

# **Activation Policies and the Protection of Individual Rights**

A Critical Assessment  
of the Situation in  
Denmark, Finland  
and Sweden

Paul Van Aerschot

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Published by

Ashgate Publishing Limited  
Wey Court East  
Union Road  
Farnham  
Surrey, GU9 7PT  
England

Ashgate Publishing Company  
Suite 420  
101 Cherry Street  
Burlington  
VT 05401-4405  
USA

[www.ashgate.com](http://www.ashgate.com)

### **British Library Cataloguing in Publication Data**

Van Aerschot, Paul.

Activation policies and the protection of individual rights  
: a critical assessment of the situation in Denmark,  
Finland and Sweden

1. Public welfare--Law and legislation--Denmark.
2. Public welfare--Law and legislation--Finland.
3. Public welfare--Law and legislation--Sweden.
4. Welfare recipients--Employment--Denmark. 5. Welfare recipients--Employment--Finland. 6. Welfare recipients--Employment--Sweden. 7. Welfare recipients--Civil rights--Denmark. 8. Welfare recipients--Civil rights--Finland. 9. Welfare recipients--Civil rights--Sweden.

1. Title

361.6'14'0948-dc22

### **Library of Congress Cataloging-in-Publication Data**

Van Aerschot, Paul.

Activation policies and the protection of individual rights : a critical assessment of the situation in Denmark, Finland and Sweden / by Paul Van Aerschot.

p. cm.

Includes index.

ISBN 978-1-4094-0179-7 (hardback) -- ISBN 978-1-4094-0180-3 1. Public welfare--Law and legislation--Finland. 2. Public welfare--Law and legislation--Sweden. 3. Public welfare--Law and legislation--Denmark. 4. Human rights--Finland. 5. Human rights--Sweden. 6. Human rights--Denmark. 1. Title.

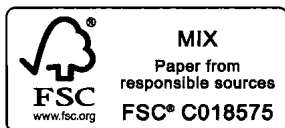
KJC3435.A38 2010

344.03'16--dc22

2010027680

ISBN 9781409401797 (hbk)

ISBN 9781409401803 (ebk)



Printed and bound in Great Britain by the  
MPG Books Group, UK

# Preface

One of the most important functions of the legal system is to balance individual and societal interests against each other. In this process the principal concern must be the protection of individual rights because of the fundamental imbalance in the power relations between the client and the decision-maker concerned. Activation policies highlight the need for protective measures in many ways. They also expose the limitations of the legal paradigm which call for the application of other approaches than the legal one to the implementation of social welfare legislation. My purpose is to examine the tensions between activation policies and individual rights in three well-established democracies. The study of the policies adopted in Denmark, Finland and Sweden should permit us to obtain a fairly broad view of the issues involved.

Many people have helped me to collect the material on which this book is based. Others have contributed to my research project by arranging beneficial working conditions. I am grateful to my colleagues, and especially rector Henrik Hägglund of the Swedish School of Social Science at the University of Helsinki, for the supportive and congenial spirit they have created at our institution. The school also provided funding (together with the Letterstedtska Föreningen) for a visit to the Department of Society and Globalisation at the University of Roskilde. During my stay at the Department I received much help from Assistant Professor Jørgen Anker and benefited also from discussions with other members of the staff, in particular Director Hanne Marlene Dahl and Professor Peter Høilund. I would like to thank all my Danish colleagues as well as researchers Bodil Damgaard, Brian Krogh Graversen and Jan Høgelund from the SFI research institute (Socialforskningsinstituttet) in Copenhagen, with whom I had the opportunity to exchange views on Danish social policy. Thanks are also due to Erling Frederiksen, chairman of the Landsorganisationen af Arbejdsledige for the enlightening interview he gave me. Moreover, I have very much appreciated the assistance provided by the staff of our school library and other libraries in Helsinki and Roskilde. Without the help of these professionals it would be much more difficult to do research. At the final stage of my work Professor Michael Adler from the University of Edinburgh and Professor Neville Harris from the University of Manchester thoroughly commented on the manuscript, which made me add some important clarifications. Also the comments of two anonymous referees engaged by Ashgate Publishing helped me to improve my text.

