SOCIAL SECURITY AS A PUBLIC INTEREST: A MULTIDISCIPLINARY INQUIRY INTO THE FOUNDATIONS OF THE REGULATORY WELFARE STATE

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Abstract

Why is social security a public interest and how does this reflect on the role of the state? This fundamental question is answered differently by various disciplines. This article gives an overview of an economic, a public administration, a legal and a philosophical viewpoint. It is observed that while social security is strongly associated with the public interest, it is never argued that it is exclusively a state affair. Private arrangements also play a role. With the emergence of the 'regulatory welfare state' private and public responsibilities become more intertwined. In order to monitor the success of the regulatory welfare state, it is necessary to be able to measure the extent to which new forms of governance contribute towards realising social security as a public interest. In order to do so, we need, first of all, to gain a deeper understanding of the core principles of social security. These principles should be seen as objectives which should be adhered to whatever choices have been made as to the division of responsibilities between the state and private actors. We also need to gain an understanding of the effects of various regulatory instruments and the way they interact.

Keywords: social security, public interest, regulatory welfare state, market failure, public values failure, fundamental socio-economic rights

1 BACKGROUND

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This article deals with the fundamental question of why social security is a public interest and how the answer to this question reflects on the role of the state. It contains some of the findings of a forthcoming book, which will be published within the framework of the Groningen research programme entitled 'Public Governance and the Welfare State'.[1] Before explaining the aims and structure of the present article, some attention will be given to the background of this study.

'Public Governance and the Welfare State' is a six year research programme, which includes funding for two PhD and two Post-doctoral researchers and aims to achieve a deeper understanding of the role of the state in privatised social security programmes. In many countries this topic has gained attention, as governments have shifted the governance of social security from the public to the private domain. In the Netherlands, this has been done by strengthening the responsibility of individual employers, and by granting a larger role to private actors, such as insurance companies and private re-integration services. This shift of governance has mainly affected the areas of healthcare, sickness and invalidity insurance, and re-integration services.

Looking more closely at the measures that have been introduced in different countries, it appears that privatisation is never fully fledged. Governments maintain a firm grip on privatised 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 how the regulatory framework contributes to social security as a public interest.

While the project deals with the functioning of various regulatory instruments in social security, it also touches on the underlying question of defining the public interest of social security itself. Why should governments want to maintain a grip on privatised

[1] The book (Vonk, Plantinga, Tollenaar and de Ridder forthcoming) bears the same title as this article. The findings of the research were presented at the EISS-conference in Athens on the 1-2 October 2009 and were subsequently discussed at an international conference, entitled 'Regulating the public interest', which was held in Groningen on the 17 November 2009.

social security schemes in the first place, and what elements of these schemes should be made subject to government control?

The latter question is a difficult one to tackle. Not only is the subject likely to touch on the political and ideological preferences of the individual, but more importantly from an academic point of view, it is perceived very differently by different disciplines, such as economics, the social sciences and law. The confusion is exacerbated by the fact that each of these disciplines makes use of its own conceptual framework and similar terms may have different meanings.

The Babylonian misunderstandings which surround our subject led us to the conviction that it is dangerous to mingle the various approaches. It is better to respect the peculiarities and methods pertaining to each of the academic disciplines. In a later stage, it may be possible to come to some overarching analysis but first we should gain a deeper understanding of the way the disciplines approach the subject of social security as a public interest. To gain such an understanding was the objective of the study underlying the present article.

2 RESEARCH METHODS AND THE STRUCTURE OF THE ARTICLE

The study was set up almost as a scientific experiment. Four disciplines were selected to offer contributions: economics, public administration (being in itself an amalgam of various social sciences), law and philosophy. The reason for this choice was that, in our earlier discussions, the first three disciplines seemed to be associated with strong views on the appropriate methods for identifying public interests. Philosophy was added at a later stage in order to obtain a better insight into the background of different approaches to the public interest. We invited a number of expert informants representing these disciplines, first of all, to reflect on one question (admittedly consisting of two parts): (a) is social security a public interest?, and (b) how does the answer to this question reflect

on the role of the state?[2] While it was tempting to provide working definitions (for example of the term 'public interest') we refrained from doing so, as we were primarily interested in learning from the disciplinary framework of the expert informants themselves. It was assumed that their own approaches would reflect preoccupations which are typical of the disciplines involved. In this way the experiment would yield the clearest results.

