RIGHTS, OBLIGATIONS AND SANCTIONS IN SOCIAL LAW

BY

LOTTA WESTERHÄLL

INTRODUCTION

The right to sickness allowance according to the General Insurance Act (AFL), ch. 3:7, and the right to social assistance under the Social Services Act (SoL), sec. 6, are two aspects of social law which are of great interest, both practically and in respect of legal theory. In legal writing and in everyday language, the availability of sickness benefits and social welfare services and benefits is referred to as rights on the part of the individual. The person concerned is entitled to help if certain conditions have been fulfilled. Society is obliged to fulfil its corresponding obligations—that is, to pay out sickness benefit and to provide appropriate social assistance. In certain cases, certain conduct is required of the individual, too. The following discussion constitutes an inquiry into the content of these rights and obligations and into the legal consequences of an individual's failure to act as required. The concepts will here be developed within the context of social law, with a view to making them useful in practice and helpful when defining the individual's position in society.

A few preliminary points regarding the concept of "right" in general will be followed by a brief review of the "right" concept as applied in administrative law. These introductory remarks should provide some basic criteria for what is generally held to constitute a "right". The "right" concept as it operates in the fields of sickness allowance and social assistance will then be investigated in some detail, as will the individual's obligations insofar as they may be related to the concept.

THE CONCEPT OF "RIGHT"—SOME GENERAL REMARKS

The general view in Scandinavian jurisprudence would seem to be that the concept of "right" lacks referential connotations but that it possesses the essential practical function, when used as a term, of providing a brief, simple characterisation of an existing legal nexus which would otherwise have to be defined by a number of factual circumstances that might call for cumbrous descriptions in individual cases.[1] Statutes which contain terms denoting rights

[1] See, for instance, Stig Strömholm, *Rätt, rättskällor och rättstillämpning* (The Law, Legal Sources, and Court Practice), Stockholm 1981, pp. 256 ff.

and obligations usually express regulations in greatly compressed form, and the concentrating function of the term "right" is its greatest merit from the point of view of legal technique. The expression "legal fact" is customarily used to denote those conditions that are contained in a regulation demanding (or prohibiting) a certain type of conduct if certain legal consequences are to ensue. The concept of "right" constitutes the "intermediary link" between legal fact(s) and legal consequence(s), entailing major advantages of economical presentation when used as a term. There is however a risk that the "concentrating effect" of the term "right" may partly conceal the actual content of the area regulated. In many cases, the various rules that express the "right" should be analysed separately: the result would be a picture of the functions of the rules that would approximate reality as closely as possible.

Further, the "right" concept is used differently in different fields of judicial language, and in some contexts it is very rare. Even where its exponent, the *term* right, is used merely as a technical aid to presentation, however, it should still be applied with discrimination and only after certain conditions, discussed below, have been met.

While the "right" concept sometimes occurs in administrative law without having been subjected to exhaustive jurisprudential analysis, various authors have proposed that certain basic conditions must be present for its use there to be warranted.[2] Thus if we wish to speak about a "right" in administrative law, that right must be carefully defined as to both content and prerequisites; it must also be enforceable, which means that the individual must have an opportunity to appeal. On occasion, a certain degree of State supervision of the agencies, etc., which actually administer, has also been called for.[3] Hence, even if the concept "right" is an empty one, the use of the term should be restricted to situations where the basic conditions are fulfilled. It is chiefly in situations of this kind that the "presentation shorthand" function of "right" is of most use.

In what follows, the question will be discussed of whether these basic conditions regarding use of the "right" concept are fulfilled in the cases of the "right to sickness benefit" and the "right to social assistance". If they are, then the regulations concerning conduct and qualifications that flesh out the concept are of interest too, and this issue is also discussed. It seems reasonable to assume that the application of the rule of law to the individual is served by clarifying the content and function of these regulations.

[2] In his book *Rätten till bistånd enligt 6§ socialtjänstlagen* (The Right to Assistance according to Sec. 6 of the Social Services Act), Älvsjö 1985, Sten Holmberg summarizes the views of these authors; see pp. 66–69.

[3] See Holmberg, *op.cit.*, pp. 70 f.

THE RIGHT TO SICKNESS BENEFIT

The three basic conditions for receiving sickness benefit are laid down in various provisions of the General Insurance Act (AFL). The central regulation in ch. 3:7 of this Act states that anyone who is *ill* and *incapable of working* is entitled to sickness benefit, and this is taken as stating the individual's right to benefit in the particular case.[4] In addition, the person must be domiciled in Sweden to be covered by the insurance (AFL, ch. 1:3) and registered with the Social Insurance Office (AFL, ch. 1:4) to qualify for the sickness benefit. Further he/she must have an income exceeding SEK 6,000 in order to qualify for sickness benefit (AFL, ch. 3:1). Together with the basic substantive conditions of illness and incapacity for work, the prerequisites in respect of domicile and income supply the basis for the "right" concept in the field of sickness benefit insurance. To be sure, the conditions "illness/sickness" and "incapacity for work" are vague and ambiguous,[5] but not so imprecise as to warrant exclusion of the term "right" in this context. Hence, the first condition may be said to have been satisfied.

The second basic condition for the term "right" to be applicable is easily established, since the possibilities of reassessment and appeal are laid down in ch. 20 of the Act. Any decision on sickness insurance may be appealed against in special insurance courts. The right of appeal to the final instance, the Supreme Insurance Court, is limited, however, as its function is mainly one of setting precedents. Its decisions are published to some extent.

The third basic condition, that regarding income—should we wish to invoke it—is satisfied, too. State supervision is a powerful factor in the social insurance system as a result of the many-faceted control and ombudsman facilities run by the National Social Insurance Board.

As suggested above, the term "right" functions as the concentration of a directive which would in this case contain the following provisions regarding qualification for sickness benefit: "to a person who is domiciled in Sweden, is registered with the Social Insurance Office, has an income qualifying for sickness benefit and is ill and incapable of work, the Social Insurance Office shall pay a monetary compensation determined according to various principles which are, in their turn, dependent on the extent of the income of the person concerned. If certain factual circumstances confirmed by medical authority have been found to prevail, the Social Insurance official/the judges at the

[4] See Rune Lavin, "Sickness Benefit Entitlement in Swedish Law", 26 *Sc.St.L.*, pp. 143 ff. (1982).

