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SOCIAL SECURITY AS A PUBLIC INTEREST

**A multidisciplinary inquiry into the foundations of
 the regulatory welfare state**

edited by:
 Gijsbert Vonk
 &
 Albertjan Tollenaar

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RESEARCH PLAN AND CONCLUSIONS

Gijsbert Vonk & Albertjan Tollenaar

1 Background and purpose of this study

This book is written as a contribution to the Groningen research programme ‘public governance and the welfare state’. This six year programme, accommodating two PhD and two post-doctoral researchers, aims at gaining a deeper understanding of the role of the state in privatized social security programmes. In the Netherlands this topic has attracted much attention, ever since successive governments shifted the governance of social security from the public to the private domain, especially by strengthening the responsibility of the individual employers and allowing a larger role for private actors, such as insurance companies and private re-integration services. This shift of governance has mostly affected the areas of health care, sickness and invalidity insurance and re-integration services.

Looking closer at the various measures that were introduced in the Netherlands, it appears that privatisation is never fully fletched. Government maintains a firm grip on privatized agencies, using various instruments such as legislation, supervision, contract management, programme evaluation, etc. This form of public control over private social security schemes is sometimes referred to as the ‘regulatory welfare state’. The central question of our research programme is to what extent the regulatory framework (in the wide sense of the word) contributes towards social security as a public interest.

While the project deals with the functioning of various regulatory instruments in social security, it also touches upon the underlying question of defining the public interest of social security itself. Why should the government want to maintain a grip on privatized social security schemes in the first place and what elements of these schemes should be made subject to government control?

The latter question appears to be a hard one to tackle. Not only is the subject of public interest of social security likely to touch upon political and ideological preferences of the individual, but more importantly from a point of view of academic discourse, it is perceived very differently by the various disciplines. Economists tend to approach it from the angle of market failure theory. In jargon: when transactions lead to negative external effects (such as free rider behaviour, cherry picking, adverse selection, etc.) the state must step in to regulate the problem. Social scientists are equally interested in the role of the state in the provision of welfare, but their understanding of this subject and the questions they raise may be very different (also amongst themselves, depending on specific background or interest: political science, sociology, anthropology, etc). Historians will point out that the present day public programmes have private roots and that the contemporary leaning towards some privatization is only a relative change when seen from the perspective of the long and rich history of the welfare states. Lawyers (by the very nature of their subject) and also some philosophers (in their quest

for understanding the meaning of justice) employ a normative approach when defining the role of the state in social security.

The confusion is exacerbated by the fact that each of the disciplines makes use of its own conceptual framework. Similar terms may have different meanings. The Babylonian misunderstanding which surround our subject, have led us to the conviction that it is dangerous to mix the various approaches. Better to respect the peculiarities and methods pertaining to each of the academic disciplines. Perhaps at later stages, it is possible to come to some overarching analysis as to why various disciplines come to different (or preferably similar!) outcomes, but first we should gain a deeper understanding of the way the disciplines approach the subject of social security as a public interest. The purpose of this study is to obtain such understanding.

2 Central research questions and composition of this book

The study was set up almost by means of a scientific experiment. Four disciplines have been selected to offer contributions: economy, public administration (being in itself an amalgam of various social sciences), law and philosophy.

The reason for this selection is that in our previous discussion the first three disciplines seemed to have strong views on the methods of identifying public interests. Philosophy was added at a later stage in order to obtain a better insight in the background of different approaches to the public interest.

Part A of the book is entitled ‘Social security as a public interest’. We confronted four authors, each from a different discipline, with a uniform instruction, based upon one simple question (although, admittedly, containing two elements): *is social security considered to be a public interest and how does the answer to this question reflect on the role of the state in social security?*

Part B is entitled ‘The instrumentalisation of the public interest: towards a regulatory welfare state’. A second group of writers was recruited to reflect upon the question: *how does your discipline perceive the instrumentalisation of the public interest in social security?*

Although at some stages it was very tempting to give further working definitions we refrained from doing so, as we were primarily interested in learning from the ‘mental framework’ of the authors themselves. It was assumed that the author’s own approach would betray the pre-occupations which are typical for the disciplines involved. In this way the experiment would yield the purest results.

3 A shared framework

3.1 Social security as a public interest: a tautology?

Social security is a collective affair. It cannot be achieved alone. If someone decides to save up money for his old age that is all very well for him, but it is not social security. Social security invariably presupposes an element of sharing and solidarity. This being the case, one can wonder whether raising the question of the public interest is not a superfluous exercise. Is it not so per definition?

We are aware of this dilemma. It is for this reason that the book is entitled ‘social security as a public interest’ and not ‘the public interests in social security’, or something along those lines. Yet it must be borne in mind that the very fact that social security is a collective affair, does not mean that we agree upon the interests that it serves. Indeed, Brinkman’s philosophical contribution to this volume provides us with an impressive testimony of the differences of opinions that exist in this regard. Furthermore, one must take into account that disciplines provide different explanations as to why social security as a collective instrument is necessary. So even when the raising of the question of social security as a public interest is an expression of tautology, it is still an interesting one.

The tautology problem lingers on when we have to define the concept of social security used in this book. Very often reference is made to the definition employed in major international instruments, such as ILO-Convention no. 102 and EC regulation no. 1408/71. This definition refers to a system of income protection related to number specific social risks, such as unemployment, sickness, invalidity, old age, etc. While it is also possible for us to fall back upon this definition, there is one element that requires extra attention. The concept of social security is often identified with public governance in the formal sense of the word. Thus, for example, ILO-Convention no. 102 and EC regulation no. 1408/71 exclude contractual social security arrangements from their material scope of application.¹ If we take a similar stance, raising the question of the public interest in social security is not possible as there would simply be no social security outside the public domain.

There are two major problems with this public law bias of the concept of social security *stricto sensu*. In the first place, it excludes non-governmental schemes, private and occupational, that contribute equally to the realization of the objectives of social security. In the second place, it does not take into account the diversity of the role of the state vis-à-vis social security at large. In reality the social security systems of most countries reflect a mix of public, collective, or private approaches. These approaches may exist side by side, or layer upon layer, or may even be mixed within single schemes; sometimes public schemes allow for private elements (e.g. opt outs, private administration), while private schemes are often publicly regulated and supervised. The role of the state in relation to social security varies from direct provider or regulator to mere facilitator and there exists an array of instruments in support of these roles: legislation, administration, supervision, contract management, fiscal steering mechanisms, benchmarking, public exposure, etc. The foregoing also infers that privatization of social

¹ Unless included by separate decision (art. 1, sub g Regulation (EEC) nr. 1408/71) or supervised by public authorities and jointly administered by employers and workers (art. 6 ILO-Convention nr. 102).

security is not necessarily as extreme as the term suggests; it may merely involve a shift in governance (more private and less public) or even less than that: just a different form of public governance. Indeed it is the awareness of the alternative forms of government intervention that can be used that gives rise to the concept of a 'regulatory welfare state', a concept that is increasingly used to denote mixed private public approaches in social security.

So, for the purposes of this study we cannot restrict ourselves to public social security schemes in the formal legal sense of the word. All systems providing protection against the internationally recognized social risks must be taken into account, regardless of whether these are based upon formal state legislation, collective agreements or any other form of self-regulation or even individual contracts. Thereby, we remain conscious of the fact that also schemes which are formally covered by private law may in fact come under some form of public governance. In that sense it is not so much the state responsibility which is challenged in this book, but much rather the public-private dichotomy.

3.2 Chosen abstraction

The general nature of this study also infers that social security is treated as a monolith. In reality social security is not. There are different systems for many different risks. How to regulate the public interest probably depends very much on the system involved. For example, a private health care system gives rise to different threats to the public interest than in the case of insurance against occupational injuries (the latter risk being primarily a employer's liability) In the same tone: it makes quite a difference whether we speak of basic minimum subsistence schemes or of extra-minimal benefit schemes (the former will invariably weigh heavier on the responsibility of the state than the latter). This book merely contains a preliminary theoretical reconnaissance. Further differentiation as to the risks or systems involved was not possible.

3.3 Social security versus social welfare

This study sometimes refers to the concept social welfare rather social security. The latter term is wider, in the sense that it refers not only to the provision of income security in case of poverty or certain risks, such as unemployment and old age, but to the whole spectrum of government action intended to make sure that citizens meet their basic needs, such as education, housing and health. Also 'welfare' does not only refer to cash benefits schemes, but also to various types of services and in-kind programmes which are sometimes considered to fall outside the social security domain, such as probation and parole, child protection services, socialization services, etc.² The core object of this study is social security. Nonetheless, the wider term social welfare is also used. This can be explained by the fact that very often certain propositions are not only applicable to social security, but to the welfare state as a whole.

² For the meaning of the term social welfare, see Popple & Leighninger 1993.

3.4 Nature and ambit of the study

While the book has been written by Dutch authors (in fact with one exception all authors are or were employed at the University of Groningen), it is not a book about the Netherlands social security system. We asked the authors to take into account international literature and to take their examples not only from the Netherlands but also from other countries.³

The general nature of this study infers that we refrained from analysing the situation from the perspective of one country or a particular legal, political or economic system. Thus, for example, no specific attention has been paid to the framework of the European Union. This does not mean to say, of course, that some writers do not incidentally refer to some countries or to the EU by means of single reference.

4 Short summary of the contributions

On the basis of these preliminary remarks the contributions to our study can be compared. In this paragraph we aim to summarize the individual chapters, providing an opportunity to make comparisons. The conclusions will be drawn in the next paragraph.

4.1 Part A: Social security as a public interest

Economy

The first chapter, written by Andries Nentjes and Edwin Woerdman, immediately throws us of balance. Our starting point was that privatization raises the question of safeguarding the public interest. However, the writers assume the reverse. Privatization measures are introduced in the pursuit of the public interest.

According to the authors, economics defines the public interest as maximizing the benefits of economic transactions for the society. This definition is (still) in line with the old utilitarian maxim according to which societies should aim at the greatest happiness for the largest majority, but it can also be formulated in more modern terms, such as transitions between work and care or transitions on the labour market (changing jobs). The next observation is that the 'mixed economy' is based upon the tacit assumption that the free market serves the public interest the best, as this leads to an optimal allocation of resources. Therefore, there is only a need for the government to step in when markets fail because of the occurrence of negative external effects, such as cherry picking, creaming, free rides behaviour, etc.

The rise of the public social security system can to a large degree be explained with reference to market failure theory. If vertical solidarity was to be left to charitable institutions, the system would be underfunded. Free rider behaviour would induce many to remain idle while only some contribute. The case is somewhat different for horizontal solidarity. Here the authors assume that the masses were too poor to pay private insurance contributions. But they

³ To safeguard the international perspective the chapters of the book have been scrutinized during an international conference which will be held in Groningen on the 17th November 2009. In this way we could collect valuable comments from academics coming from other countries.

allege that there were also paternalistic motives involved in introducing mandatory social insurance.

The authors then move on setting out the drawbacks of the public system. Economic science is not only interested in market failure, but also in public sector failure. This comes under the umbrella of other terms, such as overproduction, overconsumption, x-inefficiency and lack of choice. In social security these advantages accumulated in benefit dependency, a spectre which continues to haunt public social security systems to date.

When the sum of advantages of a public system is outweighed by the disadvantages a partial privatization is required, as this will give room to behavioural incentives which increase efficiency and stimulate individual responsibility. In all, not only the rise of the public social security system but also the (re)introduction of private elements follows the economic rationale of the public interest

Public administration

Mirjam Plantinga refers to the definition of the public interest used by Bozeman (2007, p. 12) as outcomes best serving the long-run survival and well-being of a social collective construed as a 'public'. This definition would coincide with the way sociologists tend to perceive social security, i.e. as something which is instrumental to the well-being of the society as whole, either formulated negatively (e.g. avoiding social disorder)⁴ or positively (e.g. in terms of social cohesion).⁵ Nonetheless, Plantinga observes that in social sciences a unifying definition of the public interest does not exist. She is therefore more interested in contemporary methods of identifying public values. Underlying values of our system can be traced by studying various sources such as constitutional texts, court cases, political debates, journal articles etc. If systems no longer uphold underlying values, then that system can be said to have failed. This concept of public value failure is clearly different from the economic concept of market value failure.

Is social security a public value? Clearly so. Again and again research provides evidence for broad underlying support for the welfare, particularly vis-à-vis the elderly, the handicapped and children. However, when dealing with support systems for the poor and the unemployed Plantinga points out an interesting anomaly. In countries with weak social security systems, public support for these systems is low. In more developed systems, this is less so. Citizens either see themselves as net beneficiaries of the system, or support washes away.

Plantinga concludes that public administration treats social security as a public interest. However, which groups are believed to be deserving depends on the institutional context. As a result, the question of allocating responsibilities for social security between the public and the private sector is also relevant; it may differ from country to country and over time. Our author thus refrained from concluding that if the state relinquishes too much responsibility (by not creating a proper safety net), this may lead to a breakdown in confidence and eventu-

4 E. de Gier, R. Henke & J. Vijgen, *The Dutch Disability Insurance Act (WAO) and the role of research in policy change*, Amsterdam: Amsterdam School for Social Science Research, ASSR Working paper 03/02, 2003.

5 E.g. Jos Berghman & Ines Verhalla, 'Heading for the future, social security and social cohesion', in: J. Berghman et al (eds), *Social security in transition*, The Hague: Kluwer Law International 2002, p. 11-20.

ally a value failure. We will be somewhat less careful in drawing our conclusions, below in paragraph 6.

Law

According to Gijsbert Vonk the concept of the public interest plays a role in law, but as an open norm, the meaning of which is variable. The author therefore discards any public-interest-doctrine and instead relies upon the relevance of socio-economic fundamental rights, adopted in national constitutions and international human rights instruments. Social security is recognized as one these rights. While there is much difference in opinion as to the legal nature of socio-economic rights, according to Vonk the fundamental right to social security brings this subject within the public domain. Social security is a public concern and when the system fails to deliver, it is the state that must be held accountable.

What obligations arise from the right to social security for the state? In answer to this question, Vonk refers to the logical structure set out in the recent General Comment no. 19 of the UN Commission of Economic, Social and Cultural Rights (CESCR). In short: the state may not negatively interfere in private social security (duty to respect), it must ensure the proper functioning of private social security, making sure for example the funds are not abused (duty to protect) and it must actively develop a policy on the welfare state and create -at least- a safety net in the form of a social assistance scheme (duty to fulfil).

Vonk concedes that the above categorization of state obligations is merely a framework within the formal sense of the word. It does not make clear what social security is, or which substantial rights must be respected, protected or fulfilled. The author does not claim that the nature of such substantive rights can be discovered by studying law. He rather turns it around by proposing a number of 'extra legal' basic principles in order to find out to what extent these are actually supported by concrete legal standards, adopted amongst others in conventions of the ILO and the Council of Europe. The principles come under the heading of protection, inclusion, reliability, solidarity, equality, the rule of law and good governance. As it appears most of these principles are supported by concrete legal norms, albeit some more than others and in differing degrees of concreteness.

Philosophy

Onno Brinkman takes the post-war consensus about the Keynesian economic theory as a starting point for his analysis. According to the author this consensus had led to the watering down of the differences between the public and private interest. What was good for the public interest was equally good for the private interest, and vice versa.. But when the validity of Keynes' economic theory had run its course, it became necessary to reformulate the relationship between the public and private interest. Brinkman describes the major movements in political philosophy that have endeavoured to respond to this need. The distinction between liberalism and communitarianism is a red thread running through this description.

Liberals are united in their opinions regarding the autonomy of the individual and the neutrality of the state. Egalitarian liberalism formulates the public interest as being a 'joint venture' for the benefit of the individual participants. It puts strong emphasis on reciprocity because the cooperation of all is needed to make the joint venture a success. Through this the concept of distributive justice, including social security, acquires instrumental characteristics: it is considered by these liberals as a means to ensure the cooperation of all. Libertarians do

acknowledge a common fate, but this goes no further than providing mutual protection in the face of external threats. The public interest is principally revealed in the protection of the inalienable rights of the individual, in particular the right of ownership. The private interests can be best realised through the operation of the market or through charity.

Communitarians oppose both notions. In their eyes the individual can only be comprehended as part of the community in which he lives: as a result the individual is not autonomous and neither is the state neutral. By its very nature communitarianism is immersed in the reciprocity principle. After all the very core of communitarianism is that the individual can only develop in interaction with the community.

This contrast between liberals and communitarians is perhaps the most revealing element in Brinkman's contribution. Either the final objective of social security is the liberation of the individual who must be able to fully develop his natural capacities, or it is the quality of the society as a whole. Fortunately it is not necessary to make a principle stance for these two extremes. They balance each other out, just as Rawls showed us. Only when one extreme takes too much preference over the other do we enter a danger zone. For example, a system that only focuses on individual rights runs the risk that it benefits consumerism, while a system which is immersed in community obligations (work fare!) might crush the individual.

4.2 **Part B: The instrumentalisation of the public interest: towards a regulatory welfare state**

Economy

Given the fact that from an economist's point of view social security calls for public interference, as the absence of government interference will leave 'market failure', but also knowing that a public provision of social security causes 'public sector failure', as governments tend to work inefficiently, the answer to the question how to safeguard public interests in social security lies in the rational of a 'mixed system'. Andries Nentjes and Edwin Woerdman analyze the instruments in this 'mixed system' from an economic point of view.

For their analysis they use the Dutch system of social security as an example. In the last two decades of the 20th century social security has been dramatically re-designed. The reason for this re-designing can be found in the failures of the system: overconsumption, overproduction and x-inefficiency. As an illustration: in the past both employees and employers agreed upon misusing the system of Invalidity Insurance Act, by driving in particular older employees towards claiming benefits on the basis of this act. This was beneficial for both employees and employers: in difficult economic periods the employer could get rid of these (expensive) employees, while the employees did not complain as the benefits based on this act were generous enough. As a result the system absorbed so many public means, that the Dutch welfare state became financially untenable.⁶ This example of overconsumption called for more sophisticated instruments, providing solidarity against reasonable costs.

⁶ E. de Gier, R. Henke & J. Vijgen, *The Dutch Disability Insurance Act (WAO) and the role of research in policy change*, Amsterdam: Amsterdam School for Social Science Research, ASSR Working paper 03/02, 2003.

As a result, regulation has changed. First of all the employers were obliged to continue paying wages for two years in case of illness of the employee. Secondly the criteria for eligibility in the Invalidity Insurance Act were re-formulated and tightened. Both changes in regulation illustrate the stricter demarcation between *individual* responsibility of both the employer and the employee and *public* responsibility.⁷ This public responsibility became more indirect: the state only interferes where the private actors fail to provide social security.

Where social security calls for government provision Nentjes and Woerdman observe incentives based on economic theory. This resulted in a ‘semi-market’ in which administrative relations were capitalized. Governmental bodies, responsible for the supply of social security services, had to hire either public or private bodies that were responsible for the actual provision. This tendency towards a more market-oriented relationship is illustrated by the re-integration services. Initially the legislator forced the government bodies to hire private parties to supply these services, under the assumption that competition between these suppliers would decrease the costs of the services.

Nentjes and Woerdman demonstrate the problems arising when ‘semi-markets’ provide social services. On the supply side markets, it is evident that the social service has to be guaranteed. This means that often the market is not open to all potential suppliers; suppliers have to meet certain standards beforehand, before they can enter the market. After all, it is unthinkable and unwanted that a supplier goes bankrupt, leaving the clients (citizens) without public services. Here the public responsibility for continuity of the public services calls for strict regulation of market parties.

On the demand side, the problem arises that the social services are often ‘trust goods’, making it difficult to formulate the exact conditions of these goods. Therefore the contracts relating to social services will often contain vague terms, which need further interpretation. It is easy enough to draw the conclusion: a perfect market for social services is miles away and perhaps impossible to achieve. Again, the Dutch system of social security can serve as an example. The prescribed privatization of re-integration services had the undesired consequence that the public ‘principle’, unable and not expected to conclude a full contract that would diminish the discretion of the private agent,⁸ was confronted with private parties that ran off with the money, not fully investing in the education or whatever was needed to re-integrate the client. The most popular evasive technique was to give the client a short employment contract: long enough to *pretend* success and to cash the premium that could be shared with the employer.⁹

Therefore the main conclusion of the economic analysis is that the public responsibility calls for regulation, even though regulation will interfere in the market of demand and supply and therefore undermine the optimum spread of wealth. The form of this regulation and the amount of ‘market’ oriented solutions depends on the type of social security services.

Public administration

7 As a result of this measure private insurances stepped in, selling for single-premium policies covering the risk of a regression of wages and therefore the risk of being unable to continue making mortgage payments.

8 On the ‘principle-agent theory’ and the difficulties on contracting: K. Eisenhardt, ‘Agency theory: An assessment and review’, *Academy of Management Review*, 1989 (14-1), p. 57-74; B. Holmstrom, ‘Moral Hazard and Observability’, *The Bell Journal of Economics*, 1979 (Spring), p. 74-91.

9 A.D.R. Corrà, M. Plantinga & J. de Ridder, *Contracting for complex services: Analyzing the contracting-out of employment reintegration services by Dutch municipalities*, presented at Public Management Research Association conference, Columbus, Ohio, October 2009.

The lesson the economists teach us is that contracting out, hiring private suppliers for social services, is not easy and perhaps impossible. Here the perspective of public administration, written by Ko de Ridder, gives some additional insight. Public administration deals with the individual behaviour of those in charge of providing social services. This individual behaviour is affected by individual values. One can expect that these values in a *public* sphere differ from those in a *private* sphere. The main assumption is that people working in a private environment focus mainly on increasing profit. Depending on the market situation and the competition, this might cause the realization of the assigned jobs at minimum costs: just enough to satisfy the client, guaranteeing the agreed reward. One could call this a ‘run to the bottom’. Client satisfaction is only relevant if this will increase profit: if, for example, the number of satisfied clients is taken into account when contracts are awarded in the future.

De Ridder shows that the public understanding of a job is quite oppositional to this image of the ‘private actor’. The public servant acts in a bureaucracy and is constrained by public values. The classical bureaucracy comprised a corps of civil servants with a very specific set of attitudes. Their stated interest was to do justice, ‘sine ira et studio’, without prejudice, unequal treatment or other forms of arbitrary rule. Their oath of office leads them to the correct execution of the law. Discretion is applied on the basis of bureaucratic judgement, in two or three instances if so required. If a citizen felt slighted by a primary decision, he could find recourse in an administrative appeal – with all its advantages such as adjudication *ex officio*, integral assessment and substitutive decisions. The bureaucratic ideal in many ways comes close to what Kagan calls the judicial mode of rule application.¹⁰

The mixture of public and private elements that can be found in any policy area, but especially in social security, makes safeguarding of the public interests complex. The public sphere has the hierarchy as its main characteristic. In the end the government has the ultimate monopoly to intervene in citizens’ property or liberty. The legislator could guard public goods, threatening unwanted behaviour with fines and enabling governmental bodies to expropriate if necessary. In the private sphere the mutual relation, contracts and transactions form the social order. In this sphere the government does not *tell* the citizen what is needed, but leaves room for discussion and negotiation.

The mechanisms to safeguard public interests in social security show both elements. First of all there are mechanisms related to influencing the values on the work floor. In a public sphere this would lead to training of staff. More modern methods, based on a ‘private’ view of public organizations, use private-like relations. Under the umbrella of ‘New Public Management’ the traditional bureaucracy loses its traditional bureaucratic values, being steered on ‘output’ and ‘costs’.

New public management is still the method used *inside* the public organization. Privatization goes a step further: the governmental bodies have to hire private actors. With regard to this instrument the public administration stresses the importance of ‘smart’ contracting out. If the social services are provided by contracting out, it is important to notice that many of these

10 R.A. Kagan, *Regulatory justice: implementing a wage-price freeze*, New York: Russell Sage Foundation 1978, distinguishes three other, less attractive ways of administrative justice. The *legalistic* mode ignores the purpose of the rules that are applied; the unauthorized discretion ignores formal compliance to those rules, while *retreatism* does both.

contracts are actually based on 'trust'. 'Trust' is easy to understand, but hard to make operational. Trust is needed for smart contracting out, but is also violating the basic assumption that a contract is nothing more than the expression of the mutual services.

The instruments brought forward by public administration show that private elements are complicating traditional administration. An interesting insight from the public administration point of view is that the struggle for the perfect welfare system, with the perfect mixture of public and private elements, is not without consequences. After all: the output of the system itself will cause a re-balancing of the social order itself. The public administration approach in particular shows the connection between the safeguarding mechanisms and the definition of public interests as such: the production of the system itself will be assessed and might lead to a so called 'public value failure', causing a new definition of the public interest of social security itself.

Law

In the legal point of view Albertjan Tollenaar limits the relevance of law to *individual* relationships. The key-mechanism of law is legal protection. In many systems legal protection is limited to the individual decision or contract. This individual legal act is described and analyzed in three steps: the legislative authority, the competence of the public bodies versus the competence of the judiciary and finally the use of private elements to safeguard public interests.

It is interesting that the legislative authority with regard to social security is often a matter for central government. This expresses the character of social security as a human right. Nevertheless there are two nuances with regard to this legislative power. First of all, some elements of social security have been regulated at a supra national level. Examples here are the treaties and regulations of the ILO and European Union level. And secondly, quite often the legislator enables private organizations to regulate themselves. In many systems organizations of employees and employers are entitled to formulate additional regulations binding the individual members of their organizations.

With regard to the allocation of competence between public authorities and the judiciary it is striking that many aspects of the individual decisions are immune to a strong judicial review. The main problem of individual decisions in social security law is that these decisions are based on information that can only be assessed by experts. If the citizen claims a benefit on the grounds of the Invalidity Insurance Act, the administrative body will have to call in a medical advisor who has to assess the physical condition of the claimant. The legal positions are based on this medical information. In practice this information is almost immune to legal discussions. If the claimant wishes to contradict the decision of the administrative body, he will have to provide medical evidence, preferably in the form of a 'second opinion' by another medical advisor. The judge himself is by definition unable to assess to what extent the conclusions of these medical experts are correct.

Furthermore, it is remarkable that the legislator tries to regulate the method the medical expert has to use to assess the physical condition of the claimant. This is an indirect form of regulation that serves as a handle for legal assessment by the judge.

Finally the interference of private law in safeguarding public interests. Privatization of social security brings new forms of public interference that is more indirect and leaves room for private law as well. As an example one can think of labour law that has many public obligations. Many (national) systems of social security lay down an obligation for the employer to continue payment of wages during illness. If the employer and employee have a dispute regarding the question of whether or not the employee is actually ill, there is often a public provision to settle these disputes. Either by enabling the employer to call in the public medical advisor to re-assess the claim (as in the German system), or by obliging the employee to call in the public medical advisor before he institutes an action to recover back wages (as in the Dutch system).

This public interference in a private sphere is also noticeable in the form of the obligatory institutional provisions. The obligatory works councils in the middle and larger companies and the clients' participation councils in the semi-public institutions are two examples. The obligatory complaints procedure can also be regarded as an institutional provision. With these institutional provisions the legislator indirectly safeguards public interests, by enabling the clients, employees or citizens to protect their interests.

The main conclusion one can draw from the legal point of view is that mixed structures are complicated, causing conflicts on competences. Quite often mixed structures disturb full judicial review. As this judicial review is the main element of the legal instruments it is necessary to take these effects into account when privatizing elements of social security. Quite often the legal review is regarded as something superfluous, which need not be considered beforehand: 'practice will solve the way legal review is being made'.¹¹

Philosophy

This conclusion of the legal approach coincides with the view of Pauline Westerman, who analyses the philosophical view on mechanisms to safeguard the public interests. Westerman stresses the need for a clear demarcation of the public and the private sphere. The public sphere has some special characteristics, mainly based on explicit, public rules. Public is the result of social interactions between individual citizens. This public sphere becomes more relevant if the members of the society are more and more varied. The more members in society with their own different individual goals and cultural background, the more need there is for a clarification of the social rules that ease the social interactions. Furthermore, the diversity also affects the kind of rules. The more diversity there is, the more abstract these rules have to be.

The next step in the analysis is the conclusion that the enforcement of these rules has to be assigned to an 'official domain', which is impartial and has no specific interests whatsoever. This analysis sounds familiar to those who read Locke and Hobbes: there is a tacit treaty in society giving room for an impartial ruler that has the monopoly to enforce these rules. Without this ruler the status hominum naturalis appears: the situation of full liberty for all individuals as there is no limitation from rules or laws, but also the situation where every individual fears death as there is no protection. The bellum omnium in omnes: the war of all against all. The impartial ruler entitled to use his monopoly of violence breaks this situation.

¹¹ This is a quotation of the Dutch legislator, privatizing the Sickness Benefits Act: *Kamerstukken II 1995/96*, 24 439, nr. 3, p. 27-28.

Westerman then concludes that this impartiality is threatened as soon as the ruler provides social services. The task of defending the public order is easy compared to the task of providing social services. After all, these social services bring new requirements and new obligations for the citizens. The ruler cannot act perfectly 'neutral' and will probably use these services to achieve his particular goals.

Furthermore, the provision of services, based on the individual needs of the citizens, threatens the abstraction of the rules needed in the public sphere. This causes overregulation, regulatory burdens and other frequently voiced complaints.

Therefore the official domain trying to safeguard the public interests should be carefully monitored. The logical conclusion would be that safeguarding public interests needs a strong judiciary. The judiciary should assess whether or not the regulation is strictly necessary and creates impartial, just, solutions with respect to the public interest. This would probably bring limitation with regard to welfare services: only the services that have to be provided by the government are included in the official domain. A mixture of public-private instruments often brings disorder and opens the way to manipulation and arbitrariness

5 Conclusions

So what conclusions can be drawn from our exercise? Let us go back to the prime questions. First of all, is social security considered to be a public interest and how does the answer to this question reflect on the role of the state in social security?

In answer to this question we can safely conclude that social security *is* a public interest, although different disciplines employ different arguments for this. Economists see it as a neutral instrument (or perhaps one should say a 'necessary evil') for bringing welfare to the masses. Public administration views it as an expression of underlying values within the community. The law just proclaims that social security is a public interest. Philosophers consider it as an expression of justice.

In fact there also seems to be some consensus as to the role of the state in social security. Most observers would agree that some government interference is necessary and practical. Indeed it would be hardly conceivable that the grand achievements of social security in terms of realising solidarity between rich and poor, between young and old, etc. could ever have been realised without direct state interference. But nonetheless, neither of the disciplines argues that social security is exclusively a state affair. Economists welcome privatisation measures in order to counterbalance public sector failure. For public administration the division of responsibility between the state and the individual would depend very much on the underlying values which prevail in a particular society. Lawyers submit that formal state responsibility for social security does not rule out the involvement of private and collective arrangements. And finally, philosophical thought, both in libertarian and in communitarian circles, provides arguments in favour of non-state solutions for realising social security.

In other words, most observers agree that social security is neither fully public, nor fully private. This makes the system easy to subject to mixed governance structures. This is not at

all unique for social security. Many policy areas where the state has to provide services share this characteristic. From public transport to environmental issues, from energy supply to working conditions, one can see the same problem over and over again: the state has to provide a certain level of services, holds itself responsible for the provision of these services, but needs private mechanisms or private actors to fulfill this responsibility. Involvement of private mechanisms is often the result of perceived public sector failure: efficiency and effectiveness call for more private instruments providing social services. In social security there is an additional explanation. The roots of social security very often stem from private relationships, i.e. in civil liability for industrial accidents for employers, in the labour contract between the employer and the employee, in voluntary mutual funds for workers or even in family relations.¹² As a consequence many arrangements for income protection are still somehow vested in these private relationships.

Mixed structures in social security often face an ideologically driven resistance. This ideology is characterized by an inherent fear of the diminishing social provisions, as if changing governance structures are just another expression of a global neo-liberal conspiracy. From this perspective the *public* interference with social security is only allowed to increase. The critical remarks on the so-called privatization of the sickness benefits in the Netherlands, by the ILO Committee experts and to a lesser extent the European Committee of social rights can be seen as an exponent of this ideology.¹³ This ideology blurs the neutral academic approach to the working of mixed structures. It is our ambition to describe and analyse in a neutral way, the mixed structures of the social security system.

In the current stadium of our research, based on the contributions in this book, four conclusions can be drawn. *First* of all there is a need to find the exact kernel of social security that calls for a *public provision*. This is the social security that will not be provided without governmental interference and which is called upon by fundamental right treaties. The seven principles Vonk introduced, protection, inclusion, reliability, solidarity, equality, the rule of law and good governance, might be useful to demarcate the aspects of social security that *has to be* safeguarded and provided by the state as long as the market fails to achieve these goals. These principles find their response in other disciplines: the fact that the market will probably fail to achieve these goals will convince economic academics, while from a public administration point of view it is almost unthinkable that these fundamental principles will not have their support in a society.

When it is not necessary for the state to act as a direct provider of social security, because private actors succeed in maintaining these aspects of social security, the government will use other mechanisms to safeguard these principles. The classical mechanism of course is legislation. But there are many alternative instruments to support the legislative framework: many forms of supervision, fiscal steering instruments, contracts management, policy coordination, benchmarking, evaluation studies, comparing best practices, etcetera, etcetera.

¹² See f.e. the Dutch Social Support Act that entitles citizens to some provisions for as long as 'informal care' does not meet the needed care.

¹³ ILO Committee of Experts, *Individual observation concerning Convention No 102. Social security (Minimum Standards); Netherlands*, 2003. The European Committee of social rights has taken a more reserved stance in 2001 by calling for more information and further research, XVIII (1).

Our second conclusion is that we have to understand these ‘alternative mechanisms’ and in particular the way they interact. What is needed to ensure that the market is regulated in such a way that all the objectives of social security are met? How do we obtain a balanced overview of the advantages and disadvantages and how can the success of alternative regulatory instruments be measured? Very often, these questions are not systematically addressed when governments decide to allow market forces to enter the social security scene. Political preferences dominate the debate. But from the point of view of analyses a systematic overview of the consequences of mixed forms of governance helps to establish the right mix of instruments. Such an analysis should not only have an eye for the positive effects of alternative governance. Also the negative effects must be taken into account. All four contributions in part B of this study (instrumentalisation) stress the complexity of the mixed structure of governance. Although the economic academics understand the use of private elements and perhaps even preach an increasing use of these mechanisms from an efficiency point of view, they will confirm that the market has its failures. These failures can be seen as the undesirable side effects of the privatization policy. From a public administration point of view there are even more undesirable side effects, as the use of private elements disturbs the traditional public values in a bureaucratic governmental body. There is also the question of democratic legitimacy: if governments do not choose legislation as the main instrument for regulating social security, Parliament is no longer directly involved. Another consequence is the diffuse judicial review: quite often the legal framework does not provide the judge the leverage he needs to fully assess and correct the decisions or legal acts being made. Such disadvantages must be given full consideration.

The third conclusion would be that if one encounters failures in the regulatory welfare state, one has to think of possible solutions. What kind of corrective mechanisms can be considered as effective or efficient contributions to the improvement of the regulatory state? Leaving aside the situation of acute and severe crises, where the state will have to mop up the pieces of failed private initiatives, corrective mechanisms must quite often lie in a form of ‘smart’ supervision. Supervision has many faces. Supervisory mechanisms are needed to manage and to control contract relations between government principals and private agents. Supervision is also needed in the form of a strong judiciary, able to correct unequal treatment and safeguard the very kernel of social security. Furthermore, supervision is needed where the law falls short. This means that institutions should take into account the management of values of the individual actors on the shop floor. Legal relations cannot work without these ‘trust’ relations. The supervisory relation between the supervisor and the supervised body is after all not only a legal relation, based on the authority the supervisor has to correct the supervised body, but it is also a social relation. In this social relation trust does matter. One could call this the ‘soft’ aspects of supervision, leading to structures like ‘peer reviews’ etcetera. The ongoing legalization of relationships damages the social aspects of supervision, threatening the products of the regulatory state. In particular in the area of social services and in the re-integration market in which the client plays a central role and where tailor-made solutions must be found, this is something to be avoided.

Our *fourth* conclusion is that our attempt to design the ‘perfect’ regulatory state, safeguarding *all* public interests in social security, is probably tantamount to reaching for the sky: we can suggest improvements, we can even try to get closer to the ‘perfect’ regulatory state, but we have to realize that the perfect regulatory state is unreachable. Incidentally, the same applies

for the opposite of the regulatory state model: a minimum basic income for all; such a model can only be found in the books, not in reality. The contribution of neutral academic research is thus to provide a rational analysis of the failures of the regulatory state, suggesting where possible solutions may be sought, as well as drawing attention any (other) failures resulting from these solutions. Ultimately decisions have to be made by politicians. Improving rational reasoning at a political level is perhaps the highest goal possible for academics working in the field of social sciences.

6 Prospects for the regulatory welfare state: recommendations for further research

The conclusions of this research prescribe our agenda for further research. In order to monitor the success of the regulatory welfare state in social security, it is necessary to be able to measure to what extent new forms of governance contribute towards realising social security as a public interest. In order to do so, we need to gain a deeper *understanding* of the core principles of social security. These principles should be seen as objectives which should ideally be adhered to, regardless of the choices made with regard to the division of responsibilities between the state and private actors. Two things need to be done to give further credence to such a proposal. First of all, research must be conducted into the validity of these principles.

Here we have to refine our vision of the social security system. After all, the core principles of social security, which *have to be*, should be defined differently for social assistance, for sickness benefits, for health care benefits and for pensions. Each social risk calls for a separate analysis. Some objectives may require direct interference. Creating a minimum subsistence level by means of a social assistance system is frequently referred to in this respect, although even in this area private elements are feasible, varying from client re-integration contracts to forms of private administration. In a more inactive role the state is *regulator* or *facilitator*, enabling private actors to take up the social risk. To do so the state has several measures at its disposal. These measures vary from tax regulation to the declaration that private collective agreements are universally binding.

To gain a better understanding of the regulatory welfare state case studies are needed. These case studies provide data of examples of the regulatory welfare state. At the moment research is being conducted into the privatization of re-integration services and the privatization of sickness benefits in the Netherlands. Both cases throw light on the way in which mixed governance operates in the regulatory welfare state. The collected information in these cases has to be analyzed in a *multidisciplinary* approach, according to the contributions in this book. This will enable us to fully understand the working of the regulatory welfare state and to draw conclusions that apply to more than only one discipline.

Finally, it is recommended that different social security systems be compared. As stated above: especially in the field of social security both public and private arrangements will be used to provide social security. The line between the public and the private sphere is drawn differently in different countries. Comparing different systems of social security and analysing these systems on the basis of whether or not private mechanisms are incorporated or excluded, will probably provide a better insight into the working and justification of the regulatory welfare state.

Part A

Social security as a public interest

THE PUBLIC INTEREST IN SOCIAL SECURITY: AN ECONOMIC PERSPECTIVE

Andries Nentjes & Edwin Woerdman

1 Introduction

In its publication on safeguarding the public interest, the Dutch Scientific Council for Government Policy (WRR) defined the public interest very broadly as any societal interest that has been made the objective of government policy.¹ Applying that definition, social security is one of the domains of societal interests for which the government has taken responsibility. From an economic point of view, the objective of social security policy is basically (a) to provide economic security for citizens against the mishaps in human life, including a basic level of income, (b) while avoiding unnecessary high costs to society. Although it perhaps takes an economist to explicitly mention the latter part, hardly any politician will deny that containment of societal costs is as much in the domain of the public interest as delivering services of good quality. The political challenge is to find the balance between, on the one hand, the benefits of providing security where it is needed and, on the other hand, the sacrifice that is involved.

From an economic perspective, the broad definition the WRR has given to the concept of public interest is not really satisfactory. It fails to provide guidance for demarcating domains. Political decision makers can draw the dividing line wherever they see fit without being criticized because of the absence of criteria. With regard to social security, the broad definition does not give any clues as to when the government should act to further or restrict its provision of social security and when it should not act.

In this chapter we shall look at the public interest in social security from the perspective of economic science. In doing so the first task is to propose criteria for demarcating the public interest domain in social security. The next step is to identify and analyze the problems encountered in furthering that public interest. The chapter on the economic perspective that follows later in the book focuses on the instruments for safeguarding the public interest in social security. Our insights are applied by studying the development of social security in the Netherlands.

This chapter is organized as follows. Section 2 defines the concept of the public interest based on an economic approach. Section 3 analyzes the economic-political life cycle in social security. Section 4 explains what market failures have contributed to the emergence of social

¹ WRR, 2000, p. 20-21.

security. Section 5 explains what public sector failures hamper the efficient provision of social security. Conclusions are drawn in section 6.

2 An economic definition of the public interest

Before we define the public interest from an economic perspective, we have to say a few words about what economics actually is and what an economic perspective on social security thus entails. To explain this, it is helpful to understand that the economic system of the Netherlands is of the ‘mixed economy’ type: basically a market economy with a government stepping in when and where the market fails to provide in the needs of citizens. Economic science teaches us that the market is the most appropriate mechanism to satisfy human needs for private goods; that is, goods that can be individually owned. The agreement to transfer the property of a private good is a matter solely between buyer and seller, who both expect to gain from the transaction. Others remain outsiders to the contract. They have nothing to do with it and they are excluded from using the good. In contrast, the use of collective or public goods has to be shared with others. The Dutch textbook example is a dike to protect a population and its properties against high water. Procurement and maintenance of such a good needs a common decision and an organisation to implement it: the prototype of a government. The basic public goods are the provision of ‘law and order’, including the rule of law. Without the provision of these essential public goods a thriving market economy could not even exist, since protection of property rights and compliance with contractual commitments are the fundamentals on which the market is built. Although in real life the distinction between public and private goods is not a simple matter of black and white, the conceptual difference does provide criteria for delineating the public interest domain from the sphere where the government has no responsibility.

If one accepts that the market is the basic mechanism for providing the goods and services society demands, it follows that a government which intends to pursue the public interest faces a restriction on what can be the objective of government policy. When and where the market functions properly in supplying the goods and services citizens need, the government should abstain. Safeguarding the public interest by providing security against the mishaps of life by way of public sector intervention is in place when and where the market fails in delivering security. Market failure can be due to the fact that a good is not purely private, but to some degree public. Another source of market failure is lack of competition. It will lead to prices that are too high relative to their quality. The market will also fail when consumers are ill-informed and incapable of assessing the value of the product.

To identify and assess market failures, economists investigate the impact of market arrangements on the welfare of society. Citizens have wants they aspire to satisfy. They make sacrifices to get the goods and services they need and which are beneficial to them. Economics brings the sacrifices and the satisfactions under the measuring rod of money. Satisfaction or benefits is expressed as the maximum amount of money a person is willing to pay for the object of desire. The efforts and sacrifices or costs to bring the object forward are also measured in terms of money. What counts are the net benefits or surplus: the benefits obtained minus the costs made. A market failure is a failure because the market arrangement does not bring in the full net benefits. And a public sector arrangement to correct the market failure has to provide higher benefits than costs. Some will win, others may lose as a result of the

intervention; but if the benefits exceed the costs, the losers can be fully compensated without depleting the benefits and net gains will remain some. In that case, economists say, the criteria of ‘potential Pareto efficiency’ is satisfied, meaning that the winners could, in principle, compensate the losers.²

From all this, it follows that the economist will define the public interest as maximizing net benefits to society. Governments should focus on constellations and developments that threaten the maximization of net benefits and look for options to redress them. Government interventions with intentions other than increasing societal welfare cannot be defended from an economic perspective as being in the public interest.