After discussing some preliminary problems relating to this study (in section 3), we present an overview of the answers given to our research question from the angle of economics (section 4), public administration (section 5), law (section 6) and philosophy (section 7). Finally, we draw some general conclusions (section 8).

We are aware that no single answer can be given to our question from the point of view of any of these disciplines. The well-known Dutch saying that 'two people make a church, and three a church division' applies also to academics; there is no such thing as *one* legal opinion, *one* economic doctrine, let alone *one* philosophical truth. The findings are therefore presented as the viewpoints of the expert informants who contributed to this study, who are identified in the introductions to the relevant sections.[3] Each section contains a reference to two key publications, which the expert informants referred to most often in the subsequent discussion.

3 PRELIMINARY OBSERVATIONS

3.1 Social security as a public interest: a tautology?

Social security is a collective affair which cannot be accomplished by someone on his/her own. If an individual decides to save up money for himself/herself, that is very nice for that individual but it is not social security. Social security always presupposes an element

[2] There was also a second question dealing with the instrumentalisation of the public interest, which was dealt with by another group of writers. This part of the study has been excluded from the ambit of this article.

[3] I am much indebted to all the informants for giving their permission to be named in this article.

of sharing and solidarity. This being the case, one can question whether raising the issue of the public interest is really a superfluous exercise. Is it not so by definition?

We are aware of this dilemma. This article is therefore entitled 'Social Security *as* a Public Interest'. Yet it must be borne in mind that the very fact that social security is a collective affair does not mean that there is any agreement on the interests that it serves and why these interests should be considered as 'public'. Indeed, the various contributions to our study provide us with impressive testimony of the differences of opinions that exist in this regard. So even if the question that is raised of whether 'social security as a public interest' is a tautology, it is still an interesting one.

The tautology problem lingers on when we have to define the concept of social security. Very often reference is made to the definition employed in major international instruments, such as ILO-Convention 102 and EC Regulation 883/2004. This definition refers to systems for income protection related to a number of specific social risks, such as unemployment, sickness, invalidity, old age, etc. While it is possible to fall back on 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, both ILO-Convention 102 and EC Regulation 883/04 exclude contractual social security arrangements from their material scope of application.[4] If we were to take a similar stance, raising the question of public interest in social security would not be possible, as there would simply be no social security outside the public domain.

There are, however, two major problems with this public law bias in the concept of social security *stricto sensu*. In the first place, it excludes non-governmental, private and occupational, schemes that contribute to the realisation of the objectives of social security. In the second place, it does not take into account the diversity in 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 and private approaches. These approaches may exist side

[4] Unless included by separate decision (art. 1, sub. l Regulation (EEC). 883/2004) or supervised by public authorities and jointly administered by employers and workers (art. 6 ILO-Convention no. 102).

by side, or layer upon layer, or may be mixed within a single scheme; sometimes public schemes allow for private elements, e.g. opt outs or private administration, while private schemes are often publicly regulated and supervised. The role of the state in relation to social security varies from that of 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 implies that privatisation 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 our study it was not possible to restrict ourselves to public social security schemes in the formal legal sense of the term. All systems providing protection against the internationally recognised social risks must be taken into account, regardless of whether these are based on formal state legislation, collective agreements or any other form of self-regulation, or even individual contracts. We are conscious of the fact that schemes that are formally covered by private law may also in fact come under some form of public governance.

3.2 Social security as a monolith?

The general nature of the study also implies that social security is treated as a monolith. In reality it 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 the case of insurance against occupational injuries (the latter risk being primarily an employer's liability). Likewise, it makes quite a difference whether we speak of basic minimum subsistence schemes or of more generous benefit schemes (the former will invariably

weigh heavier on the responsibility of the state than the latter). This article merely contains a preliminary theoretical reconnaissance. Further differentiation as to the risks or systems involved was not possible.

