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RIGHT TO WORK IN ARTICLE 27 OF THE UNCRPD AND "SWEATSHOPS FOR SEVERLY HANDICAPPED PERSONS"

Abstract

In Germany since generations sweatshops for persons with severe handicaps do exist. As to § 56 of the Social Code IX these institutions have to develop, improve, unfold or restore the capabilities of persons with severe handicaps. They are addressed to persons, who are—depending on the manner and severity of their handicap—cannot be employed on the general labour market. They should contribute in sweatshops to a minimum standard of economic production and their transition into the general labour market should be supported.

Słowa kluczowe: Organizacja Narodów Zjednoczonych, prawa człowieka, osoby niepełnosprawne, Powszechna deklaracja praw człowieka, prześladowania ludności żydowskiej w Niemczech w okresie narodowego socjalizmu, prawo naturalne, konstytucja weimarska, prawa gospodarcze, społeczne i kulturowe, Amartya Sen, Martha C. Nussbaum, podejście do zdolności, prawo do pracy, pomoc społeczna i ochrona osób niepełnosprawnych, zakłady pracy chronionej

Keywords: United Nations, Human Rights, Persons with Disabilities, Universal Declaration of Human Rights, persecution of Jewish people in Germany during the NS period, natural law, Weimar Constitution, economic, social and cultural rights, Amartya Sen, Martha C. Nussbaum, capability approach, right to work, social assistance and protection for the handicapped persons, sheltered institutions

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1. Social policy: Matter of national or international legislation?

More than 10 years ago the United Nations' (= UN) Convention for the Rights of Persons with Disabilities (UNCRPD) was incorporated into the legislation of many UN member states worldwide. It outlines explicitly and specifically the human rights of persons with disabilities and makes the states responsible to align their legal provisions on social protection for persons with handicaps to the human rights' guarantees stipulated by and in the UNCRPD.

In Germany since the UNCRPD's has come into force, a legal and political debate emerged on its impact on schooling and the working conditions of severely handicapped

persons. These persons were traditionally educated in special schools, and after having left school most of them did not work on the general labour market, but were active in "sweatshops for handicapped persons" (*Werkstätten für Menschen mit Behinderung*). Sheltered schooling and work were the orthodox answers of German social policy to protect persons with handicaps.

Albeit the overriding goal of the UNCRPD is the inclusion of persons with handicaps, i.e. their integration into the general social life; schools and the labour market stand for it. Sheltered schooling and jobs in special institutions are, therefore, prone to discriminate against persons with disabilities. If this should be true, what does it mean for the German legislation?

The debate touches upon fundamental questions of national labour law making in an international legal order, built upon socio-economic human rights. Why are the states bound in their national social policy to observe international labour and social welfare or security law (II)? The answer requires a broad look back to more then two centuries history of constitutional human rights and their transformation into international guarantees. Article 27 of the UNCRPD ascertains a right to work to persons with a handicap. What does this provide for (III) and what are the consequences of this right for severlely handicapped persons, if they work till today in special institutions called "sweatshop for severely handicapped persons" (IV)?

2. Human rights: National or international guarantees?

2.1. Emergence of human rights in the 18th century

The history of human rights did not follow a straight path. The persons, to which these rights apply, and the content of these rights changed substantially, since they were proclaimed the first time in the United States and France at the end of the 18th century. This came in the form of the Declaration of the Rights of Man and of the Citizen (déclarations des droits de l'homme et du citoyen) rooted first and foremost in natural rights and the ensuing justifications stemming from the general nature of man. Despite the natural law rhetoric, they initially applied de jure only to a small, distinctively elite cadre of property-owning men, who were citizens of the state that was guaranteeing those rights. The state was strapped for funds at the time and needed each of them as taxpayers, providing compensation with human rights in turn.[1] Such rights were aimed at protection through participation in the body politic. Initially, they were granted only to "citizens" who owned property and, as a result, paid taxes. In contrast, this excluded

[1] The maxims of revolution were derived from Locke [1689], p. 140—a revolution which, when examined in detail, constituted a taxpayers' revolt: "No taxation without representation!" *Qu'est-ce que, le tiers-état ?* These statements associated with the revolutions underscore the calls for political participation asserted by holders of wealth subjected to taxation.

the overwhelming majority, consisting of those without property, women and foreigners; therefore, these groups were initially outside the scope of human rights.