Applied to social security, the economic prescription is that the government should identify the market failures in providing security and create net benefits by designing and implementing a social security policy that corrects the market failures. In the next two sections we shall see whether the government has indeed followed the prescriptions of economic science and focused on intervening where the market failed to provide an adequate level and quality of social security.

Apart from the question whether or not the correction of market failures has been the major reason for drawing social security into the public interest domain, it is evident that the involvement of the national government of the Netherlands in social security insurance and in providing safety nets for the uninsured has expanded immensely. It expanded from next to nothing a hundred years ago to about ten percent of net national income in 1960, to twenty seven percent in 1980 and thirty percent in 2008.³ Unfortunately, not only markets can fail, but governments can fail too. The ambition is to build and maintain a high quality, efficient and balanced system of social security. However, in this process, inefficiencies and imbalance between the benefits and the costs of social security may turn up. Instead of being the solution to market failure, the public sector then has become (part of) the problem. If this occurs, the public interest in social security has to be redefined as identifying the public sector failures and creating net benefits by redressing them. In the next sections we shall see whether actual developments in the Netherlands correspond with our economic prescription of the public interest. Has the view on what the public interest in social security is changed and have public sector failures been perceived and corrected?

In sum, the economist’s view on what the public interest in social security is, has been defined as (a) correcting the market failures in the private provision of security as well as (b) identifying and correcting the public sector failures in the public supply of social security. Our definition of the public interest corresponds with the approach of Teulings et al.,⁴ but rather than focusing on externalities and market failures in general, we introduce the concept of so-called ‘caring externalities’, as we will explain below, and perhaps lean even more heavily on identifying and remedying public sector failures. One could say that our economic approach is the same as that of Teulings et al.⁵ But that there are some differences as to how the economic view is worked out, basically since we focus on the development of one specific sector.

2 e.g. Hochman and Rogers 1969.

3 For 1960 and 1980 data see Nentjes 1989. For 2008 calculations are based on CBS data: *sociale beschermingsuitkeringen* as percentage of *netto nationaal inkomen*.

4 Tuelings et al 2003.

5 Tuelings et al 2003.

The task in the next sections is to investigate how suitable this economic interpretation is in presenting and understanding actual developments in social security. Do the decisions taken by the government match the ‘idealisation’ of economic theory? We shall give our verdict in the final section of this chapter.

3 The economic-political life cycle in social security

The national system of social security in The Netherlands was built up between the year 1900 and the 1970s.⁶ In those years the gaps in existing social security supplied voluntarily through the market were one of the major political issues, hand in hand with the political urge to close those gaps through a form of government involvement.⁷ Political discussions framed the public interest mainly in terms of the benefits to be reaped from an encompassing framework of social security, replacing the earlier ramshackle private arrangements. In building up the national system of social security, the cost side was not totally neglected. However, the cost burden and its economic repercussions were not perceived as a major bottleneck and hardly as a component of the public interest in need of surveillance.

After completion of the social security structure in the 1970s, the political discussion on social security made a U-turn. In the face of growing evidence that the post-war decades of strong economic growth and full employment were over, most politicians began to accept from the late 1970s onwards that the steady expansion of social security had been and still was a major driving force behind the rise in labour costs with dramatic negative impacts on employment and economic growth. Implicitly the concept of the public interest was redefined: instead of expansion and deepening of social security arrangements, the containment of their costs in order to save employment made the political agenda. The global political trend of the nineteen eighties is best caught in Reagan’s words on becoming president of the U.S. in 1981: ‘Government is not the solution to our problem; government is the problem’. In the Netherlands, social security provided by the public sector started to be viewed no longer as the solution (to market failure), but as a problem (of rising costs). The public interest was defined now as spotting the public sector failures in providing social security. The public sector failure had two dimensions. The first one was that many entitlements were seen as ‘over the top’ and no longer affordable. Curtailing the levels, for instance a lowering of employment benefits, was the remedy here: technically simple, but politically extremely difficult. The largest contribution to the reduction of public expenditure did indeed come from this source. The second dimension of public sector failure was inefficiency in the organisation of providing social security. In the effort to eliminate the waste of scarce resources, criteria for eligibility have been made more strict and other changes were enacted, among them the incorporation of market elements in the social security system. Most of the reforms and the motivations given reflect mainstream economic thinking on incentives and other causes of regulatory and organisational inefficiency.

In the first decade of the twenty-first century the government has continued its efforts to improve efficiency and to reassess the balance between the benefits and the costs of the vari-

6 e.g. Nentjes 1989; Postma 1995; Roebroek & Hertogh 1998.

7 e.g. Woerdman 2009.

ous social security services. But one can also observe a reaction of critical journalists, social and legal scientists as well as politicians who fear that cost containment actions have gone too far. The phrase ‘paradigm change’ was even used: a switch from providing security and income protection to making social security subservient to economic interests, such as a well-functioning labour market.⁸ The criticism often tallies with a distrust of - if not aversion against - the infusion of market elements in social security legislation. The critics tend to identify the public interest in social security with quality of service in supporting people in need and prevention of economic insecurity and anxiety. They recommended a caring public sector not driven by profit-making motives, and in particular not in health care, as the best approach to safeguard that public interest. Cost considerations do not seem to be much of an issue for them. Are these the first signals of a new and third stage in the political life cycle of social security? Probably not in the near future. The huge government expenditure made to counter the financial and economic crises from 2007 to 2010 and the consequent increase in public debt will urge a critical review of government tasks. Social security will not escape unnoticed. Looking further ahead one can only say that time will tell which way we are going.

4 Market failure and the emergence of social security

In the Netherlands, provision of social security has evolved from being predominantly a private affair to a public arrangement, along two different routes. Development type 1, discussed in subsection 4.1, deals with mandatory insurance which started and developed as social security for wage-dependent workers, with the government using public regulation to secure insurance. Development type 2, surveyed in subsection 4.2, deals with social security that encompasses all citizens and in particular aims to provide security for people with low income. It appeared later on the national scene, but had a long history at the local level. The economic arguments for government action are very distinct for the two domains. In this section, we shall investigate whether market failure was indeed the major reason for the government to take an interest in the two types of security against the economic mishaps in life.

4.1 Mandatory insurance for wage-dependent workers

Individually unpredictable incidents, which lead to loss of income or extremely high expenditures, are a fact of life. Basically it is possible to protect oneself against the financial consequences of such situations through transactions in private goods. A first line of defence is via building up a capital buffer through saving. When accumulated savings fall short, loans can be taken and be repaid when the tide has turned. Private financial security is for sale in the form of insurance: against costs of health care and loss of income due to illness, invalidity and old age. In extended families or close knit communities, the social network and the social norm of mutual help, can be viewed as a type of insurance in kind: a complement to or an alternative for the individual capital buffer and private insurance bought in the market. Historically, these private mechanisms of providing security have been the way people sought to protect themselves against the misfortunes that life might bestow on them.

⁸ Asscher-Vonk 2005.

The Dutch national government began to take an interest in social security issues and expanded its involvement during the twentieth century because it took the view that the private mechanisms of security provision fell short of what was required. Looking at the broad spectre of social security as it exists today, the signal seems to be that private provision of security failed in virtually all its various domains. Traditionally the extended family and local communities had provided mutual help. But due to the rise of factory labour and the growth of an urban proletariat - in the Netherlands from about 1870 onwards, the traditional systems of support were crumbling. Insurance provided within trade unions offered only a partial substitute. The intermittence of prosperity and depression in the industry brought new uncertainties about the continuity of employment and income. The suffering of the incapacitated and ill unable to work, of capable workers unable to find work, and of old people living in poverty were visible enough in cities for those of the middle and higher classes who were willing to look. The 'social question' appeared on the political agenda and at the beginning of the twentieth century it had become politically widely accepted that there were serious defects in the provision of security for the wage-dependent part of the population and that the government could not abstain. From a substantial part of the organized workers, the discontent came to the fore as a political outcry against capitalism, that is, against the market economy: a potential political time bomb. The concentration of the labour proletariat in towns and cities had already become a political force well before the extension of the political vote and even more so thereafter.

In the end, the government intervened. But was this a reaction to market failure, or were other considerations involved? For an answer, one has to look at the specific laws that successively came into being in the Netherlands. The very first 'social' law of 1874, on labour by women and children, aimed to protect those deemed unable to protect themselves from abuse. Welfare economics is based on the premise that individuals can make their own choices – and they should have the freedom to do so as long as their choices don't cause damage to others. Not being able or not being allowed to make one's own deliberate choices can therefore be viewed as a market failure. The Accident Law of 1901 made it mandatory for employers to take out insurance against the financial consequences of liability for the incapacity of their workers due to accidents during work. One can view the law as the correction of the market failure consisting of the risk that the employer goes bankrupt, leaving the victim of the accident without financial payment.

The next three social security laws - on Illness (1913), Incapacity (1913) and Old Age (1919) - also involved the employer taking out mandatory insurance for his workers. But here the market failure is far less evident. The major reason why private insurance was often not taken out was most probably a lack of income, if not the sheer poverty of the wage earner. The urgent needs of today had to be met, leaving no money to provide for a future that never might come. An insurance market could thus not develop, since the demand for voluntary, private insurance was absent. Low income is not necessarily a market failure requiring government intervention. Suppose that labourers had been given the choice between mandatory insurance and receiving the equivalent of the insurance premium paid by the employer in cash. If they would have chosen the latter option, the logic of economic theory compels us to conclude that, in this case, social insurance was not a correction of an evident market failure. It appears more like political decision makers expressing their paternalistic preferences in an effort to meet the political demands of trade unions half way. Trade unions could accept mandatory

insurance as an exaction from greedy bosses, but the legislator would never have imposed a mandatory wage increase. To make a case for market failure, considerations other than low income have to be put forward against voluntary private insurance. Well-known bottlenecks in insurance are moral hazard – the insured person takes less care to avoid risks covered by insurance – and adverse selection – only ‘bad risks’ take out insurance. Commercial insurers counter the bottlenecks by not covering the full damage, by differentiation of premium and by refusing to insure persons with risks that are too. This means that the market can cope with the potential bottlenecks of private insurance. Consequently, from the perspective of economics, those bottlenecks are not a sound argument for public intervention. However, the so-called ‘bad risks’ unable to find insurance against loss of income due to illness and incapacity will be the ones that are most vulnerable. Socially and politically that is difficult to accept and social security legislation offered a way out. In the name of solidarity, the financial burden of including this high-cost category was distributed over the total number of insured workers in the form of a higher insurance contribution. Nevertheless, the equivalence between the contribution paid and claims on payments – a major feature of private insurance – was maintained in the social insurance arrangements. Of the social insurance arrangements for wage earners that followed in the later decades of the twentieth century, the insurance providing income during unemployment (1949) and the insurance in case of incapacity to work (1966) showed the same equivalence. Insurance providing children’s allowances (1939) and insurance covering the costs of health care (1964) are the exception: the insurance contribution was income-dependent, while payments were equal or dependent on health care expenditure.

Given the characteristics of the aforementioned social security laws, it would not be correct to view the development of social insurance wage-dependent workers as an ongoing correction of failing markets for private insurance. Suppose that the government had not intervened, then private insurance on a voluntary basis or as an ingredient of collective labour contracts would probably have developed, following the rather steady increase in income. This is in particular likely for the types of social insurance where the relation between insurance contribution and payments is based on the so-called equivalence principle. Outstanding examples in the Netherlands are insurance of employees against loss of income due to unemployment, illness and labour incapacity. With voluntary instead of mandatory insurance, coverage would of course have been lower and more workers would have taken recourse to the arrangements that will be discussed hereafter.

We conclude that social insurance of wage-dependent workers is not the outcome of ongoing efforts to safeguard the public interest against market failure. So the scheme developed in section 2 does not apply. In our view, a better interpretation is the paternalism of the legislator. Wage-dependent workers were restricted in making their own choices with regard to taking out insurance against risky incidents by a government that intended to protect them against – what it saw as – short-comings in caution. Putting it somewhat more provokingly: it was an exercise in disciplining the wage earning population in its spending pattern.

4.2 Social security through vertical redistribution

Type 2 social security, dealing with vertical redistribution, was built up in the nineteen fifties and sixties. The arrangements cover all citizens. Entitlements to benefits are equal for all,

but insurance premiums are proportional to taxable income up to a maximum. So transfer of income is an inseparable part of the scheme. In the Netherlands, social insurance against loss of income due to old age and the national insurance against the costs of health care fit in this category. Poor relief to provide income support to people with either no income or an income below the poverty line has a similar structure, but that is financed by taxes and not through insurance contributions. This type 2 social security is a more suitable candidate for market failure than type 1 treated above, for reasons to be explained hereafter.

In his *Theory of Moral Sentiments* (1759), Adam Smith noted that normal human beings have the innate capacity of sympathizing, based on the ability to see oneself in the position of the other. As a result, a person is not indifferent to another's suffering. Modern economics has conceptualized the phenomenon as a special type of externality. Positive externalities are the enjoyment of benefits created by others for which one pays less than the costs or for which one pays nothing at all. Negative externalities are the damage and suffering one undergoes without being compensated by those who caused it. Applied to social security issues, the negative externality is, for example, the lamentable state of individual A that makes individual B feel less well. Spending money on help for A will raise the well-being of B. There is a voluntary transfer either in money or in kind that raises the welfare of both receiver and donor. The 'caring externality', as it is called, is 'internalized'.⁹ For many decades, care for orphans, poor elderly people, the sick and the invalidated came from private action as a result of the charity of the local aristocracy, churches, religious orders and civil organisations. Donations or provision in kind were voluntary. Only the 'deserving poor' were eligible for support; circumstances and behaviour distinguished them from the undeserving. Although voluntary care worked, it did so imperfectly. Caring citizens could observe that many people in distress remained without adequate help. The major problem undermining the private provision of charity is its public good property. When a public good is supplied, many enjoy the benefits: the persons that made sacrifices for its production, but also those who remained inactive. The same is true for charity. Free-riders can enjoy the fact that needy persons are supported without sharing in the cost. It undermines the incentive to contribute voluntarily. The larger the potential donor group is, the stronger the free-riding effect is and therefore scaling up from differentiated local provision to a uniform national scheme increases the problem. The caring person is willing to pay, but his actual payment will suffer if he sees that the good is supplied anyway and that his personal sacrifice hardly makes a difference. Considering society at large, there is a willingness to pay, but only a part of it can be extracted from the potential donors. As a result, caring externalities are not fully internalised and the supply of care motivated by altruism falls short of the efficient level of full internalisation.

Fundamentally, the problem of a shortfall in the supply of charity is similar to the disincentive for the voluntary production of a classic public good, such as law and order. The solution that emerged in history is also similar. Where gaps in the provision of charity were visible, the public authority stepped in. To prevent the situation in which free-riding undermines social care, citizens accept that contributions to finance its provision are collected from those who are financially able, if necessary by using force. Local governments were the first to do this. Orphanages financed by the local authorities have a history of centuries. In the Netherlands,

9 See e.g. Collard 1978; Culyer 1980; Nentjes 1989.

the first national legislation on poor relief dates from 1800,¹⁰ although national schemes of social security with uniform eligibility criteria entitling individuals to uniform benefits, and financed through income-dependent insurance contributions or taxes, were built up much later, in the second half of the twentieth century. The economic argument for public sector involvement is a threat of market failure if the redistribution of income from rich to poor, based on caring, were left to the market. Active government intervention is required to avoid market failure and to ensure adequate social care. In other words: voluntary redistribution of income meets the economic definition of the public interest.

The big question is whether the above theoretical contemplation is of any use in explaining the real world. First, what do we know about the actual redistribution in the domain of social care? Second, is it plausible that this redistribution is fully based on the caring and voluntariness of those who make the net contributions?

To answer the first question about actual redistribution, the most informative publication is, in our view, Ter Rele.¹¹ He shows which groups benefit from and pay for diverse public arrangements in the Netherlands. The information in table 1 refers to the arrangements existing in 2003 and 2004. They encompass a broader category than narrowly defined social security and include the benefits from public housing arrangements and benefits in kind from private goods that are provided for free, such as education. The transfer column consists mainly of social security expenditure. As one can see, they are more or less evenly distributed over educational classes. Benefits in kind are dominated by the cost of education. It explains why higher education levels have the highest benefits. In housing arrangements, low incomes benefit from rent subsidies and high incomes and even more from tax exemption for interest on mortgages. In total benefits there is no systematic differentiation between the educational levels. The group with only higher secondary education has the lowest benefits; ten percent less than persons with basic education only and almost thirty percent less than those with university education, who have the highest benefits. The most striking fact is that overall the differences in total benefits between the educational categories are not big.

Table 1. Total lifelong benefits from collective arrangements (present values, in thousand euros)

	Transfers	Benefits in kind	Housing arrangements	Total
Basic education	86.7	167.7	17.8	272.2
Lower secondary	85.1	158.8	14.6	258.5
Higher secondary	85.5	150.5	15.7	251.7
Intermediate vocational	85.6	171.2	14.6	271.4
Higher vocational	88.5	166.2	27.5	282.2
University	88.5	197.9	35.2	321.6

(Ter Rele, 2005, table 4.4, p. 30)

¹⁰ Postma, 1995.

¹¹ Ter Rele, 2005.

However, the picture changes if the payments for the public expenditures are included. Income taxes and value-added taxes (VAT) rise with educational level, as is shown in table 2. A relatively equal distribution of benefits in combination with a progressively increasing contribution to the costs of the arrangement leads to vertical redistribution.

Table 2: Lifelong income, benefits and taxes (present values, in thousand euros)

	Net labour income	Total benefits	Taxes	Taxes as percentage of benefits
Basic education	294.1	272.2	155.6	57%
Lower secondary	384.5	258.5	204.5	79%
Higher secondary	554.0	251.7	302.0	120%
Intermediate vocational	569.9	271.4	304.0	112%
Higher vocational	769.6	282.2	421.3	149%
University	1043.7	321.6	569.4	177%

(Based on Ter Rele 2005, tables 3.1, 4.4 and 5.1)

The two lowest levels in education receive on average per person more in benefits over their lifetime than is paid in taxes. They can be supporters of the caring state for selfish reasons. The call on solidarity starts at the level of the middle group: individuals with higher secondary and intermediate vocational education pay over their lifetime ten to twenty percent more in taxes than they receive in benefits. From people with higher education considerably more is expected. They have the highest total benefits, but that is far surpassed by higher taxation. There is a systematic and substantial redistribution from the 'rich' to the 'poor'. The *net lifelong payments* for people with a university degree are 247.800 euro. On the contrary, the group with basic education has positive *net lifelong benefits* of 116.600 euro.

The second question, posed above, was whether all that redistribution is voluntary, based on the caring of the citizens who make the net contributions. If so, the result is a so-called 'Pareto-efficient' redistribution, since it leaves some better off and no-one worse off.¹² The figures of table 2 show that a substantial vertical redistribution indeed exists in the Netherlands. Therefore, on the one hand, the hypothesis that government action in the Netherlands is solidly based on altruism or caring cannot be falsified. On the other hand, the existence of vertical redistribution is not proof that solidarity really exists to such a degree. Vertical redistribution may be supported by those who pay for it for selfish reasons, in addition they may see the arrangements as an insurance in case either they or their close relatives hit hard times economically. Or vertical redistribution is accepted as the price to be paid for political stability.

However, one should not neglect the option of explaining vertical redistribution more or less as a symptom of social conflict, where the other theories rather see consensus.¹³ Vertical redistribution is then supposed to be involuntary. In a democracy, the majority of voters, with

¹² Hochman and Rogers 1969.

¹³ e.g. Nozick 1974.

an income level below the national average income per person, have the political power to exact ‘surplus’ income from the minority, earning an above average personal income, against their will: the Marxian notion of exploitation turned upside down, if you will.¹⁴ Although constraints such as ‘voting with the feet’ by emigration of the rich, capital flight and negative economic repercussions will mitigate the degree of exploitation of the ‘rich’ by the ‘poor’, involuntary redistribution is a possibility that cannot be excluded *a priori*.

Considering the political economy of redistribution further, one can also think of potential political coalitions. Middle incomes hold the key, since the median voter makes the difference between winning or losing the elections, or the coalition formations. Since the highest ‘rents’ can be extracted from the ‘rich’, Tullock predicts a coalition of low and middle incomes taking from the rich where middle incomes benefit proportionally more thanks to their strategic position.¹⁵

Remarkably, as far as we can see, no empirical research has been done in the Netherlands to test these diverse theories. However, by using the figures of Ter Rele¹⁶, we can give an indication. In Table 3 the educational levels, which correspond with lifelong income levels, have been aggregated to three classes. The same has been done for taxes plus social premiums as a percentage of the lifelong benefits of various arrangements. In the third column our calculation is presented of the percentage of voters in each class (based on CBS data).

Table 3: Tax-benefit ratio per group of voters

Educational and income level	Percentage of all voters	Tax-benefit ratio
<i>Lower</i>	38%	69%
<i>Middle</i>	38%	114%
<i>Higher</i>	24%	158%

(First and third column based on Ter Rele 2005; second column own calculation derived from CBS data for 2004)

From Table 3 one can conclude that a simple political–economy model with a low income group exploiting a high income group is a democratic impossibility. There is no majority of voters which might support that option. A coalition is thus necessary. Neither is Tullock’s postulate supported by the evidence of Table 3 that middle incomes will profit excessively from their coalition with the low income group to exploit the rich. Middle incomes rather turn out to be net contributors. The figures suggest that instead of exploiting their median voter position to extract high net benefits through redistribution, the middle income group shows solidarity or, in other words, ‘caring’ by cofinancing the low income group’s consumption of welfare arrangements. It seems a plausible conclusion, since the degree of revealed caring is a modest 14 percent. The call on the high income group is considerably larger: 58 percent. On the one hand, one can have doubts as to whether such a high contribution would be offered on a voluntary basis. On the other hand, the expectation that on further investigation the high income’s degree of caring would appear to be above 14 percent seems reasonable to us.

14 Downs 1957.

15 Tullock 1971.

16 Ter Rele 2005.

In conclusion, our reasoned guess is that of a mixed picture: a considerable part of vertical income redistribution is voluntary and another part, in particular a fraction of the net contributions of the high income group, is involuntary.

Involuntary redistribution has benefits for those who receive and costs for those who pay. Economic science offers no criteria to judge whether the transfer in itself is a good or a bad thing. However, it has the conceptual tools to analyse the repercussions on national welfare, conceived as total net benefits. Whether these are positive or negative is a matter for empirical research. In section 5 we come back to the issue.

In sum, it has been argued in this subsection that type 2 social security can be considered to be a welfare enhancing correction of market failure, and therefore meets the economic criteria for being in the public interest domain, in so far as it is based on the caring motive or is accepted as collectively organised self-insurance. Although we found a substantial vertical redistribution in the Netherlands, that alone is insufficient to serve as proof that social security of type 2 meets the criteria and does increase welfare. In so far as income redistribution is forced upon citizens and against their own preferences, economic theory sees it as a government intervention outside the economically demarcated public interest domain. As a participant in the political arena, the economist may support such policies for social reasons. As a professional economist he will see that next to the direct benefits for those who receive and possibly the indirect positive economic impacts there is also reason to worry about the negative impacts on the economic incentives of those who are forced to pay and on the negative repercussions on national income.

The question posed earlier with regard to the extent to which market failure has been a leading motive for the public interest in social security in the Netherlands has received a mixed answer. We have basically identified three driving forces behind social security legislation: paternalistic correction of perceived lack of prudence of wage-dependent workers, politically forced involuntary redistribution and voluntary redistribution either to internalize caring externalities or as self-insurance. Only in so far as the arrangements have been based on voluntary redistribution can they unequivocally be classified as public intervention to correct market failure. And only insofar as social security services can be retraced to this motive, can welfare economics welcome the policy as safeguarding the public interest by increasing national welfare. As for the first two motives, the judgement of whether public intervention has served the public interest depends on one's political views. Economic research can shed light on the distribution of the benefits and costs between groups and may help to inform the general public on its findings.

5 Public sector failures and the reform of social security

Whatever the precise motives of the government may have been in becoming involved in the provision of social security to its citizens, the fact is that in the twentieth century social security has developed as a public sector provision. Throughout its lifetime of about two hundred fifty years, economic science has focused in particular on how markets work and how they may fail, but also on how governments work and how they may fail. Public finance is about as old as general economic theory and in the past four decades an even more specialised branch

of economics has emerged, called public choice, or (new) political economy. Among the other issues investigated is how the public sector can fail in his task of serving the public interest. The public interest is conceived here as maximum net benefits for all citizens. Public sector failure is creating or letting in existence public arrangements of which the net benefits are either lower than what could be achieved or even negative.

The literature has come up with a list of potential failures for organisations in the public sector.¹⁷ In this section, the concept of public sector failures will be introduced and applied to social security to see how suitable they are for explaining the changes that have been made in social security after the U-turn of the nineteen eighties when the focus of politics shifted from expanding and raising the level of social security to revisiting and trimming the system. The public sector failures to be discussed are basically too much production, too much consumption, too little choice for clients, too high costs for the quality provided and too little innovation. We shall investigate whether actual changes made in social security arrangements, and the arguments for them, can be fitted into the scheme of public sector failures or whether they have another origin.

5.1 Overproduction

In the economic literature on public sector failures one can be sure to come across overproduction as a major problem. Production is excessive if at the margin the value for its consumers is lower than the cost of providing the output. Net benefits of the redundant part of production are negative: valuable inputs are transformed into output of lower value.

The phenomenon of overproduction has been analyzed using different approaches. Underlying all of them is the view of the public sector as a centrally planned system, suffering from the same economic weaknesses that ultimately led to the collapse of the communist systems at the end of the twentieth century. Applied to social security, one can point out that users of social security services do not directly pay for the service rendered. The finance comes from the government budget or from social insurance contributions. Consequently, which is essential from an economic point of view, consumer preferences are not revealed to the suppliers of the social service. The market's function of signaling the demand for the service is taken over by a national bureaucracy planning the quantity and quality of the service provided as part of the social arrangement. Since market signals are lacking, the planner needs a different clue with regard to how much to provide and of what quality. He has to gather and process relevant information on needs and costs and on the basis of this information he decides. But the capacity of the central organization has its limits. Imperfections in planning may lead to wrong choices. Mistakes alone can cause the planner to err on either side: quantity or quality can be either too much, or too little. However, other forces also have to play a role systematic overproduction.

Niskanen suggested the explanation that the bureaucratic administrator may not be the politician's neutral agent as portrayed by Weber, but has its own objective of maximizing the budget.¹⁸ If true, the bureaucracy tends to produce more public output than the efficient level.

¹⁷ e.g. Hanush 1983; Recktenwald 1980; 1984.

¹⁸ Niskanen 1971.

Since Niskanen's publication the focus of theoretical analyses has shifted to the role of interest groups lobbying for higher budgets. The theory of rent-seeking analyses the strategies of interest groups trying to extract public expenditures or regulation that serves their special interests.¹⁹ Political decision makers are an attractive target for rent-seekers, since they can provide goods or services for free while the costs will be borne by someone else. Successful rent-seeking feeds overproduction. In social security trade unions are major interest groups, although their pressure is mitigated by having to take into account the negative impacts that rising costs of social security might have on employment. Employers' organisations act rather as a countervailing power by demanding restraint from the politicians. In the past three decades trade unions and other interest groups have acted most manifestly in organizing resistance against government decisions to trim or reform arrangements in social security.

Bureaucrats and interest groups may push for more and better social security arrangements and resist cuts and restrictions, but in the end politicians decide. Ideologies and views on social security differ between parties, yet what is most striking is the broad political consensus in bringing about social security legislation.²⁰ Over time it resulted in a development characterised by de Swaan as 'a long squib and late explosion'.²¹ The squib refers to the comparatively slow growth during the first half of the twentieth century. The explosion came in the period from 1950 to 1980: social security expenditure expanded from hardly 6 percent of the national income to more than 28 percent, following the introduction of the type 2 social legislation.²² The new social arrangements coming into force in the 1950s and 1960s were carried by a broad political consensus. In those economically booming years there was little attention for the economic cost of maintaining such an all encompassing system of collectively provided security. Only in the 1970s, when the international economic tide turned did the full financial and economic consequences become visible and start to become a political worry. The public choice theories of bureaucracy and rent seeking are of little help to explain that turn. We rather think that the story of unforeseen consequences of decisions taken earlier applies here. Part of the explanation is the tendency to extrapolate present favourable developments into the nearby future. However, the 1970s were very different from the two foregoing decades. Once the new safety nets were in place, it turned out that not only did they function to support the victims of social accidents, but they were a potential invitation to make use of the available facilities. As a cause of the fast increase in the number of persons dependent on social security, it went hand in hand with the increase in unemployment due to the slowdown of economic growth and the subsequent deep depression from 1979 to 1983. The combination of social security expenditure going up (the nominator) and a stagnating national income (the denominator) led to a rapid rise in the relative costs of social security as well as a steadily increasing deficit in the government budget. The train of events took the political body by surprise. One additional explanation for the late and hard awakening is that social security financed by insurance contributions was not included in the government budget, but set apart in public social security funds, which were considered as a separate, closed system. Social contributions thus remained outside the norms drafted for the size of the government budget until 1976. In that year the so-called one-percent norm was introduced, stipulating that the sum of taxes and social contributions as a percentage of national income should not grow

19 Tullock 1980.

20 e.g. De Swaan 1989; Postma 1995.

21 De Swaan 1989.

22 Postma 1995.

faster than by one percent point per year.²³ The evident lack of political control of social security expenditure during the 1970's originated initially from a lack of political will, facilitated by the lack of unambiguous signals and norms for public social expenditure, and in the late 1970s the tide could not be turned due to a lack of suitable instruments.

5.2 Overconsumption

From the point of view of the consumer, his use of social security is financed externally, through the public budget or through a social insurance scheme. Having past the eligibility test, the service has no costs, so that an incentive to contain consumption is lacking. For an unemployed person the unemployment benefit or income from poor relief is a subsidy on inactivity that tends to lengthen the period without a job. Wrong incentives for consumers tend to push the consumption of social security services to a level where at the margin the costs of provision exceed the benefits of those who consume it.

Where the service is provided for free, the introduction of a new social security arrangement creates a situation where supply literally generates its own demand. Consumers first have to discover the new product and when it suits them there is an incentive to pass the eligibility test. The strength of the 'supply generates its own demand' effect of new arrangements is difficult to predict, but easily underestimated. An outstanding example of this is the developments under the Invalidity Insurance Act. The level of benefit depended on the diagnosed degree of labour incapacity and in case of full labour incapacity benefits were 80 percent of the former salary and for people with minimum wage 100 percent of the former net wage. After the act came into force in 1967 a steadily increasing number of wage-dependent workers applied for and was granted benefits. In 2002 no less than 13.5 percent of the working population was receiving payments under the arrangement. By international standards an incredibly high level of full or partial labour incapacity.²⁴

An almost similar story can be told about the Social Assistance Act, which came into force in 1965 to replace the Poor Law of 1912. Individuals from the age of 18 years without income of their own were eligible for income support, fixed at 70 percent of the net minimum wage. Income support was a right and no longer a favour, as it had been under the old law. Again the inflow was high and the number of people receiving support was increasing.

5.3 Lack of choice

As one can see in table 1, throughout the lifetime of a Dutch citizen an enormous amount of money is spent on social policy arrangements, principally social security services. For transfers only it amounts to roughly 6,000 euros per year (undiscounted value). From an economic perspective, this is money that cannot be spent freely according to a person's or household's own preferences, perceptions of risk and willingness to bear that risk. Instead the state decides on the destination of the tax payer's primary income and regulates for what and under which circumstances the tax payer is eligible for consumption of social services and what criteria will be applied to assess his or her eligibility. The regulations are very much of the

23 Postma 1995.

24 Calculation based on CBS data.

type 'one size fits all'. The discrepancies between the diversity of private preferences, on the one hand, and on the other hand the uniform type of service and security provided by the arrangements imply a national welfare loss.

In social insurance the lack of choice shows up in the standards for eligibility, insurance coverage and level of benefits. Traditionally the client has no choice between insurers and between suppliers of the social services. There are signs that recent governments have understood the economic lesson that uniformity is a real bottleneck. Politicians have started to search for solutions that allow choice and consequently more diversity. The chapter on instruments for safeguarding the public interest in social security will give some examples.

5.4 X-inefficiency

Public sector suppliers of social security traditionally have a monopoly in administrating and delivering the service. The relaxed existence of a monopolist, free from the pressure of competition, makes surveillance and containment of costs less urgent. Costs will tend to creep up to a level higher than necessary. The excess of costs above the necessary minimum has received the label X-inefficiency.²⁵ It can take many forms. The traditional jokes about the short working day and slow working pace of the civil servant reveal that a low work load is a long-standing and widely observed form in which X-inefficiency has appeared. In social security, X-inefficiency can take the form of relaxing the criteria for being admitted as eligible for a specific arrangement, by applying the criteria less strictly than is formally required. It was considered to be one more cause, next to the overconsumption incentive, of the fast increase in the number of people receiving benefits under the Invalidity Insurance Act.

A more recent case, that has received much attention in the media, is the practice of non-profit firms supplying care-at-home to employ more highly qualified personnel than is strictly necessary - and charge for it. The practice was facilitated by the commissions that decided on eligibility and type of care, but they had no responsibility for the public budget spent on home care. Many journalists were enthralled about such good care for the needy old and sick, but from the economic point of view, it is a clear-cut piece of X-inefficiency.

X-inefficiency can thrive where competition is lacking. Monopolists in the private for-profit sector are not free of it. However, the owners of stock that want to see profits are a countervailing power. Or the managers have to fear a take-over and shake out when their incapacity to show good profits is reflected in a low price of equity. In public (including non-profit) organisations such feedback is lacking and consequently the scope for X-inefficiency is larger. Since financial (budget) surpluses cannot be paid out, the incumbents have an incentive to consume the potential surplus within the organisation under the guise of costs. From this perspective, X-inefficiency is more than simple neglect; it is a well-considered choice to use revenues for objectives other than the efficient delivery of services, including high salaries and wages, low workloads and expenditure on 'pet projects'.

For the Netherlands a striking illustration of pet projects is the merger wave between non-profit providers of home care in the first decade of the twenty-first century. A belief in the advantages of large scale in home care paired remarkably well with managers' ambitions and

²⁵ Leibenstein 1966; 1978.

their perspective of a higher salary. In many cases the mergers resulted in big losses. A critical study on the bankruptcy of the Mediavita conglomerate concluded that the managers and board of supervisors had been totally absorbed by the merger frenzy and had seriously neglected the firm's primary task of delivering home care services of good quality at a cost that is covered by revenue. An example of a type of pet project that is well-known in the literature was provided by Newhouse.²⁶ Drawing his inspiration from health care, he pointed out that organisations with a strong position of professionals have a predilection for using the newest technology, which will show up in excess costs.

5.5 Lack of innovation

Innovation is the mainspring of economic progress. In social security, new ways of doing things can improve quality of service, raise the productivity of workers in the sector and lower costs. However, a large bureaucratic organisation that has a monopoly in its field is not a stimulating place for innovation. When life is easy the necessity to change is not felt. Moreover, most workers have no or hardly any space to diverge from the prescribed routines. When there is such space, the effort to innovate may fail, leaving the instigator with the blame; and if successful, what does he gain? A lack of incentives for innovation has the same background as X-inefficiency, but in the long run the resulting stagnation is far more serious. When there is innovation in a bureaucratic environment, it may even have adverse effects on cost and quality as the failures of realizing economies of scale through mergers in home care seem to suggest.

In this section the public interest in social security has been defined in terms of redressing the identified public sector failures. In the chapter on instruments we shall discuss the efforts to contain overproduction and overconsumption as well as the reforms to counter X-inefficiency, lack of choice for consumers and failure to innovate in social security.

6 Conclusion

The economist's view on what the public interest in social security is, has been defined as (a) correcting the market failures in the private provision of social security as well as (b) identifying and correcting the public sector failures in the public supply of social security. The government's task in safeguarding the public interest in social security can broadly be defined as finding the balance between the benefits of economic security for citizens and the costs of providing it. In a mixed economy, it is not evident that the public interest requires economic existential security to be provided through the public sector. On the contrary, economists in principle find that needs are to be satisfied in the private sector, where the market coordinates economic decisions. From an economic point of view, the public interest in constructing an economic safety net of social security lies there where the private sector fails to satisfy the essential needs. This is the domain where the government should intervene and regulate private activity or undertake production and distribution activities of its own.

²⁶ Newhouse 1970.

We have investigated how far the development of social security in the Netherlands corresponds with this blueprint of the public interest in a mixed economy. It turned out that the correspondence was partial. The only case of correction of market failure that could be identified was voluntary redistribution through social security with the aim to internalise caring externalities. The transfer of income is supported by the willingness of those who are taxed to pay for it. Empirical data are lacking on the degree of voluntary vertical redistribution as opposed to politically forced involuntary redistribution, imposed by the political majority on the unwilling minority. As a second force, apart from evident market failure moving the public sector into regulation and the provision of social security, the paternalistic correction of a perceived lack of prudence of wage-dependent workers stands out. One can conclude that in building up social security as a public sector activity, political decision makers had a broader conception of the public interest in social security than the more narrow definition of welfare economics. Clearly, more political objectives were involved than raising national welfare through a correction of market failures in providing security for citizens.

Mixed as the motives may have been, the fact is that in the twentieth century social security has developed as a public sector provision. It is in the public interest that public sector failures in social security are prevented and, if detected, that they are remedied. The build-up and completion of the welfare state in the 1950s and 1960s led to an unforeseen increase in the cost of social security when the international economic tide turned. The ongoing growth of unemployment in the 1970s and early 1980s convinced the government that social security had over-expanded to an economically unsustainable level. The decades that followed were clearly characterized by an ongoing struggle against the public sector failures of overproduction and overconsumption. It went hand in hand with the detection of other public sector failures: lack of choice for clients, too high costs for the quality provided (X-inefficiency), and too little innovation. Efforts have been undertaken to mend them, as we shall see in the chapter on instruments. In doing so, political decision makers have indeed conceived the public interest in the way economic science suggests. And in their actions they have also followed the prescriptions derived from economic theory more closely than they did in the foregoing decades of building up the national system of social security.

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THE PUBLIC INTERESTS OF SOCIAL SECURITY: THE SOCIAL SCIENCE APPROACH

Mirjam Plantinga

1 Introduction

The concept of public interests has received more and more attention lately. Especially in the policy domain public interests form an important point of concern.¹ Often government policies are justified by arguing that they are in the public interest. Significant factor explaining the current attention to the concept of public interest are the reforms the Western welfare states have been confronted with over the past decades. Important element of the reforms concerned the introduction of market forces and a re-orientation of the role of the government. Where the responsibility for the welfare state used to be attributed to the public domain, in the reforms the advantages of the market, especially with regard to the possibilities of increasing efficiency, were brought forward. Handing over responsibilities from the public to the private domain does, however, raise the question about the definition of public interests in a more private welfare state. What should be considered as the inviolable part of the welfare state for which the government should take responsibility? Especially when the market fails to deliver, the issue of the safeguarding of public interests is raised. Can public interests be safeguarded in the private domain or does the safeguarding of the public interest warrant government intervention? In order to be able to solve the issue of the safeguarding of public interests, first, the question for which public interests the government should take responsibility needs answering.² It is this question that is the object of this chapter. In defining public interests a social science approach will be taken.

2 State of the art

2.1 From public interests to public values

In this chapter the public administration or more broadly the social science approach to defining public interests is central. The reason for not restricting to the public administration literature is that the public administration discipline traditionally has been a multidisciplinary field drawing on theories and concepts from a range of related disciplines. Moreover, the approach towards defining public interests taken by public administration scholars and researchers stemming from related disciplines such as political science and sociology show great similarities. It is important to mention that the social science approach as presented here does

¹ Dicke and De Bruijn 2003; Bozeman 2007.

² WRR, 2000.

not include the economic discipline. In fact, the social science approach to defining public interest is positioned opposite to the economic³ or new public management approach.⁴

Important proponent of the social science approach to defining public interests is Bozeman.⁵ According to Bozeman ‘public interest refers to the outcomes best serving the long-run survival and well-being of a social collective construed as a “public” ’.⁶ The definition of Bozeman resembles the view of the Netherlands Scientific Council for Government Policy (WRR). In their report ‘Het borgen van publiek belang’ (safeguarding public interests), this council defines public interests as those interests that are the result of a normative debate in a country and which are laid down in regulations by the legislator.⁷ Important aspect of the definition of the WRR is, however, that the concept of public interest implies government intervention, while in the line of reasoning of Bozeman the concept of public interests does not necessarily imply government intervention. Bozeman argues that public interests may be realized in the private domain and that only in situations when public interests are not realized without government intervention, the government has the responsibility to take action.⁸ Whether or not governments should intervene therefore depends on the extent to which public interests are realized. Since the definition of public interests, as brought forward by Bozeman, resembles the general view to defining public interests in social sciences, this definition of public interests will be central in this chapter.

The social science approach to defining public interests, raises the question whether a unifying definition of public interests exist. The answer is that it does not. A unifying definition of public interests does not exist since public interests depend on what societies agree on at a certain point in time and ‘certain 18th-century self-evident truths might be subject to very different interpretations today’.⁹ Public interests are therefore ‘ubiquitous’,¹⁰ ‘emergent’,¹¹ and ‘ambiguous’.¹²

The argument that the question for which public interests the government should take responsibility cannot lead to straight answers, raises the question whether the social science approach can provide guidance to decisions about the allocation of responsibilities between public and private actors. Given the ambiguity of the definition of public interests, public interest theories provide little or no guidance in this respect. In the social sciences, over the years, the literature has therefore started to focus more and more on public values.¹³ The distinction between public interests and public values is that the former is regarded as an elusive ideal, whereas public values have specific identifiable content.¹⁴ Public values can therefore

3 Bozeman 2007.

4 Stoker 2006; O’Flynn 2007.

5 Bozeman 2002; 2007; 2008.

6 Bozeman 2007, p. 12.

7 WRR, 2000.

8 Bozeman 2007.

9 Jørgensen & Bozeman 2002, p. 375.

10 Bozeman 2007, p. 143.

11 Stout 2007.

12 Dicke & De Bruijn 2003.

13 Bozeman 2002.

14 Bozeman 2007.

be regarded as the operationalization of the public interest: when something is considered as a public value, the safeguarding of this value becomes a public interest.