[5] See Lotta Westerhäll, *Sjukdom och arbetsoförmåga* (Sickness and Incapacity for Work), Stockholm 1983.

coincide to a great extent. Overall control is exercised through general rules, applied by public bodies to individual cases.

Social insurance and social security payments have an important effect as directives of behaviour.[11] The introduction of a continuous distribution of benefits of this type has this regulatory effect even though the chief purpose is redistribution of wealth. The effect arises not only from the very availability of help in certain situations, but exists also as a result of regulatory devices built into the rule system itself and which affect the chances of being entitled to the benefits concerned.[12] "Even if you fulfil the formal and substantive conditions for sickness benefit, you may, by acting in a certain manner, forfeit your right to any or some of the compensation".

Thus the directive in AFL, ch. 3:7, is not complete, and must be supplemented by rules such as that in AFL, ch. 20:3. This contains a contradictory instruction. Here, however, we are not concerned with establishing additional legal "entities", but with deciding whether the legally qualified person has observed certain directives. As the statutory text (ch. 3:7 combined with ch. 1:3 and 4, as well as with ch. 3:1) states that the "right" arises in consequence of the establishing of the legal "entities" referred to above, the most natural way of regarding the matter is to hold that the rule in ch. 20:3 belongs outside the "right" concept as such, and that it affects only the instruction in ch. 3:7, not the qualification rule.

This means that the insured is not entitled to sickness benefit, despite being legally *qualified* for it, if he/she has not complied with certain legal requirements. The legal consequence here entails something unfavourable for the qualified individual in that he/she loses financial compensation, and the consequence stems from the individual's undesirable behaviour. The present author considers, therefore, that this legal consequence may indeed be regarded as a *sanction*, as has been suggested in legal writing.

A sanction may thus be defined as a legal consequence prescribed in law or other statutory instrument and unilaterally determined from case to case by a public authority to the detriment of an individual, and which ensues when that individual has not observed a prescribed pattern of action. Naturally, there are various ways in which social law can be used as an instrument to influence behaviours. The content of the whole rule system itself, as indicated above, can be used to guide the behaviour of the individual in certain directions without his/her actually being ordered to comply with some pattern of action. Yet a legal consequence that can be designated as a sanction following the definition

[11] *Op.cit.*, p. 166.

[12] See, for instance, Anna Christensen, *Avstängning från arbetslöshetsersättning* (Debarment from Unemployment Benefit), Stockholm 1980. See, too, the same writer, *loc.cit.*, footnote 7 above.

above has a clear function as a regulator of behaviour. There is a difference here in relation to other rules, which cannot be called rules on sanctions, but which have a discernible regulatory function: however, this difference is one of degree rather than of kind. To refer to a rule as a sanction may be clarifying, especially for the individual since it supplies some information about the structure of the rule system and, in consequence, about the reason for the authority's having given a decision a certain content. Besides, the term "sanction" may, as indicated above, entail some technical advantages in presentation, even though it leaves entirely out of account any value-loaded components.

That differently designed rules can still provide similar regulatory effects is illustrated by comparing AFL ch. 3:17, subsec. 1(b) before 1984 and ch. 3:15, subsec. 1(e) after 1983. Until 1st January 1984, the former subsection contained the following rule:

> Sickness benefit should be discontinued or reduced to a reasonable extent if the insured *travels to another country* during his/her illness ... unless the Office has approved payment of sickness benefit during a stay in the country concerned.

For the reasons outlined above, this regulation may also be regarded as a sanction rule, and has been so regarded in legal writing and court practice. As with ch. 20:3, it is clear from the application of the law that a so-called "3:7 assessment" was often made in cases where ch. 3:17, subsec. 1(b) was felt to be pertinent, and this led to the conclusion that particularly the incapacity-for-work condition was no longer supported by proof.

This is not the place to deal with the question of whether the content of what was to be proved might possibly have changed, i.e. whether the factual constituents of the legal "entity" termed "incapacity for work" were now different from those applied when the initial "3:7 assessment" indicated that the conditions for the right to sickness benefit were present. The fact that sickness benefit was not paid in such a case is not a result of the application of some sanction rule; it is the outcome of a construction of the "ordinary" direction in ch. 3:7. Naturally, if one of the basic conditions for the right to sickness benefit has not been met, the legal consequence—payment of benefit—does not ensue. However, the sanction rule is applied when the insured, though deemed to be in a state of health entitling him/her to benefit, has failed to comply with the directions stated in the relevant legal text. The fact that no sickness benefit is paid in such a situation is a negative legal consequence, associated with the individual's non-compliance with the obligations stated above.

As a result of an amendment of the Act on General Insurance, subsec. 1(b) in ch. 3:17 was removed and ch. 3:15 was partly amended. Its subsection 1(e)

now states that sickness benefit shall not be paid for a period of time which the insured spends abroad, unless he/she works abroad as part of an activity pursued in this country; works as a sailor on board a Swedish merchant vessel, or travels abroad for the purpose of rehabilitation according to ch. 3:8, subsec. 2. In other words, the main rule is that no benefit is paid during a stay abroad. The regulation amounts to a directive to the Social Insurance Office to the effect that the Office must not pay sickness benefit in a case of this kind. This legal consequence is not dependent on whether the insured observes a certain pattern of action or not; hence the legal consequence in this case—no sickness benefit—cannot be regarded as a sanction. Instead, the various circumstances adduced in ch. 3:15 may be said to be integrated in the "right" concept itself. In addition to the prerequisites stated above, for the right to sickness benefit, the factual circumstances specified in ch. 3:15 can be held to constitute a necessary condition for that right.

