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THE SANCTIONS MITIGATION PARADOX IN WELFARE TO WORK BENEFIT SCHEMES

Anja Eleveld†

I. INTRODUCTION

Since the 1990s European welfare states have adopted a wide range of measures aimed at promoting labor market participation, including training and work programs.¹ Where a quick return or entering in the labor market is not possible, welfare recipients may be obliged to perform unpaid labor work or useful communal services that—perhaps on a very long term—prepare welfare recipients for the labor market. Recipients who fail to comply with these measures will normally risk a work-related sanction (i.e., sanctions that are imposed on recipients who fail to comply with welfare to work or activation measures), varying from a reduction, suspension or termination of their benefits. In line with European Union social policies,² national social policies in European welfare states have tended to classify these kind of policies as policies of social *inclusion*. That is, policy makers predominantly perceive work-related sanctions as a more or less efficient means to incentivize recipients (of social assistance) to work. We find a similar perspective on work-related sanctions in dominant strands of social policy

† Assistant Professor, Faculty of Law, VU University Amsterdam. The author wants to thank two anonymous reviewers for their very useful comments.

1. The turn to activation policies in Europe has been documented by various authors. *See, e.g.*, *ACTIVATION AND LABOUR MARKET REFORMS IN EUROPE: CHALLENGES TO SOCIAL CITIZENSHIP* (Sigrid Betzelt & Silke Bothfeld eds., 2011); *AN OFFER YOU CAN'T REFUSE: WORKFARE IN INTERNATIONAL PERSPECTIVE* (Ivar Lødemel & Heather Tricky eds., 2001); *RESHAPING WELFARE STATES AND ACTIVATION REGIMES IN EUROPE* (Amparo Serrano Pascual & Lars Magnusson eds., 2007).

2. Since 2008 European policies of “active inclusion” are guided by the goal of adequate income support. However, the European Commission does not recognize that sanction-backed activation policies (which are part of policies of “active inclusion”) may have an adverse effect on the goal of adequate income support. *See* the European Commission Recommendation, *On the Active Inclusion of People Excluded from the Labour Market*, (EC) No. 867/2008/ of Oct. 3, 2008, 2008 O.J. (L 307/11) and its follow up documents: (1) Communication from the Commission, *The European Platform against Poverty and Social Exclusion: A European framework for social and territorial cohesion*, SEC (2010) 1564 final, Dec. 16, 2010, at 6; (2) Commission Staff Working Document. *Social Investment Package*, SWD (2013) 39 final, Feb. 20, 2013, at 13; (3) Communication from the Commission. *Towards Social Investment for Growth and Cohesion*, COM (2013) 83 final, Oct. 20, 2013, at 10.

scholarship.³ This stands in sharp contrast with the work of some critical scholars. For example, Joel Handler has shown for over three decades how sanction-backed welfare to work policies may result in the social *exclusion* of the poor underclass.⁴ Welfare recipients, then, do not only face severe financial problems if they receive a financial sanction, they are also prone to being subjected to the arbitrary exercise of power of either the street-level bureaucrat or the work supervisor.⁵ The vulnerability of working welfare recipients for abusive practices on the “work floor” further increases due to the absence of effective labor law regulations in most jurisdictions.⁶

In the spirit of Handler’s work, this article explores the extent to which the implementation of work-related sanctions violates the fundamental right to minimum means of subsistence that has been enshrined in various international treaties.⁷ Note that the violation of this right is connected to the possible violation of other human rights as well, such as the prohibition on compulsory labor⁸ and the right to freely chosen work.⁹ For example, the threat of being left without means of subsistence may force the recipients to participate in work activities they would not have chosen voluntarily. The right to minimum means of subsistence is also related to the risk of being subjected the exercise of arbitrary power, because in the absence of alternative means of subsistence, the recipient may feel forced to accept the

3. Sarah Marchal & Natascha Van Mechelen, *A New Kid in Town? Active Inclusion Elements in European Minimum Income Schemes*, 51 SOC. POL'Y & ADMIN. 171 (2017).

4. JOEL F. HANDLER, *SOCIAL CITIZENSHIP AND WORKFARE IN THE UNITED STATES AND WESTERN EUROPE: THE PARADOX OF INCLUSION* (2003).

5. This is also the point that is made in the republican theory of domination. According to Lovett, in a relationship where there is an imbalance of power and where party or person A is dependent on the party or person B, this party or person B will exercise arbitrary power over party or person A, unless the exercise of power is effectively restrained by rules. See FRANK LOVETT, *A GENERAL THEORY OF DOMINATION AND JUSTICE* 96 (2010). See also PHILIPPE PETTIT, *ON THE PEOPLE’S TERMS: A REPUBLICAN THEORY AND MODEL OF DEMOCRACY* (2012). On the application of the republican theory to welfare to work relationships, see Anja. Eleveld, *Rules and the Reduction of Arbitrary Power in Workfare Relationships* (paper presented at the Seminar “Normative Perspectives on Working Welfare Recipients,” VU University Amsterdam, Nov. 4, 2016).

6. Amir Paz-Fuchs and Anja Eleveld argue that working recipients should (to a great extent) receive the same employment protection as employees. See Amir Paz-Fuchs & Anja Eleveld, *Workfare Revisited*, 45 INDUS. L. J. 57, 58 (2015). On this issue, see also Noah D. Zats, *What Welfare Requires from Work*, 54 UCLA L. REV. 373 (2006); Vadim Mahmoudov, *Are Workfare Participants Employees: Legal Issues Presented by a Two-Tiered Labor Force*, 1998 ANNUAL SURVEY OF AMERICAN LAW 349 (1998); Matthew Diller, *Working Without a Job: The Social Messages of the New Workfare*, 9 STAN. L. REV. 19 (1998).

7. See Section II, *infra*.

8. Article 4 European Convention of Human Rights (ECHR); Convention No. 29 International Labour Organization (ILO); Art. 8 International Covenant on Civil and Political Rights (ICCPR); and Art. 5 EU Charter of fundamental rights (ECFR). See also Elise Dermine, *Activation Policies for the Unemployed and the International Human Rights Case Law on the Prohibition of Forced Labour*, 5 EUR. J. HUM. RTS. 746–76 (2013).

9. Art. 23 UDHR; ILO Convention No. 122; Art. 6 International Covenant on Economic, Social and Cultural Rights (ICESR); and Art. 1 European Social Charter (ESC). See also Elise Dermine, *Activation Policies for the Unemployed and the International Human Rights Case Law on the Right to Freely Chosen Work*, in *ACTIVATION POLICIES OF THE UNEMPLOYED, THE RIGHT TO WORK AND THE DUTY TO WORK* 139–77 (Elise Dermine & Daniel Dumont eds., 2014).

behavior of the work supervisor, work that he or she otherwise would have objected.

In order to assess the extent to which national sanction regimes violate the fundamental right to minimum means of subsistence, I will compare the strictness of work-related sanctions in twenty-five European welfare states with the legislation of so-called mitigation clauses, such as discretionary clauses, reparatory clauses, and hardship clauses. As such, this study adds to the existing social policy literature for at least two reasons. First, the implementation of mitigation clauses has been neglected for the most part in comparative studies on activation policies.¹⁰ Second, most of these studies have focused on unemployment benefits instead of social assistance benefits (of the last resort). From the viewpoint of fundamental rights it can be argued that these latter benefits are more important.¹¹

The article is organized in the following way. Section II considers the Conclusions of the supervising body of the International Covenant on Economic, Social and Cultural Rights (ICESR), the Committee on Economic, Social and Cultural Rights (CESCR) and the supervising body of the European Social Charter (ESC), the European Committee of Social Rights (ECSR), on work-related sanctions in social assistance legislation in various European welfare states. Whereas this analysis reveals that the supervising bodies value the adoption of mitigation clauses, Section III examines various mitigation clauses that have been adopted in social assistance legislations. This section also examines a less-well-known mitigation mechanism, namely sanctioning of separate benefit components. Section IV constructs a sanction indicator and compares for twenty-five European welfare states the sanction indicator with the presence of mitigation mechanisms. Section V contains the main conclusions and the outlook.