2.2 Identifying public values

The public value approach was first articulated by Moore.¹⁵ According to Moore ‘The idea of managerial work in the public sector is to create *public* value just as the aim of managerial work in the private sector is to create *private* value’.¹⁶ Important aspect of public values is, however, that they are expressed by the citizenry and determinations of the citizenry inherently are collective choices.¹⁷ Public value can therefore not be derived from the aggregation of individual preferences such as done in the economic approach, but only from individual and public preferences resulting from public deliberation.¹⁸ Public values thus rely on ‘politically-mediated expression of collectively determined preferences’.¹⁹

Given the link between public interests and public values, in the social sciences the concepts are often used interchangeably.²⁰ According to Bozeman ‘a society’s “public values” are those providing normative consensus about a) the rights, benefits, and prerogatives to which citizens should (and should not) be entitled; b) the obligations of citizens to society, the state, and one another; and c) the principles on which governments and policies should be based’.²¹ Moreover, public values can be traced in many ways. Public values are, for example, reflected in fundamental laws and constitutions. Public values often are also reflected in policy and politics, public speeches, elections, and public policy. Furthermore, in countries with a strong judiciary, the high courts are regarded as an excellent viewing point for identifying public values.²² Without defining what public values actually are, Bozeman therefore does define a set of core public values for which the government is responsible. Other authors follow the same line. De Bruijn and Dicke, for example, distinguish between procedural and substantive values²³. Procedural public values refer to the way the public sector should act and to standards that the process of government action should meet, while substantive values are defined as those ‘values for which the state, either directly or indirectly, is responsible’. The content of such core or substantive values is, however, not specified and may differ from sector to sector, from country to country and even over time.²⁴

Lately, in the social science literature, analyses of public values are conducted for many different countries and different sectors. As a result, different lists of public values have been proposed.²⁵ Jørgensen and Bozeman have, for example, examined leading public administration periodicals on writing on public values.²⁶ On the basis of their analysis they come up with a list of 72 public values including, amongst others, social cohesion, legality, equity, and

15 Moore 1995.

16 Moore 1995, p. 28.

17 Alford 2002.

18 Kelly et al 2002.

19 O’Flynn 2007, p. 360.

20 Dicke & De Bruijn 2003.

21 Bozeman 2007, p. 13.

22 Bozeman 2007.

23 Dicke 2006, p. 719.

24 Jørgensen 2007.

25 Schreurs 2003.

26 Bozeman 2007.

accountability. In the Netherlands, public values in utility sectors are intensively studied. In these sectors, public values such as affordability, safety, and the protection of the environment are important.²⁷ In an analysis of the reorganizations in the Dutch social insurances, public values as social cohesion, effectiveness, and accountability are brought to the foreground.²⁸ The public values that most often come up probably are: quality, accessibility, and efficiency. The consequences of the introduction of market forces in several Dutch sectors for the safeguarding of these public interests have recently been analyzed.²⁹

The different lists of public values show that in each context different values are emphasized. An important aspect that the lists of public values bring forward is therefore that public values are a social construct. A weak aspect of the social science approach to identifying public values is, however, that it provides little guidance in making decisions regarding the allocation of responsibilities between government and private parties. To some extent the identification of a different set or a change in public values may be helpful in deciding about which institutional setting is best suited for safeguarding these values, for different public values may ask for different safeguards. The analysis of Van Gestel,³⁰ for example, shows that a changing attitude towards the position of the social partners in the Dutch welfare state, has resulted in a handing over of responsibility for the safeguarding of public interests from the social partners as a collective to individual employers and employees.³¹ Also in the history of the Dutch welfare state, changes in the organization of the welfare state can be explained by a reorientation of public values.³² However, if it is possible at all to measure normative consensus about public values, which can be questioned, such an analysis does not provide the government with a decision making tool with regard to the allocation of responsibilities. Recently, however, an important step towards developing such an analytical tool has been taken by Bozeman³³ with his public values failure approach.

2.3 Identifying public values failures

In order to be able to make decisions about the allocation of responsibilities between public and private, Bozeman proposes a pragmatic approach to public interest theory.³⁴ In this view it suffices to pay attention to public values in decisions about the allocation of responsibilities. More specifically, one should focus on instances where public values fail. The public values failure approach of is positioned opposite to the economic approach.³⁵ Where the economic approach starts with an ideal, that of a perfect market, and applies this ideal to concrete policy issues, the public value failure approach begins with the policy issue ‘and then works toward a limited ideal – a practical solution to a recognized public failure’.³⁶ According to Bozeman, in decisions about the allocation of responsibilities between public and private actors, public

27 De Bruijn & Dicke 2006; Stout 2007; Lijesen et al.2007.

28 Van Gestel 2003.

29 Ministerie van Economische Zaken 2008.

30 Van Gestel 2003.

31 Van Gestel 2003.

32 Plantinga & Tollenaar 2007.

33 Bozeman 2007.

34 Bozeman 2007.

35 Bozeman 2002.

36 Bozeman 2007, p. 100.

value failure instead of market failure should be leading. This raises the question, however, how to define instances where public values fail.

According to Bozeman ‘from one perspective it is not possible for public values to fail; they simply change.’³⁷ But if we consider a public value about which there is consensus and observe that the value is not being obtained, then perhaps it can be said to have failed’. In line with market failure criteria, Bozeman poses eight criteria for identifying public value failures.³⁸ Public values failures are, for example, likely to occur in the case of extended time horizons, cases of imperfect public information and in situations that threaten human dignity and subsistence. The criteria suggested are not meant to be exhaustive, but are debatable and are meant to promote deliberation about public value.³⁹ In instances where public values are not provided, it is a responsibility of the government to take action.

Although questions regarding the allocation of responsibilities can be considered as an issue of safeguarding and therefore beyond the scope of defining or identifying public interests or public values, the importance of defining public values or public interests is given by the link between defining public interest and safeguarding them. In fact, if it is not possible to define the public interests or public values for which the government should take responsibility, it is also not possible to analyze to what extent the government fails or succeeds in doing so. If the social science approach wants to operate on an even playing field with the economic approach to defining public interests,⁴⁰ that is influencing decisions regarding the allocation of responsibilities between public and private, developing analytical tools for guiding such decisions can be argued for. The public value failure criteria Bozeman proposes forms a first step in such a direction and can therefore be regarded as an important development in the social science approach to defining public interest.⁴¹

3 Applying the social science approach to the welfare state

3.1 Identifying public values in welfare states

Without defining what public values actually are, by using the concept of public value failure as an argument for government intervention, Bozeman does imply that there exists a set of core public values or public interests for which the government is responsible. The content of such a set of core or substantive public values is, however, not specified since it may differ from sector to sector, from country to country and even over time.⁴² Research, for example, shows that changing economic conditions go hand in hand with changes in public attitudes towards welfare state policies.⁴³ The question therefore remains what presently should be considered as the inviolable part of Western welfare states for which governments should take responsibility. A social science approach to answering this question demands an analysis

37 Bozeman 2007, p. 16.

38 Bozeman 2007.

39 Bozeman 2007.

40 Bozeman 2007.

41 Bozeman 2007.

42 Bozeman 2007; De Bruijn & Dicke 2006.

43 Blekesaune 2007.

of the public values that are held within a given country, regarding a certain policy context, during a certain period of time.

In the history of the Dutch welfare state, public values about which there is consensus are, for example, the redistribution of income through the provision of a minimum level of subsistence as well as the protection of income, legitimacy, solidarity, equality of rights, legal certainty, and the efficiency and effectiveness of the institutional design of the welfare state⁴⁴. Goodin et al.⁴⁵ come up with a slightly different list. According to them there is a broad consensus across all welfare regimes that welfare goals should include the following: promoting economic efficiency, reducing poverty, promoting social equality, promoting social integration and avoiding social exclusion, promoting social stability, and promoting autonomy. Social objectives of the European Union, linked to the concept of fundamental rights, for example, are freedoms, such as the right to liberty and security, equality, solidarity, citizens' rights, and justice⁴⁶. And according to Esping-Andersen,⁴⁷ the essence of social policy can be captured in one policy goal: the extension of social rights, where social rights can be regarded in terms of their capacity for decommodification.

The different lists of public values show that in each context different values are emphasized, although the lists are characterized by some overlap. As mentioned, the fact that something is perceived as a public value provides, however, little guidance in making decisions regarding the allocation of responsibilities between government and private parties. According to the social science literature, the responsibility for the government comes up only in instances where public values fail. In order to be able to make decisions about the allocation of responsibilities between public and private it is, therefore, important to focus on identifying public values failures in Western welfare states.

3.2 Identifying public values failures in welfare states

One way of identifying public values failures in welfare states is by investigating to what extent welfare states are publicly supported or democratically legitimized, for if welfare states are found to receive low public support, this might be an indication of public values failure. As table 1 shows low public support may, however, also be explained by a low importance that is attached to the specific welfare state regime. In this case, a low level of public support does not indicate a public values failure but rather forms an indication that something is not considered as a public value. In order to be able to identify public values failures in welfare states it is therefore important not to focus on low levels of welfare support only, but also investigate how low levels of public support can be explained.

44 Plantinga & Tollenaar 2007.

45 Goodin et al. 1999.

46 D'Antonio 2006.

47 Esping-Andersen 1990.

Table 1: Identifying public values failures in welfare states

Importance attached to welfare state regime	Public support	
	<i>Low</i>	<i>High</i>
<i>Low</i>	No public value	No public value
<i>High</i>	Public value failure	Public value realization

In sociological explanations for the legitimacy of welfare states, solidarity is often brought forward as an important explanatory factor. Recently, however, solidarity is said to be under pressure due to processes of individualization and globalization.⁴⁸ According to Van Oorschot,⁴⁹ the question whether solidarity is under pressure depends heavily on the way the concept is operationalized. Van Oorschot argues that solidarity consists of several elements: solidarity out of perceived self-interest, solidarity out of moral conviction, and solidarity because of emotional ties.⁵⁰ In the Netherlands, perceived self-interest is found to be the most important motivator for willing to contribute to the welfare state. From the Dutch 82% regards perceived self-interest as an important motivator for contributing to welfare, 64% is motivated to pay for reasons of moral convictions, and 42% because they have compassion for the beneficiaries. Van Oorschot argues that when the concept of perceived self-interest is taken into account, developments of processes of individualization are not found to be threatening for solidarity.⁵¹ In fact, according to him, in order to receive high public support the key is to make large parts of the population stakeholder of the welfare state. Crepaz,⁵² however, argues that due to rising diversity as a result of increased immigration, solidarity out of perceived self-interest is not sufficient and attitudes of universal trust and a sense of social solidarity are of high importance for the willingness to support the welfare state.

Although there is disagreement with regard to the question which type of solidarity is most important when explaining the public support for the welfare state, the importance of solidarity for the legitimacy of the welfare states is clear. The importance of different types of solidarity is also shown in the extent to which benefits for different needy groups are publicly supported. Van Oorschot has investigated European public perceptions with regard to the relative deservingness of several needy groups.⁵³ Over the past decades in Western welfare states, the public was found to be most in favor of social protection for old people, closely followed by sick and disabled people. Unemployed people were found to be a little less deserving and social assistance receives least support of all. Howard also finds that the rank order of priorities between different needy groups is similar across different nations, including the United States.⁵⁴ According to Van Oorschot the distinction in support for the various groups

48 De Beer & Koster 2007.

49 Van Oorschot 2006b.

50 Van Oorschot 2000.

51 Van Oorschot 2006b.

52 Crepaz 2008.

53 Van Oorschot 2006a.

54 Howard 2007.

of needy people can therefore be regarded as a ‘truly universal element in the popular welfare culture of present Western welfare states’.⁵⁵

Van Oorschot explains the distinction in support for the various groups of needy people by five deservingness criteria: control, need, identity, attitude, and reciprocity.⁵⁶ Control refers to the control people have over their neediness. The less control, the more deserving people are found to be. Need refers to the level of need: the higher the level of need, the more deserving. Further, people who we can easily identify with and people with an attitude of gratefulness and willingness to conform to our standards are found to be more deserving. Finally, people who have contributed to our group before or who can be expected to contribute in the future are found to be more deserving. Empirical research based on a Dutch solidarity study stemming from the year 1995 shows that the most important deservingness criteria are control, identity, and reciprocity. Control has also found to be an important criterion in other European and American studies.⁵⁷

To conclude, the sociological literature shows that support for the welfare state is influenced by the deservingness criteria control, need, identity, attitude, and reciprocity. Also different forms of solidarity such as solidarity out of perceived self-interest, solidarity out of moral conviction, and solidarity because of emotional ties, are important. In the next section, we will investigate the public support Western welfare states receive and describe to what extent differences in welfare state support can be explained by deservingness criteria and different forms of solidarity. In doing this, we hope to identify, in the case when low levels of public support are found, whether these low levels of support form an indication of public values failure.

4 Identifying public values failures in Western welfare states

4.1 Western welfare states

Before addressing the public support for Western welfare states, it is important to pay attention to the concept welfare state. Since each country has its own welfare state with its own unique culture and institutional set-up, one cannot speak of ‘the’ welfare state. However, it is also not the case that the welfare states are totally different from each other. Most Western welfare states share similar characteristics. In the literature, three types of welfare states or welfare regimes are distinguished: the liberal, corporatist/conservative, and social democratic regime.⁵⁸ An overview of the differences between the three regime types is given in Table 2.

55 Van Oorschot 2006a, p. 25.

56 Van Oorschot 1998.

57 Van Oorschot 1998.

58 Esping-Andersen 1990.

Table 2: Overview of differences between the liberal, corporatist/conservative, and social democratic welfare regime (based on Table 1 of Clasen & Van Oorschot 2002, p. 94).

Welfare regime	Liberal	Conservative	Social democratic
<i>Underlying principle</i>	Need	Reciprocity (equity)	Universalism (equality)
<i>General aim of regime</i>	Minimum level of subsistence	Income protection	Promotion general well-being
<i>Safeguarding instrument</i>	Social assistance	Social insurance	Universal benefits
<i>Responsibility</i>	State responsibility	Involvement of social partners	State responsibility

Each regime type is characterized by different underlying fundamental values⁵⁹ or principles.⁶⁰ Liberty forms an important value in the liberal welfare state. In relations of free exchange, people are able to make mutually beneficial exchanges. However, when the market fails and some people are in danger of falling below the poverty line, the government needs to step in. On the basis of the principle of need resources are redistributed to only those who are worst off. The reduction of poverty or the provision of a minimum level of subsistence therefore forms an important goal of the liberal welfare state. Social assistance forms an important instrument for safeguarding these goals and the provision of social assistance is considered a state responsibility.⁶¹

In a conservative or sometimes also called corporatist welfare state social cohesion forms an important underlying value. In such a regime, cooperation and collaboration are important. People contribute to the group they belong to and, in case of problems, can fall back on this group. The principles of reciprocity and equity are also important: the entitlements depend on the contributions that have been made. Important goal of the conservative or corporate regime is therefore income protection, and in doing this, preserving the social order and realize social stability⁶². Social insurances are an important instrument for realizing these goals. Furthermore, in the provision of these insurances the social partners play an important role.

Finally, in a social democratic welfare state social equality as well as freedom, justice and solidarity form important underlying values⁶³. The principle of universalism also plays a role: everyone should be able to participate in society. The promotion of general well-being therefore is an important aim of the social democratic welfare state, but also goals such as reducing poverty, enhancing economic equality and personal autonomy are important for

59 Goodin et al. 1999.

60 Clasen & Van Oorschot 2002.

61 Clasen & Van Oorschot 2002.

62 Goodin et al. 1999.

63 Stjernø 2008.

realizing social equality. Redistribution of resources from the rich to the poor forms an important safeguarding instrument in a social democratic welfare state as well as the provision of universal benefits.

Although the welfare regime classification of Esping-Andersen is criticized the distinction between three different ideal types is used up until today since it provides a useful heuristic for identifying broad differences in welfare regimes.⁶⁴ Moreover, what is important for our discussion is that the three welfare regimes are expected to differ with regard to the public support that is given to their welfare policies.⁶⁵

4.2 Public support for Western welfare states

According to Esping-Andersen social-democratic welfare states have the highest capacity for decommodification, that is, the extent to which individuals can uphold a socially acceptable standard of living independent from their participation on the market.⁶⁶ The capacity for decommodification is lower in conservative welfare states, while liberal welfare states have the least capacity for decommodification. According to this typology, in social democratic welfare regimes the highest public support for government intervention can be expected, followed by conservative welfare regimes. Finally, liberal welfare regimes are expected to be characterized by the lowest public support for government intervention.⁶⁷ The evidence supporting these hypotheses is, however, mixed.

Gelissen,⁶⁸ for example, does not find support for the hypothesis that a relationship exists between welfare regimes and levels of support. His analysis is based on the Eurobarometer 1992 and 2001 surveys and includes the public support for a broad range of government interventions, such as, government intervention aimed at ensuring a decent standard of living for children and the unemployed and housing support. Individuals who live in social democratic welfare regimes show less support for these types of government intervention compared to individuals living in liberal welfare regimes. When using the 1989 Eurobarometer survey and investigating the question ‘which social welfare programs are absolutely necessary to be able to benefit from social welfare when needed’, Lapinski et al.⁶⁹ also find that social democratic welfare states did not attract greater support.

Variations between welfare state regimes are found when the International Social Survey Program (ISSP) data for 1985 and 1990 are used. Lapinski et al.⁷⁰ find a difference in attitude between, on the one hand, liberal countries, and on the other hand, conservative and social democratic countries. Individuals living in liberal welfare regimes are less supportive. No differences between conservative and social democratic countries are observed. Andreß and Heien use the ISSP data of 1992.⁷¹ They also find that people in liberal welfare states show low levels of support for governmental action. They further find medium level of support in

64 Esping-Andersen 1990; Svallfors 1997; Lapinski et al 1998.

65 Lapinski et al.1998.

66 Esping-Andersen 1990.

67 Lapinski et al.1998.

68 Gelissen 2000; 2008.

69 Lapinski 1998.

70 Lapinski et al, 1998.

71 Andreß & Heien 2001.

conservative regime and high support in social democratic regime. The questions they use are: whether it is the responsibility of the government to reduce income differences, whether it is the responsibility of the government to provide jobs for all, and whether it is the responsibility of the government to provide a basic income for all. The measure of public support in the ISSP data is therefore different from the measure of the Eurobarometer surveys.

According to Larsen,⁷² when focusing on items measuring attitudes towards policies concerning the poor and the unemployed, a regime pattern can be found. Liberal welfare regimes receive low support, conservative regimes moderate support, and social democratic regimes high support. Svallfors comes up with similar conclusions.⁷³ Basing also on the ISSP data of 1992, he concludes that the social democratic welfare regime shows the highest redistribute attitude and highest support for government intervention, while the redistribute attitude and support for government intervention are lowest in the liberal welfare regime. The analyses of the public support for Western welfare states thus show that welfare states show large similarities in public support for a broad measure of government intervention. Public support does, however, differ for policies concerning the poor and the unemployed. In the next section possible explanations for these differences in public support are brought forward.

4.3 Explaining differences in public support

In explaining why social democratic welfare regimes are characterized by the highest public support and liberal welfare regimes by the lowest public support with regard to policies concerning the poor and the unemployed, Svallfors focuses on differences in attitudes to income differences.⁷⁴ He finds that citizens from different welfare regimes vary in the extent to which income differences are regarded as legitimate. Compared to citizens living in the liberal welfare regime of the United States, citizens of social democratic welfare regimes, in particular Norwegians, are much less in favor of income differences. From this respect, differences in public support for income redistribution by the government can be explained by different attitudes with regard to the legitimacy of income differences.

Alesina & Angeletos explain different in public support by differences in perceptions regarding the fairness of market outcomes.⁷⁵ They argue, that when income differences are believed to be highly determined by luck higher income redistribution is supported compared to situations where income differences are believed to be highly determined by ones own effort. Lower public support for income redistribution in the United States can, from this respect, be explained by a strong belief that income differences are highly determined by ones own effort and not by luck. The World Values Survey, for example, shows that 71% of the Americans versus 40% of the Europeans believe that the poor could become rich if they tried hard enough.⁷⁶ According to Alesina & Angeletos,⁷⁷ this argument is not limited to a comparison of the United States versus Europe, but holds for European welfare regimes as well. They find

72 Larsen 2008.

73 Svallfors 1997.

74 Svallfors 1997.

75 Alesina & Angeletos 2003.

76 Alesina & Angeletos 2003.

77 Alesina & Angeletos 2003.

a significant relationship between a leftist political orientation in a country and the belief that luck determines income.

The follow-up question is how differences in attitudes toward the legitimacy of income differences can be explained. Comparing the United States with European welfare regimes, Alesina & Glaeser find that economic explanations in terms of a lower pre-tax income inequality and lower income mobility give little explanation of why citizens from social-democratic welfare regimes favor income differences less.⁷⁸ They find that the political institutions and heterogeneity of the population in the United States do form an important explanation. Brooks & Manza also find that the context in which individuals are situated forms an important explanatory factor for welfare state preferences.⁷⁹

Larsen offers an explanation of how differences in institutional structures may influence welfare state preferences.⁸⁰ He argues that ‘the institutional structure of the different welfare regimes influences or frames the way the public perceives the poor and unemployed’.⁸¹ His analysis is based on the deservingness criteria we discussed in section 3.2: control, need, identity, attitude, and reciprocity. According to Larsen a liberal welfare regime, characterized by a selective welfare policy, opens the discussion of whether people are in need, in control, and have a grateful attitude.⁸² Moreover, it creates boundaries between ‘them’ and ‘us’ negatively affecting the willingness to support the welfare state for reasons of identity and reciprocity. The logic of a social democratic regime, characterized by a universal welfare policy, is in many respects contrary to the liberal regime. In a social democratic regime, the discussion of whether people are in need, are to blame for their need, or are grateful for the welfare resources they receive, is far less important. This increases the willingness to support the welfare state for reasons of meeting the deservingness criteria need, control, and attitude. Moreover, in a universal welfare state regime everyone belongs to a national ‘us’ and the boundaries between those who give and those who receive are blurred, positively affecting the willingness to support the welfare state for reasons of identity and reciprocity.

The hypothesized link between welfare regimes and the fulfillment of deservingness criteria is verified in an analysis of the World Values Study of 1990. Larsen, for example, finds that in the liberal welfare regime of the United States 39% of the people believe that the reason for people living in need is due to laziness and lack of willpower, while in the social democratic regime of Sweden only 16% of the people believe so.⁸³ In addition to the deservingness criteria, Van Oorschot has emphasized the importance of solidarity for welfare state support.⁸⁴ According to Van Oorschot, the support for solidary welfare policies highly depends on the interest that the middle class has in the regime.⁸⁵ He argues that in order to retain high public support it is important to make a large part of the population stakeholder of the welfare regime. The involvement of the social partners is therefore important. Moreover, it might form an impor-

78 Alesina & Glaeser 2004.

79 Brooks & Manza 2007.

80 Larsen 2008.

81 Larsen 2008, p.148.

82 Larsen 2008.

83 Larsen 2008.

84 Van Oorschot 2000.

85 Van Oorschot 2006b.

tant explanation for the finding that social democratic welfare regimes are characterized by higher levels of public support.

All in all, the research described in this section shows that an important factor explaining differences in public support between welfare states, is the extent to which different groups are perceived as being deserving or meet the deservingness criteria. From this respect, a low level of public support for policies concerning the poor and the unemployed found in liberal welfare regimes does not seem to be an indication of a public values failure. Rather, it indicates that citizens of liberal welfare states perceive the position of the unemployed and the poor differently compared to citizens of social-democratic welfare states.

5 Towards an interdisciplinary approach to defining public interests

An important message the social science public interest literature brings forward is that public interests or public values are a social construct. Therefore, public interests or public values inherently are dynamic and involve political decision making regarding different possible competing public interests or public values. With regard to the question what can be regarded as the public interests of the welfare state for which governments should take responsibility, the social science literature therefore also does not come up with a unifying answer. Such an answer depends on the country and the specific period of time under study. From the perspective of social science, an interdisciplinary approach should therefore take the context into consideration when trying to define public interests.

Moreover, the fact that something is regarded to be in the public interest or is perceived as a public value does not, in itself, have any implications for decisions with regard to the allocation of responsibilities between public and private. According to the social science literature, the responsibility for the government comes up only in instances where public interests are not realized or public values fail. The question is then, of course, in which instances public values fail. Important development in the social sciences is the public values failure approach of Bozeman which formulates general criteria, in line with market failure criteria, to describe situations in which public values are more likely to fail.⁸⁶ A second important element the social science approach to defining public interests brings forward is therefore that in order to be able to make decisions about the allocation of responsibilities between public and private, it is necessary to focus on public values failure.

When focusing on the question what can be regarded as the public values of the welfare state, a social science approach will emphasize that such a definition depends on the country and the specific period of time under study. However, the social science approach also brings forward that by adopting the public values failure framework some general notions might be made with regard to what should be considered as the inviolable part of the welfare state for which the government should take responsibility.

One way of identifying public values failures in welfare states is by analyzing to what extent welfare states are publicly supported or democratically legitimized. What is clear from the

⁸⁶ Bozeman 2007.

welfare state literature is that the rank order of public support for different needy groups is similar across different welfare regimes. All over modern Western welfare states, in various decades, the public was found to be most in favor of social protection for 1) old people, 2) sick and disabled people, 3) needy families with children, 4) unemployed people, and 5) people depending on social assistance.⁸⁷ The hierarchy in public support between the different groups can be explained by five deservingness criteria: control, need, identity, attitude, and reciprocity.⁸⁸ Given the stability in rank order of public support for different needy groups, the low level of public support that is attached to government interventions for the unemployed and for people depending on social assistance does not seem to be an indication of public values failure but rather indicates a difference in importance that is attached to the protection of these groups (see Table 3). That is, the unemployed and people depending on social assistance are perceived as less deserving in comparison to the old, sick, and disabled.

Table 3: Identifying public values failures for policies concerning different needy groups

Importance attached to different needy groups	Public support for policies concerning the different groups	
	<i>Low</i>	<i>High</i>
<i>Low</i>	No public value (Poor and unemployed)	No public value
<i>High</i>	Public value failure	Public value realization (Old, sick and disabled)

The question is whether the low levels of public support for policies concerning the poor and the unemployed found in liberal welfare regimes can also be explained by differences in public values or whether it forms an indication of a public values failure. Here, the explanations also seem to be more in line with the former. Research shows that the extent to which different groups are perceived as being deserving or meet the deservingness criteria, differs between welfare regimes. A low level of public support for policies concerning the poor and the unemployed in liberal welfare states therefore does not necessary indicate a public values failure. Rather it indicates, as Table 4 shows, that citizens of liberal welfare states perceive the position of the unemployed and the poor differently compared to citizens of social-democratic welfare states.

Table 4: Identifying public values failures for different welfare regimes

Importance attached to the poor and unemployed	Public support for policies concerning the poor and unemployed	
	<i>Low</i>	<i>High</i>
<i>Low</i>	No public value (Liberal welfare regime)	No public value
<i>High</i>	Public value failure	Public value realization (Social democratic regime)

⁸⁷ Van Oorschot 2006a.

⁸⁸ Van Oorschot 1998.

Although within each welfare regime, the extent to which certain groups are perceived as deserving changes over time and is adjusted to economic developments such as levels of unemployment, changes in perceptions between welfare regimes are likely to persist since they originate from institutional factors and are historically grounded.

To conclude, our analysis of the public support for Western welfare states shows that some general notions can be made with regard to what should be considered as the inviolable part of the welfare state for which the government should take responsibility. A public interest to protect vulnerable groups can be identified. Which groups are believed to deserve protection or which level of protection is believed to be necessary does, however, depend on the institutional context. As a result, the allocation of responsibilities between public and private for the protection of these groups depends on the institutional context and may therefore differ from country to country and over time.

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THE PUBLIC INTEREST AND THE WELFARE STATE: A LEGAL APPROACH

Gijsbert Vonk

1 Introduction

This contribution analyses the theme of the public interest and the welfare state from a *legal* angle. It addresses the following question.

Does the law provide a basis for defining social security as a public interest and if so, to what extent is this interest supported by concrete legal standards?

This chapter is structured as follows.

Paragraph 2 includes some preliminary observations with regard to the public interest as a legal concept. While this concept is frequently used in the law, it does not have a fixed meaning. The concept is a typical example of an open norm the meaning of which varies according to the legal regime, the specific context of the case and nature of government policies. For this reason it was decided not to use any “public interest doctrine” as a tool for answering our question. Instead we have identified the public interest with state responsibility under fundamental socio-economic rights. Legal doctrine with regard to these rights offers a framework for interpreting such responsibility. This proposition is worked out in paragraph 3 with reference to the modern method of differentiating the state obligations, i.e. the obligation to respect, the obligation to promote and the obligation to fulfil. In paragraph 4 we move on to the second part of the central research question dealing with concrete legal standards. Here the quest is to link up the framework of state-obligations with the principles underlying the right to social security. It was tempting to try to deduce such principles from various legal sources. But it is difficult to do so without resorting to subjective arguments and ‘cherry picking’ the legal rules that support these arguments. Therefore, we came up with an own proposition as to the basic principles, in order to find out to what extent they are actually supported by concrete legal standards. The concrete legal standards have been drawn from various sources, i.e. both international and regional instruments (such as conventions of the ILO and the Council of Europe), domestic legislation, case law and doctrine. The article concludes in paragraph 5 with a number of reflective remarks about our legal approach to defining social security as public interest.

2 The public interest as a legal concept

The term ‘public interests’ and its equivalents ‘general interests’ and ‘public good’ play a major role in legal argumentation. The concept seems to be particularly relevant in case law when courts feel a need to create room for exceptions to established legal rules. Thus, for example, legal doctrine dictates that indirect discrimination is prohibited unless it is objectively justified by the public interests. Likewise in the area of European Community law, the public interest test serves as construction to allow exceptions to the free market regulation. Under this test trade restrictions may be excusable when they are ‘aimed at an overriding reason of public interest’. Similarly some fundamental freedom rights for citizens may be restricted in the light of the public interest.

When we look at these three examples the concept of the public interest each time refers to some collective good which superimposes itself over private interests. This makes the concept potentially interesting for our subject: can social security be considered to be such a collective good and if so what are the legal consequences of this qualification? Indeed case law in this area, especially of the European Court of Justice, is very relevant for social security. For example, this case law kept the Dutch second pillar pension schemes out of the claws of the EU internal market regulation, threatening to undermine the solidarity bases of these schemes.¹ It equally put a halt to full unbridled intra-community competition in the area of health care, threatening to undermine the local hospital infrastructure. These are just two examples of important public interest exceptions which the ECJ formulated vis-à-vis social security schemes.

Yet despite the relevance of the case law, the suitability of any legal ‘public interest doctrine’ for our subject must not be overestimated. The concept is a typical example of an open norm, the meaning of which varies according to the legal regime, the specific context of the case and nature of government policies. This probably explains why there seems to be some reluctance amongst renowned legal scholars to examine the nature of the public interest.² Case law in this dealing with the boundaries between free market regulation and social values, mostly of the ECJ, offers a confused picture. Also recent attempts of the European Commission to develop criteria for determining ‘social services of general economic interest’ have grounded to halt.³ It is for this reason that we have decided to discard the public-interest-doctrine as a tool for answering our research question and instead to embrace the concept of state responsibility under socio-economic fundamental rights. Thus, for the purposes of this contribution ‘public interests’ refer to interests for which states bear responsibility. As we will see in the next paragraphs the legal doctrine surrounding socio-economic rights is well matched for identifying such responsibilities in the area of social security.

1 ECJ J 21 September 1999, C-115/97 to C-117/97 (Brentjens); ECJ 21 September 1999, C-67/96 (Albany International BV) en ECJ 21 September 1999, C-219/97 (Drijvende bokken), 1999 [ECR] I-5751.

ECJ 12 September 2000, C-180/98 - C-184/98, 2000 [ECR] I-6451.

2 Cf. Kadrjann Ikkonen ‘The public interest as an undeterminable legal concept’, *Juridica* III 2005.

3 Communication of the European Commission 26 April 2006, COM, 2006 117def. The commission has decided to no longer pursue this project.

3 Social security as a fundamental socio-economic right; state responsibility

Every person, as a member of society, has the right to social security (...); so proclaimed art. 2 of the Universal Declaration of human rights in 1948. Since then the right has also been adopted in international and regional human rights instruments, such as the International Covenant on Economic, Social and Cultural Rights (ICESCR, art. 9), the European Social Charter (ESC, art. 12), the EU Charter of Fundamental Rights (CFREU, art. 34), as well as in the national constitutions of a growing number of states.

There is much conflicting opinion about the meaning of the right to social security as a fundamental right (and socio-economic fundamental rights in general).⁴ On the one hand there are ‘optimists’ who argue that with some effort these rights can be given a concrete meaning. For example, George Katrougalos, argues that the *Sozialstaatprinzip* is not a typical feature of the German constitution alone. According to the author, similar constitutional guarantees exist in many other countries and in Europe in general (under both the treaties of the EU and the Council of Europe).⁵ Katrougalos is of the opinion that the social state principle dictates that the state should primordially act as a direct provider of social security, either directly or through public entities. Merely regulating and facilitating the efforts of others is not enough. The rationale behind this is that benefits should be made available to everyone as a social right, not to be jeopardized by the contingencies of the market.⁶ Others suggest that socio-economic fundamental rights, including the right to social security are or should even be individually justiciable, in the sense they may give rise to a right to concrete benefits. Proponents of this viewpoint can point at the increasing body of case law of constitutional courts in countries such as India and South Africa in which individual claims under socio-economic fundamental rights has been recognized.⁷ Yet, on the other side of the scale there are ‘pessimists’ who maintain that most of the socio-economic fundamental rights are merely amorphous policy guidelines, the legal meaning of which roams in the dark: too vague, too undetermined and too political. It is up to the legislator to decide how to organise social security and judges should respect the choices made.

Between these two extremes, there is one thing that cannot easily be contested and that is state responsibility. The inclusion of the right to social security in an internationally binding norm infers that it is the state which must be held accountable for the progress a country makes in the area of social security. It is a simple consequence of international law under which states are legally bound to the treaty obligations they have adhered to. It would, for different legal reasons, also be the consequence of inclusion of social security in the national constitutions.⁸

In theory, state responsibility does not imply that the right to social security prescribes a specific division of powers between the state, society at large and the individual, let alone that it presupposes that the state should organize or administer social security itself. It can equally

4 Most literature refers to socio-economic rights in general, and not specifically to the right to social security. For an exception, see *Social Security as a Human Right, Drafting a General Comment on Article*, 2007.

5 George S. Katrougalos 1996 -1; 1996-2; 2009.

6 Georg S. Katrougalos 2009, p. 24.

7 For a discussion of this case law, cf the various contributions adopted in Fons Coomans 2006.

8 D. Pieters 1985, p. 448-449.

be been contended that it should not be the state but rather society as a whole that should take primary responsibility, as classic fundamental rights tend rather to restrict the possibility of state interference. From this point of view it is more plausible to interpret the right to social security as implying that the right to social security could also be implemented by means of contractual rights and obligations between citizens and private parties. Whatever may be said about this, it must be accepted that total state abstinence is no longer an option. Social security is a public concern and when the system fails to deliver, it is only the state that can be held accountable. Acceptance of social security as a constitutionally or internationally binding fundamental right makes it a *public interest*.⁹

What are the legal obligations arising from state responsibility? According to the ICESCR the answer is that states “must take steps (...) by all appropriate means (...) to achieve progressively the full realization of the rights to the maximum of its available resources”.¹⁰ While some refer this matter entirely to the national political decision maker (bringing the matter at least within the public domain), others argue in favour of a further concretization of the obligations by independent experts and judges. In the meanwhile various attempts have been made to clarify the legal nature of socio-economic rights.¹¹ Since the eighties of the previous century a number of scholars have started to differentiate between various types of obligations that may arise from socio-economic fundamental rights: the obligation to respect, the obligation to promote and obligation to fulfil.¹² This method, which is increasingly gaining acceptance among human rights experts, turns out to be relevant for our subject. In the introductory chapter of this book we rejected the public-private dichotomy for social security because it does not take into account the various shades of grey that exist between these two extremes: the state plays a variety of roles, supported by an great number of different instruments. As we will see, the differentiated model of obligations is suitable for social security because it takes this variety into account.

At this stage reference should be made to an interesting document produced by the Commission of Economic, Social and Cultural Rights (CESCR), the general comment no. 19. The CESCR is the committee of human rights specialist which guards over the application of the ICESCR. In order to clarify the socio-economic fundamental rights contained in the Covenant, the CESCR has started to develop so called general comments. For a long time, the right to social security as contained in art. 9 of the Covenant, had not been the subject of a general comment, but the latest general comment no. 19, adopted in November 2008 made an end to this. The document includes 21 pages and can be accessed on the internet.¹³

The general comment makes use of the distinction between the three types of obligations. Without entering into the full contents, let us briefly look at the outcome of the reasoning.

9 It is interesting to connect this observation to the events that followed from the recent credit crunch. As a result of the combination the collapse of the stock markets and low interest rates, many privately run pension schemes have run into trouble. States in all the continents which rely heavily on such schemes have reacted to this by taking measures, often in the form of strengthening the public elements within the pension system as a whole. For an overview of measures that various state have taken in reaction to the credit crunch, cf Katrougalos 2009.

10 Art. 2 (1) ICESCR.

11 For an official attempt by human rights experts, cf. the *Limburg principles on the implementation of the international covenant on economic social and cultural rights*, Maastricht, 1986; on the impact of these principles cf. David L. Martin 1996.

12 For an overview of the literature Sepúlveda 2003. In the Netherlands the first proponent of the differentiated model was Vlemminx 2002.

13 <http://www.unhcr.org/refworld/type,GENERAL,CESCR,,47b17b5b39c,0.html>.

(a) Obligations to respect

33. The obligation to *respect* requires that State parties refrain from interfering directly or indirectly with the enjoyment of the right to social security. The obligation includes, inter alia, refraining from engaging in any practice or activity that denies or limits equal access to adequate social security; arbitrarily interfering with self-help or customary or traditional arrangements for social security; or interfering with institutions that have been established by individuals or corporate bodies to provide social security.

So this is an unexpected outcome. The first obligation of the state is to not negatively interfere in private social security but to respect its integrity. At first sight it not easy to understand why a government would want to upset private social security arrangements, at least in a free and democratic society. But examples do exist. Thus I came across a recent ruling of the Canadian Supreme Court which overturned a ban on private health care insurance in the province of Quebec. Waiting lists in the obligatory universal health care services had induced some Canadian citizens to take out private insurance in order to be able to buy in preferential treatment. But in some Canadian provinces this was prohibited. The ban on private insurance was considered to be contrary to the right to life and personal integrity protected by the Quebec and Canadian Charter.¹⁴

(b) Obligations to protect

34. The obligation to *protect* requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to social security. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, inter alia, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to social security schemes operated by third parties or others, imposing conditions or providing benefits that are not consistent with the national social security system; or arbitrarily interfering with self-help or customary or traditional arrangements for social security.

35. Where social security schemes, whether contributory or non-contributory, are operated or controlled by third parties, States parties retain the responsibility of administering the national social security system and ensuring that private actors do not compromise equal, adequate, affordable, and accessible social security. To prevent such abuses an effective regulatory system must be established, which includes independent monitoring, genuine public participation and imposition of penalties for non-compliance.

The general comments move on: not only should private social security be respected, its proper functioning must also be protected. A more active role for the state is born, be it not as direct provider but as regulator.

The regulatory function is particularly relevant in the area of collective agreements, being an important source for (supplementary) social security entitlements and for employee benefits in general, in particular second pillar pension schemes. The conviction that the state must play an active regulatory and supervisory role in this area has become more widespread, particularly after the bad experiences some countries have had with the introduction of a funded private pension system. At first sight such *systems offer all sorts of advantages over public pay as you go schemes. The financial burden is shifted to another generation and funded systems include the promise of higher replacement rates. But there are also certain flaws attached to funded private pensions.* The levels of benefit are dependent upon the return of

14 Chaoulli v. Quebec 2005, 1 S.C.R. 791.

investments which are not always prosperous and which may fluctuate, giving rise to differences in entitlements, not only in time but also between funds. Also there is the risk of bad management and failing administration. These risks have led to the belief that a shift from public to private pension schemes must necessarily involve the introduction of strict and effective regulatory and supervisory machinery.¹⁵

(c) *Obligations to fulfil*

36. The obligation to fulfil requires States parties to adopt the necessary measures, including the implementation of a social security scheme, directed towards the full realization of the right to social security. The obligation to *fulfil* can be disaggregated into the obligations to *facilitate*, *promote* and *provide*.

37. The obligation to *facilitate* requires the State to take positive measures to assist individuals and communities to enjoy the right. The obligation includes, *inter alia*, according sufficient recognition of this right within the national political and legal systems, preferably by way of legislative implementation; adopting a national social security strategy and plan of action to realize this right; ensuring that the social security system will be adequate, accessible for everyone and covers risks and contingencies, namely income security, access to health care and family support. Examples of such steps include establishing a contribution-based social security system or a legislative framework that will permit the incorporation of the informal sector.

38. States parties are also obliged to fulfil (*provide*) the right when individuals or a group are unable, for reasons beyond their control, to realize that right themselves within the existing social security system with the means at their disposal. States parties will invariably need to establish social assistance or other non-contributory schemes and/or provide support to those individuals and groups who are unable to make sufficient contributions for their own protection together with mechanism for the progressive coverage of all risks and contingencies.

(...)

Here, we find the foundation for welfare state as a whole. States are expected to develop a strategy or policy on the welfare state. This is left entirely up to the state's discretion, except where it involves the minimal care for those without any protection: setting up a system of social assistance is mandatory. The latter is a typical consequence of this present state obligation theory: the obligation is far more intense when it comes to guaranteeing the bare essentials, for further entitlements it becomes more diluted.

It is important to bear in mind that the general comment is not a binding legal source. It is merely a draft and even when officially adopted by the CECR, it does not qualify as a source of international law. On the other hand, it is an authoritative source for the interpretation of the ICESCR and similar instruments. For us the most important thing about the general comment no. 19 is that it constitutes proof that it is possible to establish a normative framework for identifying state responsibility in social security with reference to the law. The general comment offers a perfect illustration of what such a framework might look like.

15 Cf. Robert Holzmann & Richard Hinz 2005. For the situation in the Balkan countries: Vonk 2007.

4 Social security; substantive legal standards

The differentiated model is not specifically designed for social security but applies equally to other socio-economic fundamental rights. It is a framework in the formal sense of the word; the exact nature of the obligations depends on the substance of the rights involved.

When dealing with the right to social security, we meet a considerable problem. The meaning of this right cannot easily be determined: it does not say what social security is or what social security model should be adopted. As a result, we do not know exactly what must be respected, protected or fulfilled. Indeed, it is doubtful that a universal model for social security could be developed anyway, or as the ILO put it in its 2001-publication *Social security, a new consensus*:

*There is no single right model of social security. It grows and evolves over time. There are schemes of social assistance, universal schemes, social insurance and public or private provision. Each society must determine how best to ensure income security and access to care. These choices will reflect their social and cultural values, their history, their institutions and their level of economic development.*¹⁶

While accepting that there is no single model for social security and that social security in itself is a relative concept, an attempt could be made to formulate a list of core principles which do have more universal acclaim. Once such a list is established we can investigate to what extent the various principles are supported by concrete legal standards.