For permission to reproduce previously published material in revised form I am grateful to: Jon Hilton, Amy Woods and Sweet & Maxwell (Chapter 5 is based on my article "On the right to participation in activation processes in three

Nordic countries”, *Journal of Social Security Law* 2008:3, 99–112) as well as Tom Scheirs and Intersentia (I used parts of my article “Some aspects of the application of legal safeguards to active social policy in Denmark, Finland and Sweden”, *European Journal of Social Security* 2003:3, 230–248).

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# Chapter 1

## Basic Framework of the Study

### 1.1 Social Policy and the Law – Preliminary Remarks

By applying for a social benefit the client enters into a relationship with the authorities marked by an imbalance which necessitates protective arrangements. A certain trade-off inevitably takes place between their freedom of action and the conditions of entitlement in question. However, this process is subject to normative and other constraints determining its outcome. Social policies are enacted as laws and implemented by public and private actors. Legal provisions are instrumental in achieving social policy goals and, at the same time, each piece of legislation is integrated in the broader legal system protecting the recipient against violations of their rights. This integration process implies that the content and implementation of social security and social services are partly regulated by other legal elements than those included in the piece of social welfare legislation concerned. Such elements are, for example, other social welfare laws, general procedural requirements concerning administrative decision-making or certain fundamental principles such as proportionality, equality and self-determination (including respect for individual liberty and protection of one's private life). In other words, the intertwining of different components of the legal system with each other also limits the powers of the decision-makers in the field of social welfare, both at the level of enacting and applying legal provisions. Barriers against infringement of these limitations are provided by legal safeguards and, more generally, by legal security, as will be explained below. This protection is especially important in periods of intensified reforms, when vigorous action tends to overshadow legal safeguard considerations, which may be thought to hamper swift progress.

In practice there are many other factors threatening the realisation of individual rights. To clarify this complex issue the structure and workings of the implementation of the relevant legislation should be analysed in depth. Social policy and law constitute two different frames of reference with their own internal viewpoints which interact in the implementation of social welfare law. Moreover, implementation does not proceed mechanically but is shaped by structural, organisational, cultural and other characteristics of the decision-making actors. This means that there are three interrelated discourses or paradigms influencing decision-making. The paradigm of social policy is focused on achieving certain policy results (by means of legislation providing resources and permitting the use of public or private agencies). The legal paradigm aims at delineating the functions and powers of the actors involved and at ensuring the realisation of

the client's substantive and procedural rights within the broader framework of democratic values and basic rights. To accomplish this the legal system guides, directs and compels both decision-makers and clients to behave in a certain way. The third paradigm is rather a group of paradigmatic practices developed in the course of day-to-day decision-making by front line and other officials. Michael Lipsky and others have shown that officials construct particular rules and methods to be able to cope with their caseload and with various pressures they are subjected to.<sup>1</sup> Laws and regulations do not usually provide straightforward solutions for all cases coming up. They are often open to interpretation or sometimes are even indeterminate. The implementers have to develop practical application routines and prioritise legal, administrative and organisational requirements in ways satisfying their superiors (and possibly certain political leaders responsible for their area as well as the general public). It is impossible for officials to manage without wielding discretionary powers. This creates a state of affairs enabling them to set and carry out their own agenda as long as they do not transgress given boundaries. They may, for example, standardise their work by classifying clients into categories to be dealt with collectively in a certain way and not as individual cases. Sometimes the criteria of such a categorisation include inappropriate value judgements or other extra-legal considerations.

Thus on the level of implementation legal elements have to compete with other priorities. The implementers combine social policy goals and legal rules with organisational, personal and other relevant viewpoints to create a particular version of the application of the legal provisions involved. From the perspective of the legal paradigm this situation is not entirely satisfactory. The relationship between the legal system, which has its foundation in the imperatives of our democratic regime, and the agencies implementing the law is a hierarchical one. Citizenship entails expectations that implementers adhere to democratic principles. These principles imply that clients are entitled to equal treatment irrespective of organisational or other contingencies. Moreover, they put the individual to the fore and require the agency concerned to act accordingly. Hence non-observance of individual rights by the officials is legally construed as an implementation deficit. Lawyers may ascribe non-compliance, for example, to insufficient awareness of the legal constraints on decision-making, or to lack of information on the interpretation of the legal rules concerned, especially in the absence of precedents or interpretation guidelines.