4 AN ECONOMIC APPROACH

Two colleagues, Andries Nentjes and Edwin Woerdman, both professors of law and economics at the University of Groningen, were responsible for the economic analysis.[5] The authors are as much interested in indentifying and correcting market failures in the private provision of social security as they are interested in identifying and correcting public sector failures in the public provision of social security. Thus, their contributions immediately throw us off balance. Our starting point was that privatisation raises the question of safeguarding the public interest. However, economists assume the reverse. Privatisation measures can equally be introduced in pursuit of the public interest.
According to Nentjes and Woerdman, economics defines the public interest in terms of maximising the benefits of economic transactions for society. This definition is (still) in line with the old utilitarian maxim according to which societies should aim for the greatest happiness of the greatest number. The next observation is that the 'mixed economy' is based on the tacit assumption that the free market serves the public interest best, as it leads to an optimal allocation of resources. Therefore, the government only needs to step in when markets fail because of the occurrence of negative external effects, such as cherry picking, cream-skinning, free-rider behaviour, etc.

The rise of the public social security system can, to a large degree, be explained in terms of market failure theory. The major market failure is situated is the private organisation of solidarity amongst citizens. If vertical solidarity left to charitable institutions, the system would be under-funded. Free-rider behaviour would induce many to lie back while others contributed. The case is somewhat different for horizontal solidarity. Here Nentjes and Woerdman assume that the masses are too poor to pay private insurance contributions. But they also claim that paternalistic motives were involved in introducing

5 Two important works referred to are Culyer (1980) and Hanusch (1983).

mandatory social insurance, or at least the argument that mandatory social insurance only serves to correct failures in the insurance market is economically not convincing

Nentjes and Woerdman also set out the drawbacks of a public system. After all,aconomic theory is not interested only in market failure, but also in public sector failure. This comes under the umbrella of other terms, such as over-production, over-consumption, x-inefficiency and lack of choice. In social security these disadvantages lead to benefit dependency, a spectre which continues to haunt public social security systems. When the disadvantages of a public system outweigh the advantages, a partial privatisation is required, as this will give room to behavioural incentives that increase efficiency and stimulate individual responsibility.In sum, not only the rise of public social security systems, but also the (re)introduction of private elements, reflect the economic rationale of the public interest.

5 A PUBLIC ADMINISTRATION APPROACH

One of the Post-doctoral Fellows in the programme, Mirjam Plantinga, analysed the public interest from the perspective of public administration. She referred to the definition of the public interest used by Bozeman (2007) as 'outcomes best serving the long-run survival and well-being of a social collective construed as a public'. This definition coincides with the way social scientists perceive the function of social security, i.e. as something which is instrumental to the well-being of society as a whole, either formulated negatively, e.g. avoiding social disorder[6], or positively, e.g. in terms of social cohesion.[7] Nonetheless it should be noted that, in the social sciences, a unifying definition of the public interest does not exist. Plantinga was therefore more interested in contemporary methods of identifying public values.

The public value approach was first articulated by Moore (1995). According to Moore, the idea of managerial work in the public sector is to create public value just as the aim of managerial work in the private sector is to create private value. Public values cannot be derived from the aggregation of individual preferences but are expressed by citizens

6 Cf. De Zwaan (1988)

7 e.g. Berghman and Verhalla (2002)

when they make collective choices. Thus, the underlying values of our system can be traced by studying various public sources such as constitutional texts, court cases, political debates, journal articles, etc.

In the public value approach, the concept of 'public value failure' plays an important role. If a system no longer upholds underlying values, then that system can be said to have failed. This concept of public value failure is deemed to be different from the economic concept of market failure which is based on the assumption of a perfect market leading to an optimal allocation of resources.

Is social security a public value? Clearly so. Again and again, research provides evidence of broad underlying support for the welfare state, particularly vis-à-vis the elderly, the disabled and children. However, in dealing with support systems for the poor and the unemployed, there is an interesting anomaly. In countries with weak social security systems, public support for these groups is typically low. In countries with stronger social security systems, this is less likely to be the case. If citizens do not see themselves as net beneficiaries of the system, support for the welfare state fades away. According to Plantinga this proves that the public interest and public values are both social constructs. Our ideas interact with the way we organise them.

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

6 A LEGAL APPROACH

The legal analysis of the public interest was provided by George Katrougalos, Professor of Public Law at Demokritos University of Thrace, and by Gijsbert Vonk, the author of this article.[8] Katrougalos and Vonk pointed out that, although the concept of the public interest does play a role in law, it is an open norm whose meaning is variable. They therefore set aside any legal public interest doctrine and instead rely upon the relevance of socio-economic fundamental rights, adopted in national constitutions and international human rights instruments. Social security is recognised as one of these rights.