For the purposes of this article we propose a catalogue of seven core principles of social security, i.e.

Protection. Social security must provide income protection. This assumes the existence of a system that provides protection against labour risks, such as unemployment and labour incapacity, and life risks, such as old age, excessive costs and, in the broadest sense of the term, poverty.

Inclusion. The system must be aimed at the citizen's participation in society via paid employment, sheltered work places or in some other way.

Reliability. The social security system must be durable and reliable. This assumes a proper balance between a solid financial basis and respect for accrued benefit entitlements.

Solidarity. Social security can only be realized when there is a certain degree of support from the strong for the weak. The financing of the system should at least partly be based on a collective responsibility of groups, in the widest sense employees, employers and the state and may for this purpose be rendered obligatory.

Equal dispensation of law and non-discrimination. The system must be accessible to everyone, regardless of social position. This assumes extra attention to vulnerable groups, such

¹⁶ ILO 2001, p. 2.

as the disabled, the chronically ill, and minorities. The system may furthermore not discriminate on grounds of gender, race, religion, etc.

Rule of law. The right to social security demands that claims must be vested in law. This implies that they have a recognizable legally defined position that can be enforced. The *rule of law* assumes also that there is access to the courts and ultimately subordination to all fundamental rights.

Good governance. The system on which social security entitlements are based must be managed and implemented efficiently, transparently and without prejudice. .

These principles have different characteristics. In fact there are three groups. Principles one, two and three (protection, inclusion and security) constitute *objectives* (as in French: finalités”); numbers four and five (solidarity and equality) constitute *intrinsic values*; the last two principles (rule of law and good governance) should be considered as *preconditional*. The principles may be somewhat overlapping.

We take our seven principles as the list of ‘outcomes’ for which the state bears responsibility. Although these principles are merely brought by means of proposal and do not have any legal force of their own, it is possible to identify each of them with more rules that are clearly vested in the law. This is what must be done in the last phase of our method: connecting principles to legal standards.

4.1 Protection

There are various ways that the principle of protection can be identified with legal standards

First of all the ‘core content’ of the right to social security can be taken into account. The core content can be seen as a method of interpreting socio-economic fundamental rights which is based upon the notion that each right contains a hard nucleus that is not to be negotiated under any circumstances.¹⁷ The CESCR perceives the core content of social security as the minimum essential level of social security that is essential for acquiring water and sanitation, foodstuffs, essential primary health care and basic shelter and housing, and the most basic forms of education, which must be accessible on a non-discriminatory basis. In matters between life and death, it should be possible to establish this bottom line proposed by the CESCR. Although it may not be much it is a least something to fall back upon.

Secondly, it can be argued that the notion of protection cannot be fixed with reference to one specific standard, but that it depends on the circumstance of the case. This contextual interpretation would be similar to the so called ‘reasonableness approach’ adopted by the South African Constitutional Court and which has led to its famous sequence of socio-economic fundamental rights cases, dealing *inter alia*, the bulldozing of townships without offering any support or compensation to its inhabitants (Grootboom-case), providing medicine to children with HIV/AIDS (TAC-case) and the right of permanent resident non-citizens to the South

17 Cf. de extensive study of Catharine J. Young 2008.

African old age grant (Khosha-case) .¹⁸ In general, the incipient case law relating to socioeconomic fundamental rights of both national courts and international organs, such as the European Commission of Social Rights, can be seen as a treasure chest for legal interpretations of protective standards provided by the right to social security.

Thirdly, reference can be made to minimum social security standards adopted by the ILO and the Council of Europe. There are a large number of such ILO instruments, both recommendations and Conventions. The mother of all conventions is considered to be Convention No. 102 which contains minimum standards for all branches of social security (but excluding social assistance). Other conventions cover specific branches, such as industrial accidents and occupational diseases (no. 121), invalidity and old age (128), and unemployment (164). Besides these there are social security standards as part of categorical conventions which apply to specific categories of workers, such as seamen and migrant workers. The main instrument of this nature within the Council of Europe is the (revised) European Code on social security. On the one hand these instruments contain sets of system requirements for each of the branches of benefit, on the other hand they formulate minimum percentages of coverage and of benefit levels.

Interestingly, the minimum social security standards address the problem of the degree of universality of protective standards. The instruments include various types of flexibility clauses which allow states to adjust the obligations to their level of development. Also, more stringent criteria may be established in regional instruments, most notably the (revised) Code on social security adopted by the Council of Europe. Nonetheless it must be borne in mind that ILO minimum standards are hardly ratified by the poorer countries. Thus the universal acclaim of these standards is not fully realised in practice. In this respect it must be borne in mind that 50% of the world population is not covered by any formal system of social security at all. The extension of social security to larger groups of the populations remains a major challenge.¹⁹ It has been argued that this challenge can be realised better by a new social security instrument dealing with minimum subsistence schemes, than by increasing the number of ratifications under ILO Convention No. 102. This idea has been picked up by the ILO which is currently contemplating the possibility of developing a separate convention for a so called *social security floor*.²⁰ This kind of floor could be achieved by means of a convention that stipulates regulations for the most essential forms of support. The following are currently being considered in this context: basic healthcare, family benefits that allow children to attend school, focused programmes for work and support for the poorest of the poor, and a basic pension system for those who are no longer able to work. Obviously, if such a convention should become a reality it would be a most suitable point of reference for the protection principle, for richer and poor countries alike.

Fourthly, the notion of protection can be given a more concrete meaning when judged in the light of the legal obligations which exist in the various national countries. Just to give an example: when in the Netherlands the minimum level of subsistence is associated with 90% of the so-called social minimum, which in itself is derived from a percentage of the minimum

18 Sandra Liebenberg 2007; M.P. Olivier, N Smit, E.R. Kalula 2003 p. 87-90.

19 Cf. ILO 2001.

20 See, among others, Michael Cichon and Krzysztof Hagemeyer, 2007, 169-196.

wage (depending on household status), this might be considered as a point of reference for defining the minimum level of protection under the right to social security. This would infer that it would be contrary to the principle of protection pertaining to this right to exclude certain groups from this minimum subsistence level, at least when there is no objective justification for doing so.

Some would argue that the notion of protection goes further than providing a minimum subsistence level alone. Benefits should stand in a “reasonable proportion” to the previous earnings of a person. When it comes to social insurance schemes which qualify as income replacement benefits, this point of view is supported by the relevant minimum standard conventions of the ILO en the Council of Europe.

4.2 Inclusion

The inclusion principle of social security has regained much attention ever since governments have embraced the idea of the ‘activating welfare state’. Many policy documents stress the need of integrating social security beneficiaries into the society. Yet, the ‘activating welfare state’ as a legal concept has rarely been examined.²¹ And when examined, the conclusion is that a fully fledged right to integration or a legal doctrine on activation has not yet emerged.²²

Despite these misgivings, two things must be pointed out. Firstly, the principles of social security, or indeed social security as a public interest, are not only reflected in the law by means of individual rights, but also by obligations. Obviously, obligations are as much part of the legal sphere as rights. It can well be argued that the obligation to be available and accept work is necessary consequence of the reciprocity principle; it may not be nice for the individual, but it is in the interest of the society at large.

Secondly, even when solely focussing on rights it should be pointed out that the principle of inclusion is not entirely without legal protection. Before the advent of the new activating policies, the right to work emerged as a fundamental right. It is adopted in the national constitutions of many countries, as well as in various international instruments on socio-economic fundamental rights, such as the European Social Charter (ESC)²³ and the International Covenant on social, economic and cultural rights (ICESCR)²⁴. It is not easy to catch the meaning of this right in a single phrase. It suggests that everybody should be able to earn his living in an occupation freely entered upon. On the one hand it presupposes a positive obligation of the state to strive for a high and stable level of employment and to provide and promote employment services and occupational training. On the other hand it displays characteristics of a freedom right where it protects the freedom of occupation. In the latter sense the right to work is related to the prohibition of slavery and forced labour, adopted in the other human rights instruments, such as the International Covenant on economic, social and cultural rights (art. 6) the European Convention on human rights (art. 4) and conventions of the ILO.²⁵

21 Sol et al 2008, 163.

22 Noordam 1987, E. Sol et al 2008, p. 217.

23 Art. 1 ESC.

24 Art 6 ICESCR.

25 E.g. Forced Labour Convention, 1930 (ILO, nr.29).

The point is however -and here I agree with the pessimists- that the introduction of the new activating welfare policies have done little to enhance the right to work as a fundamental right. On the contrary, these policies, in particular if they fall under the heading of ‘workfare’, have lead to a negative shift in the balance between obligations and rights of social security claimants. Work fare policies come with more discretionary powers for the administration, more stringent criteria and harsher sanctions and not with more rights for the persons involved. Protective legal standards are far and in between.²⁶ In that sense one indeed be careful to associate these policies too much with the inclusion principle anyway. If we would have to find protective legal standards, it would be better to look for them elsewhere, for example in the area of rehabilitation services for the handicapped and the elderly.

4.3 Reliability

While the long term sustainability of our social security schemes is primarily an economic issue, the balance between a solid financial basis and respect for accrued benefit entitlements is also a legal question. This question has entered the legal domain with the recognition that social security benefits should be considered as property rights. Social security beneficiaries can claim protection under this right when governments interfere with existing rights, for example for budgetary reasons. It is then up to the judiciary to decide whether any infringement of accrued rights is legitimate on grounds of overriding arguments, such as the long term financial viability of the system.

With respect to this issue, the case law of the German *Bundesverfassungsgericht* has particular relevance. This court has a long tradition in applying the constitutionally enshrined principle of peaceful enjoyment of property in the field of social security benefits.²⁷ In order to meet requirements prescribed by the German court, special transitional arrangements are required in case social security schemes are negatively adjusted. In practice, these usually involve gradual rather than immediate implementation of adjustments, be it that in this process the legislator ultimately has discretionary powers in formulating such arrangements.

A more or less similar case law has evolved ever since the European Court of human rights has accepted that social security benefits fall under the concept of property rights, as protected by the first protocol of the European Convention of human rights.²⁸ Thereby the European Court does not refrain from calling cut backs in social security into question when it feels that the government does not pursue legitimate aims.²⁹

In all, the shaping of transitory regimes accompanying cut backs in social security is firmly subject to legal scrutiny.

4.4 Solidarity

²⁶ Vonk 2009.

²⁷ Cf. Schuler 1988, p. 131-134.

²⁸ ECtHR 16 September 1996, *Gaygusuz v. Austria*.

²⁹ ECtHR 12 October 2004, *Asmundsson v. Iceland*.

Although solidarity can be voluntary, most often it is not. It is enforced by law. This can take various forms: obligatory statutory insurance, a duty to participate in collective or private schemes, or mere contribution- or tax liability.

Solidarity and forced participation in social security is very much an issue in European Community law where a line must be drawn between activities which come under the free trade and competition rules and activities which do not.

Initially it seemed that only public social security institutions which operate purely on the basis of mandatory participation were not to be qualified as commercial undertakings within the meaning of European Community law.³⁰ The ECJ case of *Fédération Française* had made clear that as soon as institutions move outside this domain they run the risk of being qualified as commercial undertakings.³¹ Such was the fate of the *Caisse Centrale*, the governing board of the French old age insurance scheme for farmers; the fact that this scheme was not mandatory but based upon optional participation played a major role in this decision.

However, it has now become clear that the qualification of a social security institution as an undertaking is not crucial for answering the question whether social security schemes should come under free trade and competition law. Especially the *Brentjens* cases have been of importance here.³² The question at stake in these cases was whether Dutch companies could be obliged to participate in occupational, second pillar pension schemes, even though this may run contrary to the freedom of movement of services and competition law. These schemes are based upon collective labour agreements. The ECJ ruled that the Dutch pension funds are to be considered as undertakings for the purposes of competition law. But this did not affect the outcome of the case. As the Dutch pension schemes are based on solidarity and serve social objectives, the exclusion of these schemes from competition law was considered to be justified on grounds of the general interest.

The post-*Brentjens* case law has often been very tolerant vis-à-vis obligatory participation in non-statutory social security schemes. Thus in *Pavlov*,³³ the duty for medical specialists to participate in Dutch occupational pension schemes was considered to be justified. In *Van der Woude* the ECJ had no difficulties in accepting that certain Dutch contribution facilities for employees are only payable to those who are affiliated to a health insurance company chosen under a collective agreement.³⁴ And in *Cisal* it was beyond any doubt the Italian Institute for occupational accidents insurance could impose contribution liability on a building company.³⁵

In short, all those claimants who hoped to circumvent their social security obligations by invoking EU free trade and competition law were let down by the ECJ. It is this type of case

30 ECJ 17 February 1993, C-159/91 (*Poucet en Pistre*), 1993 [ECR] I-637.

31 EC 16 November 1995, C-244/94 (*Fédération Française des Sociétés d'Assurance v. Ministère de l'Agriculture et de la Pêche*), 1995 [ECR] I-4013.

32 ECJ J 21 September 1999, C-115/97 to C-117/97 (*Brentjens*); ECJ 21 September 1999, C-67/96 (*Albany International BV*) en ECJ 21 September 1999, C-219/97 (*Drijvende bokken*), 1999 [ECR] I-5751.

33 ECJ 12 September 2000, C-180/98 tot en met C-184/98, 2000 [ECR] I-6451.

34 ECJ 21 September 2000, C-222/98, 2000 [ECR] I-7111.

35 ECJ 22 January 2002, C-218/00, 2002 [ECR] I-717.

law which illustrates how much solidarity is alive in legal practice not only as a bone of contention for some individual claimants, but also as a point of reference in case law.

4.5 Equal dispensation of law and non discrimination

The legal basis of the principle of equality can be easily established. Equality has two objectives. *Firstly*, there is the core principle of non-discrimination. Any lawyer will recognize the meaning of this principle as an important safeguard against governmental arbitrariness. He will be aware of the difference between direct and indirect discrimination and recognize the importance of the so called objective justification test on grounds of which discriminatory measures may be justified by certain objectives, provided that these measures are necessary and proportionate. He will appreciate that direct discrimination on certain grounds such as race, gender and religion is *prima facie* suspect, while in matters of indirect discrimination judges retain considerable leeway to strike down discretionary provisions or allow such provisions to continue to exist.

Secondly, the skin of the principle of equality requires a policy that compensates inequalities and protects vulnerable groups. The legal standards that meet this part of the principle of equality can be found in the special treaties and conventions, such as the Convention on the Rights of Persons with Disabilities or the Convention on the Rights of Children. International treaties protect all kinds of vulnerable groups that bear social risks that are hard to secure.

In the Netherlands, the relevance of international law can be illustrated by the events that followed upon the privatisation of the public invalidity insurance scheme in 2004. As a result of this privatisation pregnant self-employed women were left unprotected as no insurance company would offer them insurance (for the insurance companies it would be unwise to do so, as the risk of payment is 100%). Hence, with regard to pregnant women the privatisation was regarded to be contrary to international treaties, such as the UN Convention on the protection of the rights of women. This claim was not awarded by the Dutch Courts on purely formal grounds, but nevertheless the legislator adjusted the system and created a special scheme for this group (the so-called 'Self-employed and pregnant scheme').

4.6 Rule of law

The rationale behind accepting the rule of law as one the principles of the right to social security, is related to the distinction between the pre-modern concept of charity and the contemporary concept of social security. This difference has a legal connotation. Charity does not presuppose a legal obligation to provide benefit; this is a matter of discretion for the charitable institution which is –at most- under a moral obligation to deliver. As a result in a charitable system there cannot be any corresponding right to a benefit either for the recipient. The right

to social security however presupposes a system under which persons are entitled to support. This suggests that the beneficiary has some sort of legally defined position.³⁶

The inference of a legally defined position is that claims should be vested in the law and can be enforced. So if we were to distil a ‘public interest’ from the rule of law it must be that the state is responsible for setting up a legal system, that social security rights should somehow be legally defined and that the rights can be enforced. Indeed, this is also very much how it is perceived in the draft general comment no. 20. In this respect it should not be forgotten that art. 2(1) ICESCR contains a preference for legislation as an instrument for the implementation of the socio-economic fundamental rights.

The enforcement of rights suggests access to justice in general, but in particular the right and the possibility to bring disputes before an independent tribunal which has the power to take binding decisions. This is the right to a fair and public hearing as laid down in art. 6 of the European Convention of human rights and fundamental freedoms, as well as in national and international legal sources. We now find ourselves very much in well known legal terrain. The various aspects of the right to a fair and public hearing have been codified in national and international rules; there is an abundance of case law (also in relation to social security disputes)³⁷ and a large body of legal doctrine. As a result it is easier to come up with a list of legally recognized principles. We merely have to open any text book to see how this subject is broken down into sub-principles: access to court (full jurisdiction, legal aid, etc.), right to a fair trial (equality of arms, the right to adverse proceedings, etc.), public trial and public pronouncement of judgment, the reasonable time requirement, independent and impartial tribunal, the presumption of innocence, etc. The translation into concrete legal standards is complete.

The ‘rule of law’ eventually requires subordination to all human rights. Many of them have been proven to be of importance to social security, in particular the right to property, the prohibition of discrimination and the right to privacy.³⁸ Most of them can be broken down into concrete legal standards in the same way as the right to a fair and public hearing.

4.7 Good governance

It could be considered quite controversial to include a principle as good governance in our catalogue. It is potentially so large that is capable of swallowing up all the others. However, here it is used in a narrow sense of the word. Social security is not only a matter of good intentions. It requires a stable machinery for supervising claims and delivering benefits. For us the notion of good governance refers to the standards which define a proper administration of the schemes. Such standards can be found in various laws, sometimes specifically desig-

³⁶ This fundamental distinction between charity and social security has been reflected upon in an impressive opinion of Advocate General *Mayras* of the European Court of Justice in the *Frilli*-case, where the court had to decide on the exclusion of ‘social assistance’ from the material scope of social security regulation no. 3/58 (now Regulation 1408/71) and is –as a bottom line- still accepted in the Court’s case law up to this day. ECJ 22 June 1972 (*Frilli*), 1972 *ECR* 457. The criterion of the legally defined position still applies, but would in practice no longer exclude many social assistance schemes. Instead these schemes are outside the EC Regulation in view of another criterion that has been developed by the ECJ, namely that there should be a clear connection between the benefit and one of the classical social insurance risks, such as unemployment, sickness, old age, etc. See ECJ 27 March 1985 (*Hoeckx*) 1985 *ECR* 928.

³⁷ Referring to the famous cases of the ECtHR in *Deumeland* and *Feldbrugge* of 29 May 1986, appl. 8562/79 and 9384/81 and subsequent developments.

³⁸ For the impact of the case law of the ECtHR: *Social security cases in Europe: The European Court of Human Rights* (2007).

ned for social security, sometimes of a more general nature. Thus, acts do not only regulate the legal status of the administrative institutions and their powers, but also the time limits within which decisions must be taken or benefits must be delivered, transparency rules, the protection of personal data, the involvement of interested parties, client participation, etc. As a matter of fact, the involvement of third parties in the administration, in particular employer and employee organisations is also prescribed by international minimum standards on social security.³⁹

5 Concluding remarks

In the introduction of this paper we raised the following question: does the law provide a basis for defining social security as a public interest and to what extent is this interest supported by concrete legal standards? As we have seen, legal doctrine relating to socio-economic rights supplies us with a formal framework of state responsibility. The main thing that we have learned from this framework is that state responsibility for social security does not rule out the involvement of private and collective arrangements. Under the doctrine of state responsibility any division of power is feasible as long as it realises the objectives of social security. At the same time it must be realised that the responsibility lies heavier on the shoulders of the state when it comes to providing the minimum protection. The state must –at the minimum– provide minimum substance level. Furthermore, a system of basic social insurance cannot do without state a strong element of state interference either, as the necessary solidarity amongst the insured population presumably will not arise spontaneously. When dealing with additional benefits the state can more easily fall back upon a regulatory or facilitating role.

Our formal framework of state responsibility needs to be supplemented with a substantive notion of social security. For the purposes of this article seven principles were identified which constitute the core of social security: protection, inclusion, reliability, solidarity, rule of law and good governance. These principles have been put to the test of the presence of concrete legal standards. We have found that most of the principles are somehow supported by the law, albeit some more than the others and in differing degrees of concreteness. For example the principle of equality of treatment is much more part of the legal domain than the principle of inclusion.

The fact that social security principles are strongly supported by the law is not surprising. These principles constitute an expression of the public interest in social security and the law is an important instrument for safeguarding this interest. This should, as such, not be confused with a preference for public social security. For example, the non-discrimination rule equally plays a role in public and in private social security arrangements. Law is an instrument to regulate the public and the private sphere alike.

With regard to the relevance of our approach three remarks. Firstly, it can be used as a shield against self-proclaimed cynics who reject the relevance of socio-economic fundamental rights straight away because they are so strange and vague; perhaps it will make them change their minds! Secondly, it allows young legal researchers to become active without having to carry

³⁹ cf. art. 72 ILO-Convention nr. 102.

the heavy load of the difficult multidisciplinary connotations that are attached to concepts of public interests and the welfare state; they simply have to come to a good selection of core principles and corresponding legal standards. Lastly, the method can be useful in the legal practice itself when it is – once more – confronted with the question of how the free market relates to social objectives. Lawyers who are encharged with application of concrete legal standards will realise that these standards are not merely of a technical nature; they serve higher principles and must interpreted accordingly.

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THE PUBLIC INTEREST AND THE WELFARE STATE: CONTEMPORARY POLITICAL PHILOSOPHY

Onno Brinkman

1 Introduction¹

If a few centuries of political philosophy would have to be summarized in a few words, one could say that it is a quest for the right balance between the concept of the individual as an autonomous being who is responsible for his own life course, and the concept of an individual as a social animal who can only give meaning to his life in relation to the community in which he lives. This quest for the right balance is particularly apparent in theory formation with regard to social security. After all, social security can be described as the collectivisation of risk cover. Thus, by definition, social security transgresses the boundaries of individual interests. The essential question here is what the relationship between the individual and the public interest should be. This chapter addresses contemporary political-philosophical opinions regarding this issue.

This chapter looks at the role played by today's political philosophy based on the proposition that as a result of the Keynesian paradigm in the nineteen sixties and seventies, the reciprocity between the public and private interest gradually unravelled. There was no longer any distinction between both types of interests because the respecting of private interests by the state was justified by economic theories about state expenditure, such as social security payments. Private vices became public virtues, to misuse the words of Mandeville in this context. When, however, the Keynesian paradigm became stranded in the nineteen seventies, the relationship between the private and the public interest had to be reassessed. However, the political philosophy of that time could no longer be of any help.

If it can be said that the entire history of Western philosophy consists of a series of footnotes to Plato, with the same exaggeration the same can be said of the relationship between Rawls and modern-day political philosophy. It is however not an exaggeration to state that the publication of Rawls' 'A Theory of Justice' in 1971 represented a revitalizing of normative political philosophy, which was much needed at that time.² The book broke through a post-war academic stance, which left no space for normative statements about political justice. The

1 In writing this chapter more use has been made of the following general introductions: Fleischacker, 2004, Hampsher-Monk, 1992, Kymlicka 1990/2001, Scruton, 1981/1985, Stanford Encyclopedia of Philosophy and Wiser (1983). With a view to readability no more separate references shall be made to these works.

2 Rawls, 1971. In later years Rawls has his theory amended and adjusted to communitarian and pluralist critics. In 1999 he published a revised edition. In this chapter reference is only made to the 1971 edition.

prevailing logical positivism dictated that statements were only meaningful if they could be empirically proved. Statements related to social justice obviously fell outside this category. In the United Kingdom Isaiah Berlin defended the plurality of values, between which, he argued, it was in principle impossible to choose.³ Subsequently the French structuralists, such as Foucault, announced the end of modern time. According to them the post-modern time no longer accommodated ‘big stories’ such as Marxism or Christianity.

This chapter is structured as follows. It starts with a brief description of the philosophical background of social security and the departure point of modern political philosophy. The following paragraphs explain contemporary philosophy. They examine what each separate movement has to say about the relationship between the public and private interest. First of all focus is on egalitarian liberalism, as described by Rawls. It will then become clear that ‘A Theory of Justice’ cannot only be seen as a starting point for contemporary political philosophy, but also as a fixed point. Other movements included in this chapter can be seen as a response to Rawls’ work, as they implicitly, but more often explicitly refer to it when launching other forms of egalitarian liberalism, such as the “luck egalitarianism” that is related to egalitarian liberalism but which emphasises individual preferences more strongly. Subsequently liberalism sees the emergence of a conflicting movement in the form of liberalism focussing more on self ownership. This is followed by an examination of the criticism aimed at the resurgence of liberalism. Harsh criticism of the liberals’ vision of the individual as the ultimate moral agent and the neutral state came from the communitarian quarter. Although communists can recognize individual normative interests (although they do not necessarily do so), the public interest is always given an intrinsic normative value.

To conclude, a balance is made. The different movements are examined alongside the developments in social security and an evaluation is made of how far the movements have visibly influenced these developments. Key here is the question how far they have been able to contribute to the need for a new look at the relationship between the public and the private interest in social security.

Finally, a note regarding the scope of the subject. Strictly speaking, given the subject of this book, the description of the modern political-philosophical movements could be limited to the opinions of them regarding the nature and scope of the public interest. It does not need to include the relevant legal justice theory. This would, however, render this chapter unreadable, and probably make it incomprehensible. For this reason I have taken the liberty to loosely combine remarks regarding the role of the public interest in the relevant theories with an examination of the material content of these theories.

2 The political-philosophical roots of social security

Social security is rooted in communitarian ground.⁴ Bismarck’s 19th century Germany, to which the origins of social security can be traced, was dominated by Hegelian-Marxist ideas. As we know, Hegel dismisses Kant’s range of liberal ideas, in which the individual autonomy

³ Berlin 1958/2002.

⁴ Much in this paragraph is derived from Dupeyroux 1966 and Vloemans 1980.

is central. Hegel saw the state as the vehicle of the world spirit, to which individual interests were, when necessary, subordinate. The central role of the state, as formulated by Hegel, found its way into the social democratic body of thought via Marx. Of course there is a world of difference between Hegel's and Marx's concepts of the state. For the first, the state was the objective, for Marx the state was merely a tool in the transition phase to communism, and would ultimately disappear. Both, however, agree that the state is the level at which the public interest is defined, whereby Marx assumes that the state ceases to be necessary once the public and private interest converges, a conclusion that has not been adopted by the social democrats. The Hegelian-Marxist influence over social security in its infancy is expressed in its focus on the employee's labour relationship. Individuals need labour in order for them to strike a balance with nature. A proportional reward is thereby required, or a reward in proportion to the labour performed, so that humans do not become 'alienated' from nature. The public interest in social security aims to provide a fair – in other words a wage-related - reward during temporary periods of inactivity.

Catholic doctrine, the other communitarian source of social security, is also based on the fair wage. '... remuneration for labor is to be such that man may be furnished the means to cultivate worthily his own material, social, cultural, and spiritual life and that of his dependents, in view of the function and productiveness of each one, the conditions of the factory or workshop, and the common good' (2nd Council of the Vatican, Constitution, on the church in the world of today, *Gaudium et Spes*, 7 Dec 1965.). The mere fact that the parties have reached agreement is not sufficient to morally justify the wage amount. But there has always been a strongly strain against the concept of state in catholic (and protestant) teachings. Augustine views the state simply as being the result of the Fall, of the human desertion of God. The true state is The City of God. This argument continued to form the basis for the Catholic Church's approach to the state, even after the "social issue" also became an important issue for the Catholic Church in the second half of the nineteenth century. Thus the encyclical *Rerum Novarum*, published in 1891, also has strong sentiments against the state. In this encyclical the Church announced a corporatist vision of society, in which the public interest is represented by communities of interested parties. In shaping social policy the state was granted only a supplementary – subordinate - role. This has resulted in many European states having many corporatist features, especially those in the southern catholic countries. But the Netherlands too has a corporatist tradition, in particular where implementation is concerned.⁵

Although both these – continental – schools have different views of the role of the state, they both allot the same task to the public interest. The public interest lies in determining the fair wage in return for labour and a wage-proportional benefit during times of inactivity. This standard of justice prevails over individual interests. After all, the fair wage is determined on the basis of material – non-neutral – politico-philosophical notions of what a fair wage is, over which the autonomous individual has no influence.

⁵ But not only where implementation is concerned. The history of the Dutch old age insurance in the late nineteen fifties is a good illustration of the clashing and merging of the state's position with respect to these two forms of communitarianism. The social democrats worked for the introduction of a state pension. The confessionals feared the intervention of the state would be too great and stuck to the vision of insurance upon which the classical Bismarck model is based. The compromise: a national insurance, whereby the full title of the benefit entitlement is indeed the insurance, but whereby the coverage of this insurance extends to the entire population, including the non-working population. The implementation was in the hands of regional Councils of Labour, a council of employers and employees under the supervision of a chairman appointed by the state. In other words materially a state pension, but in the shape of an insurance scheme.

The liberal influence over social security can be traced to the Anglo Saxon quarter. First and foremost we can point to utilitarians such as Jeremy Bentham and John Stuart Mill, who contributed substantially to the 19th century reforms in the United Kingdom. The reforms introduced by Roosevelt in 1929 in response to the Great Depression form a more recent contribution. Where the response on the continent to the Industrial Revolution was initially political, the measures introduced with the New Deal linked the elimination of poverty to measures to promote the recovery of the economy. The philosophical background to these measures was American pragmatism. These measures were justified by the up and coming economic theory of Keynes which defined government expenditure on social security payments as a stimulus for the economy. For this reason the question as to the form given to the public interest (state or other forms of community) that arose on the European continent never became an issue in the United States. The New Deal led to a system of flat-rate benefits – based on the subsistence minimum, not on notions of justice – , whereby the autonomy of the individual was respected by maintaining the freedom of communication between employee and employer. The public interest lay in the recovery of the economy, which would ultimately make it possible for the free market to once again resume its regulatory function. It is this form of social security that, through the Beveridge Report, influenced the West European systems established in the aftermath of World War Two.

The social security systems that came into being after World War Two in the Western European welfare states are founded on an amalgamation of these philosophies, which embraced strict notions of justice with regard to the public interest. Little by little these ideological theories of justice made their way into the ‘Keynesian consensus’, which had begun to dominate the Western world. As stated earlier this consensus originated in the US in the thirties and was exported to West Europe in the shape of the Marshall Plan. The West European welfare state was able to develop by virtue of the Keynesian notion that government expenditure increases demand and thus promotes economic development. The Keynesian paradigm also included the merging of the private and public interest, or at least they became less easy to distinguish from each other. After all the remuneration of private wishes and preferences through extensive social security schemes also benefited the public interest. In a nutshell, this ultimately led to the ‘permissive society’ of the nineteen sixties and seventies, when the public interest ceased to be recognisable. Where social security was concerned this meant that the concept “reciprocity” was pushed into the background.

When the Keynesian paradigm faltered and the supply economy took over, national states were forced to scale-down their welfare state schemes. This called for a new definition of the public interest, which was necessary in order to redefine the division of responsibility between the state and its subordinates. The concept ‘reciprocity’ had to be re-examined. But, as we recalled in the introduction, the academic ideas in force at that time had no room for normative statements about political justice. The traditional ideologies of the welfare state had lost their resilience. Neither social democracy nor Christian democracy had an answer to the questions that arose following the demise of Keynes. Neither could traditional liberalism come up with an alternative. When Friedrich Hayek discussed this political movement in his famous article in 1973,⁶ he referred to it in the past tense. He observed that liberalism had

6 Reprinted in Hayek 1982, p. 119-151.

only a few supporters left, and these were mainly to be found among economists (such as himself).

Thus the scene is set against which today's philosophical debate takes place. As we have already seen, contemporary political philosophy presented itself in the form of 'A Theory of Justice' by John Rawls in the early nineteen seventies. Rawls had been expanding his theory since the nineteen fifties and important parts of it were already published.⁷ However, these publications were largely unnoticed outside the circle of colleagues. It was not until the seventies that conditions were right for his theory to take off.

Rawls' attempts to reconcile the concepts 'freedom' and 'equality' in a single normative theory, 'A Theory of Justice' provided for the (European) need for a theory that once again gave substance to the concept 'reciprocity', without it being necessary to relinquish the principle fundamentals of the welfare state. Both social democrats and liberals were (and are) inspired by this in their new approach to the public interest. (Hereby it must be noted directly that this was not Rawls' intention. As an American he is, as we shall see later, not committed to the European model of the welfare state). This resulted in liberalism regaining its position as a political factor and in social democracy focusing more on the responsibility of the individual. Only among the Christian democrats did Rawls fail to gain support. For this his emphasis on the autonomy of the individual was too great.

3 Egalitarian liberalism

Rawls was a great reader and admirer of Kant all his life. As a consequence his ideas regarding the individual and the public interest are also much influenced by him. This applies in particular with regard to his basic assumption that every individual person is a moral entity. Here Rawls adheres to the categorical imperative of Kant that the individual human exists as a subject in itself, not merely as a tool for the random use of others.⁸ Every individual, suggests Rawls in imitation of Kant, is a free and reasonable human individual planning (and perhaps adjusting) his own future unconnected to his position in society or his relationships with other individuals. In this context liberals refer to the individual as 'the unencumbered self', a concept that has come in for much criticism from communitarian quarters, as we shall see below.

The basic liberal assumption of Rawls is thus that individuals are responsible for their own future, but, and here the egalitarian side of Rawls puts in an appearance, undeserved inequality between individuals may not affect the possibility for an individual to shape his own future. Talent and origins are not moral merits and in a just society they should therefore be excluded as being criteria for the division of welfare.

Foremost in Rawls' theory is thus that it is up to the individual to put his own life plans into action: the state must remain neutral with respect to different conceptions of the good life. In Rawls' eyes the public interest has no intrinsic moral value; the state is 'a cooperative venture

⁷ The majority of these publications are contained in Rawls 1999.

⁸ Kant 1785/1997, p. 81.

of mutual advantage'.⁹ The central question Rawls asks himself is under what conditions the state can regulate the conflicting individual interests so that the individual members of the society can optimally realise their life plans.

Rawls therefore sees the public interest as being the 'well-ordered society' within which the individual human is able to optimally realise his ideal of the good life. This does not imply that a well-ordered society must provide for all the wishes and requirements that an individual can think of. To Rawls the neutrality - and definition - of the public interest means that the state is only responsible for the just division of the so called 'primary goods'. Rawls understands primary goods to be the basic liberties, equal opportunities to hold social office, income and wealth and the social basis for self-respect, such as the possibility to start a family and to join organisations. These are the 'Lego blocks' that make it possible for every reasonable individual to plan his own future in his own way and which are fairly divided within a 'well-ordered society'. It is not a public interest to realise personal preferences that cannot be satisfied using the primary goods.

The core of Rawls' argument is based on the principle that this division takes place on the basis of the principle that 'free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association'.¹⁰

With this Rawls returns to the tradition of the social contract, as developed by Hobbes, Locke and Rousseau. However, his model of a social contract is substantially abstracter by nature. He does not refer to a historical original position, but he places the – notional – participants in the social contract in a fictive original position, whereby they are ignorant of their social place in or value to society. In the original position the participants are, in the words of his famous metaphor behind a 'veil of ignorance'. With this mental experiment Rawls attempts to enable the participants to formulate the just society on the basis of moral principles and not based on their expectations regarding the manner in which their specific individual qualifications and skills shall be valued in the society designed by them. Rawls' claim is that the contract participants placed in such a fictive original position shall opt for the following two principles of justice for distributing the so called primary goods.

In the first place each person has an equal right to the same *basic liberties*. The basic liberties of individuals are the right to the integrity of the person, freedom of speech etc. These basic liberties can be traded off against each other, but this trade-off must apply to everyone in the same way; in allocating the rights and implementing the trade-offs no distinction whatsoever may be made between individuals.

The second principle is hierarchically subordinate to the first and concerns the distribution of *social and economic goods*. It is the best known part of Rawls' theory. Rawls permits inequalities in the distribution of social and economic goods to individuals, but in a just basic societal structure these goods are distributed in such a way that each inequality benefits the worst-off members of the society (the famous 'difference-principle'). This is attached to the

9 Rawls 1971, p. 4.

10 Rawls 1971, p. 11.

condition that offices and positions are open to all. In other words, everyone must have equal opportunity to obtain the same social and economic benefits.

Rawls is indeed referred to as the philosopher of the liberal welfare state¹¹, but this typification is not without its problems. Indeed, in his later work Rawls even explicitly rejects the capitalist ‘welfare state’:

*Welfare-state capitalism (...) rejects the fair value of the political liberties, and while it has some concern for equality of opportunity, the policies necessary to achieve this are not followed. It permits very large inequalities in the ownership of real property (productive assets and natural resources) so that the control of the economy and much of political life rests in few hands. And although, as the name ‘welfare-state capitalism’ suggests, welfare provisions may be quite generous and guarantee a decent social minimum covering the basic needs, a principle of reciprocity to regulate economic and social inequalities is not recognized.*¹²

Although in his ‘Theory of Justice’ Rawls does not yet adopt a position with regard to the type of community that best reflects his principle of justice theory, or which does so not at all, this harsh judgement of the capitalist still does not come totally out of the blue. This can be explained with reference to the part played by reciprocity in the difference principle. “(T)he difference principle expresses a conception of reciprocity. It is a principle of mutual benefit.”¹³ The cooperation of all can only be assured through the application of the difference principle: it gives the worst-off a concrete incentive to play their part as they are able to share in the profits; on the other hand, it is a just basis on the grounds of which the better endowed and socially better equipped individuals can expect to receive the cooperation of all for the benefit of the common interest.¹⁴ Although he does not say so as such we can glean from Rawls’ criticism of the welfare state that he is concerned that social security could undermine the reciprocity principle and in so doing deny the citizen his liberties. Or, to put it more strongly, a benefit granted by the state erodes the autonomy of the individual. After all Rawls’ basic starting point is that the free citizen shapes his own future. In this portrayal of the citizen it is fitting that the citizen takes precautionary measures *ex ante* to enable him to cope with any misfortune that may come his way. By compensating misfortunes *ex post* the state runs the risk of creating a benefit-dependent ‘sub-class’.¹⁵

In other words Rawls also sees a public interest in the maintenance of the reciprocity principle. Rawls distinguishes two problems that could undermine the “difference principle” as a result of the reciprocity being broken. First of all he refers to the so called “free-riders” problem. How do you avoid the situation in which an individual ceases to make his contribution to the community because he will get his share anyway? Alongside this he distinguishes the ‘prisoner’s dilemma’ as being potentially damaging to the difference principle. Why should I make my contribution to the community if I cannot be sure that my neighbour will do so too? This means that a society cannot operate without some form of state that is able to monitor whether and penalise if the citizen fails to deliver his or her fair share:

11 In the Netherlands: Wibren van der Burg 2003.

12 Rawls 2001, p. 137-138.

13 Rawls 1971, p. 102.

14 Rawls 1971, p. 103.

15 Here Rawls touches upon the recurring theme in the work of Foucault that the social institutions consolidate the balance of power within society.

Therefore, to maintain public confidence in the scheme that is superior from everyone's point of view (...) some device for administering fines and penalties must be established. It is here that the mere existence of an effective sovereign, or even the general belief in his efficacy, has a crucial role.¹⁶

Rawls' Theory of Justice inspired many subsequent authors to publish their own interpretation of egalitarian liberalism. Many authors have endeavoured to refine or improve Rawls' Theory of Justice. However, they continue to work within the framework of the question posed by Rawls as to how the neutral public interest of the autonomous individual can best be promoted.

Capability approach

Thus Sen argues that what individuals can make of their lives cannot depend exclusively on the degree of access that individuals have to primary resources. As an alternative, Sen proposes the concept of 'basic capability equality', which also takes into account the personal potential of the individual to be able to shape his or her future.¹⁷ This idea also affects the interpretation of the public interest. After all the state need not concern itself with the distribution of primary resources but with the development of the individual's basic capabilities, through which an individual is able to shape his or her own future. These basic capabilities include health, being able to enter into relationships with others (which the state can support by creating institutions such as marriage) and being able to participate in the political decision-making process.

Luck Egalitarianism

Other egalitarian liberal philosophers argue that the emphasis placed by Rawls on the equal distribution of primary resources is at the expense of individuals' notions of the good life, and the choices they make as a consequence. Rawls does not distinguish between the hard working factory worker who is willing to work overtime and the surfer in Malibu who spends half the day on the beach and makes shift with a modest income. On grounds of the difference principle the surfers in Malibu should indeed have a share in the output of the factory workers' overtime. The so called luck egalitarianism therefore makes a distinction between brute bad luck and risks consciously taken 'bad option luck'. The individual bears full responsibility for risks consciously taken. He can take out – private – insurance against these, but state intervention would be paternalist. The public interest relates solely to the removal of inequalities that are the result of brute bad luck, for instance origin, lack of talent or physical defects.

The best-known advocate of the luck egalitarianism is Dworkin.¹⁸ His target is equality of resources. In other words everyone should possess the same level of resources with which they can shape their own future. To achieve this Dworkin has come up with a new variant of the contract theory. He hypothesizes a desert island and imagines a group of people are

¹⁶ Rawls 1971, p. 270.

¹⁷ See for example Sen, 1979, Martha Nussbaum has elaborated upon this 'capability approach' in a large number of articles and books. A (temporary?) conclusion was made by her in Nussbaum 2006. There is an association, of which Sen was the first chairman, and Nussbaum the current, for promoting the concept "capability approach" <www.capabilityapproach.com>.

¹⁸ Dworkin 1981. Dworkin himself however did not consider himself to fully represent the "Luck Egalitarianism", see Dworkin 2003.

stranded there and form a new community. How should they distribute the island's resources? Dworkin proposes they have an auction: every member of the community receives the same measured quantity of clamshells, which they can use to bid for the island's resources. An individual who likes apples will bid a higher price for an apple tree than will an individual who likes pears. The idea is that at the end of the auction, when everyone's shells are finished, the island's resources will have been distributed in accordance with the personal preferences of each member of the community, so that nobody has cause to be jealous of another individual's parcel of resources.

But Dworkin can't stop there. One individual will be better equipped than another to achieve a happy life with the resources purchased at the auction. After all, talent and physical qualities are unequally distributed. An individual who, as a result of brute bad luck, was born blind is entitled to – financial - compensation because his handicap limits his capacity to shape his own future. Dworkin therefore supplements his auction theory with an insurance scenario as a means of determining the amount of this compensation. He claims it is a public interest to provide coverage against the risks that the stranded person would have guarded himself, if he was unaware beforehand whether he would incur the risk, whereby everyone has an equal chance of incurring the risk. The amount of tax – or social security contributions - to be levied is determined based on the amount of the hypothetical insurance premium that in such a case the inhabitants of the island would be willing to pay.

