

Is there a European Work-First Welfare State? In search of a legal answer

Concluding remarks

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Work has become the centre of most modern welfare policies. It is the primacy of work, as the proposed key-aspect of welfare sustainability, which has created notions of *work-first welfare*. A main political concern of most European countries in the last years has been to develop strategies that will increase the level of labour market participation of the workforce.

Comparative welfare state research has provided us with knowledge of some of the systematic, structural, differences existing between western welfare models. Still, in spite of differences, a widely spread concern for the economic sustainability of social security systems seem thus to have led to a common response: an ambition to turn passive recipients of benefits into active participants on the labour market. We used the notion of “employment support” as an overarching notion to describe this phenomenon. One of the main goals of this study was to find a *legal* answer to the question on whether there is a specific response in European states to this challenge. Is there a “European work-first welfare state”? What are the normative implications of it – both on the EU and on the national level? Can we identify legal strategies and normative patterns that would enable us to compare the impact of “employment support” in different legal systems?

”Work-first” in EU-law?

An important question dealt with our research project was about the possible effects of the interplay between national and EU employment and welfare legislation in Europe. Although much of the positive measures that are possible to take on an EU-level in the area of welfare are soft law, it is apparent that this soft law has developed into less soft structures. From notes by the Commission in reports in the early 1990s, to an organized governance structure with a firm legal basis in art 128 where both Council and Commission are dominant actors. Additionally, the EC-treaty in art 137 express that questions on most aspects of working life are questions where the EU has (a limited) competence to legislate or at least use the OMC-method. Seen together with the EMU, the OMC can be seen as a complement to the traditional EU-method of hard law.

This expansion of the use of soft law and the new techniques for governance is often characterized as symbols of a development where member states seek new methods of integration without pre-emptive effect. A response to the fact that ever widening competences at EU-level have provided for a more heterogeneous effect of Community law on national law. But seen in relation to the diversity of national welfare states, e.g. the differences found in the construction of legal instruments (benefit levels, personal scope etc.), level of economic development and normative aspirations and institutional structures, there are minimal chances to be successful in harmonization of European social policies.

Even if the European Employment Strategy has connections to traditional EU-lawmaking, it is still a “neo-voluntary”¹ legal method which can be characterized as an intergovernmental rather than a supranational procedure. There are supranational features in the sense that the Commission holds a central position and that the guidelines are decided upon with qualified majority voting in the Council. However, the member states have the last saying as it is up to them whether they want to follow the guidelines or not. This of course effectively limits the possible achievements of the open method of coordination.

After stating that the combined efforts of soft and hard law regulation at an EU-level have at least a potential impact on national social policies, the next question of concern is what the normative contents of this impact is?

Already in the late 1990s critiques pointed out that the values of national welfare state regulation were not reflected in the forming of the employment strategy. Looking at the development of the EES within the Lisbon-process, it seems evident that the EU has retreated from promoting social citizenship and moved towards a narrower work-line oriented conceptualization of social security. This would mean that there is an expressed common EU normative structure within the OMC governance method. However, it must be stressed again that the commitments are free of clearly defined obligations for the Member States. Still, the development at national level also seems to emphasise work-oriented models in reshaping social security models.

When exploring the impact of the EES and OMC more closely, there seem to be very little (if any) evidence of real legal impact on national legal reforms, even if the policy formation and debate is carried out in an institutionalized European context. Still, national policy choices are defined as matters of common concern and governments are willing to present their plans for joint discussion. Although the OMC system is without sanctions, the joint discussions on national choice with the goal to set common indicators of achievement and objectives mean that the system is exposed to peer-review. However, one should also note that the OMC development is joined with a, however modest, development of the “hard” Community competences in the field of social law. Substantially, the OMC cannot be considered to contribute to the development of a common social policy with a direct im-

¹ Streeck, W. (1996) Neo-Voluntarism: A new European social policy regime. I Gary Marks et al (eds.) *Governance in the European Union*, London:Sage.

pact on national social law. But as a procedure it is new and complementary, and receives a position in law-making on the national level.