The recognition of social security as a fundamental right did not appear out of the blue. It is reflected in the various ways European states gradually attempted to solve the 'social question' in the 19th century. The constitutional recognition of social rights implied a change in the functions of the state: instead of regulating the market only on the basis of norms that were derived from the private law of contract, property and tort, states actively intervened in the operation of the economic system in order to achieve results that the economic system would not achieve on its own. In nearly all countries in Europe − the exception being the United Kingdom[9] − this change was given explicit constitutional recognition, either by explicit 'Social State' clauses or by analytical enumeration of social rights, or by both.

While there is much difference in opinion as to the legal nature of socio-economic rights, the recognition of social security as a fundamental right brings the subject of social security into the public domain. Social security is a public concern and when it fails to deliver, it is the state that must be held accountable.

Which obligations arise for the state from the existence of a right to social security? In answer to this question, Katrougalos and Vonk refer 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) but must ensure the proper functioning of private social security, making

8 The two works they most often referred to were Katrougalos (1996) and Sepúlveda (2003).

9 This is because the UK does not have a written constitution.

sure, for example, that funds are not abused (duty to protect), and it must actively develop a policy on the welfare state and create − as a minimum − a safety net in the form of a social assistance scheme (duty to fulfil). The conclusion is that 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 a heavier responsibility lies on the shoulders of the state when it comes to providing minimum protection. The state must provide at least a minimum subsistence level. Furthermore, a system of basic social insurance will not suffice without a strong element of state interference, as the necessary solidarity amongst the insured population will not arise spontaneously. When dealing with additional benefits, the state can more easily fall back upon a regulatory or facilitating role.

Katrougalos and Vonk accept that the above categorisation 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. They put forward seven basic principles in order to find out the extent to which rights to social security 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 headings of protection, universality, inclusion, reliability, solidarity, equality and good governance. It appears most of these principles are supported by concrete legal norms, albeit some more than others, and in differing degrees of concreteness.

7 A PHILOSOPHICAL APPROACH

The philosophical dimension was added to obtain an overarching understanding of the public interest in social security. For Onno Brinkman, Senior Policy Advisor International Affairs in the Ministry of Social Affairs and Employment, it was not an easy task to bring the wealth of philosophical thought to bear on the question of why we perceive social security as a public interest.[10] Brinkman pointed out that the question is

[10] Apart from the inevitable references to Rawls (1971), Brinkman frequently referred to Fleischacker (2004) and Kymlica (1990/2001).

never posed in these terms and that there are few fixed points of reference. Philosophers start with the question of how the concept of the public interest should be conceived. Is it merely an aggregation of individual needs or is it more than that, as Rousseau argued when he introduced the concept of the general will (*volonté générale)?*

Brinkman avoided such questions by expressing his personal point of view. He took the post-war consensus around Keynesian economic theory as a starting point for his analysis. According to him, this consensus led to a watering down of the differences between the public and the 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 the private interest. Brinkman described the major movements in political philosophy that have endeavoured to respond to this situation. The distinction between liberalism and communitarianism is a thread running through his account.

Liberals are united in their opinion regarding the autonomy of the individual and the neutrality of the state. Egalitarian liberalism formulates the public interest as a 'joint venture' for the benefit of individual participants. It puts a 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 for ensuring the cooperation of all. Although libertarians acknowledge a common fate, 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. They believe that private interests can best be realised through the operation of the market or through the exercise of charity.

Communitarians oppose both these notions. From their perspective, the individual can only be understood 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 nature communitarianism is

committed to the principle of reciprocity. 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 society as a whole. Fortunately it is not necessary to make a principled choice between these two extremes. As Rawls demonstrated, they balance each other out. Only when one extreme is given too much priority 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 that is immersed in community obligations (workfare!) runs the risk of crushing the individual.

As a post-script to Brinkman's contribution, it is interesting to note that some of the harmony between public and private interests that was characteristic of social security during the period of Keynesian consensus is reviving. There seems to be a new recognition that social security is beneficial to the economy, at least when it is organised in the right way. This awareness is now formulated in new language: such as 'flexicurity', 'employability' and 'facilitating transitions between work and care'.

8 CONCLUSIONS AND FURTHER RESEARCH

So what conclusion can be drawn from this exercise? Let us go back to our central question: is social security a public interest and how does the answer to this question reflect on the role of the state?

We can conclude with some confidence that social security is a public interest, although different disciplines give different explanations and employ different (but overlapping) notions of what the public interest is. 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, by defining it as a responsibility of the state. Philosophers consider it as an expression of justice.