It is clear from these legal regulations that a desired behaviour-influencing effect, in this case that the insured should remain in Sweden throughout his/her illness, may appear regardless of whether the rule is designed as a sanction rule directed against the individual's non-compliance or whether it constitutes a directive which the authority must take into account when certain factual situations prevail. In both cases, the legal consequence is the same: no sickness benefit is paid.

The insured person's duty to report sick and to present a medical certificate also comprises obligations which must be observed; otherwise, the possibility of receiving sickness benefit is affected. The obligation to *report sick* is described in AFL, ch. 3:10, subsec. 4, which runs as follows:

> Sickness benefit shall not be paid for any period of time prior to the case having been reported to the Social Insurance Office, unless obstacles prevented such reporting or other special reasons exist which suggest that sickness benefit should be granted.

As the quotation shows, this rule clearly directs the Social Insurance Office not to pay sickness benefit if the insured has not reported sick. In some cases, however, the Office may still pay out, e.g. if the individual was prevented from reporting or if other particular reasons favour such payment. A review of court practice would probably clarify what situations can be held to involve such obstacles or special reasons.[13] In many cases where neither obstacles nor special reasons prevailed, Social Insurance Offices/Insurance Courts have found it impossible to prove that the insured was in fact ill and/or incapable of work. Still, in quite a few cases it is evident that the insured was able to prove

[13] See Westerhäll, *op.cit.*, pp. 78 ff.

both illness and incapacity to work, regardless of the fact that the responsibility of the Office to investigate the situation had not become operative, since no report had come in. If no obstacles or special reasons were present, however, the main rule in ch. 3:10, subsec. 4, obtained, and no sickness benefit was paid. The reason for withholding payment was that the insured had not complied with the prescribed pattern of action, viz. had failed to report sick. Since no obstacles and no special reasons prevailed, the insured's failure in this respect amounts to negligence. He/she is not excused; therefore, the legal consequence, non-payment, comes into effect. As the intention is to ensure that sick people do report sick, negligent failure to do so cannot be tolerated. The rules concerning such reporting were created on the basis of the Social Insurance Office's need to be able to supervise cases of illness. Sickness has to be reported before the Office is able to institute various regulatory and follow-up measures, such as requiring a medical examination, a physician's certificate, or specialist care. Office representatives may also visit the insured at home. In addition, reporting early is important from the point of view of practical administration. Every delayed report makes for disturbances in Office routines, which leads to considerable extra work. On the other hand, the factual circumstances in cases that have been reconsidered show that the demand for prompt reporting is hardly justifiable from the point of view of rehabilitation.

There appears to be no difference between this situation and those arising when the insured has not observed the patterns of action prescribed in ch. 20:3 and the previously valid ch. 3:17, subsec. 1(b). The insured is able to prove that he/she is in a condition which renders him/her qualified for sickness benefit; however, the direction to the effect that sickness benefit should be paid—a direction expressly linked with this rule—does not apply since the obligation to report sick has not been fulfilled. The legal consequence that sickness benefit shall not be paid thus functions as a sanction.

This view is not shared by everybody, though.[14] It has been argued that in almost every field of administrative law, the individual must submit a report or make an application if he/she wishes to be considered eligible for a benefit. The rule in ch. 3:10, subsec. 4, is to be regarded as an ordinary procedural rule; and as a result of its application, a sickness-benefit proceeding is instituted at the Social Insurance Office.[15]

Obviously, reporting sick may be compared to other ways of instituting proceedings in an administrative matter, or in a court of law. From this point

[14] See Rune Lavin's review of Westerhäll, *Sjukdom och arbetsoförmåga* in *SvJT* 1984, pp. 972 ff.

[15] P. 974. "In fact, the author employs a highly artificial approach when she argues that a Social Insurance Office imposes a penalty in a case where the Office does not grant an insured person sickness benefit because he/she did not submit the prescribed report that he/she was ill."

of view, the rule is indeed a procedural one. The question is, however, whether it is an *ordinary* procedural rule. The report initiates the investigatory work in the Office, the purpose of which is to establish whether the insured is ill and incapable of work. (The three basic conditions discussed earlier are disregarded here as they should be easy to verify in most cases.) Investigation *may*—even if the responsibility of the Office does not begin until the report has been made—establish that the insured has been ill and incapable of work from a date prior to that registered by the Office, the one on which the case was reported. Consequently, illness and incapacity for work, the legal "entities" which make up the "right" concept, have been found to obtain from a certain point which precedes the reporting date. Even so, the directive to the Social Insurance Office to pay sickness benefit does not apply until the day on which the insured person reports sick. We might say that the right is conditional up to the point when the report has been made. Not to pay sickness benefit, irrespective of whether the established illness or incapacity for work actually antedates or coincides with the report, is of course a concession to the demand for efficient administration and control.[16] In many cases involving administrative law, where a report or an application is needed before someone is entitled to a benefit, it seems clear that the benefit should instead be paid from the moment when the right arises (sometimes, a retroactive time limit is stipulated). In other words, the benefit is due from the point from which the conditions for receiving it were indisputably established.[17]

In view of the above, and considering the following-up function of the "sickness report", the rule contained in ch. 3:10, subsec. 4, cannot be held to be a mere procedural rule. The following-up function of the Office, as already pointed out, emerges in AFL, ch. 20:3, as well as in the previously valid ch. 3:17, subsec. 1(b). It is obvious that both the logico-semantic and the practical function of the rule in ch. 3:10, subsec. 4, is the same as in these cases. The fact that no sickness benefit is paid in cases where the insured can be proved to have been ill and incapable of work for a period before reporting sick, though no obstacles or special reasons prevailed, is a consequence of the insured person's failure to observe the established rule regarding "sickness reporting". Against the background of the (generally accepted) definition of "sanction" supplied above, the fact that sickness benefit is not paid may be regarded as a sanction directed against the insured's conduct. The content of the obligation, and the consequences of failure to comply are unilaterally established by a public authority. Therefore, the described rule possesses direct substantive legal functions.

[16] See the Publications of the National Social Insurance Board (RFFS) 1979:16.