From the outset, these rights promised individual liberty among equals (Bloch 1972, p. 76). Thus, they were created and designed to allow every human being to do as they wished (Bloch 1972, Note 2, p. 176; also see Luhmann 1974, p. 32). That is why this liberty could not remain a privilege over the long term. The development of human rights since that time must initially and primarily be considered an expansion of personal scope and applicability over several centuries, but the actual content has changed as well.

The 19th century was marked by the "social question" of overcoming the lack of rights for classes not holding property. The essential and vital interests of socio-economic human rights attained prominence for the first time. By integrating workers, they became holders of civil (right of association) and political (right to vote) human rights; both of which thus provided the conditions for freedom of association, geared towards the needs of workers and serving their interests, and social insurance to become their own human rights.

The end of the 19th century saw the beginnings of the women's rights movement, which began to take hold in the 20th century. The idea of equal rights for men and women strives to overcome the historical division of labour between the sexes and the resulting legal, political, social and economic allocations of tasks that have emerged and the associated unequal treatment of women in relation to men.

2.2. International turn of human rights

Since 1948, human rights have no longer been simply rooted in the constitutional laws of countries, but they are also enshrined in international law which must be observed and respected throughout the world. International human rights are closely linked with the formation and goals of the UN. The Universal Declaration of Human Rights proclaimed in the Palais de Chaillot in Paris on 10 December 1948 (Prost, Winter 2011, p. 269) emerged from the experience of war, destruction and genocide due to and during World War II. It was written in response to gross, overt violations of human rights and the impotence of international organizations towards dictatorial regimes with disregard and contempt for human rights that characterized the interwar period.

The story of Franz Bernheim epitomizes the problem. Franz Bernheim was a German citizen of Jewish descent who fled from Gliwice (part of Germany at the time) to Prague. In 1933, he petitioned the League of Nations regarding the persecution of Jews occurring in Germany ever since the Nazis had taken power in January 1933. He criticized the poor treatment of Jewish Germans as a violation of the Convention of 15 May 1922 regarding Upper Silesia that had been initiated by the League of Nations as a protective measure intended to safeguard equal treatment in civil society for minorities (Ball-Kaderni 1963, pp. 185–199; Graf 2008, pp. 129 ff).

The German National Socialist leadership protested against this sort of interference in allegedly "internal" affairs, which it deemed illegitimate. At the same time, the

German foreign policy utilized delaying tactics in an effort to prevent a legal investigation into the persecution of Jews in Germany and by Germany at the international level. The League of Nations insisted on its request to review and safeguard the protection of human rights even within states (Graf 2008, Note 5, pp. 220 ff). The issue became irrelevant once Germany announced its withdrawal from the League of Nations on 16 October 1933. This sort of defensive attitude equated human rights with civil rights and considered both to be an expression of the sovereign nation-state. This attitude fed the misconception that each nation-state may define, shape and allot human rights under its own authority.

The dictatorial regimes never once considered the struggle for human rights nothing else but a sort of humanitarian rhetoric, which is conceived as an idealized observation of the reality, primarily conceived as being nasty and brutish; they derided complaints made by states belonging to international organizations because of human rights violations as unsolicited interference in their internal affairs. In light of this, the UN must be viewed as an attempt to base the post-war world order on basic human freedoms and to allow everyone to experience them. As a follow-up to the four fundamental freedoms identified by US president Franklin D. Roosevelt (Roosevelt 1944, pp. 663 ff), freedom of speech, freedom of worship, freedom from want and freedom from fear, social rights also form a focal point for all of the guarantees of human rights.[2] It was given the responsibility of deepening international trade and monetary policy and, finally, protecting human rights. This is the context of the Universal Declaration of Human Rights (UDHR). According to Eleanor Roosevelt, widow of the US President and one of the three authors,[3] it should be treated as an international bill of rights (Glendon 2000, p. XV).

The internationally proclaimed human rights are thereby intended to form the principles to serve as a means of orientation for future global policies and so that all peoples and nations may set a common standard for achievements in human rights. First and foremost, the human right means the right to have rights and to be considered an independent being and not as a means towards other purposes (Beitz 2009, p. 1). The core of such a guarantee is that the dignity of every human being must be recognized, every human being must receive all human rights (Arendt 1960) and every state must ultimately ensure they are upheld.