Dworkin thus claims it is a public interest that everyone is equal at the starting gate from which position they can make their own life choices. Everyone must be given the opportunity to achieve the same degree of happiness. Obstacles to such happiness, for instance lack of talent or physical defects should therefore be removed using resources financed from public means. However, if an individual's future is derailed by misfortunes that are the result of the individual's own life choices, then the state no longer acts as a safety net. In this case the solution must be sought in the private sphere. An individual who is blind from birth is entitled to a benefit financed from public means; the individual who loses his sight setting off fireworks is only entitled to an invalidity benefit if he has taken out private insurance against such a risk. Other 'luck egalitarians' go even further than Dworkin and claim 'equality of welfare'. They do not take into account the starting gate but the final position.

Democratic liberalism

Elizabeth Anderson has expressed important and influential criticism of the 'luck egalitarianism'.¹⁹ Her chief objection is that luck egalitarianism violates the equality that should underlie the relationship between all individuals. Anderson claims that if it is a public interest to compensate a citizen due to lack of talent, or birth defects, in doing so the state not only expresses a moral, but also an offensive opinion regarding the ability of a citizen to live a fulfilling existence.²⁰ In her eyes luck egalitarianism is based on the implicit implication that some individuals are unable to obtain quality of life. As an alternative to luck egalitarianism Anderson proposes 'democratic liberalism', which assumes all individuals are fully equal, making it unnecessary to compensate specific categories of individuals. It is, however, in the

19 Anderson 1999. She does not explicitly state that her criticism also includes Rawls. According to Pierik, 2007 a distinction should be made between Rawls and Anderson on the one hand ("citizen egalitarianism") and Dworkin and others on the other hand.

20 Her examples are hilarious. For instance she gives examples of a letter from the hypothetical State Equality Board with the following tenor: 'Sir, you have been born so ugly that you may never find happiness in marriage. You are therefore eligible for damage compensation.'

public interest that everyone is able to participate fully in social and political life, whereby the cause of an individual's physical or mental defect is, in principle, irrelevant. The individual who is unable to walk as the result of a birth defect, is not entitled to compensation because his life is supposedly incomplete, but he is, however, entitled to any resources that allow him to lead a life that is as normal as possible, for instance a wheelchair. In other words Anderson does not consider distributive justice as being a criterion in itself for compensating individuals who are worse-off due to factors that are morally irrelevant. From her argument that society is a system of cooperation it follows that she supports the notion of a safety net, also for less careful individuals, this can be defined in the form of a minimum wage or invalidity insurance schemes. Mandatory social insurance for medical care is also in the public interest according to Anderson. Her reasoning behind this is that everyone is entitled to medical care, even the heavy smoker. It follows from this that everyone must contribute by means of premiums or tax. This is not paternalist as luck-egalitarians may think, after all everyone is at liberty to refuse such medical care if it is offered to him.

4 **Libertarianism**

'Individuals have rights, and there are things no person or group may do to them (without violating their rights).' With this famous opening sentence Robert Nozick lays his claim in his book 'Anarchy, State and Utopia' for 'the minimal state' in which there is no room for the state as distributor of social justice.²¹ Nozick's book can thus also be seen as a plea for the minimization of the public interest. With this book, which was published in 1974, and that is a direct response to "A Theory of Justice", Nozick entered acceptable circles, in particular those of the American intellectuals, and has thus (together with Hayek) laid the philosophical grounds for the economic neoliberal reforms of Reagan and Thatcher.

Nozick's theory is based on the assumption, and here he does not differ substantially from Rawls, of self-ownership. But whereas Rawls describes society as a communal enterprise focusing on mutual advantage, Nozick accepts no such responsibility for the fate of others. A society is based on voluntary cooperation, whereby the members of the society, contrary to what Rawls believes, do not have a normative relation. Rawls stated that the participants in the social contract are reasonable human beings (in other words are able to take the interests of others into account) who plan the course of their lives in a rational manner. Nozick does not distinguish such a basic Kantian standard in the mutual relations between individuals.

From the concept 'self-ownership', as summarised by Nozick, flows the concept of absolute property rights and the justification of the free market (property-ownership). Where Rawls was greatly influenced by Kant, Nozick is inspired by Locke. According to Nozick, property can only be 'justly' acquired on the grounds of three principles. First of all is the principle of transfer, what is justly acquired can be justly transferred. This is the principle upon which the free market is based. The principle of just initial acquisition explains how an individual first acquired a good that can be transferred in accordance with the principle of transfer. A good that is appropriated from nature without causing disadvantage to others, can be justly transferred. The third principle, the principle of rectification of injustice provides for rectifi-

²¹ Nozick 1974.

cations of violations of the first two principles. These three principles are jointly referred to by Nozick as his entitlement theory.

It is important to dwell upon the principle of initial acquisition, the principle that legitimates property appropriation in the initial natural state. The assumption is, as we have seen, that ownership in the natural state is justly acquired through appropriation, such as the picking of fruit or the tilling of the land. As a result of self-ownership, an individual has an inviolable right to that which is produced by the labour his own body.²² The fact that an individual has the absolute right of self-ownership means that justly acquired property cannot be disputed in any way.²³ This privatization of the common property is however subject to one condition. It must not result in other individuals in nature being worse-off than they would have been if privatization had not taken place. In other words: you have to make sure there is enough left over for others. Locke also laid down such a condition and it is therefore referred to as the 'Lockean proviso'.²⁴

The entitlement theory is the starting point of Nozick's political philosophy. Rather than a contract theory he uses the invisible hand explanation of his interpretation of the state. According to his theory, which makes no claim to historical correctness, in the state of nature individuals shall spontaneously, as if driven by an invisible hand, form protective associations to guard their acquired property against attacks from third parties. These separate protective associations shall, Nozick goes on to suggest, not fight out their differences among each other but shall lay them before a third organisation, the dominant protective association. These associations are the first forms of state. In Nozick's words: '...there arises something very much resembling a minimal state ...'²⁵ But this is as far as the public interest goes as far as Nozick is concerned. He rejects all forms of state that go beyond a minimal state, the night watchman state, and which intervenes in matters such as the distribution of welfare and education, because such a state breaches his entitlement theory and in doing so is an unacceptable violation of its citizens' rights of ownership. Nozick most strikingly suggests that the levying of taxes is on a par with forced labour.

Thus Nozick also abhors political philosophies, such as those advocated by Rawls and Dworkin that are based on a desired pattern for the distribution of welfare. The best known example used by Nozick to explain his horror of patterned theories is that of Wilt Chamberlain, the top NBA basketball player at the time his book was published and still a legendary name. Suppose, says Nozick, that a community has been created in which a just system of income distribution applies in line with notions of justice stated beforehand (a patterned theory). Now suppose that Chamberlain has concluded a contract with his club under which he shares in the takings. How in this case can the patterned theory be applied to solve the problem that arises when it appears that people are willing en masse to pay an additional twenty five cents to see Chamberlain play? These shifts in income, which make Chamberlain a rich man, lead to a disturbance in the pattern that had previously been stamped as the only form of just distribu-

22 According to John Locke's statement regarding property acquisition: "Whatsoever then he removes out of the state that nature hath provided, and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property." John Locke, 1690, Sec. 27.

23 It is this mental leap in particular for which Nozick came in for much criticism, because it was claimed that it lacked a philosophical base; see for example Nagel, 1975.

24 "...no man but he can have a right (...) at least where there is enough, and as good left in common." Locke, 1690, Sec. 27.

25 Nozick 1974.

tion. Do the incomes have to be distributed again to return to the original just distribution? And what happens if people want to watch Chamberlain again? Will there be redistribution? Nozick shrinks from the state intervention that would result from this.²⁶

Political theories such as Nozick's (and Hayek's) have influenced the neo liberal economists who, led by Friedman, sought a new way of allocating responsibility with respect to social security. Pinochet's Chilli was used as a pilot project for a new pension system. A defined contribution scheme was introduced, under which the amount of the contribution is fixed but the amount of the benefit is not guaranteed, being dependent on the results on the stock exchange. This model has been adopted in many South American countries. The schemes, under which pension risks were borne collectively, were wholly or partially replaced by private savings accounts, which are not based on solidarity, but by which the individual bears the risk associated with the yield of his investment. As a result multi-pillared pension schemes were usually created; an individually borne second pillar was added to the collectively financed first pillar. This multi pillar model has been adopted by the World Bank,²⁷ and therefore also forms the basis for the pension reforms in many Central and East European countries. Much more modest forms of private savings accounts have also been introduced in Sweden and the UK. In America itself this form of financing is used for occupational pensions. Even before the advent of the credit crisis, however, it appeared that this pension system failed to yield what was expected of it. Not only were the profits on the stock exchange disappointing after the Internet bubble burst, but, in practice the administrative costs turned out to be disproportionately high.²⁸ The World Bank also partially retraced its footsteps to the extent that the report published in 2004 entitled 'Keeping the Promise' gave greater import to the collectively financed pillars.²⁹

Nozick is generally referred to as a right libertarian. This, however, only applies with respect to his economic opinions. With regard to ethical issues Nozick is unmistakably left-wing. Alongside Nozick there are also left libertarians and libertarians who can be considered as being much more right-wing. These qualifications can be awarded in accordance with their interpretation of the Lockean proviso. To start with the extreme right libertarians, for instance Rothbard, refuse to accept that there are any moral conditions attached to the acquiring of property.³⁰ If an individual has the right to own his own body it follows that everything an individual appropriates from nature belongs to that individual as long as the bodily integrity of others is not violated. Rothbard leaves so little room over for the public interest that he should in fact be seen as an anarchist.

Left libertarians

The left libertarians, who, just like Nozick attempt to minimize the role of the public interest while trying to link it to an egalitarian notion of the distribution of resources, are indispu-

26 With this sort of criticism Nozick is close to Friedrich Hayek, another source of inspiration for him, who in his famous book 'The Road to Serfdom' saw state intervention in the well being of the individual as the first step down the road to dictatorship.

27 See the report by the World Bank: 'Averting the Old Age Crisis' of 1994.

28 Fultz 2004.

29 It is apparent that pension beneficiaries in countries that have embraced this form of national capitalism most enthusiastically, for instance in Bulgaria much more than Poland, are being hit hardest by the crisis. Because with respect to ten years ago the stock exchanges have made no progress, no pension accrual whatsoever has taken place. On the other hand, there is no guarantee that the collectively financed systems will survive the current crisis, although the most recent reports are apparently more positive about this.

30 Rothbard 1998.

tably more interesting from the point of view of the social security debate. Left libertarians base their ideas on the assumption that the natural resources are common property. However, whereas Locke and Nozick accept that an individual may acquire property as long as others do not become worse-off as a result, left wing libertarians argue that the acquisition of property may never detract from other individuals' rights to the common property. In other words, left-libertarians do not accept the Lockean proviso as justification for the acquisition of property. In the words of Tideman and Vallentyne:

Unlike right-libertarianism, left-libertarianism holds that natural resources (land, oil, air, etc.) are owned in some egalitarian sense and can be legitimately appropriated by individuals or groups only when the appropriations are compatible with the specified form of egalitarian ownership.³¹

A striking example of this movement is Philippe van Parijs, who, on the basis of libertarian motives argues for a basic income.³² He arrives at this conclusion in two stages. (a) Everyone has an equal claim to all the natural resources. (b) To keep state intervention with regard to the distribution of these resources to a minimum this claim can best be expressed in the form of a basic income. Moreover from (a) it follows that the granting of a basic income may not be subjected to conditions. This brings him to the conclusion that individuals, who have a preference for spending the whole day on the beach at Malibu, are also entitled to a benefit. Hereby he also notes that the amount of this benefit need not be above subsistence level, and that over-priced surfboards do not fall within the justified expenditure pattern. Rawls warded off this criticism aimed at Van Parijs by supplementing his list of primary goods with leisure time.

A frequently heard criticism of left libertarians is that they adopt a progressive position that, for political reasons, is packaged in a neo-liberal argumentation.³³ Now that the neoliberal tide would seem to be turning, we will see whether left-libertarianism can continue as an independent movement.

5 Communitarian criticism

The Communitarian roots of social security were described earlier in this chapter, namely the Hegelian-Marxist and Catholic doctrine. It is striking that present-day Communitarianism is almost entirely disconnected from these roots. Echoes of Marxism are virtually inaudible in the social security debate, in reality the same applies for the confessional philosophies.³⁴ Present-day communitarianism is first and foremost a response to liberal philosophers such as Rawls and Nozick, not a continuation of the past. But history does repeat itself. Whereas Hegel is a response to the liberal enlightenment ideal, the communitarians oppose the budding liberalism of Rawls and Nozick.

³¹ Tideman 2001.

³² Van Parijs 1988.

³³ Fried 2004.

³⁴ The political scientist Jos de Beus called it remarkable in a recent TV programme that the Christian-democrat prime minister in the Netherlands sought inspiration from among the American communitarian Etzioni rather than falling back on the European Christian heritage.

The different communitarian writers are linked in their criticism of the liberal concept of the neutral state. They propose the ‘embedded self’ as an alternative to the ‘unencumbered self’, the individual who is embedded in the context of the environment in which he lives, for instance his family, is not (fully) in a position to determine his own aims as an autonomous being.³⁵ Communitarianism consists, no more than liberalism, of a homogenous group of authors. The spectrum is broad. As two extremes in this spectrum we will examine two very different authors, Alasdair MacIntyre and Michael Walzer, who only have in common their criticism of Rawls’ and Nozick’s liberalism.

MacIntyre

MacIntyre remains in tune with the Catholic tradition by resolutely rejecting the state and through his references to Catholic icons such as Thomas van Aquino and St. Benedictus.³⁶ However, he is first and foremost the modern advocate of the re-examination of Aristotle’s virtue ethics. For him, defending these classical values means that he fundamentally rejects the Enlightenment Project, including the liberal nation-state that he considers to be a product of the Enlightenment. What we have lost as a consequence of the Enlightenment is a common *tells* (‘objective’). He believes we no longer have public standards for gauging what a good life is. The result of this is a pluriformity of values in which an individual is no longer able to convince another individual that he is right.³⁷ MacIntyre illustrates this by comparing Rawls and Nozick.³⁸ Both are in the right insofar as the principles they believe in work out. Their principles are, however, irreconcilable. MacIntyre takes this seriously. In his eyes modern politics is ‘... civil war carried on by other means ...’³⁹ In this context he also talks of a social catastrophe.

What is MacIntyre’s alternative to the Enlightenment Project? Central to MacIntyre’s political philosophy is the concept of the ‘common good’. The concept of the “common good” is not, as is the concept of the ‘public interest’ advocated by the liberals, subordinate to the separate interests of individual members of the community, but has an intrinsic normative value. First and foremost the members of a community are bound by a common understanding of the good life. Examples of human communities are the family, neighbourhoods and professional groups. In this context MacIntyre explicitly refrains from referring to the state. The good life is not the result of common activities in these communities, but rather the manner in which this result was achieved. Individual members of the community find their value and self-respect through the manner in which they contribute to the ‘common good’. Examples of the manner in which individual members can contribute are the concepts derived from Aristotle’s ethics such as ability, professional pride and merit. In defining the good life a major role is attributed to the public interest. This is namely the role of ‘governing institutions’ in creating an arena in which the good life can be defined in common deliberations. It is important that no one is excluded from this debate. For MacIntyre this is an important as well as a practical reason to reject the modern nation-state: it is quite simply too big to enable everyone to have their say. MacIntyre is, however, first and foremost a moral rather than a political phi-

³⁵ See for example Sandel 1984.

³⁶ For this paragraph use have been made of, among others, Murpy 2003.

³⁷ In fact he comes to the same conclusion as Isaiah Berlin (see note 4). Berlin however took this conclusion much more light-heartedly. Put more strongly, he considered this to be a requirement for a strong democracy.

³⁸ MacIntyre 1981, chapter 17.

³⁹ MacIntyre 1981.

losopher. He has never developed his theories about the right form of government any further, although they are grist to the mill of supporters of the corporate model.

Walzer

At the opposite end of the communitarian spectrum we have Walzer, who claims to belong to the social democrats.⁴⁰ His arguments regarding distributive justice contained in his book ‘Spheres of Justice’⁴¹ find expression in his assumption that human beings are most of all social beings. Walzer attempts to reconcile this conviction with the principles of the liberal nation-state.

In Walzer’s opinion the public interest is the common definition of the good life. This definition is not the sum of what individuals envisage, but is the result of a quest for standards already existing within the group. Walzer is not searching for objective truths and universal opinions in his theory of distributive justice, but for the hidden meanings of shared values, ‘shared meanings’, as these apply in the existing community. In his eyes philosophical notions of a just and egalitarian community are always hypothetical. ‘If such a society isn’t already here – hidden as it were in our concepts and categories – we will never know and realize it in fact.’⁴² Thus Walzer considers Rawls’ social contract to be nothing but a clinical mind experiment that says little about what happens in real life let alone that it contributes to a more just society.

The importance attached by Walzer to the research and explanation of ‘shared meanings’ has resulted in his concept of justness being bound to the borders of the national-state.⁴³ After all shared values only have meaning and remain meaningful if they can be set-off against the shared values of other groups; otherwise they lose their ability to differentiate.

Walzer calls for equality within the borders of the national state. The manner in which goods are distributed must recognize and confirm the equality of the members. But Walzer’s concept of equality is complex. In a liberal society it is permitted to distribute resources unequally provided the differences are limited within a single sphere of justice. Walzer argues that the modern liberal nation-state has different spheres of justice, such as politics, education, health care etc., between which watertight partitions must be erected whenever just distribution is concerned. The powerful politician is not entitled to priority treatment with respect to health care; children of millionaires have no right to special treatment when it comes to education. The specific communitarian element in Walzer’s argument is, as observed above, the great importance he attaches to shared meanings. Thereby the community itself also attends to the needs of its members: ‘But one of our needs is community itself: culture, religion and politics. It is only under the aegis of these three that all other things we need become *social recognized needs*, take on historical and determinate form.’⁴⁴ Walzer explains this with reference to, among other things, health care. The importance currently attached by Western society to good health can, according to Walzer, only be understood in the context of present-day cul-

40 For this paragraph use has been made, among others of Trappenburg 1994.

41 Walzer 1983.

42 Walzer 1983, p. XIV.

43 Another consequence is that his book is very narrative, which has resulted in it being criticised as anecdotal.

44 Walzer 1983, p. 65.

ture and its level of knowledge. Today's health cult would mystify the mediaeval man, who sought only spiritual welfare and who put up with physical discomforts.

Etzioni and Giddens

Since the nineteen nineties communitarianism has been highly influential as a counter balance to liberal notions. The emergence of these philosophers coincided first and foremost with a growing social dissatisfaction about the lack of 'values and standards' and the state's neutral disposition. As a result ideas related to a morally tinted public interest were surreptitiously included in the formation of public opinion. In the Netherlands this was fodder for the debate about society's 'standards and values' that emerged during the nineteen nineties.

But communitarianism also became so influential due to authors such as Anthony Giddens and Amitai Etzioni who formulated the communitarianism philosophy, both in their books and in their personal recommendations to government leaders, in such a way that it became suitable for political use.⁴⁵ Giddens was the founder of the Third Way ideology, the movement that attempted to link neoliberalism with the communitarianism of social democracy. This movement sought to find a balance between the social democrat concepts such as Community (community-minded) and Opportunity (opportunity for individuals to advance themselves), and the liberal principles of Responsibility and Accountability (between individuals and the government). In doing so he helped to found the New-Labour movement under Tony Blair, and in general boosted the revival of social democracy in Western Europe during the nineteen nineties. In the Netherlands, the Third Way ideology opened the door for a coalition between the social democrats and the liberals.

Etzioni's work focuses on strengthening the moral foundation of modern societies. Although he uses the individual and his rights as a starting point, he is concerned about the dislocating and alienating effects of an ideology that allocates overmuch importance to individualism and the free market. For this reason he calls for a better balance between the individual and the community.⁴⁶

6 Balance

At the start of this chapter reference was made to the need that arose in the mid nineteen seventies, as a result of the running aground of the Keynesian consensus, for a new look at the relationship between the public and the individual interest in social security. It was claimed that this consensus had led to the watering down of the differences between the public and private interest. Once it appeared that the validity of Keynes' economic theory had run its course, it became necessary to reformulate the relationship between the public and private interest. This is followed by a description of the major movements in political philosophy that have endeavoured to respond to this need. The distinction between liberalism and communism is a red thread running through this description.

⁴⁵ Well known books by them are Etzioni 1996 and Giddens 1998.

⁴⁶ Mark Bovens, Het communitarisme als "catch-all" stroming, in Bovens 1998.

Liberals are united in their opinions regarding the autonomy of the individual and the neutrality of the state. Egalitarian liberalism formulates the public interest as being a 'joint venture' for the benefit of the individual participants. It puts strong emphasis on reciprocity because the cooperation of all is needed to make the joint venture a success. Through this the concept of distributive justice, including social security, acquires instrumental characteristics: it is considered by these liberals as a means to ensure the cooperation of all. Libertarians do acknowledge a common fate, but this goes no further than providing mutual protection in the face of external threats. The public interest is principally revealed in the protection of the inalienable rights of the individual, in particular the right of ownership. The private interests can be best realised through the operation of the market.

Communitarians oppose both notions. In their eyes the individual can only be comprehended as part of the community in which he lives: as a result the individual is not autonomous and neither is the state neutral. By its very nature communitarianism is immersed in the reciprocity principle. After all the very core of communitarianism is that the individual can only develop in interaction with the community.

At this point the question arises as to how the developments in social security since the nineteen seventies can be explained on the basis of these antipoles.

The developments within social security display a hybrid picture, within which a number of trends can be distinguished. On the one hand these developments have been derived from libertarian thoughts, inspired by Nozick, on the other hand they can be reduced to communitarian ideas regarding the role of the state and the individual.

The first response to the economic crisis that manifested itself in the late nineteen seventies as a result of the collapse of the Keynesian paradigm, is of a financial-economic nature. Cuts are made in the system by reducing the level of benefits. Alongside this 'volume management' is practiced by tightening the entitlement requirements, or introducing or extending qualifying periods. This budget-based approach to social security stems from libertarian ideas of the public interest within social security. The community no longer feigns full responsibility for the welfare of the individual and will only continue to provide the primary guarantees for his existence.

In later years there is a further neoliberal sequel to this budget-based response, as the operation of the market is seen as the means for best realising the private interest. This resulted in parts of the social security system being privatised. In the Netherlands this resulted, de facto, in the abolition of the Sickness Benefit Act, which was replaced by an obligation under private law for the employer to continue to pay wages. The employer can choose whether or not he wants to take out insurance to cover this risk. In addition major parts of the health care system were privatised, whereby public guarantees were created with regard to the scope of the care package and the contribution amount. In other European countries private elements are creeping into the pension systems, as described earlier in this chapter.

On the basis of these developments it should not be assumed that neoliberal or libertarian ideas had the upper hand. Other trends demonstrate communitarian leanings. Firstly, the community's boundaries are being more strictly defined. The declining growth in welfare in the nineteen eighties, in combination with an increasing flow of migrants, put the issue of

welfare distribution on the agenda. Where less can be distributed, the circle of entitled persons has to be more strictly limited. Solidarity can only be applied within a group that has a certain degree of commitment. Or in the words of Walzer: 'The idea of distributive justice presupposes a bounded world within which distribution takes place: a group of people committed to dividing, exchanging, and sharing social goods, first of all among themselves.'⁴⁷

In the Netherlands this was expressed most markedly in the shaping of the Dutch admissions policy in combination with the introduction of the so called Linkage Act in 1998. The admissions policy for immigrants is becoming increasingly restrictive in nature. Whereas in the nineteen sixties and seventies migrants were actively sought after, since the nineteen eighties only labour migrants with an added value for the labour market are being admitted (for instance knowledge migrants) or those who are prepared to perform low skilled work that the native Dutch population refuses to perform. At the same time the introduction of the Linkage Act meant that those persons not admitted to the Dutch labour market could no longer call upon public measures, for example the right to social security.

The relationship between the public and private interest was subsequently reconsidered within this tighter circle of solidarity. This reassessment revealed itself in a stronger emphasis on the reciprocal relationship between the citizen and the state. This emphasis on reciprocity in social security means that benefits and work have become more closely connected. The principle goal of social security is no longer income protection; the goal is shifting towards the return to work, whereby in return for his benefit the individual has obligations imposed upon him intended to bridge the distance to the labour market.

This communitarian reassessment of the relationship between the private and the public interest must be analytically distinguished from the neoliberal trends described above. Communitarian and neoliberal movements do have parallel interests – both movements aim to reduce the state's (financial) contribution to the private interest-, but they do not have parallel motives. Whereas the neoliberal or libertarian tendency is based on a public interest that is normatively neutral, the communitarian movement has strong normative visions regarding the best way in which an individual can do justice to himself. The community standard is based on the working individual and if necessarily the community actively encourages behavioural changes to achieve this standard.

For social security this means that a stronger emphasis is put on reciprocity. On the European continent the source of the 'activating social security' was to be found in the Scandinavian countries as early as the nineteen seventies. These Scandinavian programmes are based on the assumption that the universal coverage of the welfare state remains intact, but that within this model strategies are sought to lead those eligible for benefits back to the labour market, whereby greater demands are made on individual responsibility. In Anglo-Saxon countries reciprocity is stimulated slightly more. In these countries since the nineteen eighties programmes have been set up under the name Workfare, in which all able-bodied beneficiaries are obliged to participate and which focus less on the personal development of the beneficiary in the longer term.

47 Walzer 1983, p. 31.

In the Netherlands these developments can be found particularly in the reform of the disability benefit scheme and the National Assistance Act. Incapacity for work is no longer interpreted as a numeric concept, the presumption is that no one is fully incapacitated for work and hence all individuals incapacitated for work should make themselves available on the labour market to make use of their remaining capacity for work. In fact this means that the traditional distinction made in social security between incapacity for work and unemployment is fading. The granting of assistance is also less automatic. Obligations to apply for jobs are being tightened, even for groups that were previously exempted, such as single mothers.

To conclude, another effect of the increasing reciprocity is an increase in punitive elements in social security as a means of encouraging behavioural effects. In the Netherlands the Act on Fines and Measures entered into force in 1996, on the grounds of which benefits can be (partially) withdrawn and fines can be imposed when compliance rules are violated.

In the introduction to this chapter it is claimed that modern philosophy started with Rawls. But where does 'Rawlism' stand now in relation to the libertarian and communitarian trends in social security described above?

There is no easy answer to this question. The troublesome relationship between Rawls and social security has been summarised earlier in this chapter. After all Rawls' starting point is the free citizen creating his own future. In this vision of the citizen, the citizen himself must make arrangements to deal with any misfortune, for instance by saving or taking out private insurance. In this the state is expected to remain neutral, because the moral autonomy lies with the individual. In this respect Rawls is fully in line with the liberal tradition and would distance himself from communitarian concepts of social security with normative features, because these features would violate the individual autonomy.

On the other hand the function of the public interest is to regulate the private interests so that full justice can be done to them. Hereby, as we have seen, the concept of reciprocity plays a major role. For Rawls is the difference-principle a form of reciprocity, that forges the link between the interests of the autonomous individual and the neutral state. Social security can help the difference principle to take shape. The most important question Rawls hereby lays before the participants of the social security debate is how a bridge can be built between libertarian opinions regarding the autonomy of the individual and communitarian concepts of reciprocity. In his eyes reciprocity between the public and private interest may not be at the expense of the freedom of the individual (and the self-respect that can be derived from such freedom), which would be the case if the public interest is painted too normatively.

Political philosophy remains a quest for the essence of the individual: the individual seeks the protection of the community, but while doing so it does not wish to lose too much of his autonomy. The same quest applies to social security.

Epilogue

While this book was being written it was announced that as a result of the current financial crisis the number of people in the world suffering from hunger has risen to more than one

billion.⁴⁸ This adds urgency to the question of whether the national state is properly representing the public interest in social security. If egalitarian liberals see a public interest in the discarding of morally irrelevant factors such as talent and origins for the sake of a just distribution of welfare, the question of whether an individual's country of birth is not equally such an irrelevant factor is unavoidable. This question, first posed by Peter Singer a year after the publication of 'A Theory of Justice', has led to a wholly new, parallel debate about justice world-wide, and the question of how the public interest should be given substance.⁴⁹ This debate heavily emphasises that the state is not an absolute entity when it comes down to realizing the public interest.

48 NRC Handelsblad, June 20 2009.

49 Peter Singer 1972.

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Part B

The instrumentalisation of the
public interest:
towards a regulatory welfare state

SAFEGUARDING THE PUBLIC INTEREST IN SOCIAL SECURITY: AN ECONOMIC PERSPECTIVE

Andries Nentjes & Edwin Woerdman

1 Introduction

In the previous chapter a distinction was made between the period of building up social security and, from the late 1970s on, its revision. The instruments applied by the government in the two periods are basically the same: regulation of the private sector and bringing the provision of social security under direct government control. The difference between the two periods rests in how the instruments were designed and how they were applied.

In the first half of the twentieth century the development of social security arrangements for wage-earners was carried out with the instrument of regulation, while leaving its organisation and implementation to the cooperation between employers and trade unions. The government used its power to regulate the private sector to make insurance mandatory against the financial consequences of a range of risks. The insurance was provided by a monopolistic insurer operating on a non-profit basis under control of the branch organisations. There was no free choice of insurer for the insured and no competition between insurance firms. Insurance of wage-earners against the costs of medical care was based on the same principle, although implemented per region and not per business branch. The supply of medical care remained as it had always been: a private sector activity, partly on a non-profit base (hospitals), and the scope for consumers to choose their own supplier remained free, in principle.

The second half of the twentieth century, but mainly the years between 1950 and 1970, saw the introduction of social security covering the whole population, with equal entitlements for all citizens and financed through income-dependent premiums and taxes. The overarching instrument to safeguard the public interest in the new type of social security was to keep the arrangements fully under government control by making them public sector activities. The provision of insurance by a public monopolist, the collection of mandatory contributions and the distribution of benefits all remained within the public sector. However, the delivery of medical and other types of care, which in the past often had started as private initiatives of caring citizens to provide care for the needy, remained within the private sector.

In the building-up period a differentiated and complex set of instruments had emerged to safeguard the public interest in social security. In this chapter the focus is on what happened with those instruments and their application in the decades of repair and reconstruction following the building-up. Since the 1970s safeguarding of the public interest in social security has very much been conceived of as detecting and remedying the public sector failures in the

arrangements. Potential public sector failures have been identified in the previous chapter on the economics of safeguarding the public interest in social security. Section 2 presents a survey of the diverse adjustments made in instruments to cope with the new challenges. In section 3 health care is discussed separately because, unlike in other social security sectors, a new arrangement geared to correcting market failures as well as public sector failures has been implemented. Section 4 questions whether there has been a paradigm change, as some authors argue, in the provision of social security. Conclusions are drawn in section 5.

2 Three decades of repair and reconstruction

An array of adaptations in instruments has been made in the past three decades to mitigate public sector failures in social security arrangements. They have differed in the degree of incisiveness in changing existing entitlements and practices.

2.1 Macro-economic signals

Overproduction and overconsumption have been identified as major potential public sector failures. The first signals of this date from the 1970s. The problem showed up at the macro-economic level in a strong growth of total taxes and social insurance contributions; in 1975 calculated to be at a rate of 2 percent point of the national income per year¹. A publication of the Central Planning Bureau (CPB) of 1974 pictured a scenario of a vicious spiral of high public expenditure, requiring higher taxes and social contributions, which in turn would drive up labour costs. The higher costs of labour would lead to job losses and increasing unemployment, which would cause a further increase in the costs of social security and the costs of labour, leading to even more unemployment². The steadily increasing level of unemployment in the 1970s seemed to support the analysis. A worst case scenario was no longer unthinkable, in which an ever increasing share of national income going to social security would actually undermine the economic basis on which the whole social security system rested, resulting in economic and social collapse. The CPB-report was influential and acted as a political eye opener in the Netherlands bringing about the U-turn in the views of the future of the welfare state.

A first political symptom of the change in mood was the decision of the government in 1976 that the sum of taxes and social contributions should not be allowed to increase faster than by 1 percent point of national income per year. For the first time social security was integrated in the macro-economic and budgetary guidelines for government decisions on its public finance. In the 1980s the norm was made more stringent by requiring a stabilisation of taxes and premiums as a percentage of national income³. The example illustrates how economic analysis can give an indication of unsustainably exuberant social security provisions. Moreover, one could say that economics helped to change political views and to force a shift from consensus on expansion to agreement on restraint and reconstruction aiming at economic sustainability. In retrospect one can view the introduction of the integrated norm as a new

1 Postma 1995.

2 Den Hartog and Tjan 1974.

3 Postma 1995.

supporting macro-economic instrument to signal and contain overproduction and overconsumption in social security.

2.2 Lowering benefits and restricting entitlements to benefits

Specific interventions had to be made in the existing arrangements to effectuate a sustainable level of social security expenditure. The first major step was made in the 1980s. Social benefits above the minimum level were lowered from the existing 80 percent of the former wage to 70 percent. And the arrangement that tied the level and increase of minimum social benefits to the official minimum wage was terminated. The lowering of benefit levels did indeed do what it was meant to: bring down total social security expenditure. It was not of much help in reducing the demand for services, even though in theory the lowering of benefits should discourage consumption of the arrangement.

Very comparable with lowering monetary benefits was the restriction of entitlements within a social security arrangement or making benefits dependent on conditions. Both measures have reduced the benefits under the Unemployment Law. The period of entitlement to unemployment benefits after losing work was shortened and its length was made dependent on the previous employment record.

Insofar as the lowering of benefit levels and the restriction of entitlements has an effect on the number of persons in social security arrangements, it works through their impact on the incentives for potential users. Using the arrangement has become less attractive. When persons are not exclusively victims of circumstances, but still have some choice, they are encouraged to look harder for other options outside the protection offered by the arrangement. Overall the indications are that the effect on the consumption of social security has been modest and has done little to reduce the number of clients.

2.3 Restricting eligibility

To bring down the number of users of social security, more incisive measures had to be taken. A prominent one is restricting admission to social security arrangements by making eligibility criteria more stringent. The outstanding example is the Invalidity Insurance Act. Since its start in 1967 it saw three decades of high inflow and low outflow, which resulted in a steady increase in the percentage of the working population receiving payments under the arrangement. In the 1990s it had risen to more than 10 percent. By international standards this was an incredibly high level of incapacity. Lowering of the higher than minimum benefits from 80 to 70 percent had enacted only little effect on the ample use of the arrangement.

The radical revision of the Invalidity Insurance Act in 2005 had more effect. It is telling that the name changed into Work and Income to Capacity for Work Act. The criteria for eligibility became stricter by making a distinction between the really needy with a close to 100 percent labour handicap and the not so needy which are partly handicapped. The last category has been heavily curtailed in or excluded from benefits. In the first years after its introduction, the number of persons using the arrangement had been decreasing.

2.4 Changing public sector supply incentives

Another type of reform, not geared to the incentives of consumers of social security but to the incentives of its suppliers, has been more effective in reducing the production of social services and bringing down the number of clients. Bringing about a change in how an arrangement is financed is the outstanding type of adjustment. One of the causes of the public sector failure of overconsumption and overproduction was the existing separation between making decisions on eligibility for benefits on the one hand and being responsible for providing the necessary financial means on the other hand. Economic theory learns that making those who decide on the use of the arrangement also responsible for the financial consequences of a higher or lower number of users, will change the incentives of the decision makers and consequently has an impact on entrance into the arrangement.

The Social Assistance Act, which came into force in 1965, offers the first and apt illustration. Local governments decided on eligibility and the national government provided the financial means. After its coming into force in 1965, the number of people receiving support was steadily increasing. From the 1980s on, various efforts were made to turn the tide. The level of benefits relative to the net minimum wage was lowered and eligibility criteria were made stricter. However, it did not stop the growth in applicants and admittance. What in the end does seem to work is the change made in 2007 in the way local social expenditure was financed. Instead of receiving full compensation of all expenditure on income support from the central government, as it used to be, the local government got a fixed sum of money. If more is spent than the fixed budget the local government has to cover this by spending less on other tasks or by raising local taxes. If it spends less than the lump-sum, the surplus can be spent freely. Under the new financial scheme, local governments have an incentive to apply eligibility criteria more strictly – and they do so. The local administrations have also become more active in supporting clients to find work and the monitoring of clients to detect abuse has been intensified. As a result, the use of the arrangement has been decreasing.

The change in the financing of care at home for ill and handicapped (usually elderly) persons, had an analogous effect. The decision on eligibility for subsidized home care, and on the type and hours of care to be provided used to be made by regional committees that had no responsibility for total expenditure. The arrangement was financed out of the national public purse. The home care services were provided by regional non-profit organisations that could charge a fixed tariff per hour of delivered type of care. Clients could choose among registered suppliers. They paid a personal contribution dependent on income, which the provider had to return to the public fund. The year 2007 brought a reform. Instead of payment for services provided without a limit on total expenditure, the public funds for home care were distributed among the municipalities as fixed budgets. A budget surplus could be used to finance other tasks of the local government. Under the new financial regime suppliers had to negotiate on price per type of care and total hours per type of care to be delivered with municipalities, which now had a strong financial motive to be tough: asking much while giving little. In the first year, 2007, the average tariff per hour per type of care was about 10 percent lower than in 2006. A further striking change was a shift from care delivered by personnel with high professional qualifications to lower qualified, less expensive care. The care delivered by highly qualified personnel was 50 to 80 percent of total care in 2006, but it had decreased to 5 to 25 percent already in 2007. Furthermore, the traditional providers reported that labour

conditions for their personnel had deteriorated.⁴ It also led to complaints that the quality of service had deteriorated dramatically. Against such criticisms the municipalities have taken the stand that they simply, and strictly, apply the eligibility criteria. Their view is that in the past, due to lax application of eligibility criteria and lax monitoring of public subsidies paid for services, much of the low quality care, such as cleaning the house, was given by overqualified and therefore overpaid personnel. Municipalities refused to pay more for the service than the strictly necessary costs.

2.5 Mitigating X-inefficiency

The above changes in social security arrangements were in the first place meant to counter overproduction and overconsumption. However, the changes in the financing of social arrangements also have helped to reduce X-inefficiency now that the local distributors can no longer send the bill to the national government, but have to face the financial consequences of their decisions. Additional options to reduce X-inefficiency in providing social security are measures that, put simply, bring the organisation in good order. To be more specific, basic requirements for a bureaucratic organisation are: clear targets at each organisational level (in terms of production and budget), clear criteria to judge about eligibility (where applicable), competent personnel, monitoring of performance, reporting of performance, and comparison with planned targets. Comparative studies of performance help to discover best practices and to set benchmarks. Incentives to reward good performance should be built in. For (departments of) organisations that are in direct contact with clients, research of consumer satisfaction and dissatisfaction should be undertaken and its results should feed back to the level where decisions to solve avoidable consumer complaints can be made and enforced within the organisation. External auditing of financial administration as well as performance should take place on a regular basis. The whole set of instruments is geared to improve the internal organisation of social security providers and is destined to keep X-inefficiency at bay.

Abuse of social security arrangements is not only a form of overconsumption; it is also a manifestation of X-inefficiency as it entails a waste of scarce resources. Social security cannot do without credible sanctions. The organisation should include a department with the task to detect false claims and abuse. This department must investigate whether the client, in cases where benefits have been granted, indeed meets the eligibility criteria and whether he or she lives up to the requirements set for his or her behaviour. Financial and other sanctions, in combination with the probability of being tracked down and punished, should be so high - and made public - that only extreme risk takers will see cheating and abuse of social security provisions as an attractive option. The legislator, the administrators and the courts should understand that sloppy deterrence is a spur to abuse. Wide-spread public abuse of social security does much to wipe out the sentiments on which voluntary redistribution rests and by that it heavily undermines the political support for social security arrangements.

The other side of the coin is that the (potential) consumer has to be protected against abuse of power, arbitrary decisions and accidental mistakes of the provider of social security. Transparent procedures to judge on objections and complaints made by consumers, with competent staff to do the administrative and judicial work, are an indispensable component of social

4 Van der Velde et al 2007.

security provision. Its function is to prevent unjustified underconsumption. This is another manner to uphold the public support for the social security system.

2.6 Strengthening competition between private suppliers

In the previous section, we have discussed various repairs and reconstructions in social security arrangements carried out to remedy the public sector failures of the bureaucracy's functioning. In this section we discuss one more option, being the participation of private enterprise in the provision of social security, hoping that market incentives will weed out public sector failures, such as lack of choice, X-inefficiency and lack of innovation. In social security the best possibilities for partial privatisation are situated in the production and delivery of care and in insurance.

Table 1 represents four feasible options for organising a market in the delivery of social security, labelled A, B, C and D. In all options, the service is delivered to eligible users who have free choice of supplier. The public sector finances output and decides on the quantity it will maximally demand and finance per firm. The price (subsidy) per unit of service of a defined minimum quality is either fixed *ex ante* (A and C), or it is determined via competitive bidding (B and D).

Table 1: A semi-market for social security provision

		Supply side	
		Closed market with non-profit firms only	Open market with free entry, for-profit firms included
Demand side	Bureaucracy fixes price and minimum quality; negotiates on quota; finances output	A	C
	Bureaucracy fixes minimum quality; negotiates on quota; finances output	B	D

In option A non-profit suppliers compete on a market closed to outsiders for a publicly financed quota (market share). The price to be paid per unit of service is set by the bureaucracy and is not a subject of negotiation. Having negotiated their quota, the firms still have to attract consumers. When the fixed price exceeds the efficient cost of producing output of the required minimum quality, firms are urged to compete on quality. A supplier that stays behind in quality of service will lose customers who have free choice. Consumers will then switch to a more client-oriented supplier. Suppliers with X-inefficient high cost per unit of output surpassing the fixed price, will run into losses. If they do not improve, such firms end up bankrupt and eclipse from the market. So there are clearly visible indicators of success and failure in performance.

Option B goes a step further than A by letting suppliers also compete on the price to be paid for services of a defined (minimum) quality. The bureaucracy could, for example, organize an auction and select the lowest cost suppliers. Firms are forced to focus their competition on the price of a minimum quality service. Low cost suppliers are identified from the start and high cost suppliers will drop out earlier than in option A.

If the introduction of competition leads to such a drop out of high cost suppliers, it is evidently in the public interest. But will it work? The closed market can easily drift into a silent consensus not to compete on quality of service (in option A) or not to bid in the auction below an agreed upon minimum price (in option B). Conspiracy between suppliers degenerates the market into a cartel, which performs hardly any better than the former delivery through the bureaucracy. Even if suppliers do not collude, the non-profit firms cannot pay out profits, so there remains an incentive to use the (potential) surplus for X-inefficient expenditures, while they might show little eagerness to innovate with all its risks of not succeeding. All this casts doubts on how effective competition will actually be, despite the oversight of the Competition Authority.