There seems to be a basic consensus that the state cannot easily be disregarded. As to economic theory, it must be borne in mind that privatisation is argued for only as a correction of the public system, not as a substitute. It is not very likely that the big achievements in terms of solidarity between the rich and the poor, between the young and the old, etc. could have been realised without any direct government interference, e.g. without creating a social assistance scheme or introducing mandatory social insurance. This economic truth has implications for the legal sphere. When the state assumes responsibility for social security, it must see to it that an effective social security system is developed. Lawyers and economists agree: when markets fail, the state should step in. Furthermore, when public administration points at the interdependence between the strength of the welfare state and public support for it, this is not necessarily a neutral thing. Such interdependence can equally be interpreted as an imperative for the state to maintain a comprehensive welfare system. Finally, leaving aside the libertarian misgivings, most philosophers engaged in questions of distributive justice would consider some form of state interference necessary and legitimate. Even the *Rerum Novarum* (Pope Leo XIII 1891/1939) with its strong preference for corporatism, would accept the case.

At the same time none 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 depends on the underlying values that prevail in a particular society. Lawyers argue that formal state responsibility for social security does not rule out the involvement of private and collective arrangements. And finally, philosophical thought, both in its libertarian and its communitarian forms, 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 a mixed governance structure.

Such mixed governance structures are not unique to social security. Many policy areas in which 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 situation over and over again: the state has to provide a certain level of services, and holds itself responsible for the provision of these services, but needs private mechanisms or private actors to fulfil this responsibility. In social security there is an additional explanation. The roots of social security frequently stem from private relationships, e.g. in civil liability for industrial accidents, in the labour contract between the employer and the employee, in voluntary mutual funds for workers, or even in family relations. As a consequence, many arrangements for income protection are still somehow vested in these private relationships.

The next question then is how the role of the state must be defined *vis-à-vis* private responsibilities. It is at this point that our consensus starts to falter. The exact division of responsibilities is a question of political preferences, of ideology and of vested interests. It cannot be determined by academics. On the other hand, one should try to move away from simplifications of the truth and stereotypes, as if any change in governance should be seen either as a neo-liberal conspiracy or as a capricious socialist move. The debate should at least take into account that a strict public/private divide corresponds less and less to reality. In between the extremes of fully public systems and fully private ones there are endless shades of nuance. Occupational social security schemes have been public/private hybrids from the outset, and nowadays, in all branches of social security, new forms of 'mixed governance' have been introduced. As was mentioned in section 3, the reality reflects a mix of public, occupational and private approaches. Many measures which have been introduced under the umbrella of liberalisation and privatisation have not resulted in less but rather in different forms of governance. The challenge now is to understand how the new forms of 'mixed governance' work towards safeguarding the public interest.

In order to monitor the success of the regulatory welfare state in social security, it is necessary to be able to measure the extent to which new forms of governance contribute to realising social security as a public interest. In order to do so, we need, first of all, to gain a deeper understanding of the core principles of social security. These principles should be seen as objectives which should be adhered to whatever choices have been made as to the division of responsibilities between the state and private actors. A proposal for a categorisation of such principles was included in the legal contribution to this study (see section 6 above); the principles came under the headings of protection, inclusion, universality, reliability, solidarity, equality, and good governance. Two things need to be done to give further credence to such a proposal. First of all, research must be undertaken into the validity of these principles. A legal approach on its own is not sufficient since, as it has been pointed out, the core principles have extra-legal characteristics. We propose a mixed study based on economics, social sciences and the law. Secondly it is important to break down the meaning of the various principles into smaller parts, so as to better understand and communicate exactly what we are talking about. In the end, this could result in a full catalogue of principles and standards.

This second layer of research would focus on the operation of the various governance instruments. The classical mechanism is legislation. But there are many alternative instruments to support the legislative framework: many forms of supervision, fiscal steering instruments, contract management, policy coordination, benchmarking, evaluation studies, comparing best practices, etc. We should gain better understanding of these ‘alternative mechanisms’ and in particular the ways in which 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 system. Political preferences dominate the debate. 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. The

negative effects must also be taken into account. Is it really more efficient or will it only lead to more regulation, what is the democratic legitimacy of new forms of governance, etc? In other words, for all of us who embrace the concept of the regulatory welfare state, there is much work to be done!

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