As evidenced in its preamble, the UDHR was created with due consideration because "recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world" and "a common understanding of these rights and freedoms is of the greatest importance for the full realization of this pledge." It sees the foundation of all human rights in the dignity of every human being. Extensive precepts towards equal treatment and

[2] Article 6 of the Atlantic Charter from 1941 set forth the war objectives of the Western Allies. Among them was the post-war aim "that all the men in all lands may live out their lives in freedom from fear and want."

[3] The others are Charles Malik (Lebanon) and René Cassin (France).

bans on discrimination are intended to safeguard this freedom in totality for all beneficiaries. The idea that human rights are an expression of state sovereignty has never been successful in promoting understanding of human rights. Ultimately, all human rights limit state authority at a basic level and they direct the states towards the realization of individual liberty through law.

2.3. Socio-economic human rights

As the full spectrum of human rights acknowledged in international law, among them above all the basic social human rights to work, education, health, accommodation, social insurance or social assistance (Art. 22–26 UDHR). In this vein, Art. 53 of the Charter of the United Nations puts forth raising the standard of living, full employment as well as social and economic progress in and through international cooperation (free-trade, in other words) as goals of the post-war period. Article 68 of the Charter of the United Nations provided for a separate Economic and Social Council.

Socio-economic rights draw the lesson from the insight, that human rights are not embedded in the muman nature, but should characterise the human society. "Human rights are not the rights of humans in a state of nature; they are rights of humans in society . . . rights of humans vis-à-vis each other" (Hunt 2007, p. 21). They are built on the assumption that all humans in a given society or beyond the latter all human beings living worldwide accept one another as free and equal individuals (Hunt 2007, Note 13, p. 29). Insofar are all human rights "social" by nature, as they determine the position of individuals in their mutual relation to one another (Barak-Erez, Gross 2007, p. 7).

By amplifying the personal scope of human rights to universal one, human rights had been also enriched in substance and adopted new spheres of social life. New topics became palpable for them. The property right of the employer made a capitalist economy possible and lawful. But the property right for the employer raised the question on whether it encompasses the person of the employee. In the early phase of the industrial development the workers suffered from meagre wages, long working hours, unhealthy working conditions and child labour was common with detrimental effects on the workers' health, when becoming adults. Workers associated and contracted collectively with the employer on their wages and work conditions. Collective actions emerged; they should compensate the weak stance an individual worker had, when he tried to contract individually. Labour law developed by collective actions and legislation and brought about employees' rights to counterbalance the employers' power embedded in their property on the means of production. It became clear, that the human rights of employers cannot derogate the workers rights; which had been established step by step in the 19th and 20th century and finally acknowledged as fundamental social human rights.

The Weimar Constitution of 11 August 1919, was—apart from the Mexico Constitution of 1917 and the Constitution of Finland of 1919—one of the first constitutions of the World, which did provide for fundamental social human rights. In the Constitution—committed to foster "social progress"—the political changes of the decades before and

during WW I should be articulated in a broad and comprehensive catalogue of economic, social and cultural human rights: The economic life should coincide with the principles of social justice and follow the aim to guarantee a life in human dignity to each human being (Art. 151). Human labour has to be protected by a unified labour law (Art. 157). The freedom of association and collective bargaining is guaranteed to both employees and employers (Art. 159). The right to social insurance (Art. 161) was guaranteed, and it was stated, that irrespective of the individual freedom each citizen is exposed to the moral commitment, to utilize her/his physical or intellectual capability for the common good. Under there auspices each citizen should have a right to work in order to acquire his or her personal maintenance (Art. 163). Employees are entitled to take part in the question of enterprises. For this purpose, works councils shall be established on the level of a factory, the enterprise, or on regional or national level (Art. 165).

Thomas Paine wrote in his treatise on *The Rights of Men* (Paine 1791) a theory on human rights, which emphasized the social rights. He assumed, that the state's role is to protect and to unfold the rights and liberties of all individuals. This task implies to teach the younger and to protect the older generation. He advocated for progressive taxation, public assistance and a public insurance against all risks human life is exposed to. If affluence is the outcome of joint work, all contributors have a right to a fair share (Sièyes 1985, p. 27; Gauchet 1991, p. 111).