From an economic point of view, the preferable alternative is the open market with free entry for 'outsiders', including for-profit firms (options C and D). The incumbents have to fear that conspiracy not to compete will tempt potential competitors to enter the market. In option C, effective competition between firms that try to draw in consumers will result in output of a quality appreciated by the consumers. And for-profit firms tend to be more aggressive in trying out innovation that reduces costs as well as innovation that raises quality. In option D, suppliers have to keep costs per unit of output as low as possible to get a quota. Cost-reducing innovation of for-profit firms forces non-profit firms to follow.

Recent developments in home care in the Netherlands offer an illustration. It has to be noted that the delivery of home care was never fully integrated in the public sector. Before the government came to define home care as a public interest it was the domain of non-profit organisations. And the government left it like that, even though over time more and more public money went to the sector. In 2007 the government intervened with a twofold change. The way home care was financed turned around by making the local government responsible for the distribution as well as for financing local home care. The second reform was to open the market for subsidized home care to so-called commercial suppliers, that is for-profit firms, which were to compete with the established regional non-profit suppliers on price and quality. The reform very much resembles the passage from option A to D in Table 1. The new financing system made local governments tough negotiators in their bargaining with suppliers who did not want to lose clients to competitors. As we mentioned before, the average tariff per hour per type of care was about 10 percent lower in the first year than in the year before the start of the new system. The second striking difference between the year before and after the date of introduction was the shift to the more austere type of services.⁵ For the majority of traditional non-profit suppliers, the lower tariffs - together with the change in the composition of demand - did not cover costs because they had failed to adjust organisation and personnel in due time, and they basically had to eat their capital. The 10 percent price reduction and the shift to more

5 Van der Velde et al 2007.

austere services are indications of forced cuts in X-inefficiency that prevailed under the old arrangement and conform to the predictions of economic theory.

The opening of the home care market for competitors has also triggered a promising type of innovation. Wammes (2009) has given interesting information on the entrepreneurship of a former manager of a traditional organisation in home care. Against the trend of enlarging the organisational scale, he started his own business in 2006 with the building up a network of small-scale local and regional teams of about 10 nursing professionals with a mix of higher and intermediate vocational training. Team members are paid a wage according to the Collective Labour Contract for the home care sector. The organizer and employer of the team members concludes the contracts with public bureaus that spend the budget (under the Exceptional Medical Expenses Act) and delegates the contracted work to the teams that organize their own work. This is a form of self-management without a complicated monitoring mechanism.

In contrast, the large organisations have in the recent past increasingly centralized the planning of work and split up the tasks per client in their smallest elements with minutes set per element. This has led to an overhead cost of on average 30 percent of total cost and loss of work satisfaction for nursing personnel. However, the aforementioned network of small teams only has an overhead of 8 percent and where workers see the opportunity they leave the bureaucratic organisations to join a local/regional team. In client satisfaction the network comes out best. The case is a vivid illustration of how opening the market for new competitors attracts entrepreneurs who try out new combinations in a sector beset by overconsumption (in quality), X-inefficiency and counter-productive 'innovation'.

2.7 Increasing choice for consumers

In a normal market, the consumer can choose between varieties of a product, differing in quality and price. The semi-markets discussed in the previous subsection do not offer that choice. The quality and price of social security services are basically determined by the bureaucracy and tend to a uniform level, either with price and quality somewhat above the minimum (option C) or at the defined minimum quality at the lowest price (option D).

To provide for competition in a market with real choice for consumers, a more radical reform is needed. Public funds have to be channelled directly to eligible consumers of the social security services by giving them their own budget. Consumers order the type of service they want. Their account is charged with the bill and the expenditure reduces the remaining personal budget. The consumer can exceed his budget, but he or she has to finance the excess costs him- or herself. Suppliers are forced to focus on what the user of the service demands. When consumers differ in needs and preferences, firms have an interest in supplying them with differentiated services, differing in costs and accordingly in price. The instrument eliminates the public sector failure of lack of choice for users. Competition between suppliers limits X-inefficiency.

A Dutch example is the introduction, a few years ago, of a personal fixed budget for eligible sick and incapacitated persons. The voucher scheme enables them to make their own choice in buying care for certain handicaps from competing suppliers of home care. It is also under development in care for persons with specific handicaps. Alongside this personal budgets, or 'rucksacks', are also available for long term unemployed persons to finance coaching in job

searching and training to raise capabilities. In creating the latter facility, the hope was that the new arrangement would also stimulate innovation in the type of options offered on the market for job training. One of the arguments against voucher schemes is that participants might lack the information on what is offered on the market and what would suit their needs best. To counter that problem, the public authority can draw up a list of recognized providers and stipulate that budgets can only be expended on their services. The downside is that such certification throws up barriers for entry of potential competitors.⁶ One can conclude that a government introducing 'rucksack' arrangements should also consider it as its task to provide reliable and relevant information on available supply.

3 The case of construction and reconstruction in health care

We have defined the 1970s as the decade of transition from the period of building up social security to the time of its consolidation asking for repair and reconstruction. This picture is, as all schemes are, a simplification. As recently as 2006, an impressive new wing has been added to the social security building: the Care Insurance Act that covers the costs of health care of all Dutch citizens, wage-earners, persons dependent on benefits as well as the self-employed. Instead of a British-type national health care service, the structure is mandatory insurance for each citizen against the costs of a standard package of health care. Citizens have free choice between private firms supplying insurance. Under the old regime such choice was lacking for wage-earners with mandatory insurance and non-wage-earners not dependent on benefits, could remain uninsured. Insurers are forbidden to refuse customers or to differentiate contributions on the basis of health status or age. Through a mandatory scheme of money transfer, insurance companies with a share of old and chronically ill clients above the average receive compensatory payments from insurers with a lower percentage of clients in the high medical cost category. Insurers compete on price (the insurance contribution) and on quality of service. In the first years of the Act competition between insurers has been effective in preventing insurance contributions from rising too fast.

Insured persons pay their contributions to insurers. They also pay a special care insurance tax, which is proportional to personal income (presently about 5%) and which is capped. Tax revenue is partly redistributed in support of insured persons with low income. The attractive feature of the scheme is that it combines free choice of insurer for consumers, similar to what they would have had in a market for private insurance, with the financial capability to afford insurance, comparable with the former mandatory insurance for wage-earners. In our previous chapter, the thesis was developed that the vertical distribution of lifelong benefits of and mandatory contributions to welfare state arrangements in the Netherlands reflect a considerable amount of caring (or: solidarity) of citizens with higher incomes with fellow citizens with lower incomes. If one accepts that thesis, one can interpret the vertical redistribution through the care insurance tax as an instrument that internalizes caring externalities in the domain of health care, correcting the market failure that would have existed otherwise. With regard to its social and political acceptance it is of interest that the redistributive tax did not come in a flash, but had gradually evolved over a long period.

6 Groot & Maassens van den Brink 2009

The public interest comprises more than insurance in order to assure citizens equal admittance to health care. The quality and price of health care itself are also at stake. The objective of recent government policy is to develop and strengthen the market for health care as well as the market for health care insurance, in the expectation that competition will lead to better care at lower costs. Up to now the insurance market has lived up to the desired curbing of ever-increasing insurance contributions. How the market for health care provision is faring is less clear. The supply of health care has remained a private sector activity, mainly by non-profit firms, thus reflecting the sector's early development as private charity. In the second half of the twentieth century the government became increasingly involved, starting with the instrument of subsidies for hospitals and infirmaries, for instance, to keep health care affordable. It was followed by regulatory intervention, such as price regulation and the control of investments in health care, mainly geared to keeping rising costs under control. The government's blueprint for the future is to reduce price regulation and other direct interventions. Insurance companies, representing their clients' interests, will negotiate with providers of health care on the price (of a steadily growing list) of cures for which no regulated tariff exists. At the moment of writing this chapter, it is too early to assess the results. To be able to make such an assessment, three important issues have to be cleared up in the near future. First, to make informed decisions, insurers need detailed and reliable information on the quality of care provided by individual hospitals, for instance. Progress has been made in the past years, although there is still a long way to go. The hope is that with gradually increasing transparency on the quality of care, the medical performance of hospitals will become more and more an issue in the negotiations. In economic terminology: market demand will then exert pressure on suppliers to weed out quality-impairing X-inefficiencies.

Second, the market, where insurers and health care providers negotiate on price and quality, evidently has the structure of an oligopoly at both the demand and the supply side. That makes it hard if not impossible to predict what the final outcome will be.

Third, in 2009 influential political representatives are backing away from earlier decisions and have started to contest the acceptability of for-profit firms in health care, and even participation of private for-profit capital in non-profit firms. That relapse is not in the public interest. On the contrary, it is bad for variety of choice for consumers, bad for competitive pressure to reduce X-inefficiency, and bad for innovation in health care.

Health care offers a most interesting case. It combines a further build-up and extension of social security, rooted in notions of solidarity, as if we were still in the 1960s. At the same time it is a work of reconstruction, trying to cut away a proliferation of public interventions and restore the function of markets in health care.

4 A paradigm change?

In the literature the question is raised, for instance by Asscher-Vonk (2005), whether there has been a 'paradigm change': a transition from providing security and income protection to making social security subservient to the interests of the economy, such as a smooth functioning of the labour market. At first sight, there is indeed such a turn-around going on. Other perhaps than other authors, we want to stress that the reconstruction and repair of social se-

curity is not a phenomenon of the last years, but has already been going on for more than at least three decades. It is a long and tedious process. From our survey of applied instruments of repair one can see that over time the adjustments have become more incisive. Initially the adjustments are general and moderate, such as lower benefits for all. Later on the adjustments become more geared to specific groups, such as the change in legislation for wage-earners with a labour handicap. The shift from general and relatively moderate to specific and harsher may have fed the belief that the paradigm change, if there has been one, is of a more recent date.

We also want to stress that what appears to be a conflict between social and economic interests is actually a symbiotic relationship. Social security benefits and services require resources that are withdrawn from other uses. A broad and solid system of social security is only feasible in a state able to keep economic problems under control and able to sustain economic growth. It cannot survive in a failing economy. After the emergence of economic weaknesses in the 1970s and a seemingly uncontrollable increase in social security expenditure, decades of repair and reconstruction have followed, geared to make social security sustainable. Major interventions, such as making criteria for eligibility for labour incapacity benefits more strict and the expected rise in the age for receiving old age benefits, were and are unavoidable to maintain present levels of benefits.

The view that the recent trend is only to slim down social security is not only contradicted by the construction in 2007 of universal health care insurance, it is also contradicted by the figures. Expenditure on social protection in 1995 was 33% of the net national income and in 2008 it was 30 % (as we have calculated based on CBS Statline data). The sum of collective expenditure for social security and care as a percentage of gross domestic product was 24% in 1980 and the prognosis for 2010 is 23% (based on the *Tijdreeks overheidsfinanciën* of the CPB). In a society where the average income per person is roughly fifty percent higher than thirty years ago, the percentage spent and received per person with respect to social security has not gone down. Therefore, the evidence does not support the hypothesis of a paradigm change.

5 Conclusion

In our previous chapter, it has been argued that governments have conceived the public interest in providing security more broadly than the criteria of economic science prescribe and have built up a social security system in the Netherlands that goes further than the correction of market failure. Consequently the instrument of public sector intervention covers a wider field in social security than indicated by economic reasoning alone.

However, government policy in the past three decades suggests that the political view has been shifting and has led to a new, more economic view on what the public interest in social security is. Although some new wings have been added to the social security building, the efforts to make the building economically sustainable by reconstructing it in a more austere style, dominate, if you will. The unforeseen negative economic effects of an all encompassing system of social security provided through the public sector have been instrumental in bringing about that change in political attitude. Carrying the building metaphor a little further, one

could say that the original building showed construction errors that asked for repair. We have labelled the errors as public sector failures and we have indicated the repair options that have been applied to make social security sustainable thereby safeguarding the public interest.

To curb the ongoing increase in social security expenditure, as a percentage of national income, and also aiming for or at least hoping to weaken overconsumption incentives, benefit levels have been lowered and entitlements have been curtailed. To reduce the use of social security arrangements in a more direct way, criteria for eligibility have been made stricter and demands on receivers of benefits have been made harsher. We have stressed the importance of investment in detection and the implementation of sanctions to deter illegal overconsumption. To safeguard the quality of social security services, the procedure for treating complaints of clients should be transparent, accessible and fair. Adjustments have been made in the financing of social security arrangements. Confronting the body responsible for making decisions related to services with the financial consequences of their decisions has changed supply incentives within the public sector and has been an effective instrument to restrain the supply of social security services.

To weed out the public sector failures of X-inefficiency, lack of choice and lack of innovation, competition in the markets where social security services are delivered to clients has to be strengthened. To ensure effective competition it is essential that eligible consumers can make a free choice between suppliers and that suppliers have free access to the market. . The example was given where the bureaucracy purchases quantities of services of a defined minimum quality from firms and leaves delivery of services for eligible consumers to contracted suppliers. The alternative option has also been presented: the available budget is distributed among eligible clients who as consumers are free to spend their budget. Such a voucher scheme leaves them more choice, both of supplier and of type and quality of service. There will be more diversity in type of service and correspondingly in prices, whereas product innovation is encouraged. Both options are now actually implemented. Giving market incentives a place in the provision of social security safeguards the public interest, because competition is an effective instrument to bring down the unnecessary high cost of X-inefficiency and to stimulate innovation. Competition in an open market makes suppliers more pro-active. In the end, badly managed firms, with sustained high cost and/or poor quality of service, will not survive. Although such eclipses are dramatic events, one should not overlook that they are an inseparable part of recovering from X-inefficiency. Safeguarding the public interest in social security should not be confused with safeguarding the special interest of maintaining the *status quo*.

Finally, the evidence that we have collected does not support the hypothesis of a paradigm change in the provision of social security. Rather it is an indication that past and present governments of the Netherlands have succeeded in keeping social security sustainable.

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SAFEGUARDING PUBLIC VALUES IN SOCIAL SECURITY: A PUBLIC ADMINISTRATION PERSPECTIVE

Ko de Ridder

1 Introduction

When we try to get to the core of what ‘safeguarding of public values’ might be, we are confronted with three general questions:

- what are public values?
- what is safeguarding?
- what different ways of safeguarding public values are there?

The aim of this contribution is, to attempt to answer these questions from a public administration perspective – first in a general way and then applied to the policy field of social security.

Traditionally, many public administration scholars considered the guarding of public values one of the core themes of the discipline. Both the structuring and the operation of organizations in the public sector should be geared primarily to upholding public values such as equity, fairness and professional service. Public administration as an academic discipline should study the ways and means by which public administration practitioners could accomplish these aspirations.¹ In the whirlwind of New Public Management (NMP) that has swept the field over the past twenty-five years, this focus seems somewhat lost, be it in different degrees. The centre subject of NMP is another public value: the efficiency of the public sector and how to make use of market type mechanisms to enhance public efficiency.² In the wake of NMP, many an academic institution changed its name from ‘public administration’ to ‘public policy’ or ‘public management’. Accordingly, the mission of academic scholarship partially shifted towards developing tools for a more market-oriented approach of public policy. Still, a substantial part of public administration research was aimed at a critical evaluation of NMP devices and accomplishments.³ The NMP revolution did not leave the policy sphere of social security untouched. On the contrary, some of the most striking experiments with market type mechanisms have been implemented in precisely this area. Privatization, outsourcing and voucher systems are but a few of the policy instruments that found widespread application in the social security and social care of most industrialized countries. As scholarship followed

1 Marini 1971.

2 Lane 2000.

3 Pollit & Bouckaert 2004.

suit, a host of papers on topics such as voucher systems, contractual relations and cooperative governance, all in social security, filled the public administration journals.

It is important to note that the NPM-wave not only implied a modification of the tools of choice for public governance, but also an alteration of the underlying values, or at least a shift in the emphasis on different public values. This in turn has led to a new reflection of what constitute core public values that public administration is to uphold. We find this for instance in the work of Bozeman (2007), but also in the WRR-study (2000) on ‘Safeguarding public interests’. The question ‘what are public values’ is extensively dealt with elsewhere in this volume. Suffice it to remark here that from a theoretical perspective, the concept remains elusive, all attempts at clarification and operationalisation notwithstanding. At the same time, determining public values that require public safeguarding is the bread and butter of politics in modern states. Capturing and categorizing public values from such a practical point of view is routinely done. A simple catalogue in a public administration textbook lists the following:⁴

- provision of collective goods and quasi collective goods
- maintaining market infrastructure
- addressing external effects of human activity
- provision of merit goods and de-merit goods
- compensating for unequal distribution.

Especially the last one often appears as the value base for social security policies and arrangements. More specific public values that are commonly considered essential for the sustainability of social security are solidarity, efficiency and social and economic participation.⁵ This small inventory seems as good a starting point as any to discuss in more depth the idea of safeguarding public values in social security.

2 Safeguarding

We now come to the question: what is ‘safeguarding of public values’? Before we enter into a discussion of safeguarding itself, it is worthwhile to make some general remarks concerning ‘social order’. In the social sciences, it is a commonly accepted model that social order comes in three distinct flavours: markets, hierarchies and communities.⁶ Each has its own types of interaction and of social control; the Invisible Hand of the Market, the Harsh Hand of Hierarchy and the Helping Hand of the Community. Some toll the virtues of the market and its capacity to create order without law or hierarchy.⁷ Others emphasize the indispensable and vital nature of community order, trust and social capital and denounce the crowding out of structures such as a civil society by markets or hierarchies.⁸ Yet most social scientists would agree that a vital society will need a well balanced combination of all three attributes for generating social order.⁹

4 Bovens et al 2005.

5 see Plantinga in this volume.

6 Ross 1901, Ellis 1971, Goudsblom 1974.

7 Driscoll & Hoskin 2006.

8 Putnam 1995.

9 Durand 1992.

There is a distinctive difference between markets and communities on the one hand and hierarchy on the other hand. Although it does not necessarily have to be that way, unlike the other two forms of social order, hierarchies are usually intentionally designed, created for a purpose. While the social ordering of markets and communities can in some sense be considered ‘invisible’, that of hierarchies is not. All its ordering devices such as rules, instructions, control, sanctioning and the like are man made and observable. In markets and communities we see the social regularity that many individual choices add up to collective phenomena that are not or not necessarily intended by any of those individuals making those choices. There is a gap between individual choices and collective outcomes that constitutes the proverbial invisible hand coined by Adam Smith. Hierarchy conversely is an intended result of individual or collective choice. Hierarchy then stands for intentional intervention in the social processes of markets and communities.

With this in mind, we return to the concept of safeguarding. By the safeguarding of public values and public interests is generally meant: any intervention in societal affairs by a governmental body or public agency. A few particulars of this definition should be noted.

First of all, safeguarding is designated an activity, an intervention. One approach to identifying public values is to consider anything a public value if it is dealt with as a public value. In other words, because the body politic safeguards it, it qualifies as a public value. Such a concept of public values implies that public intervention and public values are congruent. When there is public intervention, there are public values and vice versa. This concept is flawed inasmuch as that there are public values that can endure without public intervention. The social order and its derivatives that are generated by markets and communities are indispensable and therefore in many ways collective interests. Generally speaking, the common good is brought about quite often without intentional social engineering. However, there are collective outcomes of individual choice that are not in the common interest, but on the contrary constitute a threat of the common good. One class of such outcomes produced by the invisible hands of the market or the community is what economists call ‘external effects’ – with environmental pollution as a prime example. The ‘tragedy of the commons’ is the parable that illustrates how collective outcomes can be detrimental to the best interests of every individual involved.¹⁰ These and other threats and missed opportunities constitute reasons for government intervention, for the activity that we call ‘safeguarding public values’.

Secondly, safeguarding is an activity of public bodies, governmental in one way or another. Again this follows from the previous assumption that much of the common good is generated by the ‘invisible hand’ of markets and communities. Active visible intervention requires accruing power in a collective actor: safeguarding public values starts with ‘transferring individual rights of control’ to a public authority.¹¹ The one distinguishing feature of a government is its monopoly on legitimate force. By compelling individual actors to comply with collective choices, negative or substandard outcomes of markets and communities can presumably be thwarted or corrected. Yet the deployment of public authority has its own drawbacks. Time lags, inefficiency and ineffectiveness are but some of the criticisms levelled at many government interventions in society. While the flipside of market blessings is market

¹⁰ Hardin 1968.

¹¹ Coleman 1990.

failures, the reverse of government intervention is government failure.¹² Thus safeguarding of public values requires careful balancing of interventionist activities with societal capacity for maintenance, recuperation and improvement.¹³

Thirdly, there is a wide variety of public interventions, of ways to use ‘collective rights of control’. For instance, a seemingly minimalist involvement of collective authority in societal affairs is to bring about and sustain a system of civil law, the infrastructure for contractual exchange. At the other end of the spectrum of public interventions is the production of collective goods or services by the public authority itself. Again, the choice of collective action instruments for safeguarding a specific public value is a balancing act that involves a lot of trial and error. Beyond that, the optimal public policy mix may change overtime, due to changing contingent factors, such as technology. More generally, in modern society there is hardly any market activity that is not affected in some way by collective intervention aimed at safeguarding one or more public values.¹⁴

The concept of ‘safeguarding of public values’ thus implies looking at government policy from a specific angle. The concept takes into account that modern society has numerous ways to preserve and reinvigorate social order apart from and beyond what governments can contribute. Yet modern society has numerous ways for disrupting social order as well – witness the 2008 credit crisis. Government policy from the perspective of safeguarding public values appears as the art of finding a precarious balance between preventing societal disruption and stimulating societal preservation of social order.

3 Variation in safeguarding

3.1 Variations in intervention

Public values come in different categories and one may assume that each type of public value requires its own mix of public interventions, as a complement to societal (market and community) ways for social ordering. The underlying argumentation is that by combining several ordering principles, weak aspects of one principle can be compensated by mechanisms of the other ordering principles.¹⁵ However, finding the right mix is not without problems.¹⁶ One complication is that usually a number of different public values will have to be preserved at the same time. An instrument that effectively safeguards one public value may very well be detrimental to another one that is equally important. The market might promote efficiency and effectiveness of service delivery at the expense of public values such as equality of rights and legal certainty, while government regulation, might safeguard public values yet have detrimental effects on efficiency. Thus, when searching for the right policy mix there are inevitably tradeoffs between different public values. Furthermore, safeguarding is costly, and

12 Winston 2006.

13 There is a similarity between the choice for the optimal policy mix and the make-or-buy choice firms are confronted with. When buying (parts for instance) a firm makes use of market forces to reap efficiency benefits. When making, the firm uses hierarchy to reap the benefits of enhanced control (Coase 1937)

14 Bozeman 1987.

15 Centraal Planbureau 1997; Lijesen, Kolkman & Halbesma 2007.

16 Kirkpatrick 1999.

the costs of an extensive set of safeguarding instruments may outweigh its benefits.¹⁷ Moreover, the optimal mix of interventions may change over time, due to changing circumstances. Finding the optimum is a recurring societal experiment, and easy solutions are not available, all the convictions of social theorists notwithstanding.

One such experiment is to be found in the sector of material infrastructure: utilities such as railways, electricity, gas, water, and telephone. Typically these utilities were for a long time conceived to be natural monopolies and therefore collective goods. The required infrastructure prohibited a competitive way of providing services. On these grounds, in Europe the public policy of choice for safeguarding public values of uninterrupted, relatively efficient and cost effective service was government self production by public companies. In the United States, many of these utilities were run by private firms (such as the monopoly Bell Telephone company) while safeguarding of public values was achieved by heavy regulation.

New technology, especially IT, created a host of new ways to use one infrastructure system by a number of competing firms. Theoretically this opened up the opportunity for enhancing the efficiency and cost effectiveness by privatization: transferring the provision of these services to the social order of the market. Yet this gives rise to the question of how to preserve other public values related to these utilities, such as uninterrupted service, affordability and safety. Government policies aimed at creating safeguards for these public values with privatized utilities again may use a mix of strategies that relate to the three primary forms of social order.¹⁸ Government may use hierarchy, imposing and enforcing rules concerning the public values it wants to protect. Government may also attempt to enhance market mechanisms and facilitate consumer choice, including exit options, by enhancing transparency of procedure and performance of private firms. Finally, government may try to harness community forces, and approach the collective of utility firms as a civil society and create incentives for self regulation, peer assessment and control within the sector.

3.2 Variations in levels of safeguarding

A second approach for gaining more insight in the process of policy intervention makes use of a social system model of society and its myriad subdivisions.¹⁹ A systems approach emphasizes a few specific features of societies and subunits of a society. One such feature is that a system operates in interaction with an environment. To model that interaction, a system is considered to have an input and an output. Processes within the system are labelled throughput. Typically, outputs generate reactions in the environment that are fed back as new input into the system. This feedback loop is thought to be the most important single feature of the relation between a system and its environment.

A policy system (as a subsystem of a society) can be conceived of as the whole of institutions and legal arrangements that develops, implements and sustains a certain policy complex within a society. From the perspective of the policy system, society appears as its environment. Policy systems differ from one to another, depending on the public values, the support and the

17 Mitnick 1981.

18 De Bruijn & Dicke 2006.

19 Luhmann 1995.

resources that go into the system (its input), on the dynamics of those values within the system (its throughput) and depending on the way the system is designed to provide for outputs, that is the implementation of policy. The safeguarding of public values may be located at each of these three levels of the policy system.

At the input level, ample support and resources need to be secured in order to make and keep the policy system viable. Political institutions that convert societal interests and demands into governmental policies and actions typically are the linking pin here between society and the policy system. If this part of the system is not functioning well, public value failure results.²⁰ Secondly, safeguards at the throughput level are inherent in the institutional design of the policy system itself. Ideally the design is such that the policy system is fully capable of developing and implementing all those policies that are required for upholding and safeguarding its public values. Design features will typically consist of a choice of market-type, community and hierarchical tools. A social health system, for instance, may be designed to produce a certain level of physical wellbeing in society under conditions of equal access and equal distribution. The policy system mix could include private insurance firms, non-profit health providers and public regulators. Thirdly, at the output level of a policy system, chosen policies are implemented. Here the design of the interface between the system and the citizens is a core issue. Both the values intrinsic to the policy and the accompanying values of for instance citizens' rights have to be safeguarded here. Depending on the institutional mix in place, clients could be confronted with street level bureaucrats, private contractors or non-profit professionals – or all three. The ways and means for safeguarding public values will vary accordingly.

3.3 Variations in the tools of government

Traditionally, government policy interventions are hierarchical by nature. Making, applying and enforcing rules is the core business of government agencies. Even when enlisting market forces or community action, the tools for government intervention are regulatory by nature. However, much of the present day literature denounces the hierarchy of command and control regulation as old fashioned, ineffective and inefficient.²¹ Instead regulators are experimenting with forms of regulation that allow for more flexible and tailor made solutions to threats of public values. Typically there are three general deviations from the traditional command and control kind of regulation to be seen.

The first deviation is with the conception of regulation. While the traditional view requires binding rules to be made by a democratically controlled legislature, present day approaches stretch the involvement of stakeholders in the rule making process. Responsive regulation is one concept for such an approach.²² Self regulation and other forms of soft law, sometimes backed up by a threat of public regulation, is another form.

The second deviation is with the application and enforcement of rules. Where the traditional view of regulation stretches the importance of equal treatment, latter day approaches empha-

20 See Plantinga in this volume.

21 Solomon 2008.

22 Ayres & Braithwaite 1995.

size case by case problem solving.²³ Not adherence to the rule as such, but tackling the problem that the rule is supposed to cover should be the essence of regulatory and supervisory activities. Thus we may observe experiments with ‘interactive implementation’, ‘compliance assistance’, ‘testing best practices’ and ‘bench mark assessments’. It is quite apparent that the old paradigm of legality and equal treatment under the law is in jeopardy here.

A third deviation is aimed at enhancing market mechanisms. Digressions from a norm or rule are not enforced so much as well as exposed. Naming and shaming, transparency and other public exposure techniques are used as incentives for customers to choose those providers that adhere best to public values. Research shows however, that public opinion may well differ from the opinion of the regulators on what constitutes best value for money, and that consumer exit is not necessarily an effective sanction to promote norm compliance.²⁴

Even though these new approaches are presented as ‘the state of the art’ in safeguarding public values, it remains to be seen whether they constitute more than a gradual shift. Constraints to be found in time honoured legal principles governing public intervention, such as legality, equality and the prohibition of arbitrariness, could very well limit their practical value. Beyond that, some features labelled as new inventions, such as interactive rule making, have been practiced for a long time in some jurisdictions. It might very well be that we are witnessing a modification in approach and attitude, more than a shift in regulatory paradigms.

4 Safeguarding public values in social security

Government involvement in social security, or more generally, in safeguarding income security under dire circumstances, has a long tradition. Income security as such can be considered a public value in the modern welfare state. It falls in the general public value category of ‘compensating for unequal distribution’. History has shown that neither the market nor civil society on their own are capable of producing sufficient safeguards against loss of income generating capacity, due to impairing accidents, illness, old age and such on the one hand, and loss of income due to lack of jobs on the other. For instance, experience learned time and again that safeguards against ‘occupational health and safety’ could not be contracted for in normal labour contracts. Therefore in most industrialized nations some kind of legislation to correct this market failure can be found. Over time, more such threats to income security have been met with collective arrangements. In fact industrialized nations usually have a complicated system of welfare provision by which all kinds of risks to a larger or lesser degree are covered. Still, there is a large variation from country to country as to the range of risks and the strength of protection that public arrangements offer. Or in the terms of our previous discussion, there is a large number of ways in which public values in social security are being upheld. Just like each policy system, a welfare system can be conceived of as the whole of institutions and legal arrangements that provides social welfare in a society.²⁵ Welfare systems differ from one to another, depending on the public values that go into system

23 Sparrow 2000.

24 Janssens 2005.

25 Korpi 2001.

(its input), on the dynamics of those values within the system (its throughput) and on the way the system is designed to provide for outputs and implement policy.

There is not just variation across nations, but also over time. Over the years, a shift in emphasis in institutional arrangements of social welfare systems can be observed, from community to state, and then to market mechanisms.²⁶ The first welfare arrangements in the 19th century heavily relied on private initiative, with an auxiliary regulatory role for the state. The churches looked after the poor and the employers and employees developed funds to cover employment related risks. State regulation should not interfere with these private initiatives. During the 20th century governments increased their role in the provision of welfare, creating agencies that provided coverage for a host of income security risks, while involvement of community-based associations dwindled. As from the end of the 20th century, there is a tendency to apply market type mechanism and engage private firms in the institutional arrangements of the welfare systems.²⁷ Underlying these recent shifts toward the market is the same expectation that has driven the NPM wave as a whole: the belief that it will increase the efficiency of the system and therewith decreases public spending.²⁸ State agencies are withdrawn from direct provision of welfare services, and the state intervention is gradually reduced to regulation. For some these developments are a reason to qualify present welfare systems as ‘regulatory welfare state’.²⁹

We will now take a closer look at issues concerning the safeguarding of public values in such a more privatized social welfare system.

5 Safeguarding at the input side

On the input side, we find three distinct policy dilemmas that are inherent to all welfare systems:³⁰ - universality vs. selectivity; - redistribution, especially between generations; - individual responsibility vs. collective responsibility. Welfare policies that are selective, target specific groups, primarily the poor and needy, while universal policies cover a much broader range of risks and will also encompass the middle class. The degree of redistribution that a welfare system is allowed to generate is a second value choice. A third one is the degree of collective responsibility and the trade off with individual responsibility that a welfare system may engender.

At first glance, all three dilemmas seem to represent pretty straightforward public value alternatives. Safeguarding those values then would imply designing a welfare system that is capable of transforming these values into practical policies and to implement those policies in the realization of entitlements. However, safeguarding of public welfare values turns out to be more complicated than that. Public values themselves, that is public support for specific policy choices, are influenced by design parameters of the welfare system. Beyond a certain threshold, too much selectivity erodes support, launching a vicious circle of increasing se-

26 Huber, Maucher & Sak 2008.

27 Van Oorschot 1998.

28 Walsh 1995; Bredgaard & Larsen 2007.

29 Leisering 2003.

30 Van der Veen 2008.

lectivity and decreasing support. ‘The more we target benefits at the poor and the more concerned we are with creating equality via equal public transfers to all, the less likely we are to reduce poverty and inequality’.³¹ Just the same there are self-enforcing effects the other way around: universal systems tend to buttress support for welfare. More so, it has been shown that a universal system enhances social capital and participation of a civil society in the common good.³² Bowling alone is more likely in societies with a selective system than in societies with a universal system. Similar positive feed back effects have been observed for public values concerning redistribution and collective responsibility. Organized solidarity spawns a sense of solidarity while collective responsibility may enhance individual responsibility.

Yet negative feed back effects may occur as well. Thus an overly universal system can erode individual and community responsibility. If the government takes care of everything, why should citizens take care of anything? Avoiding this type of moral hazard is a necessary system requirement. Instruments such as residual risk for citizens and giving citizens choice in selecting service providers (through a voucher scheme for instance) are some of the latter day attempts to remedy such deficiencies.³³

More generally, in order to sustain a social welfare system, welfare policies should aim at strengthening positive feed backs and limiting negative feedbacks. Solidarity and social trust are precarious yet indispensable resources for the maintenance of social welfare systems. Both can be eroded by negative feedbacks such as a sense of wastefulness or signs of inequity in the system. In this sense, the safeguarding of public values in social security starts with the choice of its goal parameters.

6 Safeguarding through system design

Next, safeguarding of public values of social welfare are to be found in the throughput of the welfare system, that is: in the allocation of tasks and powers to different public and private actors and in the devices for coordination and control.

The overall design of social welfare systems may include direct provision by the state (in the Netherlands: administration of social assistance by municipalities and of unemployment benefits and disability benefits by the state agency UWV); provision by corporatist arrangement (employers and employees) under a legislative umbrella; provision by private collectives under a legislative and supervisory umbrella (pension funds), provision by private insurance firms under a legislative and supervisory umbrella (life insurance companies). As is often the case, in the field of social security too, there is some competition or trade off between several public values. Prime public values, apart from the income security itself, are those of ‘social and economic participation’ and ‘efficient provision’.

The prime order of the market may provide for the latter value. For instance, private insurance companies are thought to operate relatively efficient. Yet the value of income security

31 Korpi & Palme 1998.

32 Salamon, Sokolowski & List 2003.

33 Heinrich & Choi 2007.

might not be fully realized: firms in the market are under the incentive to avoid bad risks for instance (adverse selection), and to take more entrepreneurial risks than are compatible with long term social security ('firms should be able to fail, but life insurance firms are not allowed to fail'). For the policy mix there is the choice between accepting the greater risk of the market in exchange for more efficiency, or to build in additional state safeguards to promote equal access (prohibit adverse selection for instance) or to prevent insurance company insolvency.

The value of 'social and economic participation' may be jeopardized by income security schemes, as the incentive for unemployed to invest in new employment is blunted ('moral hazard'). To counter this, the state could moderate benefit schemes, or put in additional instruments to promote the return of unemployed to the labour market (employment reintegration). Here again, employment reintegration services can be provided for by the state itself or by private firms, and again there may be trade offs between efficiency on the one hand, and other public values such as equal access on the other.

Under present day more privatized conditions, the overall system design tends towards a division of labour by which market parties provide forms of income security and related services, while state activities are more and more limited to providing safeguards against breaches of public values through regulatory interventions. In a well known NPM slogan, state interventions shift 'from rowing to steering'.³⁴ There is increasing evidence that a social welfare system loaded with market type mechanisms, requires a strong regulator, a market authority that can limit or even purge infringements into what constitutes the core values of the system (Mertens 2006). Market type mechanisms harness specific incentives such as profit maximization, hoping to reap efficiency benefits.³⁵ Yet these same incentives may elicit perverse effects: opportunistic behaviour such as adverse selection or shirking. Such effects not only harm public values but will erode support for the system as a whole as well.

Yet a regulatory approach has its own drawbacks. An abundance of literature covers criticisms ranging from 'agency capture' to lack of effectiveness and perverse effects such as stifling innovation.³⁶ General reactions to such criticism have been discussed in a previous section. As for the regulatory welfare state: it being a recent development, there is still little documented experience about its effectiveness in guarding public values. There is no reason to assume however, that welfare regulators can easily avoid the pitfalls that regulators in other policy areas have been wrestling with.

7 Safeguarding at the output side

Lastly, public values are at stake at the output side of a welfare system. Solidarity, the kind of social capital that is indispensable for maintaining a welfare system, will quickly wear down if the system proves inadequate: unable to produce administrative justice, or inept at efficient and effective service delivery. It is in the management of social welfare that public values are preserved or endangered at the output side of the system. And it is in the manage-

34 Osborne & Gaebler 1992

35 Van den Houten 2003.

36 Moran 2002

ment of social welfare, that experiments in re-balancing the three forms of social order are taking place in their most concrete and visible form: marketization of public administration, primarily by way of outsourcing (Van Berkel & Van der Aa 2005).

One important argument underlying the use of market type mechanisms in general and outsourcing of social security services in particular concerns the attitudes of the public servants. Traditionally the professional public servant is thought to have public value motivations: his aim on the job is to discharge of his duties in the best interests of citizens and clients. The administration of justice is considered to be his primary motivation. Empirical scrutiny put cracks in these assumptions as early as the late 1970's: it turned out that the sheer pressure of case overload forced street level workers in public service bureaucracies to develop coping strategies that diverged from the ideal of the administrative justice.³⁷ Still, in these public administration studies, not the attitude of the civil servant but the circumstances under which the street level bureaucrat had to function were considered to be the heart of the problem. Twenty years later, NMP thinking started questioning the very idea that public bureaucrats would have a different approach to their job than for instance workers in the private sector. It was wrong, Le Grand (2003) held, to portray civil servants as 'knights' – and giving them all the discretion to act as they please. The starting point for managing public service delivery should be to regard street level bureaucrats as much as 'knaves' as any other employee. A proper set of incentives and des-incentives would be needed to discipline the doctor and the social welfare worker. In this view it was required that public service delivery would operate under the same market type incentives as for profit providers. Giving citizens different options concerning the service and the provider ('choice') would be an effective way to break public monopolies.

The prime example of the application of such ideas in social welfare systems is the outsourcing of employment reintegration activities. In many cases this has meant the emergence of a quasi market of reintegration services in which public agencies buy such services from private providers on behalf of their clients.³⁸ Sometimes this arrangement is accompanied by a voucher system or another way to give clients a choice. Over the last ten years, a host of studies has been conducted to evaluate these market type arrangements and to test their underlying assumptions. Many were done in the USA,³⁹ but also in Australia,⁴⁰ the UK,⁴¹ the Netherlands,⁴² Germany,⁴³ Denmark⁴⁴ and Switzerland.⁴⁵ Most studies show that so far outsourcing seems not very effective: the record of private entrepreneurs in reintegrating unemployed is, on the whole, not better than that of public agencies. The same is true for efficiency. Contracting out comes with a lot of transaction costs to counter opportunistic behaviour of contractors. It seems that such costs offset any gains made by lower rates of the service delivery itself. Beyond that, managing reintegration contracts in such a way that other public values are adhered to, is a complicated task. For Dutch municipalities, this was a reason to

37 Prottas 1979; Lipsky 1980

38 Le Grand & Bartlett 1993

39 Domberger & Jensen 1997; Brown & Potoski 2003; Heinrich & Choi 2007.

40 Grub 2006.

41 Finn 2005

42 Van Berkel & Van der Aa 2005; Sol & Westerveld 2005

43 Jahn & Ochel 2007.

44 Bredgaard & Larsen 2008.

45 Bonvin & Moachon 2007

reduce their outsourcing and embark on a strategy of ‘modular buying’. The public account manager controls and merges the contributions of private contractors into one reintegration plan for individual clients.⁴⁶

All together, management at the output site of social welfare systems – the implementation of welfare policies – is still moving back and forth between neo-weberian hierarchy and contract management of marketized service delivery. The state of the art in guarding public values in this area is hardly a fixed state.

8 Conclusion

Safeguarding public values is, from the point of view of administrative sciences, a matter of institutional balancing of the three basic forms of social order in such a way that an optimal mix of administrative justice, effective social security and efficient use of public means is achieved. It is a continuous quest that has a lot in common with aiming for a moving target. ‘Muddling through’ while learning on the way seems, in most cases, the best available option.⁴⁷

Safeguarding public values in welfare systems has some specific features that have to do with the feed back mechanisms that are intrinsic to welfare institutions. Safeguarding in this area is not only a matter of harnessing adequate control mechanisms from the three areas of social order or of devising the most fitting management for welfare service provision. Beyond that, the preservations of the value of solidarity in a society, fundamental to any welfare system, requires the expression of solidarity in the make up of that welfare system.

46 Corra, Plantinga & De Ridder 2009.

47 Lindblom 1959; Bendor 1995.

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SAFEGUARDING PUBLIC INTERESTS: A LEGAL PERSPECTIVE

Albertjan Tollenaar

1 Introduction

1.1 The legal character of safeguarding instruments

Public interests can be safeguarded in many ways using different instruments. This chapter limits itself to the *legal* instruments for safeguarding these interests. The question addressed is: what instruments can be derived from law for safeguarding public interests and how are these instruments applied to safeguard public interests in social security?

This question needs to be clarified with respect to two elements, which also explains the position of this chapter between the other chapters in this volume. First and foremost, with respect to the meaning of the term *law*. In the earlier chapter, written by Gijsbert Vonk, law is used as a *source* on the basis of which public interests can be defined. Law is thus a collection of condensed norms and principles, behind which higher values shelter.¹ The analysis of these values and principles leads to a definition of the public interests in social security, which, from a legal point of view, should always be protected. With respect to social security protection, inclusion, reliability, solidarity and equal dispensation of non-discrimination from a legal perspective are defined as material public interests, alongside the preconditional public interests of the rule of law and good governance. In this chapter law has another meaning: law is not a *source* of public interests, but an *instrument* with which these interests can be protected. A positive law perspective befits this instrument-based approach to the law. After all, the law is a policy instrument alongside other instruments.²

This leads to the second definition, the boundary between *legal* instruments and other instruments with which public interests can be safeguarded. The feature that distinguishes legal instruments from other instruments is the shift of rights and obligations caused by the legal instrument. These legal consequences can be realised and enforced by the courts. Other, non-legal instruments do not have this legal consequence. This chapter examines the instruments that do have a legal consequence. In practice this means, for instance, that contracts do count as legal instruments, but covenants do not. After all, a contract involves reciprocal rights and obligations that can also be enforced by law. In contrast to this a covenant is much more of a gentlemen's agreement with no legal shift of rights and obligations taking place.³

1 See: Chapter 4 in this book.

2 Fenger & Klok 2008, p. 224-225.

3 Pröpper & Herweijer 2004. For examples of covenants see: Algemene Rekenkamer, *Convenanten uitgaansgeweld*, 's Gravenhage: Sdu Uitgevers 2004.