The supremacy of individual rights is diminished not only by the tensions and contradictions between the legal paradigm and the adaptations developed by the implementers. Within the legal system itself the status of social rights as individual rights has been disputed. Furthermore, in social welfare law the realisation of other individual rights, particularly civil rights, has not been self-evident. However, since the 1960s and 1970s the evolution of administrative law in the three Nordic countries to be examined has been marked by a shift towards a stronger protection

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1 Section 1.7.1.

of the client by the application of principles safeguarding individual rights and by the enactment of many of these principles. It is true that this move has been blurred by the more recent introduction in the public sector of new methods of management and organisational structures inspired by the (commercial) private sector. From the client's perspective privatisation and marketisation have partly diluted the responsibility of the public actors for their action.

In spite of this the primacy of individual rights and its consolidation in the area of social welfare cannot be denied.<sup>2</sup> Naturally, in certain situations rights should be balanced against each other. The preeminence of individual rights means, however, that they should take precedence over organisational and practical considerations. Their potency arises from their emancipatory capacity, which appeals both to guardians of the democratic system and to advocates of the empowerment of the client who is entitled to service of good quality. The neo-liberal ideology underlying privatisation and marketisation conceives of the recipient of benefits and services (claimant) as an autonomous actor capable of defending their own interests, for example when engaging in a contractual relationship. As a corollary of this conception social welfare reformers also viewed the client as self-reliant and self-sufficient. The new approach transformed the claimant's position. Their right to benefits was, at least in some parts of the system, predicated on their prime responsibility for their own subsistence and other living conditions.

One of the consequences of the reshaping of social policy has been the elaboration in many countries of activation policies. Activation denotes the programmes and measures intended to activate people receiving social allowances, or in danger of being excluded from the labour market, in order to make them enter or re-enter the labour market or engage in work-oriented (or otherwise constructive) activities.<sup>3</sup> From the point of view of the protective function of social welfare law activation policies have led to the weakening of the claimant's position in two ways. The conditions of entitlement to certain social benefits have been tightened and the controlling tasks of the front line decision-makers have been stressed. These developments within social policy and the social services (it should be noted that in the three Nordic countries social services include also activation of social assistance recipients) create tensions and even conflict with the persisting efforts to further acculturate the administrative machinery to prevailing egalitarian conceptions of citizenship. This acculturation process highlights the dual role of law as an instrument of domination and as a tool for defending and increasing the individual's sphere of liberty.<sup>4</sup>

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2 Hollander 1995, 20.

3 Dröpping, Hvinden and Vik 1999, 134.

4 Or, as Thurman Arnold puts it, "law ... contains both the contradictory philosophies of obedience and revolt". (Arnold 1962, 34).

## 1.2 Purpose of the Study

The main purpose of this study is to evaluate the implications of activation policies for the position of the recipient of social assistance in the light of the legal provisions adopted to implement these policies in Finland, Denmark and Sweden. The general framework of this investigation will be the interplay between elements protecting or weakening the rights of the individual, especially *autonomy*, *integrity* and *subsistence security*, and factors promoting collective economic or labour market interests. The emphasis here is on what the legal system as a whole is thought to offer the client and on how this translates into actual decision-making. The empirical and other material available reveals some discrepancies between administrative decision-making and the objectives of the legislation concerning individual rights. It also shows the tensions between the activation approach and the basic values underlying these rights.

The regime of individual rights prevailing in the three Nordic countries represents an egalitarian concept of citizenship.<sup>5</sup> Compulsory activation does not seem to fit in well with this notion. However, in all three countries there is a long tradition of active labour market policies coupled with sanctions. At the same time constant legislative efforts have been made to subjugate decision-making in social welfare matters to the legal paradigm based on emancipatory considerations. This process has resulted in legal provisions extending legal safeguards and some other protective devices to the activities of the social services. I shall examine the problematic relationship between these provisions and activation by dealing with the following issues:

- the contents of the legal provisions on activation and the client's rights in connection with activation;
- the conditions of the application of these legal rules and (to the extent relevant data have been published) the outcome of their implementation – in other words, whether the normative and emancipatory elements introduced to further the realisation of individual rights have produced the desired effect;
- certain specific questions raised by the consequences of activation policies for the protection of individual rights, notably effectiveness, participation, individualisation, self-determination, proportionality, equality and discretion.