II. THE RIGHT TO MINIMUM MEANS OF SUBSISTENCE IN INTERNATIONAL TREATIES

National social assistance regimes increasingly prefer the implementation of work-related sanctions over enabling measures such as training programs and work projects, because, briefly, they are less expensive

10. These studies commonly focus on the duration and the percentage of the reduction of benefits. See, e.g., Sarah Marchal & Natascha van Mechelen, *Activation Strategies within European Minimum Income Schemes* (Gini Discussion Paper 87, 2013); Kristine Langenbucher, *How Demanding are Eligibility Criteria for Unemployment Benefits, Quantitative Indicators for OECD and EU Countries* (OECD Social, Employment and Migration Working Papers, No. 166, 2015), available at <http://dx.doi.org/10.1787/5jrxtk1zw8f2-en>; Danielle Venn, *Eligibility Criteria for Unemployment Benefits: Quantitative Indicators for OECD and EU countries, OECD Social* (Employment and Migration Working Paper No. 131, 2012), available at <http://www.oecd.org/els/workingpapers>.

11. See, e.g., Langenbucher, *supra* note 10; Venn *supra* note 10.

and more effective.¹² In the United Kingdom, at their peak, benefit sanctions even exceeded the number of fines imposed in the criminal courts.¹³ What we are interested in here, however, is whether benefit sanctions violate the right to minimum means of subsistence.

The right to a minimum means of subsistence has been enshrined in various International Treaties, such as Article 34(3) of the EU Charter of Fundamental Rights (ECFR),¹⁴ Article 25(1) of the Universal Declaration of Human Rights,¹⁵ Article 27(1) of the Convention on the Rights of the Child,¹⁶ Article 9, and Article 11(1) and (2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR),¹⁷ and Article 13 (1) of the European Social Charter (ESC).¹⁸ In addition, following the case law of the European Court of Human Rights, Article 1 of the first protocol of the

12. It should, however, be mentioned that studies on the effectivity of work-related sanctions are almost exclusively limited to unemployment benefits and countries with relative low levels of unemployment. See Anja Eleveld, *Work-Related Sanctions in European Welfare States: An Incentive to Work or a Violation of Minimum Subsistence Rights?* 7 (Access Europe Research Paper No. 2016/01, 2016), available at <http://ssrn.com/abstract=2802656>. This Section also draws on Anja Eleveld, *Rights to Social Assistance and Sanctioning Policies across Europe: Recent Trends and Implications*, 23 J.S.S.L. 152–56 (2016).

13. Michael Adler, *A New Leviathan: Benefit Sanctions in the Twenty-first Century*, 43 J.L. & Soc'y 195, 226 (2016).

14. Article 34(3) of the EU Treaty of Fundamental Rights stipulates "in order to combat social exclusion and poverty, the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Community law and national law and practices."

15. According to Article 25(1) UDHR, "everyone has the right to a standard of living adequate for the health and well-being of himself and of his family."

16. According to Article 27(1) of the Convention on the Rights of the Child, "States Parties recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development."

17. Article 9 ICESCR stipulates the right to social security. Point 16 of the General Comment to Article 9 further states that at the expiry of the period of unemployment benefits, the social security system should ensure adequate protection, for example, through a system of social assistance (General Comment No. 19, adopted 23 November 2007 at the 39th session [doc.no. E/C.12.GC/19]). In case of unemployment, Article 11(1) ICESCR recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food clothing and housing and to the continuous improvement of living conditions."

18. Article 13(1) ESC states: "with a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake (1) to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme be granted adequate assistance, and, in case of sickness, the care necessitated by his condition."

European Convention of Human Rights (ECHR)¹⁹ and Article 8 ECHR²⁰ indirectly imply the right to minimum means of subsistence.²¹

Regarding their legal status and their scope of application, the social rights enshrined in the ICESCR and the ESC are important in particular. Article 11(1) ICESCR recognizes, among other things, the right of everyone to an adequate standard of living. Article 9 ICESCR stipulates the right to social security and, according to the general comment to Article 9 ICESCR, the right to social security also includes the right to social assistance benefits.²² In its statement of 2015 the Committee on Economic Social and Cultural Rights (CESCR) declared that basic social security guarantees

constitute the core obligation of States to ensure access to social security by providing, together with adequate access to essential services, a minimum level of benefits to all individuals and families to enable them to acquire at least essential health care, basic shelter and housing, water and sanitation, food and the most basic forms of education.²³

Hence, the CESCR intends to assure *universal* access to a minimum level of benefits. At this point it should be noted that the guarantee of a universal access to social benefits does not preclude the possibility to make these benefits conditional on certain behavior requirements. Indeed, the CESCR has argued for a fair and reasonable application of work-related conditions. In this regard it has expressed its concerns regarding the imposition of work-related conditions on disadvantaged groups.²⁴ Compared to the CESCR, the European Committee on Social Rights (ECSR) has been more explicit when it comes to work-related conditionality and sanctioning in social assistance benefits. Whereas in the European context the ESC is the key legal

19. Article 1 of the first Protocol of ECHR recognizes the right to property. The case law of the ECtHR shows that this right also applies to social assistance benefits.

20. According to Article 8 ECHR, “everyone has the right to respect for his private and family life, his home and his correspondence.” The ECtHR has stated in reference to Art. 8 ECHR that Article 8 does not merely compel the state to abstain from . . . interference; . . . In addition to the negative obligation to protect the individual against arbitrary action by the public authorities, Art. 8 also contains positive obligations that is the State may also have to act affirmatively to respect the wide range of personal interests. ECtHR 26 March 1985, *X & Y v. the Netherlands*, 31.

21. However, the practical value of these rights for sanctioned recipients of social assistance will be limited regarding the required balancing of interests (principle of fair balance), and the fact that national states possess a great margin of appreciation in these cases. On the relation of the ECHR and the right to cash benefits, see further IDA. E. KOCH, *HUMAN RIGHTS AS INVISIBLE RIGHTS* 179–207 (2009).

22. According to point 16 of the General Comment to Article 9 ICESCR, at the expiry of the period of unemployment benefits the social security system should ensure adequate protection, for example through a system of social assistance (General Comment No. 19, adopted 23 November 2007 at the 39th session [doc.no. E/C.12.GC/19]).

23. Statement of the CESCR, 15 April 2015 (E/C.12.2015/1).

24. Jennifer Tooze, *The Rights to Social Security and Social Assistance: Towards an Analytical Framework*, in *ECONOMIC, SOCIAL AND CULTURAL RIGHTS IN ACTION* 349 (Robert McCorquodale & Mashood Baderin eds., 2007). See in this respect a few recent Conclusions of the CESCR: CESCR Concluding Observations on the combined third to fifth periodic report of Romania, 9 December 2014 (E/C.12/ROU/CO/3-5); CESCR Concluding Observations on the second periodic report of Slovenia, 15 December 2014 (E/C.12/SVN/CO/2).

instrument regulating social rights,²⁵ the remainder of this section considers the extent to which the ESC sets limits to work-related sanctions.