1.2 Approach

The operation of non-legal instruments is the subject of other chapters. This chapter restricts itself to the instruments that have legal consequences. The objective of this chapter is to characterize legal safeguarding instruments and examine how these instruments are deployed in safeguarding the public interests in the specific policy field of social security. To this end paragraph 2 starts with a general description of the form and varieties of the legal safeguarding instruments. The question of how these legal instruments are given substance in the specific legal field of social security is then addressed. This is of particular interest because in this legal field public and private responsibilities merge. This mixed responsibility also has consequences for the type of instrument deployed by the state to safeguard social security: from provider to regulator to facilitator. Paragraph 3 examines these three roles and takes a closer look at the legal instruments in the policy field of social security. Paragraph 4 concludes with a brief elucidation of the significance of legal instruments in the safeguarding of public interests in social security.

2 Law as a safeguarding instrument

2.1 Identifying legal instruments

This description of the legal instruments attempts on the one hand to bring to the fore the national context, while on the other hand endeavouring to describe the variety of instruments insofar as this is possible. Both ambitions must be accounted for.

The legal safeguarding mechanism in a national context

The function of the law as an instrument for safeguarding public interests is largely dependent on the national legal system. In a system based on common law the emphasis is on case law rather than on legislation, whereas in the continental systems based on the *rechtsstaat*,⁴ law-making is pre-eminently the task of the legislator. The consequence of this is that in continental systems we can expect to find the safeguarding of public interests embedded in legislation, whereas in common law systems we can expect to find the safeguarding of the public interest lying with the judiciary, where principles play a greater role.

This difference, however, is not as great as it first appears. After all, when the state takes control and uses the law as an instrument, the result can always be traced back, either directly or indirectly to legislation.⁵ General rights are created or general obligations imposed by legislation and legislation lays down how these rights and obligations can be realised, who is charged with realising the authority of the state and who is empowered to perform the legal acts under public law to make such rights and obligations concrete. And finally, the law forms a regulatory framework within which the independent judiciary can judge these acts.

Legislation has this function in all legal systems. It does not make so much difference whether the system is based on the principle of the *rechtsstaat* of the continental systems, as in Ger-

4 The literal translation would be 'rule of law'. But as there are more than one meanings of the 'rule of law' I prefer to use the term *Rechtsstaat*, with all its elements.

5 According to Verdeyen 2009, p. 25.

many and France, or whether it is based on common law, as in the United Kingdom.⁶ The specific field of social security in particular is dominated by this instrumental legislation, making the nature of the legal system of less importance.

This chapter describes the legal safeguarding instruments without reference to the national legal context. The consequence of this is that full justice cannot be done to the peculiarities of national legal systems. The chapter suffices with a rough explanation of the instruments. Examples from a number of legal systems are used to make the abstraction more concrete. These examples are, however, chosen at random.

Three types of legal instruments

The second ambition is to provide a *full* description of the range of legal instruments. This is, however, an impossible ambition insofar as the collection of legal instruments knows almost no limits. Despite this, in an effort to leave nothing out the legal instruments are categorised into a more abstract group or type. The first type is the legislative power. The distribution of legislative power between different legislators and the mutual relationship between these legislators falls under this type.

In many cases the safeguarding of public interests leads to the creation of administrative competence under public law, empowering an administrative agency or public bodies to perform legal acts. The authorisation of public bodies and the degree in which the courts can regulate this authority forms the second type of legal instruments.

In addition safeguarding can also take place through intervening in the existing private relationships. The legislator can redistribute responsibility or create procedural safeguards. The third group of legal instruments relates to intervention in relationships under private law.

2.2 Legislating powers

Allocation of legislating power in a legal system

Legislation is based on a legislating power. In many systems the adoption of general binding rules can be traced back to the constitution. In non-constitutional states, such as the United Kingdom, this power can be traced back to the principle of the sovereignty of parliament: all legislating power is based in parliament.⁷

In almost all legal systems a number of entities can be distinguished that are each individually authorised to legislate. The legislating power is related to a territorially or functionally defined jurisdiction. Where the legislating power is divided, the mutual relationship between these legislating powers is significant. Hereby a dichotomy can be made between on the one hand federal and on the other hand decentralised relationships. In a federal relationship the different legislating entities are on an equal footing, whereas in a decentralised relationship a hierarchy can be distinguished between an ‘upper’ legislative level and a ‘lower’ legislative level.⁸ This hierarchy implies that the legislation of the upper level can restrict the legislation

6 For France see: Auby & Cluzel-Métayer 2007, p. 77. For Germany: Schröder 2007, p. 120. For the United Kingdom: Partington 2004, p. 142 e.v.

7 Partington 2004, p. 31, Heringa & Kiiver 2007, p. 21.

8 Heringa & Kiiver 2007, p. 29 e.v. Examples of a federal relationship: United States, Switzerland, Germany, Belgium. With respect to some aspects the Kingdom of the Netherlands is also a federation, namely in the relationship to the components of the Kingdom. This does not detract from the fact that the Netherlands is usually considered to be a decentralised state, as is the United Kingdom and France.

of the lower level. However this does not detract from the fact that the decentralised legislative levels have free regulatory powers within the hierarchical framework.

Decentralisation can be distinguished from deconcentration. The common feature is the hierarchy within which decentralised or deconcentrated agencies exercise their legislating powers. The difference, however, is that a deconcentrated agency does not exercise its powers independently but is subject to the supervision of the higher legislative level. Deconcentrated agencies only have a legislating power insofar as this results from higher legislation, whereas decentralised entities have a legislating power insofar as this is not restricted by higher legislation.⁹

The European and international legal order

Apart from the allocation of legislating powers within a state, general binding rules can also be derived from international and European law. European law forms an independent, autonomous legal order, from which citizens and member states can derive rights and obligations.¹⁰ These rights and obligations can be enforced through the national institutions: after all, European law is ultimately implemented or effected by the national administration and national courts.

In addition to the European legal order there is an international legal order that lays down preconditions that must be complied with by national systems.¹¹ The exact meaning of these legal norms under international law and whether or not a citizen can invoke a provision from international law depends on the national legal system. In some systems these norms only become binding once they have been transposed into national legislation.¹² In other systems the binding effect depends on the substance of the provision. Thus in the Netherlands norms contained in international conventions become binding after they have been announced and insofar as the substance of them is generally binding.¹³

Safeguarding public interests through the allocation of legislating power

The decision as to which forum is competent to legislate is important for a number of public interests. In the first place the legislating level has consequences for the *legitimacy* of the rules. Legitimacy is considered to be part of good governance.¹⁴ Legislation is adopted in a legislative procedure. This procedure provides for endorsement by those whom the decision addresses. For instance because legislation is adopted by parliament or another body representing the people, or because the legislation is made the subject of a referendum. Moreover, the legislative procedure is public and accessible, allowing room for consultation and recommendations before legislation is adopted.¹⁵ Both are mechanisms aimed at increasing (democratic) legitimacy.

9 Burkens 2006, p. 284.

10 European Court of Justice Case 26/62 Van Gend & Loos (1963) ECR I and Case 6/64 Costa v. ENEL (1964) ECR 585.

11 See Vonk 1999 for the significance of international law for national social security law.

12 This, for example, is the case in Great Britain.

13 Art. 93 of the Dutch Constitution.

14 See chapter by Vonk, which defines this interest. The connection between 'good governance' and legitimacy is explained in literature on 'good governance'. See for example: Van Montfort 2004.

15 Perhaps the best example is the Administrative Procedure Act in the United States, in which the procedure to be followed to lay down binding rules is fully regulated and provides various opportunities for consultation.

This safeguard applies to a lesser extent to binding rules arising from the European legal order. After all, here democratic legitimation only occurs indirectly, through the democratic legitimation of the national governments that adopt the legislation in the European Council and through democratic legitimacy through the European Parliament that legitimates the institution charged with drafting the legislative proposals (the Commission). The European legislation does illustrate a second public interest that is safeguarded by the choice of legislative level: by placing legislative power at a higher level, *inequalities* can be reduced. Indeed one characteristic of legislation is that it addresses a general group of citizens. The fewer jurisdictions there are, or the fewer exhaustive rules are laid down within a hierarchy at a higher level, the fewer differences there will be between the different jurisdictions.

Division of competency between the public authorities and the judiciary

Legislation has to be implemented. In many cases the implementing of legislation depends on concrete legal acts performed by a public body appointed by law. For example, the law empowers the body to grant permits, to enforce prohibitions or to pay benefits. The other side to this allocation of competency is the legal supervision by an independent judiciary. The independent judiciary has the task of settling disputes related to the implementation of legislation. In other words: legislating results in a division of competency between the public bodies on the one hand and the judiciary on the other hand.

Discretionary powers for the public authorities

The judicial regulation is limited in line with the extent in which the legislator allows the public bodies discretion. Allowing the public bodies discretion is sometimes the result of a well-considered decision, when the legislator grants the public authorities freedom with respect to the policy it adopts when deciding whether a subsidy or permit shall be granted.¹⁶ Discretionary administrative powers facilitate tailor-made solutions that would be impossible if general rules have to be applied.

Alongside this well-considered discretionary power aimed at facilitating tailor-made solutions, discretionary power can also be created unintentionally. For example because it proves to be impossible to encompass the complex reality in general rules. The legislator then uses vague terms that require further interpretation.

Regardless of the origin of discretionary power, in first instance it is the public body that will have to make a decision. The public body is the first to interpret and apply the vague term. Only when a dispute arises does the court, in second instance, pronounce judgement regarding the administrative decision.

Judicial review

The question that arises with respect to judicial review is how far can the courts impose their opinion on that of the administrative agency. Or: where does the discretion of the public body end and judicial review start? In German law the beginnings of an answer to this question can be found in § 20 Grundgesetz:

‘Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden.’

¹⁶ Compare de pouvoir discretionnaire in French law (Auby & Cluzel-Métayer 2007, p. 77) and the doctrines with respect to Ermessen and the unbestimmte Rechtsbegriffe in German law (Schröder 2007, p. 130).

The use of administrative power by the administrative agency is thus defined by acts (Gesetzsmäßigkeit) and law. In first instance the court investigates whether the administrative agency has violated a written legal rule and in second instance the court answers the question of whether another, unwritten, rule has been violated. It is with respect to this latter question that the court usually applies a little more restraint.

This distinction between written and unwritten law (legal principles) can be seen in all legal systems. For example in English law this test is laid down in *Associated Provincial Picture Houses v. Wednesbury Corporation*, where the court tested the exercise of a discretion against the requirement that this should be ‘reasonable’¹⁷:

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word “unreasonable” in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting “unreasonably.” Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in Short v. Poole Corporation gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

In the United States the Supreme Court defined a similar test in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 in 1984. In the Netherlands the same test is included in the case *Doetinchemse woonruimtevoorzorging* (HR 25 februari 1949, ABKlassiek 2003, 8).

Although the judicial review in the legal systems is comparable, there are differences in emphasis. In continental systems, such as Germany and France, much weight is attached to the *legality principle*. As a result of this the statutory boundaries create very narrow frameworks for review: if the public body acted without an authority provided by the legislator, this in itself can be sufficient grounds for nullifying the legal act.¹⁸ In the United Kingdom, where less weight is attached to the legality principle, the public body is competent *unless* it can be derived from the legislation that this is not the intention. Thus even if the public body did act without legislative authority, this does not necessarily have to mean that this is contrary to the legislation. The judiciary reviews *ultra vires* and addresses the question of whether the public body acted in the spirit of the legislator.¹⁹

17 *Associated Provincial Picture Houses v. Wednesbury Corporation* [1948] 1 KB 223.

18 This is primarily the case if the act of the agency is qualified as negative state conduct, which restricts the citizen in his freedom or rights.

19 Principally in British law: *Anisminic v. Foreign Compensation Board* [1969] 2 WLR 163.

Additional norm setting by the public authorities

Administrative powers are generally limited to the individualising of the law: the public authorities can perform *concrete* legal acts. In addition the public body also frequently has regulatory powers, with which it is able to lay down further rules. These regulatory powers allow part of the legislating authority to be shifted to the public body.

The choices made by the public bodies in adopting these rules are left to the discretion of the public bodies themselves. In other words the discretionary power is very wide-ranging, which forces the court to apply more restraint. As a result of this the statutory setting of norms with respect to administrative legislation focuses primarily on the procedure according to which these rules are created. Contrary to the usual legislative process, access and direct or indirect influence over the way in which administrative legislation is created is not automatic. The consequence of this is that the legislation that sets the norms for administrative acts often contains procedural norms relating to the way in which norms are developed. The American Administrative Procedure Act is an example of this: this act sets norms relating to the way in which administrative agencies make use of their regulatory powers. German law also provides a number of formal requirements with regard to administrative regulation. What is interesting in both examples is that violations of these standards can lead to nullification of the rules by the court.²⁰

In addition to the external binding rules adopted by the public authorities, rules can also be created that merely have internal effect. It is when the public authorities have been granted a discretionary freedom that we can expect to see additional norms being set within the administrative agencies. In the bureaucratic practice of the administrative agency these rules are unavoidable.²¹ Thus we see *Verwaltungsvorschriften* (German law), *beleidsregels* (Dutch law), *directives* (French law) or guidelines (American law).²² An exceptional subvariant of these non-binding rules concerns rules created between two administrative agencies, whereby one administrative agency has to render an account to the other. These rules do have a binding effect to some extent because failure to comply with these rules can result in a correction by the higher administrative agency. These are the '*omzendbrieven*' (Belgian Law) or circulars.²³

Self regulation

Another form of regulation is the (imposed) self regulation by the norm addressees themselves. Self regulation often takes place within the framework of a power to be exercised under public law. Thus complying with the norms created by self regulation becomes a condition for exercising a power under public law. There are various examples of self regulation. The decision of whether or not to grant an environmental permit, for example, is based on the 'best available techniques'. The drafting of these requirements is realised in consultation with the industrial sectors to be regulated.²⁴ The best available techniques ultimately form the basis of the permit rules, so that there is, within specific margins, evidence of self regulation with consequences under public law.

20 Schröder 2007, p. 112-113.

21 Davis 1980; Perrow 1986; Hood et al 1999.

22 Schröder 2007, p. 113-114; Auby & Cluzel-Métayer 2007, p. 78; Harter 2007, p. 370.

23 Leus 1992; Lust 2007, p. 23.

24 See art. 17 lid 2 IPPC-regulation (2008/1/EG).

Another example concerns norm setting with regard to the acts of medical professionals. In the Netherlands the practicing of a medical profession depends on registration in a medical register. Registration in the register for a medical specialism depends on compliance with the requirements formulated by the professional group representing that medical specialism.²⁵ Professional legal groups, such as lawyers and civil-law notaries also have a high degree of self regulation.²⁶

In all these examples there is self regulation within a social group, for example an association of professionals or an industrial sector, within which norms are formulated. Failure to comply with these requirements has consequences under public law, ranging from withdrawal or refusal of a permit, to disciplinary jurisdiction and the striking of a name from an official register.

Safeguarding public interests through administrative powers

The legal instruments relevant to the granting of administrative powers can vary according to different aspects. Here we see a development from a traditional unilateral ‘command-and-control’ legal relationship, in which the administrative agency can impose one-sided obligations on the citizen, to a more modern horizontal legal relationship, in which the norm addressee is given space to create its own standards.

In literature this horizontal legal relationship is referred to as ‘new governance’.²⁷ In new governance we see a shift in the public interests to be safeguarded. After all, the assumption is that the more closely the norm addressee is involved in the setting of the norms, the more likely he is to support these norms. Legitimacy, effectiveness and efficiency are thus important public interests on which new governance is founded.²⁸

Yet in essence ‘new governance’ is little more than a friendlier version of the traditional ‘command-and-control’ legal relationship. In both cases there is an administration in the background that is ready to intervene if the citizen does not act in line with the public interest as this is perceived by the administration. Ultimately it does not make much difference whether the public body grants a permit applying its own rules, or strikes a name from the register because the professional did not comply with the norms of his ‘peer group’.

Furthermore, one can also expect the administrative agency in a one-sided legal relationship to take account of the norm addressees’ individual circumstances, thus, practically speaking, to adjust application of its administrative power to these circumstances.²⁹ Especially if the legislator has given the administrative agency the discretionary power to do so. When such tailoring is made impossible because of internal rules that do not allow cases to be assessed on an individual basis, it is an illusion to expect that the rules that are the result of self-regulation will make allowances for the individual circumstances involved in the case.³⁰ To summarise:

25 See the Dutch Individual Healthcare Professions Act.

26 For more on self regulation of the medical and legal professionals see: Zeegers & Bröring 2008.

27 Solomon 2008, p. 822.

28 Hoekema et al 1998, p. 327.

29 Nicolai 1990, p. 54 e.v.

30 Tollenaar 2008, p. 244-245.

the tension between rules aimed at creating uniformity on the one hand and individualising tailoring on the other hand depend on the characteristics of the legal relationship. ‘Command-and-control’ or ‘new governance’ makes little difference at this stage.

2.4 Private law as a safeguarding instrument

The development towards ‘new governance’ does reveal a changed vision of governance, in which instruments under *public law* are replaced by mechanisms under *private law*. The government uses instruments that not (only) result in a legal relationship between and the citizen and the administration, but (also) in new relationships between citizens. Public interests are safeguarded by reallocating liabilities under private law, or by formulating procedural requirements to which actions undertaken under private law must comply. These are legal instruments, because these instruments are ultimately bound to *legal* consequences. The re-allocation of liability makes it possible, for example, to recover damage from another party and, if a procedural requirement has been violated, a request may be submitted for the legal act under private law to be nullified.

Liability as a governance instrument

Civil relationships are entered into between two equal parties, both with a will of their own and the freedom to make a choice. It is this principle that distinguishes legal relationships under private law from legal relationships under public law, whereby, per definition, the two parties are unequal. However, the assumed equality between the parties in the private construction is uncertain because of social status and the inequality of knowledge. For example the manufacturer of a product knows more about that product than the consumer. The consumer is not able to make a well-reasoned choice and thus runs the risk that the product purchased will not fulfil his expectations.

In this example the inequality between the parties is balanced by the law by making the manufacturer liable for the product. Similar liabilities can be found in every legal system.³¹ The purpose of these liabilities is to protect the weaker party against the stronger party. Whether this is about the protection of the consumer from the manufacturer, the weaker road user from motorised traffic or the employee from the employer: in all cases private law gives the weaker party the opportunity to hold the stronger party liable in the event of damage.

This reallocation is based on the assumption that the liable party will make more effort to prevent damage occurring. Manufacturers will invest more in the quality of their products and information about these products for the consumer, drivers of motorised vehicles will drive more carefully, financial providers will inform their customers better about possible risks and the employer will improve working conditions to prevent illness or invalidity occurring.

Institutional safeguards

The legislator can also compensate social inequality by formulating procedural requirements for specific legal acts. Procedural requirements are often institutional safeguards: the legislator makes the establishment of a supervisory committee or works council obligatory. Failure to consult the works council, or non-acceptance by the supervisory committee or the meeting

³¹ With regard to product liability this arises from the European Directive on Product Liability (85/374/EEC).

of shareholders, for instance with respect to investment decisions, opens the way for the legal act to be nullified by the court.³²

The legislator also creates institutional safeguards to safeguard public interests in other sectors. Educational committees, in which students participate, supervise the quality of the teaching and have to be consulted with respect to decisions to make changes to the education.³³ Care providers have to set up clients' participation council, which promote the common interests of customers and advise the care provider of these.³⁴ In all these cases the legislator has created a procedural safeguard with the objective of removing inequalities.

Safeguarding public interests by private law

The legal instruments examined in this paragraph focus on strengthening the legal position of a weaker party. The public interest served by this compensation is the removal of inequality. At the same time these instruments make private parties primarily responsible: the weaker party must realise its rights itself. This definition sometimes has a normative justification: the state must leave space for the private sphere. However, there is more often a more practical or economic justification: intervention by the state in the form of general rules or in the form of providing facilities, leads to market failure and affects welfare.³⁵

However, the use of this type of instruments is accompanied by a great danger. After all it is dependent on the question of whether the citizen really wants and is able to make use of his powers. Indeed, practice has taught us that there is a great difference between *having* a right and *realising* a right.³⁶ This leads to a new type of state intervention, whereby supplementary instruments under public law are deployed. For example the legislator appoints a supervisor to supervise. In the Netherlands for example the Consumer Authority supervises the way in which companies treat consumers.³⁷ This authority can impose penalties if, for example, the company violates rules regarding consumer information. These facilities under public law exist alongside the possibility for the aggrieved consumer to hold a company liable under private law.

3 Legal safeguarding instruments in social security

The objective of this chapter is to examine the working of the legal safeguarding instruments in the field of social security. This policy field is distinguished by a mixed public and private responsibility. This also has consequences for the type of legal instruments that can be found

32 A fairly recent example of the meaning of this type of obligations: Brussels Court of Appeal, 12 December 2008, 2008/KR/350, on the decision of the board of Fortis in October 2008 regarding the sale of this company.

33 See art. 9.18 of the Dutch Higher Education and Research Act.

34 Care providers are charged with the provision of care within the meaning of the Dutch Act on Exceptional Medical Expenses and the Dutch Health Care Act (see: art. 1 Dutch Act on Clients' Right to Participation) the obligation to establish these committees is laid down in article 2 of this act.

35 See this argumentation: Chapter 2 by Nentjes & Woerdman.

36 Galanter 1994.

37 More countries have a comparable institution. In the United Kingdom the Office for Fair Trading has a similar task.

in the regulation of social security. The following description of these instruments is based on the study and analysis of the social security systems in a number of countries.³⁸

3.1 Legislating powers in social security

Social security is primarily a matter for national law and is centrally organised in every legal system. This does not only apply to unitary states, such as the Netherlands, where one would expect legislating power to be centralised. In federal states too, such as Belgium and Germany, the fixing of the subsistence minimum, the formulating of award criteria and the method of funding is a federal matter.³⁹ Within this framework the *gemeenschappen* or the *Länder* have the power to decide how these rights will be effected and to confer supplementary or additional rights.⁴⁰

The central bias of social security legislation that is to be found in every legal system is nuanced in two ways. In the first place there is the European and international legal order which creates norms. In the second place the setting of norms in legislation is bounded by the social security existing in the private sector.⁴¹ The boundary between public and private in social security is unpredictable and can relate to both the (private) organisational forms for administering (public) social security and to the responsibility for substantive claims.

The European and international legal order

European intervention in national social security relates first of all to the coordination of social security between member states. European social security particularly comes into play when an employee and his family migrate between member states. The coordination of national social security in such cases is regulated in Regulation 2004/883.⁴² However, the obligation to coordinate also results in a substantive claim in article 4 Regulation 2004/883: those persons falling within the scope of the provisions of the regulation have, in principle, the same rights and obligations pursuant to the legislation of each member state as the nationals of that member state. In other words: it is not permitted to make a distinction between nationalities in a national social security system.⁴³

Alongside this direct intervention in social security, the European legal system also creates norms that affect national social security systems in a more indirect manner. On the one hand this intervention is connected to the combating of discrimination relating to labour and profession.⁴⁴ On the other hand indirect intervention takes place as a side-effect of the European harmonisation of national labour law, as the result of the harmonisation of the national

38 The social security systems in Belgium, Germany, the United Kingdom and the Netherlands have been chosen. This choice is based on the one hand on the relative simplicity of the sources to be studied and on the other hand on the expectation that the systems in these countries demonstrate sufficient variation.

39 For Belgium see art. 5, § 1, II, 2 sub a of the Exceptional Act (Bijzondere wet) of 8 August 1980 reforming the institutions and for Germany: § 74, Abs 7 and 12 Grundgesetz.

40 For Belgium see: art. 5, § 1, II, 2 sub b of the Exceptional Act (Bijzondere wet) of 8 August 1980 reforming the institutions and for Germany: § 15 Sozialgesetzbuch VII. See further: Vansteenkiste 1995, p. 115.

41 McKay & Rowlingson 1999, p. 3.

42 With regard to the predecessor see (Regulation 1408/71): Penning 2001, p. 6.

43 The discrimination prohibition is another material rule in European law that affects the national social security systems, see: Vonk 1999, p. 12 e.v.

44 Codified in Directive 2000/78/EC. With regard to the consequences thereof in the form of the Mangold case see (HvJEG 22 November 2005, case C-144/04, Jur. 2005, p. I-9981): Jans 2006, p. 115-129.

economies.⁴⁵ The harmonisation of labour law automatically leads to questions regarding the formulation of a minimum level of protection for all workers at European level.⁴⁶

Apart from the European legal order, more indirect international norms are laid down with respect to social security through international conventions, including the ILO conventions.⁴⁷ These conventions restrict the legislator, for instance with respect to the level of protection provided.⁴⁸ In this way the conventions are able to influence the legal safeguarding instruments. Such influence is indirect because the courts cannot always test cases directly against these conventions. However, the norms do dominate the political debate and can act as guidelines when interpreting legal concepts.

Private social security

With regard to social security in particular, the legislating power is bounded by the private sector. Where work related risks are concerned, responsibility lies with (representatives of) the employers and employees.⁴⁹ Within the labour relationship agreements are made relating to social risks associated, for example, with employment, invalidity and pensions. These risks can be covered by taking out private insurance, which may be arranged at corporate level or at sector level.⁵⁰ Public social security is also limited in other areas of social security, including national assistance. National assistance is a subsidiary facility, which only makes an appearance if all other facilities fail.

The boundary with private social security is in the first place formed by *private organisational forms* charged with providing social security. For example German law has the *Prinzip der Selbstverwaltung*:⁵¹ citizens must in principle be able to solve, arrange and manage their own problems.⁵² As far as social security is concerned this leads to the explicit observance of a self-regulatory power for *Selbstverwaltungs* agencies within the framework of the *Sozialgesetzbuch* under public law. These *Selbstverwaltungs* agencies may have legal personality under public law and have powers under public law, but they are compiled by the citizens involved, in other words the employees and employers and the rules allow them some room for supplementary norm setting under public law.⁵³

Similar organisational forms can also be found in other legal systems. In Belgium, payment institutions, health funds and social insurance funds for self-employed persons are charged with the administration of certain social security provisions. These agencies also have characteristics of private law, but derive their powers directly or indirectly from the law; they

45 See the green book 'De modernisering van het arbeidsrecht met het oog op de uitdagingen van de 21ste eeuw', European Commission, 22 November 2006.

46 This consequence of harmonisation of labour law is being critically followed by the member states and occasionally explicitly rejected. See the Joint opinion of the German social insurance umbrella organizations, 30 March 2007, p. 3 and the response of the Dutch government: Kamerstukken II, 30893, nr 4, p. 13.

47 More specifically ILO Convention 121 containing the general standards.

48 Pennings 2006, p. 112.

49 In the (distant) past the capacity of society to self-regulate was also an important reason not to intervene in societal arrangements through legislation as far as this concerned the security of subsistence. With regard to the charity and the meaning thereof for the safeguarding of public interests: Plantinga & Tollenaar 2007.

50 Verdeyen 2009, p. 59.

51 Becker 2003, p. 226.

52 Maurer 2009, p. 570.

53 Becker 2003, p. 226, see further § 44 SGB IV.

require recognition as social security institutions and are thus subject to supervision based on the legislation.⁵⁴ In the Dutch social security system private organisational forms play a specific role in pension accrual. The administration of the pension funds can be outsourced to private parties. This private arrangement occurs within a public framework and under the supervision of government institutions, such as the Central Bank of the Netherlands. The insurance of health costs is another example of a private arrangement within a public framework: it is mandatory for citizens to take out insurance to cover health costs, but they are free to decide which health cost insurer they want to conclude this insurance with. The coverage is subsequently also regulated by law.

By imposing requirements with regard to the organisational form or by subjecting the organisations to supervision, the state makes room for the social security provisions created in the private sector. The social security legislator may withdraw at times, but new legal arrangements then come into play under which the state is the regulator and although it may not formulate material rights, it does create procedural safeguards, or it is the facilitator in which case it (also) applies other, financial, instruments.⁵⁵

3.2 The division of power between the public authorities and the judiciary

The division of power between the public authorities and the judiciary has special features in the field of social security. In the first place, the legislator occasionally explicitly refrains from granting discretion and opts for a penetrating judicial review – even though, with a view to subsidiarity and tailoring, one might assume that statutory discretion would be granted to the public bodies. In the second place, discretion is virtually unavoidable when the public body exercises its administrative powers on the basis of facts that can only be established by an expert. This applies, for example, when an assessment involves a medical claim.

Tailoring and administrative discretion

In § 8 the German Bundessozialhilfegesetz contains the explicit obligation with regard to the ‘Form und Maß der Sozialhilfe ... nach pflichtmäßigem Ermessen zu entscheiden’. National assistance in particular requires tailoring and therefore the public body must consider the interests. For this reason the legislator often grants the public body a discretionary power.

There are, however, risks accompanying discretion. Discretionary powers are a ‘two-edged sword for benefit recipients’: on the one hand wide-ranging discretionary powers facilitate tailoring, on the other hand inconsistencies and arbitrariness lie in wait.⁵⁶ During the reform of the ‘income support’ in the nineteen eighties in the United Kingdom the scales tipped in favour of codified rights for citizens and less room for discretion for the administration.⁵⁷ A similar tendency can be observed in Germany and the Netherlands.⁵⁸

The result is: less room for the administration, and more room for the judicial review. Discretion can then only be used by the public authorities for the calculation of the financial resour-

54 Verdeyen 2009, p. 49.

55 According to Klosse & Vonk 2000, p. 191 and Plagemann 2003, p. 438-439.

56 McKay & Rowlingson 1999, p. 134.

57 Wikeley & Ogun 2002, p. 275.

58 For Germany see: Schellhorn & Schellhorn 2002, p. 97-98. For the Netherlands: CRvB 8 November 2005, USZ 2006, 13.

ces of the citizen, or in finding a solution to the question of whether the exceptional costs can be met from the resources and the assistance provided.⁵⁹

Establishing facts when assessing a claim: the definition of medical concepts

In other areas of social security the public body does have room for discretion. This is the case for instance with respect to the question of whether or not an individual is incapable of work. Determining the incapacity for work requires a medical assessment by a doctor. Sometimes the question of whether the employee is ill depends on the report submitted by a doctor appointed by the administrative agency (for example in the United Kingdom).⁶⁰ In other case (for example in Germany) the employee himself can submit a doctor's declaration attesting to the fact that the employee is incapable of work.

Setting the norms with respect to the facts that can lead to the conclusion that an employee is incapable of work, is in every case exceedingly difficult. In the United Kingdom the doctors' reports are regulated in regulations, which, however, tend to focus on setting norms with regard to the method of assessment and do not provide qualification with regard to established facts.⁶¹ In Germany the definition of *arbeitsunfähigkeit* is left to the guidelines that are formulated by the profession itself.⁶² This is comparable to Dutch law, whereby appointed protocols set the norms for the company doctors' reporting.⁶³

The role of the experts' reports also has consequences for the judicial review. The court shall after all be inclined to remain silent in the face of facts that are established by a (medical) expert. This is unavoidable because the court itself lacks the medical knowledge to impose its opinion on the medical opinion of a doctor. The result of this is that the court seeks procedural leverage points, which reveal something about the quality of the opinion. Relevant facts here include who has carried out the medical examination (is this doctor sufficiently qualified?) and the method by which the examination was carried out (were the relevant protocols applied?). With regard to substance the medical examination can only be invalidated if another expert's report is produced to contradict it.⁶⁴

Where the latter is concerned, the United Kingdom offers an interesting in-between variant, whereby in the phase preceding the safeguarding of the legal rights disputes are heard by an external Tribunal. This Tribunal consists of three independent members, possibly including a medical professional. This Tribunal can impose its ruling in the place of the administrative agency's decision (in this case: the Department for Work and Pensions' Benefits).⁶⁵ In this way more room is created for a penetrating assessment of the medical facts during the legal proceedings.

59 For Germany: Schellhorn & Schellhorn 2002, p. 98 and for the Netherlands: art. 35 lid 1 Work and Social Assistance Act.

60 Wikeley & Ogus 2002, p. 530 e.v.

61 See: Borghouts-Van de Pas & Pennings 2008, p. 42.

62 These guidelines are based on § 92 SGB V.

63 See Regulation of protocols for insurance physicians with regard to incapacity for work acts.

64 De Graaf, Schuurmans & Tollenaar 2007, p. 3-15.

65 The protection provided by the Tribunal bears some similarities to the objection stage in Dutch law, whereby a medical insurance expert re-examines the facts established in the primary phase.

3.3 Private law as a safeguarding instrument in social security

Public safeguards in private disputes

Insofar as it relates to the work related risks, social security is unavoidably bound to labour law. The legislator sometimes makes explicit use of the existence of a private legal relationship to safeguard public interests. The bestowing of liability in the event of illness or invalidity on the part of the employees on the employer is an example of this. This liability is given substance by the obligation laid down by law to continue to pay wages if the employee is unable to perform his or her work as a result of illness. In the United Kingdom this obligation arises from the obligation for the employer to pay a Statutory Sick Pay (SSP) to the employee who is ill for longer than four days. The SSP consists of a fixed sum per week and is paid for a maximum period of 28 weeks. In this way the employer himself experiences the disadvantages of his employee being absent due to illness.⁶⁶ In the German system there is an obligation to continue to pay wages (Entgeltfortzahlung), albeit that this is limited to six weeks and many companies can re-insure themselves against this risk under public law.⁶⁷ In the Netherlands the employer bears the risk of his employee falling ill and in the event of his employee falling ill the employer must continue to pay wages equivalent to at least 70% of the wage for a period of two years.⁶⁸

The definition of this liability under private law expresses the fact that the relationship between employer and employee extends beyond the performance of work in return for the agreed wage.⁶⁹ Furthermore, it is assumed that the employer shall avoid the situation in which his employee calls in sick by, for example, investing in good employment conditions. On the other hand it is assumed that the employee shall call in sick less often given that he or she is not supported by an anonymous government agency but by a visible opposite party, namely the employee's employer.⁷⁰

A consequence of this re-definition of the liability is that simple disputes will arise regarding the question of whether or not the employee is indeed ill. This is primarily a matter for private law: the employee calls in sick and is required to submit some sort of proof in order to realise his or her right to continued wage payment. The employer can invalidate this proof. In every legal system in which the legislator includes the risk related to illness in the labour relationship, arrangements are made under public law to settle this type of disputes. In the German system the employer can report to the benefits agency, which must then investigate whether the absence due to illness is justified.⁷¹ In the Netherlands this type of disputes leads to actions to recover back wages, during which the employee is required to request a second opinion from the public body's doctor.⁷² These examples illustrate that although the legislator may opt to use liability under private law as an instrument to safeguard public interests, ar-

66 Wikeley & Ogun 2002, p. 530 e.v.

67 Based on § 617 BGB and the Entgeltfortzahlungsgesetz. See also: Hoogendijk 1998, p. 226 e.v.

68 Based on art. 7:629 Civil Code.

69 Schmitt 2007.

70 Fluit 2001.

71 On grounds of § 275 SGB V the medical service of the Krankenkas must start an investigation in the case of 'begründeten Zweifeln an der Arbeitsunfähigkeit, insbesondere auf Verlangen des Arbeitgebers'.

72 The employee submitting a wage claim must also submit an expert's opinion on grounds of art. 7:658b of the civil Code.

rangements under public law are necessary to balance the undesirable effects of the private power game.

Public safeguards in private institutions

The legislator also uses private institutions to safeguard the public interest in social security. The empowerment of the employee, benefit recipient or client forms an argument for ordering the establishment of works councils or clients' participation councils. Examples of this type of institutional safeguards can be found in every legal system. In Germany there is the *Betriebsrat* on grounds of the *Betriebsverfassungsgesetz*, in the United Kingdom the Works Council on grounds of the Information and Consultation of Employees Regulations 2004 and in the Netherlands the *ondernemingsraad* on grounds of the Works Councils Act. The function and authority of these councils varies from country to country. In many cases these councils are able to influence the way in which social policy is given substance within the company through the right to consultation and recommendations. For example, with respect to the way in which the employer gives substance to preventive measures with regard to absence due to illness.

Other examples of institutional safeguards are the clients' participation councils, established by agencies under public law charged with the provision of social security. In the Netherlands persons entitled to national assistance, an unemployment benefit or an invalidity benefit are able to exert influence through so called *cliëntenraden* set up by the administrative institutions.⁷³

Finally, complaint procedures also represent an institutional safeguard. In particular when services are provided by public institutions, the law often arranges for a complaint procedure. In the Netherlands this procedure is laid down in the Dutch General Administrative Law Act. In the United Kingdom these procedures are regulated by the public authorities charged with the administration of the different facilities. This applies for example to the Jobcentre, which exercises the most authority.⁷⁴ The most important characteristic of a complaint is that it seldom results directly in legal consequences. A grounded complaint does not lead directly to the invalidation of a legal act, or to the creation of a new legal right. On the other hand, complaint procedures are pre-eminently suited to protect a public interest as 'good governance': after all in the ideal situation the quality of the service provision is thereby enhanced.

4 How do the legal instruments work?

The above reflections on how legal instruments work in general and in social security in particular bring us to three conclusions. In the first place, the legal instruments offer a number of choices between what at first sight are contradictory public interests. For example, at the level of the legislative authority, a uniform and equal social security system is an argument to for granting legislating power at a high legislative level. Legitimacy, effectiveness and tailoring are, however, reasons for granting regulatory powers at a level closer to the norm addressee.

⁷³ See art. 7 Work and Income (implementation structure) Act and art. 47 Work and Social Assistance Act.

⁷⁴ See <www.jobcentreplus.gov.uk>.

With regard to the substance of the legislation we are faced with similar dilemmas. The legislator can choose between open norms, which make more tailoring and effective decision-making possible or closed norms, whereby equality and legal certainty are safeguarded. The degree of penetration of the judicial review is also dependent on this choice. The more discretion the legislator leaves to the administration to seek tailor-made solutions or to qualify facts, the less the courts are able to judge the substance of the administration's opinion.

These tensions are also revealed in the use of instruments under private law. On the one hand, these steer by creating incentives and thus contribute to an awareness of responsibility and an efficient distribution of social security. On the other hand, it is exactly this type of incentives that can lead to external effects, which make new interventions necessary. The employer who is liable for the illness of his employee can, for example, rather than investing in better employment conditions decide to take this risk more into account when selecting, with the result that some groups, especially elderly people and handicapped persons, fall overboard. The legislator will have to act to reduce these threats of inequality.

The second conclusion relates to the range of legal instruments. Legal instruments have particular consequences for *individual* legal relationships, which can only be realised at that individual level. Ultimately the employee or benefit recipient has to enforce his or her rights. The law is tailored to this individual administration of justice and provides, with its extensive procedural rules and principles, for legal actions whereby this right can be acquired. The law cannot claim that it is able to safeguard public interests at a more general level.⁷⁵ If the employee or the benefit recipient refrains, for whatever reason, from enforcing his or her right, the public interest in respect of which the right is granted will never be realised. For this reason alone, non-legal instruments are indispensable.

This latter observation brings us to the third conclusion: in an extended system of privatisation it is unavoidable that new instruments under public law will turn up to compensate the economically and socially weaker party. The working of private instruments depends on an equal playing field. If parties are unequal there is reason for the state to intervene with supplementary instruments. Supervisors and institutional safeguards are the result. The privatisation of social security, whereby increasingly more private instruments are more frequently chosen as a means of providing social security, thus does not result in less state intervention, but to state intervention of a different sort. This is exactly what the regulatory welfare state is all about.

⁷⁵ Leaving aside the systems with a Constitutional Court, where the Court can interfere on a more abstract level. Nevertheless: even these courts are limited to the legal arguments and will have to respect the political decision-making.

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SAFEGUARDING THE PUBLIC SPHERE: A PHILOSOPHICAL PERSPECTIVE

Pauline Westerman

1 Introduction

In 1972, the Indian government issued a law which specified the minimum wage farmers should pay to their servants. In his fascinating book 'The Poverty Regime in Village India', the Dutch sociologist Jan Breman described its effects.¹ Nothing seemed to change for the landless workers, who remained underpaid and never received more than half of the prescribed amount of rupees. It did, however, positively affect the income of the inspectors. From that time on 'they travelled around the countryside, not to ensure that landowners were complying with the law, but to threaten them with prosecution unless they paid them a bribe'.² The poverty-stricken caste of the Halpati was not helped at all by governmental regulation.

Had the Halpati been able to read this volume, they would probably not have understood its efforts in pointing at the state as the ultimate safeguard for social security. Virtually all policies and programs issued by the democratically elected government seemed to founder on the incapacity of the system to provide a minimum of security and justice. Apparently, state regulation is not sufficient to safeguard their socio-economic rights, not even in those cases in which the state is democratically accountable.

The sad story seems to capture precisely the problems that are central to this volume. It makes clear that by declaring social security a 'public interest' nothing is yet said about the question who is the best candidate for safeguarding such a public interest or, more interestingly, *how* such a public interest should be dealt with. Pointing to the state as the ultimate protector of socio-economic rights does not solve the interesting question *under which conditions* the state can execute its public tasks in a satisfactory way and *how* it should execute these tasks.

In order to answer these questions we should avoid the temptation to identify too easily the public sphere with the official sphere. These are separate domains.³ Although public *law* indeed refers to the organisation of the state and its relation with the citizens, the same does not apply to other things called 'public'. A public house does not belong to the state. All we intend to say by declaring houses, gardens, restaurants and even Hyves pages 'public' is that

1 Breman, Jan, *The Poverty Regime in Village India: Half a Century of Work and Life at the Bottom of the Rural Economy in South Gujarat*, Oxford UP, 2007.

2 Breman, *op.cit.*, p. 90.

3 In the words of Eisenstadt: 'The concept of a public sphere entails that there are at least two other spheres – the "official" sphere of rulership and the private sphere – from which the public sphere is more or less institutionally and culturally differentiated. It is, therefore, a sphere located between the official and the private spheres'. Eisenstadt, S.N., "Civil Society and Public Spheres in a Comparative Perspective" in *Polish Sociological Review* No.2 – 2006 (Quarterly of the Polish Sociological Association), Warsaw, p. 143-166.

they are open and accessible to all.⁴ In this sense, the market is a public place, even though it is regulated by private law. What is more: its public nature (openness and accessibility) is safeguarded by private (anti-trust) law.

In this contribution I will argue that in order for states to safeguard different interests –including socio-economic ones- in a reliable and effective way, there needs to be a strong public sphere, to be differentiated from both the private and the official domain. The features of such a public sphere will be sketched, in fairly simple terms, as the result of a process of representation and abstraction. On the basis of this rough sketch, I will develop three normative requirements by means of which strong public spheres can be distinguished from weak ones. On the basis of these requirements the question can be addressed to what extent and under which conditions the nation-state is able to maintain a strong public sphere in which not only liberty-rights but also socio-economic rights are safeguarded. After having outlined the weaknesses of the welfare-state in preserving a public sphere, two alternative candidates are examined: lower level institutions and the judiciary. It is argued that all three have difficulties in optimising the three requirements. The article concludes by proposing some possible remedies.