[17] See below on social assistance; cf. also, for instance, early retirement, child pension, disability allowance, occupational-injury benefit, maintenance advance and family allowance.

A misunderstanding would seem to be involved in the statement that the Social Insurance Office "imposes a penalty" when it does not pay sickness benefit in this case.[18] A penalty is a kind of sanction applied in penal law; it is also based on the notion of proportionality. Of course, it is impossible to imagine any kind of proportionality between the failure to report sick, or to report at the proper time, on the one hand, and the non-payment of sickness benefit on the other. The idea that "sanction" could be synonymous with "penalty" in the sense applied in penal law is erroneous. "Sanction" is a principal concept used to denote various unfavourable measures which might affect an individual in several fields of law. It is difficult to understand a line of reasoning according to which the use of such a sanction concept (in the sense described) in the situations outlined above leads to the conclusion that virtually the whole of social law, and certain other parts of administrative law as well, must be assigned to penal law.

The Insurance Office has the option of demanding a medical certificate, a possibility provided for in AFL, ch. 3:7, subsec. 3. This subsection prescribes that the Office "should, when reasons warrant such a claim, demand that an alleged reduction in the capacity for work be confirmed by a certificate issued by a physician". According to the main rule in this respect, an obligation for an insured person to supply a *medical certificate* according to this AFL regulation cannot obtain before the seventh day after the person concerned reported sick.[19]

If for some reason the insured has not supplied a medical certificate valid from the day determined by the Office, the Office may still pay sickness benefit, under two conditions: the insured must be able to show that it is *likely* that (a) he/she suffered from *illness* according to AFL, ch. 3:7, or (b) he/she has done what can *reasonably* be required in order to obtain a medical certificate.[20]

Usually, an insured person's failure to fulfil his/her duty to submit a medical certificate at the proper time will entail a loss of sickness benefit during the time not covered by a medical certificate supplied at the right moment. This legal consequence is expressed in one of two ways: either the illness/incapacity for work has not been proved, because of the unduly delayed certificate, or the

[18] See quotation above. The expression "meting out punishment" and similar terms occur in several places in the review; see pp. 974 and 977. See also Bramstång, *op.cit.*, pp. 40 f.: "*Comparisons* between penal law and administrative law (both of which, it should be noted, form part of *public law* in a wide sense) *can* and *should* be made, and quite a few *similarities*—with regard to legal consequences and effects, among other things—may be found to be present, without rendering the innocent comparatist liable to the accusation that he professes himself an adherent of an absurd view which would, in actual fact, virtually proclaim an *identification* of the legal fields concerned."

[19] The relevant directions are found in RFFS 1979:16 regarding investigation of sickness and parent's insurance cases (secs. 1 and 2). All Offices now follow this regulation and call for a medical certificate from the eighth day.

[20] RFFS 1979:16, sec. 3.

insured person was negligent with regard to submitting a medical certificate. In this context, of course, only the latter cases are of interest.

The rule on the obligation to supply a medical certificate has also been presented as "an ordinary burden-of-proof rule in the law of legal procedure, not at all as a rule of penal law".[21] The rule demands action, calling upon the insured to obtain proof of his/her being in a condition which renders him/her qualified for sickness benefit.

To qualify for sickness benefit, the insured is obliged to prove that he/she is incapable of work due to illness and is therefore refraining from working. This demand for proof does not amount to very much during the first seven days of the illness. If the insured has done what is required in the matter of reporting sick, the Office is usually satisfied with the statement on the Declaration-for-sickness-benefit form, that he/she was indeed ill and unable to work. The form prescribes that the insured shall report himself/herself fit for work again no later than seven days following the date of the sickness report. Failing this, he/she must, on the eighth day, submit a medical certificate confirming the illness and incapacity for work. Hence, the responsibility for obtaining such a certificate rests with the insured.

Thus, the main reason why the Office demands a medical certificate is that it wishes to obtain proof that the conditions regarding the right to sickness benefit are in fact fulfilled. Nobody who is not ill and unable to work shall enjoy the benefit. The physician is felt to be the best person to decide.[22] A secondary reason for demanding a medical certificate is that the insured has now been ill for so long that it seems advisable for him/her to be examined by a doctor. This will, it is suggested, promote recovery.

Now, if the insured person has failed to present a medical certificate from the eighth day of illness, and the Office on examining the case has found that the conditions "illness" and "incapacity for work" are fulfilled (unconfirmed reports are again disregarded) but the person concerned has not done what could reasonably be required in the way of obtaining a medical certificate, i.e. has been negligent, then the Office must withhold payment: the person who is, *per se*, entitled to sickness benefit has not fulfilled an obligation prescribed for him/her. The legal consequence of not paying sickness benefit is once more the unfavourable dimension, the sanction, which affects the insured as a result of that failure. In other words, the failure to produce the prescribed proof entails the non-payment of the benefit, and it does so even if the evidence can be produced in some other way. This is not the customary characteristic of a burden-of-proof rule or a rule of evidence.[22a]

[21] *SvJT* 1984, pp. 972 f.
[22] See chs. 5–7 in Westerhäll, *op.cit.*
[22a] See now RFFS 1988:2 as of 880422.

Not all those obligations which the insured person must observe during a case of illness are described in legal or other statutory texts; some emerge indirectly on the basis of the incapacity-for-work concept and its practical application. The insured person is obliged to *refrain from work*, and from certain other activities, in the course of an illness. Gainful employment is of special importance in this respect.

The obligation to refrain from working is associated with another obligation which to some extent forms its background, namely the obligation *not to act in a manner which adversely affects recovery*. As stated above, the insured must not grossly neglect his/her health.[23] There is, however, no rule that expressly forbids common or simple negligence in this respect, even though such a rule is built into the concept of "incapacity for work" and its application.