Implementation of the legislation is at the interface between administrative action and legally defined standards for decision-making. The differences between the social policy or social work approach and the legal way of thinking are an underlying theme of the present study. It is my conviction that it is possible, at least to some extent, to bridge the gap between these two approaches and that increased communication between them would benefit the recipient of social benefits.

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5 Dean 2002, 186–189 on other concepts of citizenship; also below, section 6.1.4.

The policies and legislation of the three Nordic countries involved present some similarities but also differ from each other in many respects. My purpose is not to compose a fully fledged comparative study but to identify and analyse certain problematic aspects of the content and implementation of activation policies targeting recipients of social assistance. Admittedly, this subject cannot be dealt with adequately without at least touching on labour market policies and unemployment benefits. However, a focus on recipients of social assistance illustrates more clearly the changes in the objectives of welfare policies and their effects on the situation of the economically most vulnerable group of people.

To clarify the meaning of activation policies I shall first briefly examine the restructuring of the social welfare system.

### **1.3 The Reshaping of the Social Welfare System**

#### *1.3.1 Privatisation and Activation*

The reordering of the welfare state has been centred on privatisation.<sup>6</sup> In many fields privatisation is the prevailing policy both on a national level and in the European Union (EU). The concept of privatisation in the broad sense of the word has two dimensions, which are closely linked. Privatisation basically means the reorganisation of the task division between public and private actors, aimed at shifting the balance in favour of the latter. It also refers to the fact that market mechanisms and private law elements (for example contracts) are increasingly used to perform tasks of general interest. The main thrust of privatisation is evidently to restrict the role of the public sector in financing, organising and delivering services and other benefits. In many areas privatisation measures have led to moving public sector commitment from direct provision to subsidising or to mere regulation of private provision.<sup>7</sup> Another aspect of the privatisation trend is that methods used by private business serve as a model for public sector reforms and are also adopted by voluntary actors.<sup>8</sup>

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6 Brodtkin and Young 1989, 142–143 and 149.

7 Culpitt 1992, 184; Julkunen 1992, 98–99; Papadakis and Taylor-Gooby 1987, 37; Rothstein 1994, 234–238; Smith 1993, 129 and 133–135; Starr 1989, 26–36; Willett 1999, 349–350; 1993, 43.

8 Within the public sector certain methods typical of private business have been adopted or at least experimented with, such as management by objectives or by results, internal markets, incentive wages, marketing of publicly produced services, transferring the production of services from public agencies to publicly owned companies and so on. Patterns of cooperation between public and private actors include contracting out and competitive tendering, support to voluntary organisations, vouchers, user charges and so-called care contracts (or home care allowance, for example financial support from the authorities to a private person – often the next of kin or another relative – committing themselves to take care of an elderly, disabled or sick person needing assistance).

The privatisation trend has influenced the social welfare system in different ways. In certain fields delivery of social services has been transferred from the public sector to voluntary or commercial organisations. Another line of approach, which may be understood as an individualised form of privatisation, has been to increase the responsibility of individuals and their families for coping with the difficulties they encounter. This extended liability may, for example, imply higher fees charged for public or publicly subsidised services, or the tightening of the obligations of the recipient of a social benefit. The latter method is one of the pillars of activation policies. The connection between privatisation and activation can also be viewed from other perspectives. Janet Newman, for example, writes: "The privatisation of social risks associated with welfare reform ... represents new forms of governmental power in which the personal becomes both an object (of new strategies) and a resource (to be mobilised in the process of constituting new forms of self governing welfare subjects)."<sup>9</sup> The activation policies adopted in the three Nordic countries represent applications of the redistribution of responsibilities between public agencies and individual claimants. In this sense activation is associated with privatisation processes. Activation measures themselves can also be privatised; but I shall not deal with this aspect of privatisation, which seems to be of minor importance in the three countries.

