to an organized governance structure with a firm legal basis in art 128 where both Council and Commission are dominant actors. Additionally, the EC-treaty in art 137 express that questions on most aspects of working life are questions where the EU has (a limited) competence to legislate or at least use the OMC-method. Seen together with the EMU, the OMC can be seen as a complement to the traditional EU-method of hard law.

This expansion of the use of soft law and the new techniques for governance is often characterized as symbols of a development where member states seek new methods of integration without pre-emptive effect. A response to the fact that ever widening competences at EU-level have provided for a more heterogeneous effect of Community law on national law. But seen in relation to the diversity of national welfare states, e.g. the differences found in the construction of legal instruments (benefit levels, personal scope etc.), level of economic development and normative aspirations and institutional structures, there are minimal chances to be successful in harmonization of European social policies.

Even if the European Employment Strategy has connections to traditional EU-lawmaking, it is still a “neo-voluntary”¹ legal method which can be characterized as an intergovernmental rather than a supranational procedure. There are supranational features in the sense that the Commission holds a central position and that the guidelines are decided upon with qualified majority voting in the Council. However, the member states have the last saying as it is up to them whether they want to follow the guidelines or not. This of course effectively limits the possible achievements of the open method of coordination.

After stating that the combined efforts of soft and hard law regulation at an EU-level have at least a potential impact on national social policies, the next question of concern is what the normative contents of this impact is?

Already in the late 1990s critiques pointed out that the values of national welfare state regulation were not reflected in the forming of the employment strategy. Looking at the development of the EES within the Lisbon-process, it seems evident that the EU has retreated from promoting social citizenship and moved towards a narrower work-line oriented conceptualization of social security. This would mean that there is an expressed common EU normative structure within the OMC governance method. However, it must be stressed again that the commitments are free of clearly defined obligations for the Member States. Still, the development at national level also seems to emphasise work-oriented models in reshaping social security models.

When exploring the impact of the EES and OMC more closely, there seem to be very little (if any) evidence of real legal impact on national legal reforms, even if the policy formation and debate is carried out in an institutionalized European context. Still, national policy choices are defined as matters of common concern and governments are willing to present their plans for joint discussion. Although the OMC system is without sanctions, the joint discussions on national choice with the goal to set common indicators of achievement and objectives mean that the system is exposed to peer-review. However, one should also note that the OMC development is joined with a, however modest, development of the “hard” Community competences in the field of social law. Substantially, the OMC cannot be considered to contribute to the development of a common social policy with a direct im-

¹ Streeck, W. (1996) Neo- Voluntarism: A new European social policy regime. I Gary Marks et al (eds.) *Governance in the European Union*, London:Sage.

pact on national social law. But as a procedure it is new and complementary, and receives a position in law-making on the national level.

Legal strategies and normative patterns as a comparative point of departure

The complexity of social security law is well-known among those who work in or with the field. This is a kind of law that is often very technical, that is prone to change and where the changes made are inconsistent. It is a legal field where laws tend to end up a patchwork of different agendas and interests and often with an aim to steer people's behaviour, a field where the interdependences between different regulations are many, and where the results of administrative as well as judicial decision-making often is hard to anticipate. Still, efforts have been made to describe these complex systems in a structured way for comparative purposes. Examples of structuring elements that have been used are: "concepts and sources of social security, administrative organisation, personal scope of application, risks and benefits, financing and judicial review".² This study takes a slightly different approach.

Our aim was to capture the way *legal constructs* (rules, principles, practises) are functioning as building blocs in the implementation of social policies, and how the different usage and combination of these will determine different modes of governance. *One* example of a set of legal strategies important in the field of social security is to be found in the area of *demarcations*. The issue of demarcations seem to be at the core of social security law, to separate the worthy from the non-worthy and always keeping an eye out for malingerers (real and imagined). In social security the working are separated from the non-working, the sick from the unemployed, the disabled from the sick, the needed child carer from the working child carer or the unemployed or sick child carer, and so on. Demarcations are often important from an individual perspective as living conditions might improve or decline quite drastically depending on classification. Also from the perspective of the provider (for instance state, local authorities, unions or a contracted private sector actor) demarcations are important. From a governance perspective they can be used to influence behaviour and from a more pecuniary on an administrative level they can serve the function of pushing expenses to budgets "elsewhere". The present study also indicated other such areas where differences or similarities in legal strategies are of core importance for the normative character of a social security system.

What is provided by this study from a mere legal perspective is this suggestion to identify and use the legal strategies and normative patterns that mark social security law as the much cherished "functional elements", cutting through the diversities of social security systems and making them possible to compare. From the perspective of welfare state research, more important might be if the suggested ap-

² Pieters (2002), *The Social Security Systems of the Member States of the EU*, Intersentia Publishers.

proach leads to knowledge that lay bare the impact of legal regimes on the elaboration, development and legislative implementation of social policies.

Social security law is, as has been mentioned above, as a field of regulations in most systems marked by many and quick changes. This is indisputable, yet although Governments change, and schemes are re-labelled, benefits are raised and lowered and institutions re-organise... there is also in social security law some normative structures that hold a firm grip on the systems as such.

This stability of the models or systems has been noted in welfare state research. The economic crises of the 1990s and the reforms that followed, resulted in academic analyses discussing the dismantled welfare state, but also the surprisingly strong institutional consistency that could be concluded in its aftermath. In this field of analysing change and consistency, law has something to offer. As most lawyers are aware, rules rule on the surface, but to apply them, to understand them, to make them work in the context where they are set to have meaning, they must be linked to the deeper levels of prevailing normative structures. While the surface is prone to change easily, the underlying structures will safeguard continuity and secure against any fast leaps. In cases where surface changes do not relate to the deeper levels, the use of the legal system might well turn out a policy-obstacle rather than as an efficient tool for reform.

On a fundamental normative level it could be argued that most European welfare states are in tune. A basis for this kind of argument could be made by references to the European Social Charter or the case-law produced by the European Court of Human Rights. So while the surface level is often marked by constant reforms, a characteristic of the fundamental level is relative consistency and coherence. In the midst of such a scale, running from consistency on one end and constant alterations on the other, legal strategies, it is argued, might be found somewhere in between. To make legal strategies the focus of this study is thus to look for elements in legal systems that are more persistent than "rules" yet more adaptable to shifting circumstances than basic values. In the identification of the legal strategies used to implement measures of employment support in different legal models there might thus be an answer not only related to whether systems tend to converge or diverge but also some normative explanations as to why this is happening or not.