The sickness-benefit system was designed according to the principle of compensation for loss of income. There is no rule which expressly *forbids* the insured *to receive financial compensation* for work he/she has performed while being ill. In some cases, the performance of work for remuneration may indicate that the insured was not incapable of work after all. In quite a few cases, however, withholding of sickness benefit due to work for remuneration has less to do with incapacity for work in the customary sense, being more closely associated with the loss-of-income principle. A review of case law shows that the Office and the courts express the issue as one of whether or not an incapacity for work obtained.[24] Actually, though, it seems to be a matter of legally scrutinizing the insured's duty to refrain from work and other activities while being ill. Usually, the assessment is purely a matter of insurance law and has little to do with medical considerations.

Is a decision that sickness benefit shall not be paid, or shall be withheld, in a case where the insured has clearly been working, merely a consequence of the fact that such behaviour indicates that the alleged incapacity did not in fact prevail, or has ceased, or could a sanction element be inherent in the decision? If the latter, the sanction would be a result of the insured person's having broken the rule against working while reported sick.

As there is no express regulation concerning the obligation of an insured person in this respect, the present author does not want to refer to the legal consequence—non-payment or withholding of benefit—as a sanction caused by the failure of the insured to comply with the obligation. Court practice thus shows that the question is whether or not sufficient proof of incapacity for work has been presented. It is evident, however, that several cases involve a change in the actual *content* of the term "incapacity for work" when the insured has

[23] Ch. 20:3, subsec. 1(c).
[24] See Westerhäll, *op.cit.*

taken part in various kinds of activity during a reported illness. The term has two meanings: factual incapacity and prophylactic incapacity: either it is in fact impossible for someone to work, or it is advisable not to work because not working will promote recovery.[25] Prophylactic incapacity for work used to be the condition for which proof was required; in cases of the kind referred to here, the demand is for something that might be regarded as factual incapacity for work. Whether it is possible to see a sanction effect operating here or not cannot be decided on the basis of the conclusions drawn from the present author's investigation of court practice.[26]

The views presented here have been criticized. The gist of the criticism is that the problem is merely one of evidence.

> The reason why a Social Insurance Office is interested in the degree of activity of the person who has reported sick is that the main rule regarding the right to sickness benefit prescribes that the illness should reduce the insured's capacity for work by at least half (AFL, ch. 3:7). Naturally, it is incumbent on the Office to subject the question whether the incapacity-for-work condition is fulfilled in every particular case to close scrutiny—it is in fact compelled to do so. The Office may base its scrutiny on medical statements, but it may use other materials too, such as information on what the insured person has in fact been able to perform during his/her illness. If, in this context, the insured acts in a certain manner, he will himself be the cause of the diminution, or the entire loss, of the evidential value of a medical certificate. If the insured loses his right to compensation, this happens as a result of his no longer fulfilling the conditions set forth in the law with regard to receiving sickness benefit.[27]

In many cases, of course, this description is an adequate representation of the facts. Still, on the basis of the present author's investigation of the content of the incapacity-for-work concept applied in very many cases, it is submitted that several concern an altered content of what is to be proved rather than an altered position with regard to the evidence. Strict demands for *factual* incapacity for work obtain concerning certain groups that are difficult to supervise—such as houseworking spouses, self-employed people, and also foster parents in respect of the care of their foster children. Here, the incapacity-for-work concept is related to the difficulty of exercising control, making sure that these insured persons do not perform their customary duties while reportedly sick. The main principle is that the insured shall refrain from that work which forms the basis for his/her sickness benefit. The difference between houseworking

[25] On the varying content of the incapacity-for-work concept, see Westerhäll, *op.cit.*, pp. 24, 133 ff., 215 ff. See, too, Rune Lavin in *Tillämpnings- och tolkningsfrågor inom socialförsäkringsrätten, Juridiska Föreningens i Lund Skriftserie* (Questions concerning Application and Interpretation in Social-insurance Law, Studies of the Law Society of Lund), Lund 1986.

[26] See Westerhäll, *op.cit.*, pp. 152 f.

[27] *SvJT* 1984, p. 976.

spouses and other insured persons when it comes to assessing the incapacity for work is an expression of that main principle. The question whether the housework done by an insured person who is gainfully employed affects his/her health in any way is not asked at all.

THE RIGHT TO SOCIAL ASSISTANCE

The right to social assistance is laid down in the Social Services Act, SoL, sec. 6. The pertinent rule runs as follows:

> The individual is entitled to assistance from the Social Welfare Committee for his upkeep and other costs of living, if his needs cannot be satisfied in any other way.—The assistance shall afford the individual a reasonable standard of living. Also, the assistance shall be designed in such a way that the individual's ability to lead an independent life is strengthened.

An attempt will now be made to answer the question of whether it is appropriate to refer to the individual's possibility of receiving social assistance as a "right" in the sense and with the function established above. The prerequisite warranting the legal use of the "right" concept is that the content and conditions of the relevant right shall be established under law. The more precisely formulated the statutory text is with regard to content, and to the conditions on which the individual is to be eligible for benefits granted by an authority, the easier it will be for the authority to make a thorough and balanced assessment of the case. Such precision also helps the individual to anticipate the decision of the authority with reasonable correctness, as well as to assess its legitimacy and appropriateness afterwards.[28] This calls for an analysis of the prerequisites that make up the section.[29]

The prerequisites in sec. 6 are remarkably vague, and the Swedish Supreme Administrative Court has so far not introduced any limiting stipulations in the very wide-ranging application permitted by the Act. This means that the individual's claims for the application of the rule of law, in terms of being able to anticipate and exercise control, are far from satisfied. Judicial practice also reveals that the claim for justice in the sense that equal matters should be treated equally is not maintained in several respects. There are significant differences between municipalities in vital areas of responsibility within the social assistance sector, for instance, in day care for children, care of the

[28] See Holmberg, *op.cit.*, p. 70. See also Bramstång, *op.cit.*, pp. 80–87.

[29] The reader is referred to Lotta Westerhäll, "SoL 6 §—ett verk med eller utan ram?" (The Implementation of Section 6 of the Social Services Act) for a review of its stipulations regarding the responsibility of the municipality where the individual is staying, a reasonable standard of living, and the content of the assistance.

elderly, and transport services for disabled persons. The right to assistance, which should (in theory) comprise most of the services offered by municipal social services, is thus made up of different components, and the actual performance differs from municipality to municipality.

