

Social security as a public interest

A multidisciplinary inquiry into the foundations of the regulatory welfare state

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1 Introduction

This paper 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. The paper presents the findings of multidisciplinary study into the foundations of the regulatory welfare state, carried out over the last two years at the University of Groningen. The full study will be published as a book in 2010.

In the Netherlands the 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 misun-

derstanding 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 preoccupations 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 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.

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).

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.

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.

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

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.

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 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 eventually a

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.

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.

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 rela-

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.

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.

tions 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

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

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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

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 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.

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.

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

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.

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.

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

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)

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.

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 negative effects should 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 the re-inegration market, where clients play 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 pos-

sible 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.