The right to social assistance enshrined in Article 13 ESC is closely related to comparable provisions in other International Treaties. For example, Article 13 ESC has been an important source for Article 34(3) of the ECFR.²⁶ In addition, on several occasions the ECSR has considered that the ESC should be interpreted in harmony with other rules of International Law of which it forms part.²⁷ This implies, among other things, that the ECSR interprets Article 13(1) in conformity with the minimum core obligations of the ICESCR, such as the right to be free from hunger stated in Article 11(2).²⁸

In 1969, in its statement on Article 13 ESC, the ECSR argued that “the Contracting Parties are no longer merely empowered to grant assistance as they think fit; they are under an obligation, which they may be called on in court to honour.”²⁹ This statement shows that the Contracting Parties ought to take the right to social assistance seriously. Setting the poverty threshold at 50% of the median equivalized income,³⁰ the ECSR has decided with respect to a great number of European countries, that their social protection systems do not comply with this threshold. In addition, it has imposed three restrictions on the reduction, suspension or termination of the entitlement to social assistance due to a (work-related) sanction:

1. The conditions should be “reasonable and consistent with the aim pursued, that is to say to find a lasting solution to the individual’s difficulties”;
2. Reduction, suspension or termination should “not deprive the person concerned of his/her means of subsistence”;
3. “[I]t must be possible to appeal against a decision to suspend or reduce assistance.”³¹

The Conclusions of the ECSR have most times addressed the second point (“not to deprive the person concerned of his/her means of subsistence”), in particular by asking the ratifying states to provide additional information in order to assess whether a sanctioned recipient still has access to adequate means of subsistence. For example, in its Conclusions of 2010, the ECSR asked the Dutch government for information regarding the regulation of

25. MATTI MIKKOLA, *SOCIAL HUMAN RIGHTS OF EUROPE* 58 (2010).

26. See the explanations relating to the Charter of Fundamental Rights (O.J. 2007/C 303/27).

27. See, e.g., International Federation of Human Rights Leagues (FIDH) v. France; Complaint no. 14/2003, decision on the merits of 8 September 2004, § 26.

28. CESCR, *General Comment 3, The nature of state obligations (1990)*, UN Doc. E/1991/23, 14 December 1990, 10.

29. ECSR, Conclusions I, Statement of Interpretation of Art. 13 para. 1 of the ESC, 31 May 1969.

30. This is lower than the poverty threshold set by the European Commission that sets it 60% of the median equivalized income.

31. Digest of the case law of the European Committee of Social Rights, 98 (2008).

work-related sanctions in the national social assistance legislation.³² In its Conclusions of 2013, the ECSR noted that the Dutch government has reported that social assistance benefits may be partly or entirely reduced for up to three months if there is some form of culpability.³³ Once the reduction period has elapsed, the municipality must reassess the situation. It is not clear, however, whether the ECSR is satisfied with this report as the Committee has deferred its Conclusion pending some other questions.

In other occasions the ECSR has firmly stated that it does not accept that the application to social assistance benefits are rejected, or that social assistance benefits are withdrawn, because the person concerned has not complied with employment integration schemes, failed to register with the competent employment service, or to accept a job. This was reported, for example, in the Conclusions concerning Luxembourg³⁴ and Croatia.³⁵ However, the ECSR seems to condone work-related sanctions in cases where the national legislation provides for some kind of safety net income that replaces social assistance benefits in case a sanction has been imposed. For example, the ECSR asked the Portuguese government to confirm that exceptional short-term benefits of limited amounts covering minimum subsistence expenses are available to people whose benefits have been suspended for not accepting a suitable employment offer.³⁶ In the case of the United Kingdom, the ECSR has asked further questions concerning the hardship clauses in the British jobseekers legislation,³⁷ and in the case of Lithuania the ECSR explicitly accepted the present hardship clauses.³⁸ In sum, the ECSR Conclusions additionally suggest that, unless the state has adopted appropriate hardship clauses, work-related sanctions may contravene the right to minimum means of subsistence.

The first point (“reasonable and consistent with the aim of finding a lasting solution to the individual’s difficulties”) gets less attention from the ECSR. This point is comparable with the argument of the CESCR for a fair and reasonable application of work-related conditions. CESCR and the ECSR thus both *acknowledge* that (in addition to low levels of social assistance) the imposition of work-related sanctions may leave the (former) recipient of social assistance without sufficient means of subsistence. This is allowed as long as the sanctions are reasonable and consistent with the aim pursued. However, one can wonder whether all national regulations would stand this test. In a number of national minimum income legislations, then, work

32. ECSR Conclusions, decision of 1 February 2010 (No. 2009/def/NLD/13/1/EN).

33. ECSR Conclusions, decision of 12 June 2013, session 263 (2013/def/NLD/13/1/EN).

34. ECSR Conclusions, decision of 1 February 2010 (XIX-2/def/LUX/13/1/EN).

35. ECSR Conclusions, decision of 4 March 2014, session No. 270 (XX-2/def/HRV/13/1/EN).

36. ECSR Conclusions, decision of 12 June 2013, session No. 271 (2013/def/PRT/13/1/EN).

37. ECSR Conclusions, decision of 12 June 2013, session No. 268 (XX-2/def/GBR/13/1/EN).

38. ECSR Conclusions, decision of 12 June 2013, session No. 264 (2013/def/LTU/13/1/EN).

conditions seem to have been implemented solely with the aim of making welfare dependency as unattractive as possible.³⁹ In addition, the question can be raised why the ECSR only mentions hardship clauses as a possible (and necessary) mitigating clause. For example, a reparatory clause that stipulates that benefits are to be restored as soon as the sanctioned recipient complies with his or her obligations, clearly contributes to the reasonableness and the consistency of the sanction system. Moreover, as was noted above, a right to minimum means of subsistence is not inherently inconsistent with a conditional right to subsistence. Yet, sanctions that extend beyond the period of noncompliance will appear more punitive in nature and require a more complicated justification in terms of conditionality. Discretionary clauses and good reasons clauses may also contribute to the reasonableness and consistency of the sanction system in that they enable the case manager *not* to impose the sanction in specific circumstances, including those concerning hardship. The next section examines all four mitigating clauses—the hardship clause, the reparatory clause, the good reasons clause, and the discretionary clause—in more detail.

III. MITIGATING INSTRUMENTS

How do mitigation clauses in sanctioning regimes work? Suppose that the safety net system in countries A and B are based on social assistance benefits and that, according to the social assistance legislation, the benefits will be reduced 100% for a period of three months in case a recipient commits a work-related fault. Suppose that in both countries a recipient is punished because he or she refuses to participate in an employment program, and that it is not likely that this recipient will be hired within the next three months because their employment prospects are low. Suppose also that country A has not adopted any mitigation clause. As a result, the income of the sanctioned recipient will probably fall far below poverty rates. By contrast, country B has adopted three important mitigation mechanisms in its social assistance regulations. First, the sanction regulation includes a “can” clause. Hence, the decision-maker has discretionary space to decide whether he or she applies the sanction after the recipient has committed a fault. Second, country B has adopted reparatory measures, as a result of which the benefits are restored as soon as the welfare recipient fulfills his or her obligations. Third, country B has adopted a hardship clause, according to which the sanctioned welfare recipient is still able to apply for some allowances to buy food after a sanction has been imposed.

39. See, e.g., AMIR PAZ-FUCHS, WELFARE-TO-WORK: CONDITIONING RIGHTS IN SOCIAL POLICY (2008).

39. ECSR Conclusions, decision of 1 February 2010 (No. 2009/def/NLD/13/1/EN).

It will be clear that, despite the fact that country B has adopted a similar sanction rule, the effects of the sanction will be mitigated in various ways. First, the sanction may not be imposed because of the “can” clause (discretionary clause) and/or because of the fact that the recipient provides good reasons for his or her refusal (good reasons clause). In addition, the sanction may be withdrawn immediately because the recipient changes their mind after he or she has received a sanction and decides to participate in the employment. Finally, where the sanction is not repaired and the decision maker decides to impose the full sanction, the presence of a hardship clause may allow the recipient to buy food during this period. In sum, in terms of income support, in all three scenarios, the sanctioned social assistance recipient in country B will be better off compared to the sanctioned recipient in country A. In this section we will have a closer look at discretionary clauses, good reasons clauses, reparatory clauses, and hardship clauses.