Thus, it does not appear self-evident that the right to assistance should be regarded as a "right" in the sense described above. The Social Welfare Committee is obliged to grant a needy person the social assistance to which he/she is entitled, if certain legal "entities" are present—but the contents of these are so diffuse, and so ambiguous, that the connecting function of the "right" term seems of limited practical value.

Still, in the opinion of the present author the use of the "right" concept is justified in this context. The reason for this lies in the practice of the Supreme Administrative Court. While the Court has not introduced any stipulations that constitute limitations in the proper sense of the word, it has contributed a certain degree of precision to those prerequisites that form part of the legal section. It is clear from several decisions that the municipality in which a person is currently staying[30] really does have the ultimate responsibility concerning his/her right to assistance, even if the stay is only temporary. The individual should not end up in a no-man's-land between the areas of responsibility of different principals. The vague condition regarding a reasonable standard if living,[31] a concept heavily laden with municipal-political interests, has also been defined by some clarifying decisions from the Supreme Administrative Court, which have already brought about a certain levelling effect on the uneven social assistance offered by various municipalities. The Court has found that the field of application is very extensive as far as administrative appeals are concerned;[32] consequently, the social assistance field (and the actual content of social assistance) has become more precise and more concrete. The individual has a wide-ranging "right" to social assistance, not merely a general claim for social services. The Supreme Administrative Court has also announced decisions which elucidate the prerequisite regarding the satisfying of a person's needs in some other way.[33]

In general, the Supreme Administrative Court seems to hold the view that an extensive interpretation of sec. 6, rather than a limiting one, is the most appropriate when dealing with administrative action of the kind that may favour an individual. As emphasized in legal writing, the principle of objectivity[34] deserves particular attention in such cases: citizens should enjoy a certain

[30] RÅ 84 2:32, 84 2:33, 84 2:63.
[31] RÅ 84 2:13; see also 83 2:59, 85 2:6, 85 2:13.
[32] RÅ 83 2:82, 84 2:29.
[33] RÅ 84 2:27, 84 2:34, 84 2:39, 84 2:53, 85 2:1, 85 2:14, 85 2:22.
[34] RF 1:9.

generosity according to the conditions expressed in the Constitution, and on equal terms.[35]

Although the application of sec. 6 by the Supreme Administrative Court has not entailed the creation of limiting prerequisites in a literal sense, as was anticipated in the *travaux préparatoires* to the Act, it seems that the legal "entities" have become precise enough for the use of the "right" term, albeit with some hesitation, to be warranted in this context.

The second prerequisite usually quoted as a condition that must be fulfilled if the use of the term "right" is to be justified, is the right of appeal. It is easy to establish that this demand has been met.[36]

A third prerequisite which has been said to reinforce the "right" concept is State supervision of those bodies which exercise authority. The National Board of Health and Welfare conducts such supervision at several levels, for instance by means of its General Advice. The presence of this requisite is also easy to verify.

The "right" to assistance can thus be designated as a *right* associated with the corresponding *obligation* on the part of the administrating bodies to pay the social assistance, if money, or to make sure that the individual enjoys the assistance in some other way—such as transport for the disabled or treatment in a nursing home.

Now, the question is whether this right is conditional in the sense that the individual has to comply with certain obligations in order to be in a position to enjoy it. It is clear from sec. 1 of the Social Services Act that social assistance should be based on respect for the independence and integrity of the individual. Problems may arise here due to the difficulty of achieving a balanced relationship between the individual's own responsibility for his/her conduct and social situation, on the one hand, and the right to assistance according to sec. 6 of the Act on the other. Sec. 1 goes on to state that "Social assistance shall, while taking the individual's responsibility for his/her social situation and that of others into account, be directed towards freeing and developing the capabilities of individuals and groups". Consequently, social assistance is not intended to relieve the individual of his/her responsibility, nor should it be regarded as unconditional. In the General Advice issued by the National Board of Health and Welfare, 1981:1,[37] one line of reasoning concerns any person who "refuses to ensure that he receives the necessary care, to assume responsibility for his own situation by applying for work, or to accept that assistance can be granted only if he takes certain action too. Such a person is

[35] Bramstång, *op.cit.*, p. 41.

[36] However, double appeal routes, municipal and administrative, may entail disadvantages, both for the individual and for the administration which handles appeals.

[37] P. 14.

not usually entitled to assistance according to sec. 6 of the Act, since his needs may be met by his obtaining proper care, applying for and securing employment, or taking the proposed action. However, the Social Welfare Committee must make sure that the individual does not suffer want even in a situation of this kind."

Have these Board of Health and Welfare guidelines in fact been followed by the adjudicating bodies?

In this respect, of course, as in others, the conditions for receiving the assistance must be proved to be fulfilled. As a result, assistance cannot usually be granted if the individual refuses to agree to, or cooperate in, a necessary investigation.[38] In such a case, the necessary conditions for the right to assistance are considered not to have been shown to exist.

The Administrative Court of Appeal has not always been prepared to allow reasons of rehabilitation to compensate for deficiencies in the responsibility of a person who applies for assistance in coping with his/her own situation. One example is a decision of the Administrative Court of Appeal in Sundsvall,[39] where the following argumentation was presented:

> Assistance shall be provided in a manner conducive to strenghtening the ability of the individual to lead an independent life without the need of continued assistance. In this context, the social assistance administration must be able to make demands upon the individual, insisting that he assume responsibility for his own situtation. According to the written evidence in the case, X terminated his employment on several occasions. Furthermore, he has ceased following a Labour Market Training programme which he had begun, and he has lost the right to unemployment benefit due to insufficient contacts with the Labour Exchange. It should be noted, too, that X was granted financial aid amounting to SEK 8,566 in June, 1981, to pay outstanding rent.
>
> From what has thus transpired in the case, it would seem apparent that the mere settling of X's rent debt is not sufficient to ensure that he will be able to maintain himself in future. In addition, it is mandatory that he assume responsibility for his situation, attempting to secure employment according to the best of his ability. In view of this, the Social Welfare Committee cannot be compelled to pay further assistance to X.