Legal strategies and normative patterns as a comparative point of departure

The complexity of social security law is well-known among those who work in or with the field. This is a kind of law that is often very technical, that is prone to change and where the changes made are inconsistent. It is a legal field where laws tend to end up a patchwork of different agendas and interests and often with an aim to steer people's behaviour, a field where the interdependences between different regulations are many, and where the results of administrative as well as judicial decision-making often is hard to anticipate. Still, efforts have been made to describe these complex systems in a structured way for comparative purposes. Examples of structuring elements that have been used are: "concepts and sources of social security, administrative organisation, personal scope of application, risks and benefits, financing and judicial review".² This study takes a slightly different approach.

Our aim was to capture the way *legal constructs* (rules, principles, practises) are functioning as building blocs in the implementation of social policies, and how the different usage and combination of these will determine different modes of governance. *One* example of a set of legal strategies important in the field of social security is to be found in the area of *demarcations*. The issue of demarcations seem to be at the core of social security law, to separate the worthy from the non-worthy and always keeping an eye out for malingerers (real and imagined). In social security the working are separated from the non-working, the sick from the unemployed, the disabled from the sick, the needed child carer from the working child carer or the unemployed or sick child carer, and so on. Demarcations are often important from an individual perspective as living conditions might improve or decline quite drastically depending on classification. Also from the perspective of the provider (for instance state, local authorities, unions or a contracted private sector actor) demarcations are important. From a governance perspective they can be used to influence behaviour and from a more pecuniary on an administrative level they can serve the function of pushing expenses to budgets "elsewhere". The present study also indicated other such areas where differences or similarities in legal strategies are of core importance for the normative character of a social security system.

What is provided by this study from a mere legal perspective is this suggestion to identify and use the legal strategies and normative patterns that mark social security law as the much cherished "functional elements", cutting through the diversities of social security systems and making them possible to compare. From the perspective of welfare state research, more important might be if the suggested ap-

² Pieters (2002), *The Social Security Systems of the Member States of the EU*, Intersentia Publishers.

proach leads to knowledge that lay bare the impact of legal regimes on the elaboration, development and legislative implementation of social policies.

Social security law is, as has been mentioned above, as a field of regulations in most systems marked by many and quick changes. This is indisputable, yet although Governments change, and schemes are re-labelled, benefits are raised and lowered and institutions re-organise... there is also in social security law some normative structures that hold a firm grip on the systems as such.

This stability of the models or systems has been noted in welfare state research. The economic crises of the 1990s and the reforms that followed, resulted in academic analyses discussing the dismantled welfare state, but also the surprisingly strong institutional consistency that could be concluded in its aftermath. In this field of analysing change and consistency, law has something to offer. As most lawyers are aware, rules rule on the surface, but to apply them, to understand them, to make them work in the context where they are set to have meaning, they must be linked to the deeper levels of prevailing normative structures. While the surface is prone to change easily, the underlying structures will safeguard continuity and secure against any fast leaps. In cases where surface changes do not relate to the deeper levels, the use of the legal system might well turn out a policy-obstacle rather than as an efficient tool for reform.

On a fundamental normative level it could be argued that most European welfare states are in tune. A basis for this kind of argument could be made by references to the European Social Charter or the case-law produced by the European Court of Human Rights. So while the surface level is often marked by constant reforms, a characteristic of the fundamental level is relative consistency and coherence. In the midst of such a scale, running from consistency on one end and constant alterations on the other, legal strategies, it is argued, might be found somewhere in between. To make legal strategies the focus of this study is thus to look for elements in legal systems that are more persistent than "rules" yet more adaptable to shifting circumstances than basic values. In the identification of the legal strategies used to implement measures of employment support in different legal models there might thus be an answer not only related to whether systems tend to converge or diverge but also some normative explanations as to why this is happening or not.