Clauses that allow for discretionary space are important because these effectively leave the decision maker “free to make a choice among possible courses of action or inaction.”⁴⁰ In general, discretionary clauses have gained importance since the emergence of a contractual mode of thinking and regulation in social assistance regimes in European welfare states, where, instead of an almost unconditional right to basic social assistance, social rights have been increasingly linked to sanctions-backed behavioral conditions.⁴¹ It is up to the decision maker to decide in individual cases which conditions have to be fulfilled, whether the recipient has complied with these conditions and whether and how the recipient who has not complied with the (work-related) conditions should be sanctioned. Where a discretionary clause leaves it to the decision maker to impose a sanction (i.e., “a sanction *can* be imposed”), the decision maker has the power not to apply the sanction that has been regulated in law. As a result, the recipient has at least a chance to be better off, compared to the situation where the decision maker is obliged to impose a sanction (i.e., “a sanction *should* be imposed”).

In addition, a national social assistance scheme may have adopted good reasons clauses, which are particularly relevant in the absence of an explicit discretionary clause as described above. A good reason clause stipulates that the sanction is not imposed where the welfare recipient has good reasons for committing the fault. Hence, the presence of a good reasons clause may mandate outcomes in particular cases, thereby constraining the discretion of case-managers who might otherwise refuse to mitigate. For example, a good

40. KENNETH C. DAVIS, *DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY* 4 (1969).

41. For a development of contractualism in North-Western European welfare states, see, e.g., the contributions in *NEW CONTRACTUALISM IN EUROPEAN WELFARE STATE POLITICS* (Rune Ervik, Nanna Kildal & Even Nilssen eds., 2015). This book builds on ELS SOL & MIES WESTERVELD, *CONTRACTUALISM IN EMPLOYMENT SERVICES: A NEW FORM OF WELFARE STATE GOVERNANCE* (2005).

reasons clause may stipulate that the case manager is obliged to reconsider the imposition of a sanction in case the sanctioned recipient has been ill.

There may exist a thin line only between a general "exemption" clause for disabled and ill recipients, for example, and a good reason clause stipulating that illness constitutes a good reason not to comply with a work-related obligation. Related to this, it should be noticed that the stipulation of a good reasons clause depends on the definition of work. Widening the definition of work that, for example, also includes participation in all kinds of "pre-employment" activities addressing emotional and medical issues, has the effect that good reasons clauses cover more contingencies. Likewise, widening the definition of work increases the possible scope of hardship that may have an effect on the wordings of these clauses (e.g., explicit reference may be made to disabled people and primary caregivers).⁴² Where work requirements are more and more conceived of as an obligation to "do something in return" for the benefits,⁴³ exemption clauses may also be abolished in favor of a universal participation policy.⁴⁴ In this study, however, we did not examine the relationship between exemption clauses, good reasons clauses, hardship clauses, and the definition of work.

The implementation of discretionary clauses does not, however, necessarily benefit the recipient of social assistance. While, on the one hand, the attention to the particularity of singular cases implies that public services are more tailored to accommodate different groups (i.e., that the diversity and the needs of individual are properly addressed);⁴⁵ on the other hand, research has shown that recipients of social assistance are increasingly "at the mercy of" the street-level bureaucrat because of the increased use of discretionary clauses.⁴⁶ In addition, various scholars have shown how non-legal considerations, such as management goals that are based on efficiency considerations and prevailing norms that "the recipient has to do something in return for his benefits" have affected the ways that discretionary space has

42. See Zats, *supra* note 6, at 421–22; Noah D. Zats, *Welfare to What*, 57 HASTINGS L.J. 1131, 1157–63 (2006).

43. See Anja Eleveld, *The Duty to Work Without a Wage. A Legal Comparison between Social Assistance Legislation in Germany, the Netherlands and the United Kingdom*, 16 EUR. J. SOC. SOC'Y 218 (2014).

44. For example, in the Netherlands the possibility to oblige recipients to do something in return for the benefits was introduced in 2012. Since 2015 municipalities have been obliged to implement this provision, at the same time, the range of exemptions of the work requirement has been limited. I thank an anonymous referee for his or her remark to distinguish the good reasons clause more sharply from the discretionary clause and to relate the content of the good reasons clause and the exemptions to the work related obligation to the changed definition of work in social assistance legislations.

45. Kaspar Villadsen, *Ambiguous Citizenship: 'Postmodern' versus 'Modern' Welfare at the Margins*, 12 DISTINKTION: SCANANDINIVAN J. SOC. THEORY 309 (2011).

46. There is a whole strand of literature that could be cited here. In this context the most important are WORK AND THE WELFARE STATE: STREET-LEVEL ORGANIZATIONS AND WORKFARE POLITICS (Evelyn Z. Brodtkin & Gregory Marston eds., 2013); MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980); THE GOVERNANCE OF ACTIVE WELFARE STATES (Rik van Berkel, Willibrord de Graaf & Tomás Sirovátka eds., 2011).

been used in practice,⁴⁷ including the kind of reasoning used in the exercise of discretionary power to impose a sanction.⁴⁸ Hence, from this perspective, the application of discretionary clauses have—instead of improving—reduced recipient’s access to basic social rights. These reservations should be kept in mind in particular with respect to reparatory clauses and hardship clauses that, in most cases, leave discretion to the decision maker to decide whether the recipient complies with work-related obligations or whether the sanctioned recipient is entitled to hardship payments. Both mitigation clauses will be examined in more detail below.

The clause that the benefits will be paid after the fault has been repaired (e.g., the recipient agrees to participate in an employment program) is an example of a reparatory clause. Hence, normally, a reparation clause “softens” the sanction. However, this will not be the case in all situations. I will briefly discuss three of these situations where a reparatory clause will not necessarily benefit the recipient.

First, as was noted above, the decision maker will mostly enjoy some scope of discretion as to whether and how to apply the reparation clause. In other words, he or she may also ignore the possibility of repair. In that case a recipient would have been better off in a system that has stipulated a fixed short period of the reduction (e.g., one month), compared to a system containing a reparatory clause without stipulating a maximum length of the reduction (e.g., the benefits are restored as soon as the recipient fulfills his or her obligations). In case the recipient in the first system persists in their fault, the decision maker is at least forced to reconsider the sanction after a month. In the second system, the benefits may be reduced for a much longer period.

Second, the presence of reparatory clauses may prevent the applicability of Article 6 ECHR, which protects the right to a fair trial.⁴⁹ As a result the managerial power will increase at the cost of the legal protection of social rights.⁵⁰ This point can be illustrated in the following way. Suppose that in

47. Various recent studies have reached this conclusion. See, e.g., Dorte Caswell & Mathilde Høybye-Mortensen, *How Organizations and Street-level Bureaucrats Deal with Economic Sanctions*, 17 EUR. J. SOC. SOC’Y 31-51 (2015); Evelyn Z. Brodtkin, *Policy Work: Street-level Organizations under New Managerialism*, 21 J. PUB. ADMIN. RES. & THEORY SUPPLEMENT i253 (2011); WORK AND THE WELFARE STATE, *supra* note 46; Even Nilssen, *Contractualism and Street-level Discretion in Norwegian Activation Policy*, in NEW CONTRACTUALISM IN EUROPEAN WELFARE STATE POLITICS 73–92 (Rune Ervik, Nanna Kildal, & Even Nilssen eds., 2015); Joe Soss, Richard Fording & Sanford F. Schram, *The Organization of Discipline. From Performance Management to Perversity and Punishment*, 21 J. PUB. ADMIN. RES. & THEORY SUPPLEMENT i203 (2011); PAUL VAN AERSCHOT, ACTIVATION POLICIES AND THE PROTECTION OF INDIVIDUAL RIGHTS: A CRITICAL ASSESSMENT OF THE SITUATION IN DENMARK, FINLAND AND SWEDEN (2011).

48. Molander et al. refer in this context to “epistemic discretion.” See Anders Molander, Harald Grimen & Erik O. Eriksen, *Professional Discretion and Accountability in the Welfare State*, 29 J. APPLIED PHIL. 219 (2012).