It combines equality with the state's role to protect human dignity and liberties. On the assumption of factual inequality and diversity of humankind human rights should safeguard to each one to bring about a fair share free of any discrimination. The economic, social and cultural rights address stake—holding in a given society by measuring it in economic, social and cultural participation. For Helmut Schmidt the welfare state was the greatest achievement of Europeans in the 20th century.[4]

In the international understanding, human rights are not only supposed to determine a negative freedom (Berlin 1969)—a lat. status negativus[5]— which should leave open to each individual a sphere for choice and action free from any state intervention, but should also create the positive freedom of the individual—a lat. status positivus. This freedom is based on entitlements against public institutions, e.g. employment services, schools, city councils, social insurance administrations or the health services, or privates, above all the employer, which have to bring about and make practically feasible specific social rights.

The leading idea of negative freedom as a status free of state intervention is an inadequate and insufficient determination of human freedom for an interventionist state: "Freedom from the law's coercion is an instrumental, not an ultimate good" (MacCormick 1982, pp. 1, 10). The leading idea behind positive freedom addresses the potentials for a life in self-determination: "The notion of freedom as effective power to achieve what one would choose is an important part of the general idea of freedom" (Sen 1992, p. 69).

[4] "Die Zeit" 2006, Bd. 40, p. 3.

[5] This doctrine stems from: Jellinek 1905, 1960, 2011, pp. 94 ff, 114 ff, 136 ff.

International human rights are the global community's response to one of the three fundamental problems in social justice that Martha C. Nussbaum (2006, p. 3) still considers to be unsolved problems. She is seeking to answer the question: How can we extend justice to all the world's citizens? She reminds us that even the first international law theorist, Hugo Grotius, found that mutual dependence of states served as a basic premise for universal international law and that this was designed and aligned to create an international community (Nussbaum 2006, pp. 18 ff).

For Nussbaum, internationally recognized human rights have a contemporary explanation in the capability approach she developed together with Amartya Sen. It holds to Kant's theme that every person in an international community must be considered an end and not a means to the enrichment of others. Actions must then be taken on this basis (Nussbaum 2006, p. 70).

The central human capabilities to be protected by human rights include life, bodily integrity, imagination, emotions, ideas, affiliations with other humans and the control over one's own environment, from which material and political participation rights emerge (Nussbaum 2006, pp. 76 ff). In terms of ideas and social ethics, the capability approach has seen more refinement than the social contract theory used to explain human rights ever since they emerged. This theory states that this social contract is concluded by the readily capable, which is why people with disabilities, foreigners and animals do not appear in this sort of conceptualization.

The capability approach, however, makes it clear that the individual requires care and that this represents an asymmetrical social relationship. The culture of a society can be determined primarily based on the extent to which it assures such needs (Nussbaum 2006, p. 168). In the capability approach, human rights are to be viewed as declarations of international guarantees of positive freedom (Nussbaum 2006, p. 284; the capability approach makes the significance of human rights clear) that, for their part, form the foundation of every state as well as the international community. This was prescribed to the states as well as the international community and given up to make them a reality. After all, liberty can be understood as an "opportunity freedom" (Sen 2003, p. 29) determined by income and quality of life (Sen 2003, pp. 30 ff). Liberty requires institutions that create social opportunities and social security (Sen 2003, pp. 55 ff).

The welfare state's goal

> is to design the social institutions that will provide a nature of opportunity and employability for citizens, and will be attractive for these same reasons to international investors. What is good from the standpoint of justice—fair opportunities for all, a responsible sense of membership, an ethic of hard work and equal liberty—is also good for efficiency (Sen 2003, p. 70).

The liberty of the individual also forms the foundation for a social commitment. It is specifically directed towards using that liberty for the general good and for the next generation (Jordan 1998, p. 18). Economic and social freedoms do not oppose each

other, but rather require each other. One is merely the other expressed in different terms.[6]

Human rights no longer derive from state sovereignty but instead they set limits on the state and set the trend for sovereignty: A state is only a state of law if it heeds and respects human rights guaranteed and recognized internationally. The contemporary human rights formulated by the international community provide protection against more than just attacks during war, as the first guarantees as part of international humanitarian law were about. They also protect against state overstep during times of peace (Sen 2003, N. 30, p. 29). The effects this has on the state are serious: "The rise of principle human rights causes both collusion and confluence between international and domestic law" (Sen 2003, p. 27).