To elucidate the concept of activation one can distinguish between active social policy, active labour market policy and workfare, though these notions partly overlap. *Active social policy* can be defined as a policy based on the principle that beneficiaries of benefits should try to earn their own income, improve their employability or engage in constructive social activities. The goals of active social policy measures may be economic, for example to reduce public expenditure, or they may refer to the work ethic. Sometimes the measures are oriented towards furthering the social inclusion and empowerment of the individuals or particular groups of people concerned. This kind of "socio-cultural" activation includes, for example, programmes within community work or occupational therapy. It aims at motivating people "to change their behaviour with a view to their emancipation and to acquiring the ability to fend for themselves".<sup>10</sup> Social emancipation is about "eliminating feelings and situations of inferiority, formulating and defending one's personal interests, asserting one's rights and performing one's duties".<sup>11</sup>

The two sets of objectives of active social policy (economic or based on the work ethic and "sociocultural" or oriented towards the interests of the individual) reflect the twofold nature of social welfare.<sup>12</sup> On the one hand, the social welfare system seeks to protect people against the contingencies of life and to alleviate the dependency of their living conditions on naturally, economically, socially

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9 Newman 2007, 366.

10 Vlaar, quoted by Geldof 1999, 16; also Hvinden 1999, 27.

11 Geldof 1999, 16.

12 Ian Gough, quoted in Dean 1996, 68; Johnson 1987, 13–14; Titmuss 1963, 42–43.

and culturally determined factors. At the core of these aspirations is concern for the well-being and integrity of the individual. On the other hand, social welfare legislation demands from its beneficiaries compliance with the societal imperatives of, for example, the market economy or moral standards such as the work ethic, self-discipline and thrift.

The duality of individual and societal interests helps us to explicate the meaning of the term “active” in active social policy. In the context of the reordering of the welfare system an “active” subject is (as indicated above) somebody who earns their living by gainful employment or who is actively seeking a job or improving their employability, or at least participating in activities approved by the social welfare authorities.<sup>13</sup> However, this is clearly a policy-bound use of the word “active”, implying that a person should make an effort not to be dependent on social security. People not engaged in any of the occupations concerned may nevertheless carry out a socially acceptable and even commendable activity, for example taking care of a child, doing voluntary work, studying on one’s own, and so on. In recent years there has been a trend in many countries towards attaching the obligation to work or other work-oriented obligations to social assistance, and legislative reforms to this effect have been realised, for example in Denmark, Finland and Sweden. This brings social assistance policy closer to active labour market policy.

The concept of *active labour market policy* refers to personalised and systematic measures designed to make unemployed jobseekers enter or re-enter the labour market.<sup>14</sup> These measures may include individual guidance and counselling, courses aimed at improving jobseeking skills, job brokerage, education and vocational training. They may also involve wage subsidies and job creation. Typically in the Nordic countries economic policies pursuing a high level of employment are also regarded as a constituent part of active labour market policy. Another structural factor furthering employment is social services releasing workers from family obligations, for example children’s day care and services for older people.<sup>15</sup> Even earnings-related benefits should be considered an activating element, as people working for wages are rewarded by a higher level of social security.

The most radical form of activation is *workfare* in the narrow sense of the term, which means forcing beneficiaries of social assistance or other cash benefits into work or training by threatening them with withdrawal or reduction of benefits.<sup>16</sup> The strong emphasis of this “work-for-welfare” approach on coercion and the work ethic may lead to making recipients accept jobs or opportunities for training on the job which pay much less than the current market wages for the kind of work involved.

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13 Hvinden 1999, 27; Julkunen 1998, 182.

14 Hvinden 1999, 28.

15 Julkunen 1998, 180.

16 Grover and Stewart 1999, 76–78; Hvinden 1999, 29; Standing 1990, 678–680.

*1.3.2 Causes of Social Policy Changes*

Generally speaking, the causes of social policy changes in Western Europe can be divided into economic and ideological or political factors. The most conspicuous new phenomena belonging to the former category are the globalisation of the economy, the reinforcement of its growth imperative and the reorganisation of work.<sup>17</sup> In the global economy high public expenditure and the taxes and other contributions it requires are often considered a burden hampering the competitive efforts of private enterprise. In an internationalised and open economic system the advantages of consensual social welfare policies on a national basis are easily called into question. Furthermore, certain demographic developments, especially the aging of the population and the strain it puts on the pension system and health care, necessitate a readjustment of welfare provision. The new pressures exerted by the market economy, together with the rapid evolution of the technological infrastructure and of methods of producing goods and services, have led to a reorganisation of work. The reordering concerned is centred on flexibility geared to increasing profit-making, implying an erosion of working conditions in terms of working hours, job security and labour market value of previously acquired qualifications, skills and know-how. Flexibility may involve more unsocial or longer working hours, an increase in part-time and short-term work and demands for "skills' mobility", for example employees are expected to procure new skills in a relatively short time. Correspondingly, redundancy and long-term unemployment threaten especially low-skilled and middle-aged employees. Long-term unemployment again entails the risk of marginalisation and even exclusion, which the welfare state based on the traditional social rights has had considerable difficulties dealing with until now.<sup>18</sup>