49. Article 6 ECHR only applies to punitive sanctions.

50. Michael Adler, *Conditionality, Sanctions and the Weakness of Redress Mechanisms in the British “New Deal,”* in WORK AND THE WELFARE STATE: STREET-LEVEL ORGANIZATIONS AND

country B (that has adopted a reparatory clause in national social assistance legislation), a sanctioned recipient argues that his or her benefits should be restored at 100% since he or she now fulfills the obligations. Suppose that the decision maker does not fully agree with the recipient and refuses to withdraw the sanction. In this situation the recipient does not enjoy the right to a fair trial of 6 ECHR, whereas he or she would have been protected by this provision in case the reparatory clause had been absent. Thirdly, the presence of a reparation clause may have no practical effect whatsoever, because the recipient is not aware of the possibility of repair.

Yet, notwithstanding these three reservations, it could be argued that, generally speaking, reparation clauses reduce the harshness of a sanction in important ways. This point has been insufficiently recognized in current studies, as a result of which quite different sanction clauses have been assessed in similar ways. For example, in a recent OECD study on the eligibility criteria for unemployment benefits, the sanctions for Romania were valued higher (2 points) compared to the Netherlands (1 point), indicating that Romania has adopted higher sanctions. However, this valuation did not do justice to the fact that, in Romania, benefits are immediately restored after re-application, whereas in the Netherlands benefits are cut for a fixed period of four weeks.⁵¹

The hardship clause constitutes a fourth type of mitigation clause. This clause that prevents hardship for the sanctioned recipient, often applies to recipients with dependent children. Hardship clauses can be regulated at either the national or regional level. In both cases the application of hardship clauses presupposes a broad margin of discretion for the decision maker. To illustrate this point, consider the discretionary hardship clause in the Irish social assistance legislation that stipulates that where a claimant with a family loses his or her payment (due to a sanction), the qualified adult can apply for a supplementary welfare payment on their own behalf and that of the children. It is up to the decision maker to decide whether these supplementary welfare payments are granted.⁵²

In sum, discretionary clauses, good reasons clauses, reparatory clauses, and hardship clauses are the main instruments mitigating work-related sanctions. These clauses contribute to the reasonableness and consistency of the sanction system in the meaning of the CESC and the ECSR. It should be noted, however, that a hardship clause within a comprehensive social

WORKFARE POLITICS 229–48 (Evelyn Z. Brodtkin and Gregory Marston eds., 2013); VAN AERSCHOT, *supra* note 47.

51. Langenbucher, *supra* note 10, at 62–63.

52. The discretionary character of hardship clauses is to some extent comparable with the discretionary character of emergency assistance and special needs benefits that complemented welfare benefits in the United States in the 1960s and 1970s, that, according to Handler and Sosin, were often “miserly, illogical and hedged with restrictions.” See JOEL F. HANDLER & MICHAEL SOSIN, LAST RESORTS: EMERGENCY ASSISTANCE AND SPECIAL NEEDS PROGRAMS IN PUBLIC WELFARE 12 (1983).

benefits system may be functionally equivalent to a system where specific benefits, such as child benefits or rent subsidies, remain available after the imposition of a sanction. This is the case when these benefits are not part of a social assistance benefits.⁵³ In addition, in some social assistance regimes containing distinct components for children, paternity, heating, and rent, a work-related sanction does not affect all components; this depends on the design of the system. Obviously, in national systems where this is the case (e.g., the social benefits regimes in Germany and the United Kingdom), a sanctioned single parent with children will be better off compared to a system where all social assistance components are affected, such as the Dutch system.⁵⁴ In this study I have focused on the legislation of mitigation clauses in social assistance regimes, but in order to nuance these data I have also gathered data on non-sanctioned components of social assistance benefits.

IV. THE IMPLEMENTATION OF WORK-RELATED SANCTIONS AND MITIGATION CLAUSES IN SOCIAL ASSISTANCE LEGISLATION IN TWENTY-FIVE EUROPEAN WELFARE STATES

Work-related sanctions are central to activation policies in European welfare states. The imposition of a work-related sanction may, however, violate the right to basic means of subsistence. This section investigates to what extent European national welfare states have implemented mitigation clauses in their social assistance regimes and to what extent sanctions are mitigated due to the differentiation in benefit components.

A. *Data and Methods*

For this part of the research, legal and social policy specialists—mostly affiliated with a university—were asked to complete questionnaires for twenty-five European countries. I consulted labor law and social security law specialists of the Labour Law Research Network (LLRN) and social policy specialists, mainly via the European Social Policy Network (ESPN). The goal of this project was to investigate the level of sanctioning in all EU Member States, the European Economic Area,⁵⁵ and Switzerland. However, it was not possible to find country specialists for all countries during the term of the research. In addition, some countries had to be skipped because the provided data was not adequate. As a result, the final country selection included twenty-three EU Member States, Austria (AT), Belgium (BE), Bulgaria

53. For an excellent overview of minimum income benefit in welfare states, see J. Wang & O.P. van Vliet, *Social Assistance and Minimum Income Benefits: Benefit Levels, Replacement Rates and Policies Across 26 OECD Countries, 1990-2009*, 18 EUR. J. SOC. SOC'Y 333 (2016).

54. A. Eleveld, *The Duty to Work without a Wage. A Legal Comparison between Social Assistance Legislation in Germany, the Netherlands and the United Kingdom*, 16 EUR. J. SOC. SOC'Y 218 (2014).

55. Except for Lichtenstein.

(BU), Czech Republic (CZ), Germany (DE), Denmark (DK), Spain (ES), Estonia (EE), Finland (FI), France (FR), Croatia (HR), Ireland (IE), Italy (IT), Lithuania (LT), Luxembourg (LU), the Netherlands (NL), Poland (PL), Portugal (PT), Romania (RO), Slovenia (SI), Slovakia (SK), Sweden (SE), United Kingdom (UK), one country from the European Economic Area (NO), and Switzerland (CH).

The questionnaire contained questions on financial sanctions that, according to the national or regional legislation on non-contributory social assistance, can be imposed on recipients of social assistance who fail to fulfill one or more of the work-related requirements:

1. register with an employment office;
2. sign an integration or insertion contract;
3. comply with job research requirement;
4. participate in a job community program;
5. participate in a training program;
6. participate in an employment program;
7. other.

In addition, the questionnaire contained questions on the presence of mitigation clauses, such as discretionary clauses, reparatory clauses, and hardship clauses. Finally we asked which components of social assistance benefits were sanctioned.

The country specialists were asked to fill out the questionnaires for the situation as of January 1, 2015.⁵⁶ As in Austria and Switzerland social assistance benefits are entirely regulated at the local level, the regulations were examined at the this level (i.e., for Austria, the city of Vienna and for Switzerland the Canton of Zürich).⁵⁷ It should further be noted that some countries, such as Spain, Italy,⁵⁸ Bulgaria,⁵⁹ and Croatia.⁶⁰ have adopted rather limited social assistance benefits. For Spain it was therefore decided to examine the national unemployment benefits.⁶¹

56. With the exception of Italy where we also considered some important legislative changes in 2015.

57. Spain has a decentralized system. The regulations of Catalonia were examined, however, since the reform of 2011 this region has limited social assistance benefits (PRMI benefits to people with special and additional needs. *See Patti per il riscatto sociale (Milan) (Pacts for the advancement of social conditions).*

58. Able-bodied people are only eligible for social assistance benefits when they are unemployed and at least one member of the household is under the age of eighteen, or over fifty-five, and does not (yet) qualify for a retirement scheme.

59. Able-bodied people are only eligible for social assistance benefits after a waiting period of six months.

60. Able-bodied people are eligible for social assistance benefits for a maximum period of three years. People can only re-apply for social assistance benefits after a period of three months.

61. Workers are eligible for unemployment benefits where they have contributed for at least 180 days. The duration of these benefits is limited. Only claimants older than fifty-two years may receive benefits until retirement. This shows that in Spain there are important gaps in the social assistance scheme, particularly with respect to first time job seekers and long-term unemployed under fifty-two years.

