

THE PUBLIC INTEREST AND THE WELFARE STATE: A LEGAL APPROACH

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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. Kadriann 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 fletched 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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