2 Making oneself understood

The boundary that distinguishes the private sphere from the public domain is an essentially contested one. Frontiers shift incessantly. The mediaeval custom of the nobility to receive important guests in their bedroom may suggest to us that at that time a private life as such had yet to be invented. But the mediaeval noble might draw the same conclusion if he could have witnessed our ease in talking about emotions or sexual problems on the television. These examples may alert us to the fact that the dividing line between public and private is mainly determined by *how we act*. The nobles may have received people in their bedroom but they did not act in a very private way. They may have worn night-gowns but their conduct was a very formal one. On the other hand, what strikes us in witnessing people on tv, is that they speak to us as if we are close friends instead of an anonymous audience. What we call private and public is therefore closely connected with a *certain way of doing* things.

This difference in attitude can rather easily be explained. If we start with the simple notion of the public sphere as a sphere which is 'open and accessible to all', it is clear that it is nothing more -nor less- than the world where we have to deal with people who might not be familiar to us and who may even be strangers. This implies that in the public domain a different form of behaviour is called for, which enables us to deal with such people. We can no longer rely on the many implicit rules, conventions and customs that regulate our lives with family-members and intimate friends. We have to find ways in which we can be understood by others, who may *not* share these tacit assumptions.

This can be done by conducting affairs in a particular way; namely by adopting roles and rules. Both rules and roles generate a stock supply of meanings that are shared and therefore

⁴ Habermas, Jürgen, *Strukturwandel der Öffentlichkeit: Untersuchungen zu einer Kategorie der bürgerlichen Gesellschaft*, Hermann Luchterhand Verlag GmbH, Neuwied und Berlin, 1962, p.13.

accessible to all involved. The simplest example of someone who adopts a role is the ritual dancer who bears a mask.⁵ In doing so, he does not act out his 'true and authentic self' but represents himself on a different level, by playing a role that is recognizable to others. This role can be a very concrete one, e.g. where a particular ancestor is represented, or an abstract one ('evil forces'). What is important, however, is that the represented item can be identified, and recognized by others.⁶ In adopting a role, I represent myself as someone who is accessible and understandable to others, even strangers. I make myself public, so to speak.

We engage in this form of communicative behaviour daily. In choosing a special type of clothes, or a special trendy type of iPod, I indicate that I want to be regarded as a certain person. In order to succeed in this, I have to make sure that that role is understood by the others. In some contexts, for instance in academic circles, the proudly displayed Vuitton bag would probably not even be noticed. The bag then fails to help me represent myself, just as the masks of the ritual dancers fail to represent the ancestors in the eyes of an audience that mainly consists of tourists. Roles rely on shared meanings relating to the representation.

Roles also rely on shared understandings of the proper context. The black dress at a funeral has a different meaning from the black dresses worn by gothic girls. These shared understandings can be expressed by rules. These rules can be said to constitute the role. They are of the form:

If conditions a, b, c obtain > X counts as Y in context C.

They stipulate in advance that under condition a, b, and c, and in a specified context C, a particular mask *counts as* 'ancestor', a particular dress *counts as* the expression of 'grief', and a particular utterance *counts as* 'promise'.⁷ Every role and representation presupposes such a rule.

In relatively small and simple communities these underlying rules are barely noticed, because their content is well-known and does not need to be made explicit. Implicit rules are hardly perceived as rules. We only become aware of their existence if they are violated or simply ignored. So if we have to deal with newcomers or relative strangers, it will be necessary to make these underlying rules explicit. In such a context, it is no longer possible to rely on tacit background knowledge and unquestioned moral distinctions. The rules that are supposed to guide the representations we make, but also the rules that guide our behaviour and the way we relate to others should be made 'public', in the sense that they should be made explicit and clear; they should be 'published' in the sense of accessible to all involved, and -preferably- it should be possible to question the rules in a 'public' debate, which is equally open and accessible to all.

Instead of the dichotomous division of a space into a private and a public sphere that are mutually exclusive, it seems therefore more appropriate to keep the picture in mind of the wider

5 Grimes, Ronald L., 'Masking: Toward a Phenomenology of Exteriorization', *Journal of the American Academy of Religion* Vol. 43 No 3 (Sept. 1975) p. 508-516., O.U.P.

6 White, Randall, 'Toward an Understanding of the Origins of Material Representation in Europe', *Annual Rev. of Anthropology*, 1992, p. 537-564.

7 Humphrey, Caroline & James Laidlaw, *The Archetypal Actions of Ritual: A Theory of Ritual Illustrated By The Jain Rite of Worship*, Clarendon Press, Oxford, 2004 (1994). For a philosophical analysis of 'count-as'- norms, see Searle, J. *The Construction of Social Reality*, The Free Press, 1995.

and narrower circles that surface by throwing a stone in the water. What counts as 'public' depends on one's point of view. Viewed from the confines of my family home, the inhabitants of my village belong to the public realm. Viewed from the perspective of the village-dweller, the public realm begins outside the village. The wider the circle, the more strangers are included. The more strangers are included, the more need there is to make the rules that guide our relations, roles, and representations explicit.

If we adopt the metaphor of these widening circles, we may allow for the possibility of differentiating between what I would call 'stronger' and 'weaker' public spheres: a stronger public sphere encompasses *a greater diversity* of people, and abides by *more explicit* rules and roles than a weaker public sphere.

3 Degrees of abstraction

To the dimensions of inclusiveness and explicitness a third element should be added in determining the strength of a public sphere and that is the level of *abstraction*.

In order for ritual masks, bags and iPods to function as bearers of shared meanings, they have to be impersonal. The mask represents someone *else* (the ancestor), not the bearer himself. The representation is more 'objective' than the actual living person who represents himself, which means that the representation *abstracts* from the particulars that distinguishes Peter from Jim. One may object that although this may apply to the masks of primitive man, it does not apply to modern man who, on the contrary, wants to distinguish himself by his trendy iPod. But this is a mistake. The proud owner of the iPod represents himself not as *a particular* person but as someone belonging to a *class* of people, a class of people which is fortunate, rich, modern etc. By showing off his iPod he distinguishes himself, it is true, but only by abstracting from particular and individual features and by representing himself as belonging to the desired category of people. In the public sphere, people represent themselves in categories that are more abstract than the particular individual they are in private life.

The level of abstractness of the categories can vary and is, I believe, directly linked to the inclusiveness of the public sphere in which one moves. If I am travelling in Africa there is no sense in representing myself as someone who is born in Rotterdam, not even as an inhabitant of the Netherlands. It is no exaggeration to say that only in Africa I represented myself as a European. The wider the public circle is drawn, the more diverse its members, the more the need to make one self understood in terms that are accessible to the other members, the higher the level of abstraction required. A very high level of abstraction is reached in the representation of individuals as citizens. This representation not only abstracts from the particularities of Jim, it also abstracts from more abstract roles as employee, consumer or city-dweller and turns him into a member of the abstract category of the citizenry.

It is important to note that where the roles and categories are abstract, the rules that govern these categories are equally abstract. In order to grasp the relation between categories and rules, we should distinguish between the rules that turn Jim into a citizen and the rules that are applicable to Jim once he is regarded as a citizen. The rules that turn Jim into a citizen may be general in the sense that they all equally apply to a member of a particular class, but these rules can be quite concrete. E.g. the rule that all immigrants from a specific province

in Iraq who succeeded in acquiring a work permit before June 10, 2005, and who have been employed for more than 6 months by a certified employer, are entitled to Dutch citizenship. This is no doubt a *general* rule in the sense that it applies to all those who belong to the designated category, but the category itself (immigrants from this particular province) is extremely *concrete*. However, once Jim is entitled to Dutch citizenship he enjoys a set of rights and duties that are not only generally applicable to all citizens, but which are also fairly *abstract* since they flow from the abstract category of citizenship. Abstractness of roles matches abstractness of rules.

What we see here is that the category of citizenship acts as an *intermediary* between on the one hand a set of conditions that should be met and on the other hand legal consequences.⁸

If conditions [Iraqi province, 2005, certified employer] obtain > Ahmed counts as citizen
If condition [Ahmed = citizen] obtains > Ahmed is entitled to rights a – z

If we keep this intermediary function of concepts such as 'citizen' in mind, it is clear at once that the choice of representing oneself as either 'consumer', 'Halpati' or 'citizen' is not entirely free. Such a choice is to a large extent informed and necessitated by the rights and duties that are attached to such a concept. In a society where rights and duties are usually accorded to castes, there is obviously hardly any need to invoke the general notion of citizen. It does not serve, in those contexts, as a viable intermediary notion connecting conditions to legal consequences.

I noted above that strong public spheres can be distinguished from weak ones by the extent to which they include diversity and the degree in which they make rules and roles explicit. To this, the third criterion of abstractness can be added. I assume that in a strong public sphere, categories and rules are of a fairly abstract nature. Abstractness is directly linked to the criterion of inclusiveness. The more a certain category abstracts from the particular properties of individuals and their specific interests, the more we arrive at the ideal of formulating rules that are generally applicable to members of the abstract category, without exceptions, privileges or favors due to some particular properties.⁹

Thinking back to the Indian inspector I introduced above, one of the things that went wrong in his enforcement of the minimum wage legislation is probably the lack of abstraction of roles and corresponding rights and duties. The inspector *does not take on the role* of the government official at all. He therefore presumably does not feel bound by the abstract rights and duties that are attached to that role. He rather sees his job as his personal belonging; a source of personal, private income.¹⁰ Decisions on prosecution are therefore felt to be subject

8 These so-called placeholder concepts are analysed in Ross, A., 'Tû-tû', *Harvard Law Rev.* 1957, p. 812-815. For a good Dutch overview, see, Hage, J., *De betekenis van juridische statuswoorden*, in: *Rechtsfilosofie & Rechtstheorie*, 2008/1, p. 13-28.

9 That is why lawyers tend to refer to abstract rules as 'general' rules. Logically speaking, this is a mistake. *Any rule is ipso* general in the sense that it refers to general categories ('all immigrants who...') What lawyers mean when they talk about the virtues of 'general rules' is that the categories of such rules are abstract enough to cover a wide range of individuals.

10 The conditions required in order to take the role of the official bound by abstract rules, are analysed, as is well-known, by Max Weber, *Wirtschaft und Gesellschaft: Grundriss der verstehenden Soziologie, fünfte Auflage, besorgt von Joh. Winkelmann*, J.C.B. Mohr, Tübingen, 1980, p. 551-579. See also Eisenstadt, S.N., *Bureaucracy, bureaucratization, and debureaucratization*, in: *Administrative Science Quarterly*, 4 (1959). P. 302-320.

to personal discretion rather than to general and explicit rules pertaining to the abstract categories designated by the law.

4 Public interests

I have described several ways of making oneself understood in a sphere that is marked by diversity. In such a sphere there will not only be a diversity of opinions, values, and rules, but also of *interests*. I don't think, therefore, that 'public interests' should be seen as interests that belong to the 'public' in just the same way as we talk about 'consumer interests' as the interests of 'consumers'. Such a manner of speech presupposes a unity (the 'public') which does not exist. Rather, we call something public the more a certain space includes *different* people and interests. To talk about 'the' public interest is therefore often no more than a rhetorical device in order to conceal these differences and to elevate one particular interest above the others under the guise of its so-called public nature.¹¹

Such an a priori definition of 'public interest' overlooks the fact that a definition of the public interest is precisely what is at stake in those debates which revolve around the question *what* exactly we should make 'public' (open and freely accessible). These debates are all about the demarcations of the public sphere: e.g. what should we prefer: an open and accessible (public) *market* in which there is free competition between different transport businesses? Or do we prefer to turn *transport itself* into a public commodity, i.e. freely accessible to all?

An advantage of my analysis of 'public' as denoting a particular *way of dealing* with relative strangers, is that it does justice to that debate. The public interest is then not an interest of the public but consists in a way of handling conflicting interests. In line with the dimensions discerned above (inclusiveness, explicitness and abstraction) we may say that it is in the public interest to include as many interests as possible, to weigh and to balance them, to abide by explicit rules in regulating and resolving conflicting interests, and, if possible, to abstract from particulars by assigning rights and duties to more abstract and impersonal categories. In such a way, interests are *made* public instead of being presupposed to 'exist' prior to how we deal with them. In a strong public sphere, there is an open (inclusive, explicit) discussion about which commodities should be publicly available.

I would like to defend the view that these tasks should for a large part be entrusted to the official domain. By 'the official domain' I do not refer to a specific form of government, but simply to the idea of a third party, which has enough power to enforce its decisions, and which is hierarchically superior to the parties that entertain more or less horizontal relations with each other.¹² Such a third party is needed, since only such a party can develop the bird's eye view necessary to include, weigh, balance, explicate and abstract the various competing interests. The reasons for this all have to do with the importance of impartiality.¹³

11 Rousseau's concept of the *volonté générale* is an example of such a strategy.

12 See G. Simmel for a fascinating analysis of the differences between dyadic and triadic relationships, in: *The Sociology of Georg Simmel*, ed. and transl. by Kurt H. Wolff, Glencoe, Illinois: The Free Press, 1964, p.122-125.

13 Habermas, J., *Recht en moraal: twee voordrachten*, vert. door W. Van der Burg en W. Van Reijen, Kampen: Kok Agora 1988, p. 79. (orig. *Recht und Moral: Zwei Vorlesungen*, University of Utah Press, U.S.A. 1988).

To a large extent it is possible for the parties themselves to draft rules (contracts) which are explicit enough to coordinate their mutual actions but these rules cannot be used as standards for arbitration if we do not allow a third party to intervene and to arbitrate in case of conflict. The same applies to the requirement of inclusiveness of interests. In order to safeguard such inclusiveness, it should be entrusted to an institution which -although it may have its own interests- does not have any directly competing interests which interfere with the other interests. And finally, rights and duties which are sufficiently impersonal and attached to abstract categories rather than to particular persons with their particular interests can only be allocated by the proverbial impartial judge who is blind to individual particularities.

In other words: in order to turn the public sphere into a strong public sphere, which is sufficiently inclusive and impersonal as well as guided by explicit and abstract rules, an official sphere is needed, which is superimposed upon the horizontal relations that are entertained by the parties themselves. By drawing attention to the importance of these functions, I am, however, not necessarily committed to a view about *who* is best equipped to exercise these functions. Several options are conceivable. Not only the nation-state but also professional organisations, all kinds of supervisory boards as well as the judiciary may all come forward and present themselves as suitable candidates. I only claim here that these candidates should be assessed and evaluated according to the three above-mentioned criteria of impartiality (reached by inclusiveness, explicitness and abstraction) in order to ensure that a diversity of interests is taken into account and coordinated. If a certain institution lacks the required impartiality, that institution is unfit as defender of the public realm.

5 The welfare-state and the public sphere

So far, I have assumed and argued that the three requirements listed above all point in the same direction. It seems a plausible argument: in order to include as many interests as possible, one has to be impartial and abide by explicit and abstract rules.

However, precisely this assumption has been questioned. The debate concerning the vices and virtues of the welfare-state revolves around the inclusion of socio-economic interests. It has been argued that the inclusion of such interests is not beneficial to a strong public sphere, but rather *risks jeopardizing* the neutrality and impartiality of the nation-state. This view has been put forward forcefully by Ernst Forsthoff, when in post-war Germany the very first contours of a *welfare-state* became visible.¹⁴ According to Forsthoff, the nation-state can only retain its impartiality by confining itself to classical liberty rights. As soon as the state adopts the role of distributor of socio-economic burdens and benefits, it forfeits its role as neutral arbitrator.

This may sound quite paradoxical. Why would a state, (or for that matter, any third party) jeopardize its impartiality by including *more* rights and interests? The opposite seems much more plausible. Forsthoff's argument is mainly based on the difference between safeguar-

¹⁴ See Ernst Forsthoff, *Verfassungsprobleme des Sozialstaats*, in: *Rechtsstaatlichkeit und Sozialstaatlichkeit: Ausätze und Essays*, hrsg. Ernst Forsthoff, Wissenschaftliche Buchgesellschaft, Darmstadt, 1968, p. 145-164, and Ernst Forsthoff, *Begriff und Wesen des Sozialen Rechtsstaates*, in: *op.cit.* p.165-200. A more recent overview of the literature around the welfare-state dilemma is given by Scheuerman, Bill, *The Rule of Law and the Welfare State: Toward a New Synthesis*, in: *Politics and Society*, Vol. 22, No 2, June 1994, p. 195-213.

ding and creating rights. According to Forsthoff, a classical 'Rechtsstaat' mainly safeguards existing (liberty) rights. A *Sozialstaat*, on the other hand, does more than that. It carries out a program in order to establish new rights, to create welfare, and to achieve a just distribution of burdens and benefits.¹⁵ The welfare state is 'ein Staat der Leistung und der Verteilung'.¹⁶ Whereas the classical rights are negative limitations of the power of the state, rights, 'vor denen die Staatsgewalt halt macht',¹⁷ socio-economic rights act as positive demands on the state to *perform*. Thereby, the task of the state is fundamentally altered. It can no longer act as arbitrator but turns into a regulator with interests of its own that enter in direct competition with those of (groups of) citizens.

The difference between negative and positive rights has been the subject of an extended debate¹⁸, which -although interesting- I will not repeat here. I only want to draw attention to the fact that the distinction between positive and negative rights to a large extent depends on the assumption that negative liberty-rights should be considered as 'Vorstaatlich', existing before the state comes into being, whereas socio-economic rights are considered to be the product of state -intervention. In the contribution by Brinkman and Eleveld to this volume, the various attempts to argue in favour of such rights have been dealt with.

This distinction between pre-existing rights and rights that result from state-intervention can be attacked from both ends. On the one hand we may argue that both kinds of rights should enjoy a 'pre-state' status. One may then argue that Locke's natural rights to life, liberty and property should be extended to encompass the rights to income, housing, education etc. Or we may argue the other way round by saying that since no relevant distinction can be made between the two bundles of rights, *none* of these rights should be seen as existing prior to the state. In that case we should consider property rights as well as the right to free speech etc. as just interests that ought to be balanced against other interests. Both strategies discard the somewhat disingenuous move to elevate some rights over others by just declaring them to be 'natural rights', prior to the state.¹⁹

Forsthoff's fears can therefore be dispelled by adopting either of these strategies. Only then can we hope to break through the dichotomy between a state which has to safeguard negative rights and a state which adopts the more positive role of creation and distribution; a dichotomy which -empirically speaking- is already considerably undermined in view of the massive amount of planning and intervention both at the national and the European level that is required in order to establish and maintain a free market and a healthy financial climate. However, even if we succeed in attenuating the distinction between *Sozialstaat* and *Rechtsstaat* by claiming that a considerable amount of intervention is needed for the preservation of both sets of rights, three of the issues raised by Forsthoff remain worth noting and they all three have to do with exactly those dimensions I indicated to be vital for a public sphere.

15 Forsthoff, *op.cit.* p. 177.

16 Forsthoff, *op.cit.*, p.149.

17 Forsthoff, *op.cit.*, p. 177.

18 See e.g. Borowski, Martin, *Grundrechte als Prinzipien*, 2nd ed., Baden-Baden: Nomos 2007

19 See my *The Disintegration of Natural Law Theory: From Aquinas to Finnis*, Leiden: Brill 1998

In the *first* place, we should be aware of the risk that a state which is allocating and distributing socio-economic burdens and benefits can turn into a very manipulative one.²⁰ This risk is all the more real in those cases where the state attaches extra conditions to the benefits (pensions, subsidies, allowances) it distributes. The additional requirements that should be met by unemployed people in order to 'enjoy' their social security allowance may be defended by saying that rights should match duties, but it is rather easy to arrive at the situation in which civil obedience turns into a service for payment. The welfare state, by handing out benefits and distributing assets, has infinitely more power to enforce its own aims and interests than the classical guardian-state. The recent tendency of states to turn into bank-owners does nothing to dispel these fears. On the contrary, by becoming a player in the field, and a very powerful player at that, its interests tend to *compete* with those of the other players involved. The state risks losing the bird's eye view that is needed in order to meet the requirement of inclusiveness, which I indicated to be necessary for a strong public sphere.

In the *second* place, the required abstraction of categories and rules seems to be endangered as well. Forsthoff observes that in a welfare state, the citizen no longer identifies himself as a citizen, but mainly as an interest-holder.²¹ This contrast may be drawn too strongly. After all, one's choice to become a socialist or a conservative cannot be seen as entirely separated from one's perceived interests. However, there is a grain of truth in Forsthoff's observation that the more a state regulates the particular interests of particular groups, the more the law has to bend itself to the particularities of particular groups and particular circumstances.

The development that is discernible in the principle of equality testifies to this tendency of particularization.²² It used to be customary to stress the first part of that principle, which requires that like cases are to be treated alike. Nowadays, however, the second part of the principle, which requires *different* cases to be treated *differently*, is emphasized and leads to increasing refinement of distinctions, categories and corresponding rights and duties.²³ The principle of equality can only be maintained at the cost of an endless proliferation of rules, all covering the specific needs of specific groups of citizens.²⁴ The call for tailor-made legislation is another symptom of the same phenomenon and can very well be understood as a reflection of the fact that those who distribute burdens and benefits need to take into account a wealth of particular requirements and circumstances, which inevitably leads to concretisation rather than abstraction.

This concretisation may be needed in order to arrive at fair outcomes. No one would deny that the father who distributes his heritage justly between the handicapped talented son and a champagne-drinking debauchee has to take into account the differences in needs and circumstances.²⁵ But it should be realized that the fine distinctions required here are at odds with the

20 'Kein Staat ist mehr in Gefahr, im Dienste der jeweils Mächtigen instrumentalisiert zu werden wie der Sozialstaat'. Forsthoff, *op.cit.* p163.

21 'Er ist nicht mehr primär Konservativer, Liberaler oder Sozialist, sondern Landwirt, Importeur, Sozialrentempfänger, Grossist, Arbeiter, Hausbesitzer, Ostvertriebener usw.' Forsthoff, *op.cit.* p. 153.

22 Gerards, J.H. (2005), *Judicial Review in Equal Treatment Cases*, Leiden/Boston: Martinus Nijhoff 2005.

23 Minow, M. (1990), *Making All the Difference. Inclusion, Exclusion and American Law*, Ithaca/London: Cornell University Press, 1990

24 For an interesting analysis of how such differential treatment works in the Indian case, see Zwart, Frank de, *Administrative Categories and Ethnic Diversity: The Dilemma of Recognition*, in: *Theory and Society*, Vol. 34, 2005, and 'Practical knowledge and institutional design in India's affirmative action policy', in: *Anthropology Today*, Vol. 16, No 2, April 2000, p. 4-7.

25 Dworkin, R., What is Equality? Part 1 Equality of Welfare, *Philosophy and Public Affairs*, Vol. 10 (1981) p.183-246

ideal of blind Justice.²⁶ This means that in a welfare-state it will be increasingly difficult to arrive at impersonal and abstract categories and corresponding rights and duties.²⁷

The *third* dimension I discerned by means of which the strength of a public sphere can be gauged is the extent to which the standards for decision-making are open and accessible to all, which entails the need to make them explicit. Rules need to be explicit, clear and precise, in order to serve as a shared frame of reference, by means of which decisions can be justified as well as criticised. If this requirement is to be taken seriously in a welfare-state which has to have an open eye for the different needs and circumstances of its citizens, it is clear that it cannot fail to result in excessive overregulation, in the sense that for each and every circumstance, explicit and highly detailed rules should be drafted. And the more concretely such rules and categories are formulated, the more vulnerable they are to change. Since such concrete rules are quickly outdated and cannot catch up with social or technical developments, the inflexibility of explicit rules will increasingly be seen as a major obstacle.²⁸

This problem is not only anticipated on logical grounds, but is indeed conceived as one of the major problems of contemporary legislation and has led to all kinds of programs in order to reduce the burdens of overregulation. What all these programs in order to arrive at 'better regulation' have in common is the attempt to overcome these problems by reverting to open, flexible but vague standards.²⁹ These open standards may either invite the judge to bend the law to specific cases or they may be meant to be tailored to concrete contexts by groups of norm-addressees and stakeholders. In both cases the degree of explicitness arrived at the central level is considerably decreased.

The conclusion seems to be justified that although there is no reason to exclude socio-economic rights and interests from public consideration, we should be aware that the welfare state risks to lose the very properties needed for preserving a strong public sphere. Its distributive role may increase its power and may undermine its impartiality. The need to meet particular needs affects its power to transcend concreteness by formulating impersonal and abstract rules and finally, it will no longer be possible to meet the requirement of explicitness without suffering from overregulation and inflexibility, which will lead to the formulation of vague standards; thereby increasing the discretionary powers of decision-makers.

We should add here, that if this analysis holds, it equally applies to the level of the European Union. The vast terrains covered by European regulation, together with the ambition to steer, shape and harmonize the different member-states by means of enormous amounts of subsidies and other such regulatory mechanisms, force the EC into a position that is comparable to that of the national legislatures.³⁰ The tendencies and the shortcomings listed above all

26 According to Forsthoff: 'Im Unterschied zu den Freiheitsrechten haben Teilhaberrechte keinen im vorhinein normierbaren, konstanten Umfang. Sie bedürfen der Graduierung und Differenzierung, denn sie haben einen vernünftigen Sinn nur im Rahmen des in Einzelfall Angemessenen, Notwendigen und Möglichen', *op.cit.* p.179.

27 Cf. Habermas, J., *op.cit.* 1988, p. 52 ff.

28 An abundance of official reports comment on the inadequacy of rules in this respect.

29 E.g. *Ruimte voor Zorgplichten*, Min. of Justice July 2004.

30 This is reflected in *European governance: a white paper*, Brussels 2001, Commission of the EC, which diagnoses the problems with rules in much the same way as Dutch reports, and offers roughly the same therapy.

equally apply to the European level as well.³¹ We should arrive at the somewhat uncomfortable conclusion that the more interests are included and taken care of by the official domain, the more it risks to lose the virtues required of a neutral third party, which will inevitably weaken the public sphere.

6 Alternatives: the norm-addressees

As I noted above, we should be careful not to indentify the public sphere with the official sphere too easily. The legislatures of nation-states and the European Union are not the only possible defenders of the public sphere. There are any other candidates. In the first place the norm-addressees themselves, in the second place the judiciary. I will first examine the qualifications of the former; in the next section I will deal with the judiciary. They are both investigated by means of the above-mentioned criteria of inclusiveness, explicitness and abstraction.

The attempts to arrive at better regulation or deregulation led to a practice in which rule-making was outsourced to the norm-addressees themselves, who are required to concretise the vague standards issued by the formal legislator. By delegating concrete rule-making to norm-addressees, mostly organised in *branche-organisations* and professional associations, or to supervisory boards and the inspectorate, it is generally hoped that at the central level the rules will remain abstract enough to avoid excessive detail and to withstand time and change. As I noted elsewhere³² the rules that are issued at the central level and with which the lower echelons are confronted, may exhibit a certain amount of abstraction, but cannot be understood as ordinary rules. They do not prescribe the means in order to achieve a certain aim, but mainly prescribe the goals that should be reached. They leave it to the norm-addressees to devise the rules (i.e. rules prescribing means) by themselves. The only genuine rule here is the rule that admonishes the norm-addressee to *report* on the progress that was made.³³

This strategy is often mirrored by lower echelons, which, in a similar vein, imposes a more concrete version of the desired aim, and likewise obliges an even lower echelon to fill in the necessary detail, i.e. to take measures or to draft rules in order to achieve the intended aim, and to report on the progress made. A chain of regulations can be discerned here. At each level, goals and aims are prescribed, whereas the actual task of rule-making is imposed on others. This chain hardly leads to any rule-making but mainly consists of an ongoing process of concretisation. At each successive step, the aims are translated into more concrete goals and targets.

This solution is beset by many problems, which I pointed out in detail in other places. The deregulation reached at the central level is outweighed by an enormous amount of excessively detailed regulation at lower echelons, the loss of legal certainty (due to the fact that the rules are tailor-made), and the growing importance of intermediate bodies of managers and self-professed rule-makers of different varieties are all just as inevitable as problematical. I will

31 See for a more elaborate analysis my 'Governing by Goals: Governance as a Legal Style', *Legisprudence: International Journal for the Study of Legislation*, Hart Publishing 2007, p. 51-72.

32 See my 'The Emergence of New Types of Norms', in: Luc J. Wintgens (ed.), *Legislation in Context: Essays in Legisprudence*, Ashgate, Aldershot 2007, p. 117-133.

33 For the full argument the reader is referred to my publications, listed in the preceding footnotes.

not repeat these disadvantages but confine myself to the question which is at stake here: can we expect these lower bodies of rule-makers to meet the requirements necessary for a strong public space?

The answer is, I think, a mixed one. As for inclusiveness, it cannot be denied that the practice of outsourcing rulemaking to lower echelons, increases the likelihood that more interests are included. As long as these tasks are entrusted to groups marked by strong internal social cohesion, the chances that they can shape the rules to their specific needs are increased. It is different in those cases where regulating committees and bodies are established by the central legislator for the very purpose of such rulemaking. In those cases, inclusion may not always be warranted.³⁴ In cases where regulation is entrusted to supervisory boards, the picture is a mixed one, depending on the field at hand.

As for explicitness, the picture is less equivocal. Rules made by lower echelons are not only much more detailed but also much more explicit than those formulated at more central levels. The reason for this is simply that the lower bodies are usually confronted with the obligation to report on the rules they drafted and the measures they took. Since it is clearly not sufficient to state in vague terms that the goals are reached, standards need to be developed which enable the assessment and evaluation of such progress and documents need to be drawn up, stating in the most explicit terms the performance indicators, rules, codes and protocols that have been developed and instituted. The effects of such explicitness may be perverse, especially where the production of documents is seen as a substitute for a real performance or service.³⁵ In those cases where the rules are only drawn up in order to justify one's dealings and to account to the external world, the value of explicitness should not be exaggerated. But to the extent they are taken seriously internally as well, the process of making these rules and standards explicit may pave the way for criticism and change.³⁶

The virtue that seems to suffer most from the delegation of rulemaking to lower echelons is abstraction. Rules are no longer made by (representatives of) *citizens*, but by people in their capacity of teachers (or more properly speaking: educational managers and experts) or in their capacity of health-specialists, or of consumers, or of employers, etc. etc. The picture sketched by Forsthoff of the welfare state mainly consisting of 'Interessenten' is nowhere better embodied than in the regulatory landscape of today, where these *Interessenten* are precisely the ones who make the rules. In such a landscape more people may be included, but we should keep in mind that they are included not in their capacity of being an abstract member of society but as bearers of more concrete and particular roles.

One may be tempted to think that it is better to be included *qua* teacher or consumer than *qua* citizen, represented in a distant central body by equally abstract representatives. And indeed, as far as one's own interests are furthered by such direct forms of participation, there may be some truth in this. The disadvantage is, however, that there is no longer a *locus de-*

34 The Tabaksblat committee is an example: the trade unions were not included. See Stamhuis, Jellienke N., *Conflicting Interests in Corporate Regulation: An exploration of the limits of the interactionist approach to legislation in employee participation and corporate governance*, (dissertation), Groningen, Dec. 2006.

35 Hood, Christopher, Gaming in Targetworld: The Targets Approach to Managing British Public Services, in: *Public Administration Rev*: July/August 2006, p. 515-521.

36 A.R. Mackor, *Te meten, of niet te meten: dat is de vraag* (Inaugural lecture, University of Groningen), Amsterdam: SWP 2006.

liberandi where the various interests come together. Outsourcing areas of legislation means outsourcing to *specific agencies or institutions*, organised around the aim that is imposed by the central level. Rules concerning 'health and safety at work' are drawn up by committees, boards and institutions that all somehow have to do with 'health and safety at work'. They do not take into account other issues, such as environmental concerns, since they are simply not instituted to that end. Rulemaking is conducted in various functional regimes, which rarely interact with each other. This means that a bird's eye view encompassing different interests is lacking. Coordination between these functional regimes is highly problematical. If rulemaking is delegated and passed on to below, parliament is no longer the public space where the relationship and priority of the different aims and goals can be discussed and assessed.

We should conclude then that a strong public space can only partially be safeguarded in a type of regulation in which rulemaking is outsourced to lower echelons. Only explicitness is served, whereas inclusion is doubtful and abstraction is downright problematic. It should be noted, however, that in such a regulatory landscape, the boundaries between public and private are also drawn in a different way. The process of what is commonly called 'privatization' did not make things more 'private'. On the contrary: figures and data concerning the performance of schools and hospitals are now publicly available on the Internet, and standards have become explicit which make them liable to change and criticism by outsiders. At the same time, however, affairs are conducted in a less public way at the more central level. Debates that used to be conducted in parliament are negotiated in the corridors, decisions as to the composition of important (rulemaking) bodies are taken in ways and quarters that are not accessible to the public at large (comitology).

7 The judiciary

The judge is probably the most plausible candidate to act as a third party, who by his impartiality can act as a defender of a public space. Judges include, weigh and balance the various interests involved, they do so by reference to a body of explicit rules that are used as justification for their decisions, and in judging they make use of impersonal, sometimes even highly abstract roles. The judge is about the only figure still surviving who is almost generally acknowledged to be the embodiment of the public sphere, infinitely less 'personal' than the 'ordinary' and all too human figure of the queen.

It is no wonder then that at the sight of the crumbling public authority of the nation-state, which in the form of a welfare-state, as we have seen, increasingly takes on the role of a stakeholder with interests of its own, the judiciary has been invoked not only as a rival defender of the public sphere, but also as an infinitely better one. According to several writers³⁷ it is to the judge we should turn for the protection of our rights and interests. It is maintained that a more active role of the judge does not flout the principles of a state based on the rule of law, but instead can quite easily be fitted in the constitutional make-up. And indeed, since in a welfare state it is not the judge who distributes burdens and benefits he is better equipped to

37 In the Dutch literature examples are Brenninkmeijer, A.F.M., *Het primaat van de politiek bestaat niet meer. Over politieke rechtspraak, rechterlijk activisme en de legitimatie van rechterlijke oordeelsvorming* in: F.C.L.M. Jacobs en C.W. Maris (eds.), *Rechtsvinding en de Grondslagen van het Recht*, Van Gorcum, 1996, p. 123-145; Rijpkema, Peter, *Rechttersrecht*, Den Haag: Boom Juridische Uitgevers 2001, but also the official report to the government *De toekomst van de nationale rechtsstaat*, WRR, nov. 2002

see to it that no vital interests are excluded or harmed than the legislator with its programs, projects and aims.

However, there are problems here too which surface if we examine once more the three virtues required of any defender of the public space. The main problem is the law itself. As Habermas remarked, the law is the connection between two kinds of procedural legitimacy.³⁸ The legitimacy of the judicial procedure is to a large extent dependent on the question whether the law was administered properly. But the law can play this role on the basis of the assumption that it reflects the will of the majority of the (representatives of) the citizens. So the legitimacy of the judge depends for a large part on the legitimacy of the law and that legitimacy in turn depends on the legitimacy of parliamentary procedures of decision-making. The law is therefore the connective tissue, linking democratic and judicial procedures.

This connective issue, however, is losing firmness if the central legislator contends itself with vague standards prescribing just some values (fairness and equity) or abstract aims to be pursued. If the judge has to cope with such vague standards, the degree of inclusiveness will be diminished. Inclusiveness of interests is for a large part guaranteed by the assumption that the law embodies a balance between interests since it is the outcome reached in a democratic procedure that is designed to include as many interests as possible. If the law is too uninformative to act as such a living compromise or balance, this would entail that from now on the judge can only hope to include the interests of the *parties before him*; the concrete parties of the case at hand. But obviously, this limits the degree of inclusiveness considerably.

The same applies to the virtue of explicitness. Having no recourse to explicit standards, the judge has no other option than to formulate them himself or to rely on the rules and standards formulated by others (supervisors, organisations). It is clear that the judge is often reluctant to execute the job himself. He will remain on the safe side, referring to fairness and equity, and will not take the risk that his decision be repealed by courts of higher instance.³⁹ If, on the other hand, he takes the virtue of explicitness seriously, the judge has no other option than to rely on the rules and norms that have been developed by the lower echelons.

However, if he chooses the latter option, he is confronted with the problem that he cannot act as the judge who is blind to the peculiarities and contingencies of the concrete persons in front of him, which are relevant to the case at hand. He has to rely on norms for instance, which inform him that this particular branch of industry, of this particular size, can commonly be expected to achieve this particular level of performance in, say, health and safety precautions or environmental measures. He has to get into detail, and to take into consideration the particular make-up of the parties before him. In other words: he loses the virtue of abstraction. Although he himself may still represent the disembodied public realm, the parties before him will turn more and more into the concrete entities or living individuals they are, and whose circumstances should be taken into account. Of course, this problem is not new. It is inherent in any form of judicial decision-making. What is new, however, is the extent to which particular characteristics should be considered. If norms are made by lower echelons,

38 Habermas, J., 1988, op.cit., p. 73.

39 This risk-avoidance was criticised by Barendrecht, Maurits, *Recht als model van rechtvaardigheid: Beschouwingen over vage en scherpe normen, over binding aan het recht en over rechtsvorming*, Kluwer, Deventer, 1992.

tailored to their specific needs and capabilities, these particular characteristics determine the norms that are applicable.

We may conclude that even if we are justified in our belief that the judge is genuinely disinterested and impartial, he cannot attain sufficient inclusiveness, explicitness and abstraction to uphold a strong public sphere on his own. He is bound by the law and the shortcomings of the law directly affect the judge as well. Vague laws will compel him to either use his own discretion, which limits the inclusiveness of interests, or to rely on standards of other bodies, which limits the degree of abstraction. Needless to say that this applies to both the national courts and to the ECJ.

8 Possible directions

Not one of the players in the field seems eminently suitable as a defender of the public sphere. This has nothing to do with the shortcomings of the players, but with the enormous complexity of the tasks that are undertaken. To create and sustain a society where socio-economic rights are safeguarded, where the financial climate is wholesome and a thriving market is ensured, where safety is guaranteed and the environment is protected, where sciences and arts are flourishing (but flora and fauna as well) and where a great diversity of interests, opinions and values are taken into account is something that cannot be brought about by the nation-state or by any supra-national entity. Such a task probably calls for an entirely different ordering of affairs.

It is probable that the current system of goal-regulation and outsourcing of regulation is a beginning of such a new ordering. If that is right, we should try to repair its shortcomings. The loss of abstraction is probably not to be remedied. The more regulation takes place at lower levels, the less room there is for abstract concepts such as 'the citizen'. Probably, the functional regimes will increase in importance. Already now this is how a major part of European legislation is drafted.⁴⁰ This might imply a supranational ordering along functionalist lines. Whether such an ordering might overcome fragmentation and concretisation is yet to be seen.

As for explicitness, we have seen that rules are made extremely explicit by the lower echelons which are required to report on the progress made. Elsewhere I describe the perverting effects of such an excessive degree of explicitness more fully.⁴¹ But its effects can be beneficial as well (enabling change and criticism). Further analysis of the conditions under which detrimental and beneficial effects can be expected seems to be necessary.

Inclusiveness should be ensured by institutionalising the way committees and boards, professional bodies and associations should be constituted. It should no longer be possible that 'self-regulating bodies' are created in a haphazard way, on the spur of the moment. Also the procedures of decision-making and rulemaking should be subjected to explicit rules, safeguarding at least *a moderate degree* of transparency in these corners. Not only the outcomes (rules and

⁴⁰ Smismans, Stijn, *Law, Legitimacy, and European Governance: Functional Participation and Social Regulation*, Oxford: OUP, 2004.

⁴¹ 'Who is regulating the self?', forthcoming.

codes) should be published, but also the procedures by which they were devised should be accessible to the public at large. Deficiencies in inclusiveness are then noticed more easily.

The lack of coordination that is felt so clearly in this style of legislation should be addressed by thinking of ways to manage potential conflicts between functional regimes. National authorities should probably spend less time on controlling post hoc what each sector has done and not done, and devote more time to the organisation of the traffic *between* the various sectors.

Finally, the nation-state should try to regain some of its impartiality by thinking of new ways to separate powers. Legislative powers should be strictly separated from the competences to allocate funding, subsidies and benefits. It should be constitutionally prohibited to use subsidies as an instrument to enforce policies. Safeguarding socio-economic rights should not be dependent on the performance of civil duties. Above all, it should no longer be possible to turn socio-economic rights into favors attached to civil obedience or performance.

9 Conclusion

On the basis of a broad notion of the public sphere as a space where one acts in a particular way in order to be understood by relative strangers, I have tried to formulate a few normative criteria that should be met in order to maintain that sphere. The public space should be inclusive, in the sense that different opinions, rules, values and interests are taken into account. It should coordinate these differences on the basis of rules that are explicit, clear and precise and which can therefore serve as criteria for justification as well as criticism. Finally, the categories used as well as the rights and duties attached to them should be fairly abstract. They should abstract from the particularities of the individual persons and circumstances in order to arrive at shared meanings.

Explicitness, abstraction and inclusiveness do not arise and grow spontaneously. These virtues ought to be preserved and maintained and that should be done by a neutral third party which is powerful but also impartial enough to include, weigh and balance interests by using explicit rules that cover abstract categories and attach equally abstract rights and duties to them. Several candidates present themselves as such defenders of the public sphere. The most plausible candidate is the nation-state. However, its impartiality can be said to be jeopardized by the essentially distributive tasks that are entrusted to a regulatory welfare-state. The distribution of socio-economic burdens and benefits turns the state into an interested stakeholder, and, consequently, the distinction between rights and favors tends to be blurred. The subjects of such a regulatory state risk losing their abstract title of citizenship to the extent they are addressed and regulated as people with particular needs and interests. Finally, the need to draw fine distinctions according to different needs and interests, leads to an ever-growing body of excessively detailed rules.

The current tendency to overcome this fragmentation by issuing goals to be concretized by the norm-addressees themselves, shifts the defense of the public sphere to a multitude of more or less 'self-regulating' bodies, boards and committees. Although this leads to increasing explicitness of rules and standards, the requirement of inclusiveness can only partly be met.

Some of these bodies are more inclusive than others and matters may vary from case to case. Clear rules concerning the degree of inclusiveness are lacking. Finally, the virtue of abstraction cannot be attained at all in this fragmented landscape. Each of the institutions and bodies are organised around a single aim. These functional regimes hardly interact and there is little room for coordination.

The increasing partiality of the nation-state together with the fragmentation that ensues where legislation is outsourced to norm-addressees have led some people to emphasize the role of the judiciary as an important candidate for preserving the public space. However, since the legitimacy of the judge is ultimately based on the law as the product of democratic procedures, he cannot hope to escape from the increasing particularization of categories, the vagueness of the general clauses that are issued at the central level and the lack of inclusiveness resulting from deficient democratic procedures.

Wherever we turn, we are compelled to conclude that the three virtues of explicitness, inclusiveness and abstraction cannot all three be realized to the same extent. The complexity of the matters regulated by the welfare-state led to a situation in which explicitness can only be attained at the cost of abstraction, and inclusiveness can only be attained at the cost of explicitness, whereas all three are affected by the apparent inability of the official domain to retain its impartiality.

We are still a long way from the situation in Gujarat, with which this article began. But we should not take that distance for granted. Where discretion comes in place of explicit rules, and where impersonal roles are particularized, rights sooner or later turn into privileges that can be suspended at will.

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