B. Results and Analysis

Table 1 provides an overview of the kind of work-related sanctions that are imposed on recipients who fail to fulfill one of the six work-related requirements. In most countries different work-related sanctions apply depending on the kind of work-related fault that has been committed and on the extent of recidivism (i.e., a first, second or third fault). Table 2 presents five different mitigation mechanisms in the national legislations: discretionary clauses (DS), good reasons clauses (GRC), reparatory measures (RM), hardship clauses (HS), and the number of components sanctioned (CS).

Table 1
The Period of the Reduced Benefits or Termination and the Percentage of the Reduction

Country	<u>Termination</u>	<u>Fixed period</u>	<u>Number of faults</u>	<u>Reduction</u>	<u>Percentage, length and number of faults</u>
AT	No	-		Yes	0-50%, no minimum or maximum length. After repeated fault, 50-100%, no minimum or maximum length.
BE	No	-		Yes	0-100% for maximum one month. After repeated fault, 100% for maximum three months.
BG	Yes	1 year	After a first fault.	Yes	100% for two months. After a second fault, 100% for two years. ⁶²
CH	No	-		Yes	15%, no maximum length. After repeated fault, 15% or more, on the condition that the benefits are set at a decent minimum level, for a maximum 12 months.
CZ	Yes	3 months	After a first fault.	No	

62. Whether the benefits are terminated reduced depends on the type of work-related fault that is committed.

DE	Yes	-	After a third fault.	Yes	30% for three months. After a second fault, 60% for three months.
DK	Yes	-		Yes	15% for one month or 100% no minimum or maximum length.
EE	Yes	90 days	After a first fault.	Yes	100%, no minimum or maximum length after a second fault. ⁶³
ES	Yes	No		Yes	100% for one month. After second fault, 100% for three months. After a third fault, 100% for six months. ⁶⁴
FI	No	-		Yes	0-20% for maximum two months. After repeated fault, 0-40% for two months. The reduction can only be made if it will not endanger a living essential in providing security needed for a life of human dignity.
FR	Yes	No	After a third fault.	Yes	80% for 1-3 months. After a second fault, 100% for 1-4 months.
HR	Yes	6 months	After a first fault.	No	
IE	Yes	9 weeks	After a second fault.	Yes	50% for 21 days after a first fault.
IT	Yes	2 months	After a first, second, or third fault.	Yes	25% for one month after a first fault. 100% for one month after a second fault. ⁶⁵
LT	Yes	6 months	After a first fault.	Yes	100% no minimum or maximum length. ⁶⁶

63. *Id.*64. *Id.*65. *Id.*66. *Id.*

LU	Yes	No - 12 months	Termination after a second fault. Termination for a fixed period of 12 months after third fault.	No	
NL	No	-		Yes	Variable percentage, no minimum or maximum percentage or 100% for maximum one month. After repeated faults, 100% for maximum three months. ⁶⁷
NO	Yes	No		Yes	Variable up to a decent minimum level, no maximum length.
PL	Yes	No		Yes	0-100%, no minimum or maximum length.
PT	Yes	2 years	After a first fault.	No	
RO	Yes	No	After second fault	Yes	100% for maximum three months.
SI	Yes	6 months	After a first fault.	No	
SK	No	-		Yes	100% for two months. After repeated fault, 50% for maximum 10 subsequent months.
SE	Yes	No	After a first fault, but up to a decent minimum level.	No	
UK	No	No		Yes	100% for 4 or 13 weeks. After a second fault, 100 % for 13 or 26 weeks. After a third fault, 100% for 13 or 156 weeks.

67. *Id.*

Table 2
Discretionary Space (DS), Good Reasons Clause (GRC), Reparatory Measures (RM), Hardship Clauses (HS), and Number of Components Sanctioned

	DS	GRC	RM	HS	Components not sanctioned
AT	-.68	+	+	-	Children, rent, and heating
BE	+	+	-	+	-
BG	-	-	-	-	-
CH	+	+	+	+	-
CZ	-	+	-	+	Children
DE	-	+	-.69	+	Paternity, children, rent, and heating
DK	-	+	+.70	-	-
EE	-	+	-	-	-
ES	+.71	+	-	-	-
FI	+	+	+	+	Children, rent, and partner
FR	+.72	+	-	+	Children and partner ⁷³
HR	-	-	-	-	(only termination)
IE	+	+	+	+	Rent and heating
IT	-	+	-	-	-
LT	-	+	+.74	-	Heating

68. According to the regulation in Vienna, benefits *are to be* reduced in steps down to 50%, in case of persistent refusal a further reduction down 100% *is possible*. This clause conveys both discretionary and non-discretionary elements. I have interpreted it as non-discretionary.

69. In Germany a reparatory clause applies only after the third fault. In that case the benefits will not be terminated but (like the second fault) reduced with 60%. Whereas no reparatory clause applies after the first or second fault I have scored the legislation as not containing reparatory clauses.

70. In Denmark there are different kinds of sanctions, dependent on the kind of fault that is committed. There is no possibility for reparation where a mild sanction applies (i.e., more or less 15% reduction). *See also* Section IV.A, *infra*.

71. In cases of reduction there exists a wide discretion. In cases of termination there is no discretion. We look here at reduction.

72. In France, the decision maker only has discretionary space with respect to the imposition after the first and second fault. After the third fault (which results in termination) there is no discretion.

73. In France, all components are sanctioned. However, benefits are only sanctioned for 50% where the household consists of more than one person.

74. In Lithuania there are only reparatory measures with respect to the first fault, but not with respect to repeated faults.

LU	+	+	+ ⁷⁵	-	(only termination)
NL	-	+ ⁷⁶	+	+	₇₇
NO	+	+	+	+	-
PL	+	+	+	+	-
PT	-	-	-	-	(only termination)
RO	-	-	+	-	Heating
SE	+	+	+	+	-
SI	-	+	-	-	-
SK	-	-	-	-	Children and partner
UK	-	+	-	+	Children and rent

A comparison between Table 1 and Table 2 reveals that all countries either reduce the benefits with 100%, or terminate them, after the recipient has committed a (repeated) work-related fault, except for FI, NO, SE, and CH ((Zurich)). These four countries have all stipulated that benefits are reduced only on the condition that they are set at a decent minimum level. In addition, these countries have adopted all four mitigation clauses. At the other end of the scale we find seven countries that terminate the benefits or reduce them with 100% after a first fault for at least two months (BG, CZ, HR, LT, PT, SI, and SK).⁷⁸ Regarding the Conclusions of the CESC and the ECSR, these countries in particular ought to stipulate mitigation clauses. However, of these only three countries have stipulated (maximum two) mitigation clauses.

In order to provide a more precise picture of the relationship between the harshness of the sanction and the number of mitigation clauses, I also constructed a sanction indicator. The advantage of this indicator is that it is based on the most important indicators characterizing the variety of sanctions. Hence, instead of (partly) formulating criteria in advance, the criteria were entirely deducted from the data. As is shown in Table 3, various criteria were taken into account, including the number of work-related

75. In Luxemburg there are only reparatory measures with respect to the first fault, but not with respect to repeated faults.

76. In the Netherlands a sanction will not be imposed when the recipient is without any blame.

77. Although it must be noted that since the legislative change of January 2015, the child component that was included in the benefits for single parents is conferred to other income related (tax) benefits. As a result, the single parent whose social assistance benefits are sanctioned will now save more benefits compared to the period before 2015.

78. This group only includes countries that impose a fixed period of termination or 100% reduction for *all* work-related faults. Therefore, Estonia and Italy are excluded from this group.

behaviors that are sanctioned, recidivism, the period of reduced benefits payments or termination, the percentage of the reduction of the benefits, and the flexibility of the periods and percentages of reduction. In order to calculate a sanction indicator for each country, each indicator counted for one point. It should be noted at this point that a few countries have adopted different sanctions for different kinds of work-related faults. Because a high sanction has a stronger effect on the income of recipients of social assistance compared to a low-sanction, it was decided to focus on the highest sanctions regime.