The political reasons for the changes in social policy are complex. On the one hand, the new policies are politically inspired responses to the economic and demographic factors indicated above, and, on the other, they are part of the broad restructuring of the public sector referred to earlier as privatisation. Privatisation has been influenced by neo-liberal ideas, which were rearticulated in different ways.<sup>19</sup> In privatisation reforms policy-makers addressed neo-liberal criticism according to which traditional welfare policies were too costly, undermined work incentives and created "welfare dependency".<sup>20</sup> The relation between economy and

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17 Bosco and Chassard 1999, 54–55; Esping-Andersen 1997, 256–257; Grover and Stewart 1999, 84; Jordan 1998, 7 and 53–55; Taylor-Gooby 1997, 172, 178–179 and 189; Torfing 1999, 7.

18 Rosanvallon 1995, 9; Torfing 1999, 10.

19 Finn 1993, 40; Finn 1999, 53; Gilbert 1992, 13; Julkunen 1998, 183; Kautto et al. 1999, 6–8; Torfing 1999, 5.

20 Welfare dependency does not only refer to depending on social welfare benefits for one's income but also to an alleged culture of passivity originating with long-term use of such benefits.



social policy was re-examined and the role of public administration was modified accordingly. However, there seemed to be a consensus among the policy-makers that market forces would not on their own solve problems such as long-term unemployment and welfare dependency.

The fundamentally twofold nature of social policy surfaced in new forms in activation policies. Dealing with marginalisation or exclusion focuses on individual situations and needs and does not necessarily involve work-related measures. Reducing welfare dependency, on the contrary, is predominantly a societal objective and implies action oriented towards gainful employment. Moreover, the term “dependency” is a policy-bound concept (like “active”) obscuring the fact that a recipient of welfare benefits may be socially independent and fully engaged in the care of others (for example children). Critics of welfare dependency also fail to recognise that, as Fiona Williams puts it, “welfare benefits and services have provided for women, disabled and older people the means of *escape* from the undesirable dependency upon oppressive relationships”.<sup>21</sup> Moreover, Williams points out that people working for wages are not independent but labour market dependent. One could add that one of the functions of social security and income transfers in general is to safeguard the independence of the beneficiaries.

It is interesting to relate these remarks to Richard Titmuss’s analysis of the role of dependencies in society.<sup>22</sup> Drawing on Emile Durkheim’s assertion that (in a society characterised by the development of the division of labour) as man becomes more individual and more specialised he becomes more socially dependent, Titmuss identifies a variety of dependency factors leading to a state of affairs where a person is unable to earn their living. He distinguishes between two categories: “natural” dependencies caused, for example, by childhood, old age or illness; and “man-made” dependencies. The latter include unemployment and under-employment, compulsory retirement from work, the delayed entry of young people into the labour market and protective and preventive legislation. These dependencies are determined by social and cultural factors and processes, in which mechanisms of selection and rejection play an important part. People are assessed and categorised for education, work, professional status, social benefits and so on. Titmuss’s account of the social (including socio-legal) and cultural origins of man-made dependencies suggests that welfare dependency should be considered not only from the point of view of labour market conditions but also from the angle of institutional, social and cultural mechanisms of selection and rejection.

Individual rights aimed at shielding citizens from unlawful decision-making, maladministration and abuse of power reduce the negative effects of the dependencies in question.<sup>23</sup> However, the significance of this corrective device for administrative action concerning social services is obscured by a range of factors

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21 Williams 1999, 676. Also Dean and Taylor-Gooby 1992, 2 and 150; Paz-Fuchs 2008, 18; Simon 1985, 12.

22 Titmuss 1963, 42–44.

23 Dean and Taylor-Gooby 1992, 173–174.