All of these considerations are central to the situation for persons with disabilities; in this capacity, they provided an intellectual basis for the UNCRPD and, conversely, make it readily accessible to novel socio-philosophical debates and discussions.

Another peculiarity and occurrence must be noted in the development of social human rights: This leads to a relationship between equality and freedom. The dispute over fundamental social human rights to work, social security, welfare, accommodation, education and health (Nussberger 2005; Mikkola 2010; Becker, Pennings, Dijkhoff 2013; Lörcher 2016, p. 488) alone makes it clear that inequality inexorably leads to a loss of freedom—meaning that freedom and equality regularly go hand-in-hand together. The repudiation of workers' rights and women's rights in the early developmental phase of human rights meant a loss of rights in two senses—refused equality effects a loss of freedom. Securing both—freedom and equality—is the goal of fundamental social human rights for this very reason.

From that, there is a path that leads from bans on discrimination against individual groups of the potentially and currently disadvantaged to individual social human rights specifically necessary for that group to prevent affronts. In the context of the UNCRPD, these are the guarantees of universal accessibility (Art. 9 of the UNCRPD) and empowerment (Art. 26 of the UNCRPD).[7]

3. Right to work

The right to work is guaranteed as a human right in international and European law (Art. 23 of UDHR, 6 f. of the International Covenant on Economic, Social and Cultural Rights, 1 European Social Charter and 15 Charter of the Rights and Freedom of the EU);

[6] In that same vein, at the European level, these are accompanied by the ECHR geared towards civil and political rights and the ESC targeted towards ensuring social rights (Seifert 2016, p. 591).

[7] United Nations, Human Rights; office of the High Commissioner for Human Rights, Monitoring the Convention on the Rights of Persons with Disabilitiues, Guidance for Human Rights' Monitoring, Professional Training Series, No. 17; United Nations Report of the Cpommittee on the Rights of Persons with Disabilities, General Assembly, 17th session, Supplement No. A/70/55, New York 2015.

therefore, every person has the right to work and is linked to a safe and secure workplace. The German Basic Law (GG)does not generally express social rights, but it does guarantee the right of free choice of workplace in Art. 12 I GG. This encompasses more than the prohibition on forced labor in Art. 12 II GG The constitutions of some German states, such as Bavaria, Berlin and Thuringia, ascribe human labor an additional dimension as a fundamental and human right.

However, several factors notably obfuscate the debates regarding the right to work in Germany. For the most part, it is considered as an impossibility, because no one can "sue" for a specifically chosen place of work in a market economy and the "right to work" presumes that the state holds all of the jobs, which would, by necessity, be at the expense of all economic freedoms. These objections overlook the fact that social rights must not be misunderstood as a promise of happiness. The right to education does not make every person into a genius and the right to health does not make everyone fit. Social rights are always geared towards inclusion of the beneficiaries into existing social institutions. In the case of a right to work, the aim is inclusion in a working life or, in other words, the labor market in a market economy.

Why should it be impossible to facilitate a human right to work in a market economy regulated in a social state? Labor law has employment rights for persons with disabilities; anti-discrimination law provides claims for damages for lost income in the event that a potential employer refuses a hiring without cause and places sanctions on violations of bans against discrimination in this way. A claim such as this conceptually presupposes the entitlement to establish an employment relationship. Social security has been designed to provide protection for individuals against unemployment, which has been a social risk for a century.

In addition, the right to work is formulated as an alternative to slavery and forced labor. After all, it focuses on admission to freely chosen work and specifically does not entail the public allotment of work. Those who claim that the right to work implies public authority over work and the economy and promotes an "unfree society" are mistaking the right to work as a civil liberty. Without this, it would not be possible to explain that labor administration, basic security and unemployment insurance have long been institutions that aim to bring unemployed people into working life. Hundreds of thousands of people in Germany work in these institutions as case managers, educators, social workers, facilitators, debt counselors and therapists. German society spends countless billions of euros in these efforts year after year. Does this all happen for something that neither exists nor can exist?

In the post-war period, the right to work sought to ensure that every person capable of workwas included in recovery through work (Mikkola 2010, Note 37, p. 138 ff). The commitment to full employment serves as the guiding light for all employment policies (Mikkola 2010, p. 139). States are obligated to take part in economic policies that promote employment—employment exchange, employment promotion and unemployment insurance (Mikkola 2010, p. 140)—and in other suitable measures towards securing full employment (Mikkola 2010, p. 145).