Table 3
Elements of the Sanction Indicator

1.	Sanctions are imposed on five or more ALMP related faults.
2.	Termination or a reduction of 100% after a first fault for a fixed period of six months and more.
3.	Termination or a reduction of 100% after a first, second or third fault for a fixed period of twelve months and more.
4.	Termination or a reduction of 100% after a first fault for a fixed period.
5.	Termination or a reduction of 100% after a first, second, or third fault with and/or without a fixed time period (i.e., immediate reparation of the fault is possible) and excluding those countries who have adopted a discretionary clause with regard to the percentage of the sanction (i.e., up to 100%).
6.	Termination or a reduction of 100% after a first, second, or third fault, with and/or without a fixed time period (i.e., immediate reparation of the fault is possible) and including those countries who have adopted a discretionary clause with regard to the percentage of the sanction (i.e., up to 100%).
7.	100% reduction, fixed period of one month or more after a first, second, or third fault.
8.	Termination or reduction of more than 50% (i.e., 51% and more) after a first fault, excluding those countries who have adopted a discretionary clause with regard to the percentage of the sanction (i.e., up to 100%).
9.	Termination or reduction of more than 50% (i.e., 51% and more) after a first, second or third fault, including those countries who have adopted a discretionary clause with regard to the percentage of the sanction (i.e., up to 100%).

Figure 1
High-Sanction Indicator Excluding Mitigation and Number of Mitigation Clauses

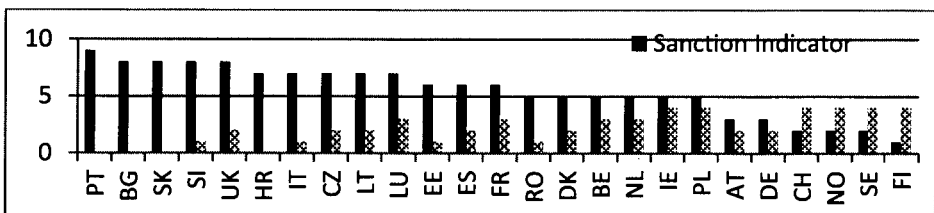


Figure 1 compares the sanction indicator with the number of mitigation clauses. This Figure clearly illustrates that welfare states that have adopted higher sanctions tend to have adopted less mitigation clauses. Indeed, there is a high (negative) Spearman correlation between these variables (-0.742).⁷⁹

Regarding the remark in Section II that reparatory measures may justify conditional access to minimum subsistence benefits, note that out of thirteen countries that score relatively high on the sanction indicator (between 6–9) only two countries have adopted reparatory measures (LT and LU) and in both countries these reparatory clauses only apply after a first fault.

Comparing the sanction indicator with the stipulation of a hardship clause, the results show that out of thirteen countries that score relatively high on the sanction indicator, only three countries have stipulated a hardship clause (UK, CZ, and FR). By contrast, out of the twelve countries that score lower on the sanction indicator (between 1 and 5) only three countries have *not* stipulated a hardship clause (RO, DK, and AT). Where a country has not regulated a hardship clause, the sanctioned recipients may still have access to some benefits, depending on the composition of the benefits and the sanctioning system. Table 2 shows that in ten social assistance regimes not all components are sanctioned. However, only in four out of thirteen countries that score relatively high on the sanction indicator a sanction is *not* imposed on all components of the social assistance benefits and these include all high sanctioning countries that have also stipulated a hardship clause (i.e., UK, CZ, and FR).

V. CONCLUSION AND OUTLOOK

The ECSR Conclusions suggest that, unless the state has adopted appropriate hardship clauses, work-related sanctions may contravene the right to minimum means of subsistence. However, the ECSR (and the CESCR) also hold that work requirements in social assistance regulations are reasonable and consistent with the aim of finding a lasting solution to the individual's difficulties. This article therefore argues that Treaty states should not only implement hardship clauses, but also reparatory clauses, good reasons clauses, and discretionary clauses in their sanctioning regimes in order to prevent the violation of the right to minimum means of subsistence. Based on this conclusion, this article examines the adoption of work-related sanctions and mitigation mechanisms in twenty-five European welfare states. The main findings reveal a reverse relationship between the strictness of the work-related sanction and the number of mitigation clauses. This could be described as the "sanctions mitigation paradox": in those countries where,

79. Significant at 0,000. Even if we omit reparatory clauses as they are partly contained in the sanction indicator, the correlations between the variables remains -0,639 (significant at 0,001).

from a social rights perspective, mitigation clauses are needed most, they are hardly or not regulated in social assistance legislation. Moreover, an alternative mitigation mechanism that excludes some components of social assistance benefits from the sanctioning regime was also less available in regimes that have adopted the highest sanctions.

Why is this the case? It could be hypothesized that regarding welfare to work policies, some welfare state types prefer sanctioning measures (i.e., “the stick”) over (expensive) training facilities (i.e., “the carrot”). These countries will not only regulate high sanctions, but also less mitigation measures in order to be as effective as possible. Note in this respect that while the Post-communist European type and the Mediterranean welfare state type are overrepresented among the countries that score relatively high on the sanction indicator,⁸⁰ the social-democratic welfare state type and the conservative welfare state type are overrepresented among the countries that rank relatively low on the sanction indicator. A final answer to the “sanctions mitigation paradox” would require more research on the relationship between sanctioning policies and welfare state type.

Countries that score high on the sanction indicator, such as Portugal, Bulgaria, Croatia, and Slovakia are at risk in particular of violating the right to an adequate standard of living and the right to social assistance enshrined in the ICESCR and ESC. These countries, then, have adopted very high sanctions without regulating any mitigation clause. In addition, in these countries the sanction is imposed on all social assistance components.

In general, the research findings support Handler’s aforementioned conclusion that policies of social inclusion of welfare recipients may very well end up in their social exclusion.⁸¹ However, in order to provide a more precise judgment regarding the possible violations of social rights, more data will be needed, such as the availability of other minimum benefits (briefly mentioned in Section III) and the practical implementation of sanction provisions and mitigation clauses. In addition, future research on the mitigation of work-related sanction should address the relationship between the definition of work (requirements), the formulation of exemption clauses, good reasons clauses and hardship clauses (see Section III).

From the viewpoint of fundamental social rights, I want to close this article with three policy recommendations. First, policy makers could be more keen on possible ways of mitigating work-related sanctions. Preferable, provisions on work-related sanctions include all four types of mitigation

80. I refer here the welfare state types used by GÖSTA ESPING ANDERSON, *THE THREE WORLDS OF CAPITALISM* (1990); Menno Fenger, *Welfare Regimes in Central and Eastern Europe: Incorporating Post-Communist Countries in a Welfare Regime Typology*, 3 *CONTEMP. ISSUES & IDEAS IN SOC. SCI.* 1 (2007); Emanuele Ferragina & Martin Seeleib-Kaiser, *Welfare Regime Debate: Past, Present, Futures?*, 39 *POL'Y & POL.* 583 (2011).