As we have seen, assistance should, in principle, be payable regardless of the reason why the need for assistance arose; at the same time, the responsibility of the individual for his situation was stressed. In this case, the Court chose to adopt a restrictive attitude, asserting the demand for responsibility on the part of the applicant, despite a factual need which was to all appearances uncontested.

[38] See, for instance, KR—the Administrative Court of Appeal—in Stockholm, 820811, Case no. 5183–82.

[39] 821202. Case no. 3186–82.

In a decision of November 22, 1983,[40] the Supreme Administrative Court established that the Social Welfare Committee was not entitled to refuse a person social security benefit solely for the reason that the applicant had not accepted the rehabilitation measures offered by the social assistance administration, nor complied with the regulations pertaining to such a measure.[41]

The Supreme Administrative Court made the following points, among others:

> The Social Assistance Act does not contain any rules regarding the conditions for refusing assistance. However, it is clear from the *travaux préparatoires* that an applicant who refuses to accept an employment proposed for him/her, for no valid reason, may be denied assistance according to sec. 6 of the Act. On the other hand, however, there is no support for debarring someone from the right to social assistance merely because he has not accepted rehabilitation measures offered by the social assistance administration, measures of a kind with which financial support shall, according to the Act, be combined if necessary, or because he has not complied with regulations pertaining to such a measure.
>
> The District Social Welfare Committee was hence not entitled to refuse X social security benefit because he had been late for a group meeting for unemployed people, which he had to attend according to rehabilitation directions made out for him by the Committee with his consent.

In other words, the Social Welfare Committee must not pose any conditions to the effect that the individual is obliged to accept rehabilitation measures offered, or to adhere to special regulations, in order to receive social security benefit, if he/she is in other respects entitled to such benefit as assistance according to sec. 6 of the Social Assistance Act. Consequently, the individual is able to decline any rehabilitation programme offered while remaining entitled to social security benefit.[42]

It is clear from this case that the investigation made as a result of an application for social security benefit shall be limited to those circumstances that are of importance to the testing of the pertinent need. Any demands made must hence be connected with maintenance, for instance the demand that the relevant person actively seek employment (see below). The individual should not have to agree to measures that are not directly associated with his/her application for assistance. The Social Welfare Committee is thus not allowed to direct the individual wishing to receive social security benefit to attend group meetings, to submit urine samples for checking drug abuse, to undergo

[40] RÅ 83 2:70.

[41] See *Socialstyrelsens Meddelandeblad* (Memoranda issued by the National Board of Health and Welfare) 1984 no. 9.

[42] See also the statement from the Parliamentary Ombudsman in *JO:s ämbetsberättelse* (the Official Administrative Report of the Parliamentary Ombudsman), 1982–1983, on participation in group meetings and video recordings from such group meetings.

Antabuse treatment, etc. The court case clearly states that using social security benefits as a means of coercion, pressing the individual to undergo treatment, is against the fundamental principle of social assistance work. The most common situation where one might expect social security to be employed as a means of bringing pressure to bear on somebody in order to initiate treatment, is the one that arises when the individual is involved in alcohol and/or drug abuse and is therefore unable to cope with his/her working life while still resisting rehabilitation measures. The Board of Health and Welfare makes the following observation in its General Advice:[43]

> People with problems involving drug/alcohol abuse are not always willing to cooperate in a scheme of treatment, and they will sometimes fail to comply with agreements regarding treatment; this is part of the entire issue. In these cases, the social assistance administration should attempt to increase the person's willingness to undergo treatment. Also, of course, the administration should try to find out whether the planned measures can be better adapted to the needs of the individual. It must be considered reasonable for the administration to safeguard the individual abuser's upkeep by means of social security benefits while these efforts are in progress, if other relevant conditions prevail.

Furthermore, it is said that the Social Services Act contains no support for debarring a person from the right to social security benefits for a period, or for debarring someone from the possibility of visiting the municipal Social Services Office. The Parliamentary Ombudsman for Administration has stated that a decision to debar is definitely against the law.[44]

The lines of reasoning outlined above are reflected in, among other things, case RÅ 84 2:86. In this court case, the Supreme Administrative Court found that a drug addict was entitled to financial assistance although he had not adhered to his treatment plan. In another case, RÅ 84 2:95, the Court found that the responsibility of a municipality where the person concerned was currently staying was unrestricted with regard to the care of an alcohol abuser, despite the fact that care supplied by a home for inebriates run by another municipality, had been interrupted shortly before the person's arrival in the second municipality.[45]

It does seem to be obvious, though, both from the *travaux préparatoires* and from court practice, that a person who is able to work is also obliged to apply

[43] 1985:1, p. 66.

[44] See *Socialstyrelsens Meddelandeblad* 1983 no. 24, the Parliamentary Ombudsman for Administration, April 15, 1983, registration no. 1668—1982.

[45] See also RÅ 84:59, where a person was held to be entitled to assistance, according to sec. 6, for necessary dental services—despite the fact that she had, after applying for assistance, already been provided with adequate funds to pay for the treatment, but had used those funds for other purposes before the Social Welfare Committee reached a decision in the case; cf. RÅ 84 Ab 94.

for work. The question whether the applicant for social assistance has evaded his/her obligation to seek work has been assessed in a number of cases.

In a decision of the Administrative Court of Appeal in Jönköping,[46] the Court found that the applicant for assistance had evinced a lack of responsibility in the matter of being at the disposal of the labour market. The right to assistance which was, in itself, considered to be present was disqualified due to the applicant's failure to cooperate with the authorities.