The international and European regulations link the right to work regularly with the rights at work. Art. 12 I GG also gives employees a right to freely choose their employer.[8] The internationally recognized right to work also focuses on freely chosen work. It ensures a realistic opportunity to employment for every person as well as access to work without forced labor and free of discrimination or obstacles (Alston 2005, pp. 1, 3 ff). Therefore, the right to work creates neither an abstract duty to work nor an enforceable claim to a specific workplace of choice.

Social rights are intended to enable legitimate autonomous action and, as a result, do not dictate that it must take place. This means there is no obligation to work from the right to work (Ssenyonjo 2009, pp. 248 ff). Obligations result only from the observance of rights and only to the extent that they are necessary for realizing rights (Mundlak 2007, pp. 341, 356). The right to work actualizes the entitlement to employment. Directed at freely chosen work, it is designed neither to prohibit the work of others (McLachlan 2005, p. 116; Krennerich 2013, pp. 162, 165 ff; judgment of the CJEU of 11 January 2000, C-285/98 (Kreil), ECLI:EU:C:2000:2) nor to grant a claim to the allotment of work.

The right to work encompasses a multitude of normative dimensions of employment. As a right to inclusion for everyone, it safeguards access to the labor market free of discrimination of any kind (Ssenyonjo 2009, Note 45, pp. 284, 310; Krennerich 2013, Note 47, p. 182), protects employees from and during unilateral, groundless dismissal by an employer (Kaufmann 2007, p. 33; Krennerich 2013, Note 47, p. 182), ensures a right to inclusion in a labor organization and when defining working conditions (Kaufmann 2007, Note 49, p. 30; Ssenyonjo 2009, Note 45, pp. 310 ff; Krennerich 2013, Note 47, pp. 180 ff), guarantees the right to the preservation of physical existence and bodily integrity, requires a labor market organization with proof of employment and employment exchange, employment promotion and income from employment as a living wage that guarantees one's livelihood (Krennerich 2013, Note 47, pp. 182 ff), and it, in turn, creates the basis for social security appropriate for the occurrence of various recognized social risks.

4. Right to work and sweatshops for persons with severe handicaps

4.1. Role of swestshops für persons with severe handicaps

In Germany since generations sweatshops for persons with severe handicaps do exist. As to § 56 of the Social Code IX these institutions have to develop, improve, unfold or restore the capabilities of persons with severe handicaps. They are addressed to persons, who are—depending on the manner and severity of their handicap—cannot be employed on the general labour market (§ 219 I of the Social Code IX). They should contribute in sweatshops to a minimum standard of economic production (§ 219 II of the

[8] See in comparison and with information on the right to work: Papier 2006, §§ 30–18 ff.

Social Code IX) and their transition into the general labour market should be supported (§ 219 I of the Social Code IX; Trenk-Hinterberger 2015, pp. 658 ff; Busch 2016, p. 561).

As to the German Monitoring Office for the UNCRPD, it is doubtful, on whether the 300 thousand persons with disabilities, who were active 2016 in Germany in more than 700 enterprises and 3 thousand locations, are treated in line with the right to work as to Art. 27 of the UNCRPD (Palleit 2016). As this Convention is transformed into the German law, all provisions for the protection of persons with handicaps should interpreted in the spirit, the main goals and the specific provisions of the Convention (Palleit 2017, pp. 64 ff).

4.2. Sweatshops and inclusion

The sweatshops are mainly critised of seperating persons with mental, physical or psychological impairments from the majority of the working populationand and, hence, isolate them in special sheltered agencies. Such work would not satisfy, what Art. 27 UNCRPD demands from the legislation. The salary received for this activity is also not sufficient for the recipients to afford an independent and dignified living. As to Art. 27 of the UNCRPD the right to work implies a right to a fair and sufficient income out of work. This criticism shows strong similarities with the one directed against sheltered schooling (Sasse et al. 2019). Both pathss are built on an exclusive mindset towards persons with impairments and this contrasts the overarching approach of the UNCRPD. The goal of the inclusion of persons with impairments, articulated and made mandatory by the UNCRPD is achieved, if persons with and without disabilities jointly learn and work. As long as this is not the case, politics have to reflect on how to react.