81. HANDER, *supra* note 4.

clauses. Second, it is recommended not to impose sanctions on all components of social assistance benefits. The additional advantage is that it—in particular where the rent component is not sanctioned—may prevent the accumulation of debts and consequently eviction. Third, welfare states could also follow the example of Finland, Norway, Sweden, and Switzerland to stipulate that benefits are reduced only on the condition that they are set at a decent minimum level. However, also in these welfare states the monitoring of the implementation of work-related sanctions remain crucial.⁸²

Appendix 1 Legislation That has Been Considered for this Study

Country	Name Legislation (date and source) <i>English translation (date and source)</i>
Austria	Vereinbarung zwischen dem Bund und den Ländern gemäß Art. 15a B-VG über eine bundesweite Bedarfsorientierte Mindestsicherung (Beschluss, 1-12-2010, STF: LGBl Nr 27/2011). <i>Agreement Between the Federal and State Governments About a Nationwide Demand-Oriented Minimum Benefit</i> (Decision of 1 December 2010. STF: LGBl Nr 27/2011). Wiener Mindestsicherungsgesetz (Gesetz, 31-8-2010, S 040-000). <i>Vienna Act on Minimum Benefits (Law of 31 August 2010, S 040-000).</i>
Belgium	Wet van 26 mei 2002 betreffende het recht op maatschappelijke integratie (26 mei 2002, nr. 2002022557, p. 33610). <i>Act concerning the Right to Social Integration (Law of 26 May 2002, No. 2002022557, p. 33610).</i>
Bulgaria	Закон за социално подпомагане (<i>Отразена деноминацията от 05.07.1999 г.</i>) <i>Social Assistance Act (7 May 1999).</i> Правилник за прилагане на закона за социално подпомагане (Приет с ПМС № 243 от 05.11.1998 г.). <i>Regulation on the Application of the Social Assistance Act (Decree No. 243 of 5 November 1998).</i>
Croatia	Zajamčena minimalna naknada (24-12-2014, 157/2013). <i>Social Welfare Act (Law of 24 December 2014, Official Gazette 157/2013).</i>
Czech Republic	o životním a existenčním minimu (14-03-2006, 110/2006). <i>Minimum Income Support (Act of 14 March 2006, Act No. 110/2006).</i>
Denmark	Lov om aktiv socialpolitik, lovbekendtgørelse nr. 1193, (<i>Statutory Act on Active Social Policy, Consolidation Act No. 1193, of 13 November 2014).</i>

82. For example, in Switzerland, the Cantons may circumvent the last resort provision by granting a “wage” to welfare recipients participating in work programs. As this “wage” does not fall under the scope of national social assistance law, the welfare office is allowed to impose a financial sanction in case the former welfare recipient does not comply with the work obligation. I thank Melanie Studer (University of Basel) for this insight (at the seminar “Normative perspectives on working welfare recipients,” VU Amsterdam, 4 November 2016).

	<p>Lov om aktiv beskæftigelsesindsats (lovbekendtgørelse nr. 990, 12-9-2014). <i>Statutory Act on Active Employment Policy (Consolidation Act No. 990, of 12 September 2014).</i></p>
Estonia	<p>Sotsiaalhoolekande seadus (RT I 1995, 21, 323, 1-4-1995). <i>Social Welfare Act (RT I 1995, 21, 323, Act of 01.04.1995).</i></p>
Finland	<p>Asiakaslaki (Laki sosiaalihuollon asiakkaan asemasta ja oikeuksista (30.12.97/1412, Act of 30 December 1997). <i>(Social Assistance Act (Act of 30.12.1997/1412).</i> Laki sosiaalihuollon asiakkaan asemasta ja oikeuksista (22.09.2000/812). <i>Act on the Status and Rights of Social Welfare Clients (22.09.2000/812, Act of 22 September 2000).</i></p>
France	<p>Revenu de Solidarité Active (LOI n° 2008-1249 du 1er décembre 2008 généralisant le revenu de solidarité active et réformant les politiques d'insertion. <i>Solidarity Income (Act No. 2008-1249 of 03.12.2008).</i></p>
Germany	<p>Grundsicherung (SGB II) (BGBl. I S. 2954, Gesetz vom 24.12.2003). <i>(Basic Insurance, BGB I S. 2954, Law of 24 December 2003).</i></p>
Ireland	<p>Consolidated Social Welfare Consolidation Act 2005 (Number 26 of 2005, Irish Statute Book).</p>
Italy	<p>Decreto Legislativo Disposizioni per il riordino della normativa in materia di ammortizzatori sociali in caso di disoccupazione involontaria e di ricollocazione dei lavoratori disoccupati, in attuazione della legge 10 dicembre 2014, n. 183. (04.03.2015 n. 22/2015). <i>Legislative Decree Recordering of Legislation Regarding Unemployment Benefits in the Event of Involuntary Unemployed People Reintegration, Pursuant to Law 10 December 2014, No. 183 (04.03.2015 no. 22/2015).</i></p>
Lithuania	<p>Lietuvos Respublikos Piniginės socialinės paramos nepasiturintiems gyventojams įstatymas. (Nr. XI-1772, 2011-12-01, Žin., 2011, Nr. 155-7353, 2011-12-20). <i>Lithuanian Law on Social Assistance for Low Income Families and Single Persons. Amending the Law (no.XI-1772 of 1 December 2011, Official Gazette no. 155-7353 of 20 December 2011).</i></p>
Luxem-bourg	<p>Revenu Minimum Garanti. (Loi du 29 avril 1999, Mémorial A No. 103). <i>(Guaranteed Minimum Income, Act of 29-4-1999, Mémorial A No. 103).</i></p>
Nether-lands	<p>Participatiewet (wet van 2 juli 2014, Stb. 2014,270). <i>Participation Act (Act of 2 July 2014, Stb. 2014, 270).</i></p>
Norway	<p>LOV- m sosiale tjenester i arbeids-ogvelferdsforvaltningen (stnavl.) (LOV-2009-12-18-131, Publisert I 2009 hefte 13). <i>(Act Regarding Social Services in the Labour and Welfare Administration (18-12-2009 No. 131, published 2009 Booklet 13).</i></p>
Poland	<p>Ustawa z dnia (12 marca 2004 r. o pomocy społecznej t.j. Dz.U. z 2015, r. poz 163). <i>Social Assistance Act (12.03.2004, Journal of Laws 2015, 163).</i></p>
Portugal	<p>Rendimento Social de Inserção (Lei n.º 13/2003 de 21 de Maio). <i>Social Insertion Income Regime (Act of 21 May 2003, No. 13/2003).</i></p>
Romania	<p>Legea asistenței sociale (Lege nr. 292 din 20 Decembrie 2011). <i>Law on Social Assistance (20 December 2011, L292/2011).</i> Legea privind venitul minim garantat (Lege nr. 416/2001, din 20 iulie 2001). <i>Law on the Minimum Income Guarantee (20 July 2001, L416/2001).</i></p>
Slovenia	<p>Zakon o socialno varstvenih prejemkih (ZSVarPre) (13.07.2010, SOP 2010-01-3350). <i>Law on Social Assistance (13 July 2010, SOP 2010-01-3350).</i></p>
Slovakia	<p>Pomoc v hmotnej núdzi (Platnosť od 12.12.2013, Zákon č. 417/2013 Z. z.). <i>Benefits in material need (12 December 2013, 417/2013 Coll.).</i></p>

Spain	Real Decreto de medidas urgentes para promover la transición por desempleo y mejora de la ocupabilidad (11-02-2011, 3/2011). <i>Royal Decree on Urgent Measures on Employability and Reform of Active Labour Market Policies (11 February 2011, 3/2011).</i>
Switzerland	Bundesgesetz über die Zuständigkeit für die Unterstützung Bedürftiger (24-6-1977, 851.1). <i>The Federal Law on the Support for Persons in Need (24 June 1977, 851.1).</i> SKOS-Richtlinien für die Ausgestaltung und Bemessung der Sozialhilfe (4 überarbeitete Ausgabe April 2005). <i>SKOS Guidelines for the Design and Assessment of Welfare (Fourth revised edition of April 2005).</i> Sozialhilfegesetz Kanton Zürich (14. Juni 1981, 851.1). <i>Social Assistance Law Zürich (14 June 1981, 851.1).</i> Leistungskürzung als Sanktion, Sicherheitsdirektion Kanton Zürich (14.2.01, 25.09.2015). <i>Benefit Reduction as Sanction, Security Directorate Zürich (25 September 2015, No. 14.2.01).</i>
Sweden	Socialtjänstlagen (2001:453), 7-6-2001. <i>Social Services Act (7 June 2001, 2001:453).</i>
UK	Jobseeker's allowance regulations 1996 (1 February 1996, SI 1996/207) as amended by the Job Seeker's Allowance Regulations 2013 (25 February 2013 (SI 2013/378)).