In another decision,[47] the Administrative Court of Appeal in Sundsvall ruled that an applicant was not entitled to financial assistance on these grounds:

> In this case, the presence of a need of financial assistance has not been called in question. One condition that must be fulfilled for a person to be entitled to assistance is that his needs cannot be satisfied in any other way. This means that the individual cannot be held to be entitled to financial support if he does not attempt to contribute to his upkeep to the best of his ability. A person who is able to work must also be compelled to try to obtain work. Whether he is in fact successful in this respect is another matter. If he does not apply for employment, he does not fulfil the conditions for financial assistance. It is clear from the investigation in the case that X applied for work in Kiruna, but that she declined to seek employment in the rest of the country. She is not therefore entitled to the assistance she has applied for.[48]

RÅ 84 2:92 clarifies the extent to which an applicant for assistance must be actively seeking employment. Financial assistance according to sec. 6 can be refused when the applicant has failed to seek employment in the prescribed manner. The following points, among others, are made in the grounds for the court decision:

> It is clear from the *travaux préparatoires* to the Social Services Act that an applicant for assistance who refuses, for no valid reason, to accept the employment proposed for him may be denied assistance according to sec. 6 of the Act. Birgitta X has not shown that she had any valid reason not to apply for work according to the directions of the Committee. The decision made by the Committee to refuse her the means to pay her rent must be considered justified. A payment of the outstanding rent in this case must be assigned to such clearing of debts as belongs outside the framework of social assistance, unless Birgitta X is placed in a situation of acute hardship if no assistance is paid. The pertinent written evidence does not offer any grounds for assuming that this has been the case.

This court case shows that the Social Welfare Committee cannot make such claims on the individual that it thereby evades the ultimate responsibility of the municipality according to sec. 3. A person whose situation amounts to a

[46] 830602, Case no. 286–83.
[47] 821025, Case no. 2717–82.
[48] See also KR—the Administrative Court of Appeal—in Stockholm, 831205, Case no. 5961–1983, which was commented on in Westerhäll, *op.cit.* footnote 29 above.

downright emergency is always entitled to assistance for his/her upkeep and other costs of living, since he/she is not "able" to supply his/her needs himself/herself. If, however, it is felt that the applicant is "able" to satisfy his/her needs himself/herself, the application is to be refused.[49] If a person is judged able to satisfy his/her needs in some other way but subsequently turns out not to be so, there are grounds for reconsidering a previous refusal. If it is felt that somebody should actually be able to take care of himself/herself, but the Social Welfare Committee suspects that he/she will not be able to do so after all, the Committee must remain in touch with the person concerned and offer help if it proves necessary. Before the Committee reaches a decision, it is obliged to make quite clear to the individual what is required in terms of his/her own cooperation. "A refusal to grant an application on the grounds of unfulfilled demands must on no account be worded in a manner which could lead to its being regarded as a retaliatory measure."[50]

As the preceding pages have shown, the issue of the individual's obligation to be at the disposal of the labour market is bound up with the prerequisite that assistance should only be granted if the need is not satisfied in any other way. The connection between the obligation and the prerequisite has been particularly obvious in decisions where the individual has not declared himself/herself willing to seek employment and to accept an offer of day care for children. The decision of the Administrative Court of Appeal in Stockholm[51] concerned a woman who was offered assistance in the form of child care. This was intended to give her a chance to contribute to the family's upkeep through her own gainful employment. It had not been claimed that the children would not be able to cope with being cared for in a nursery home or at a youth recreation centre. The woman had not been applying for work at the Labour Exchange or anywhere else. Neither the County Administrative Court nor the Administrative Court of Appeal found her entitled to assistance, since the needs of the family could be met in some other way.

By way of recapitulation, it may be stated that the right to assistance is virtually unconditional. Even if the responsibility of the individual for his/her situation is stressed, there is a still greater emphasis on voluntariness. There are no coercive elements in the ideology of assistance which forms the background of sec. 6. Nor does the practice of the Supreme Administrative Court seem to have created obligations for the individual the neglect of which entails a loss of the right to assistance where the conditions for assistance are in fact fulfilled. However, several Administrative Court of Appeal decisions have

[49] See, for instance, KR in Gothenburg, 830704, Case no. 1838–83.
[50] *Socialstyrelsens Allmänna råd* (General Advice of the National Board of Health and Welfare), 1985:1, p. 67.
[51] 831207, Case no. 6734–83.

shown that there is a desire to restrict the wide-ranging right to assistance to situations where the responsibility of the individual was evinced by his/her adhering to those duties which the Social Welfare Committee had imposed on him/her. In these cases, the legal conditions for the right to assistance had already been found to be present.

The only crucial obligation in the Supreme Administrative Court is the obligation to place oneself at the disposal of the labour market. This obligation was stipulated during the *travaux préparatoires*; but at that point it was more of a component in the prerequisite "the satisfaction of a need in some other way". Unless the individual seeks employment actively, and is at the disposal of the labour market, there can be no determining whether he/she is in fact able to obtain employment or not. Thus it has not been confirmed that the need cannot be satisfied by means of the person's own work. If, however, it is proved that the person concerned *cannot* obtain work, and if the other conditions for the right to assistance have been fulfilled, then the need cannot be satisfied in any other way; assistance shall therefore be paid.[52]

CONCLUSION

A comparison between the right to social assistance and the right to sickness benefit reveals several similarities based on the fact that both can be designated as rights for the individual, connected with corresponding obligations on the part of the authority. However, there are differences, too. Compared to the "right" concept embodied in sec. 6 of the Social Services Act, those legal "entities" which constitute the right to sickness benefit are fairly precise, with the exception of the concept "incapacity for work". Furthermore, sickness benefit insurance contains several directions aimed at the individual, directions which must be obeyed or the individual will not receive compensation, even if the "right" does in fact exist. In the field of social assistance, application for assistance is not associated with any obligations which would make the right to benefits a conditional one if the individual had been "careless" in making his/her application. Nor are there any obligations connected with the individual's production of evidence showing that the prerequisites in respect of the right to assistance are fulfilled—that is to say, no obligations entailing the loss of the right to assistance if the individual does not submit a certain kind of evidence within a stipulated period of time, even if he/she is able to submit confirmation in some other way. No obligation amounting to a duty on the part of the individual exists to obtain the consent of the Social Welfare

[52] Cf. the KR of Jönköping, 860825, Case no. 2704–1986.