4.3. Consequences for the sweatshops

A proper answer is not to dissolve sweatshops. They offer work to persons with impairments and create an opportunity for them, which would not be guaranteed in case of the dissolution of sweatshops. It is an illusion, that the persons working now in sweatshops could find easily a well-paid occupation on the general labour market. The activities carried out in the sweatshops give persons with handicaps the chance to give their daily life a structure and content; additionally, this activity offers the chance to social contacts and avoids social isolation. Nevertheless, the existing law in not in line with the UNCRPD demands. So, German legislation has to reflect on adequate steps to cope with the established international law standards.

The existing domestic law is probelamtic, as it conceives the work in sweatshops for severely handicapped persons as the general rule and the transition to the general labour market as an exemption. This principle collides with the principle, that no worker should be discrimanted because of disabilities. This implies the obligation to create work place, which concur with the handicapped worker's abilities (Welti 2016, Anm. 52, pp. 635, 649 ff). Even if not all persons with handicaps have a chance on the general labour market

(Porak 2020), "sheltered employment" can be accepted as a transitional measure for an interim period of time (Trenk-Hinterberger 2015, pp. 652, 656), but not as a general rule. The UNCRPD prohibits to seperate persons with impairments categorically from the general labour markt and isolate them in special institutions (Palleit 2017, Note 54, p. 68).

Therefore, a roadmap for a reform is needed. Social rights are to be implemented progressively (Klee 2000; Lohmann 2000, p. 351; Eichenhofer 2012). As handicaps are individual and different, a differenciating approach to inclusion is not only permitted, but required and adequate (Trenk-Hinterberger 2015, Note 58, pp. 657 ff). On the way to make inclusion progessively effective, it is not only necessary to take the economic potential of a given state into account, but also the social legacy within a state. If this legacy is to be corrected—as the ones of sheltered schooling and employment—a new approach should be instated within a prudently defined period of time. A reform process must envisage the change to be implemented, without harming the protective effects which are created by the given legislation. The progression implemenetation clause is not only limited by the economic potential of the state, but by the socialpolicy traditions.

The progressive implementation clause urges, however, to develop a strategy for reform. Such a strategy is needed, but in the current German legislation it cannnot be identified. In the legislation sheltered employment is not a transitional and exceptional form of activities, but a stable one, and the transition from it to the general labour market is not the normal, but an occasional one. Under Art. 27 of the UNCRPD this rule lacks ambition and, hence, cannot be justified.

The Federal Association für Sweatshops for persons with severe handlicaps (BAG WfbM 2019) suggested 2019 many new steps: the handicapped should receive more trust in their abilities, their self-determination should be broadened and they should have more rights in the organization of the sweatshps working processes. In edition the efforts to strengthen education, rehabilitation, cultural and linguistic competences should be extended and expanded.

The sweatshops themselfes changed their character in the past:they started as institutions of care, today they are centre of production and economic progress. The more they take part in the economic life, the more the social integration of persons with disabilities is feasible. It should be refected as to which degree the sweatshops themselves could be transformed into inclusive factories, which are open for all workers, irrespective of with or without disabilities (Trenk-Hinterberger 2015, Note 58, p. 658). The sweatshops have also to compete with new forms of assisted labour market integration programmes, which had devlopped recently in the context of labour market (§ 130 of the Social Code III). A further light is to be shed on the working conditions in the sweatshops. It is necessary to adapt them more and more to the prevailing standards in the general labour market. As far as health and safety laws are concerned, this aim is already achieved. As to the wages, that gaps persist (Trenk-Hinterberger 2015, Note 58, p. 662).

A next step should be done approaching a salary, close to the minimum wage. As to the professional education a broader cooperation with other instiutions should be made possible (Trenk-Hinterberger 2015, Note 58, pp. 659 ff; Busch 2016, Note 52, p. 575).

The necessity for an inclusive education is not to be restricted to schools, but it should be enlarged to all froms of education (Trenk-Hinterberger 2015, Note 58, p. 661). The sweatshops for persons with severe disabilities contributed to the well-being of persons with impairments considerably. But these efforts were based on strategy, which excluded the handicapped population from the general workforce. An inclusive labour market is the demand on Art. 27 of the UNCRPD; this brings about to strtansform the "sweatshops for persons with severe disabilities" into a place of inclusive work.

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