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Confidence and Changes: Managing Social Protection in the New Millennium

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of view, strong and even violent criticisms made of globalised institutions during their meetings clearly show the need of a balanced solution in which the issues of social protection play a more significant role.

In this new and worrying context countervailing competitive flexibility by exporting high standards of social protection in order to preserve countries with stronger social protection systems from the race to the bottom seems to be the only adequate answer to the political challenge of globalisation. This answer can only come from Europe.

REFERENCES

- E. Ales, *Libertà e "uguaglianza solidale": il nuovo paradigma del lavoro nella lotta dei diritti fondamentali dell'UE. Il Diritto del Lavoro*, 2001, vol. 2-3.
- N. Acocella (ed.), *Globalizzazione e Stato Sociale*, Bologna, 1999.
- D. Andrés Gutiérrez, S. Schipani (eds.), *Il debito internazionale*, Roma, 1998.
- C. Barnanard, *Social Dumping and the Race to the Bottom: Some Lessons for the European Union from Delaware*, *European Law Review*, 2000, 57.
- P. Davies, *Posted Workers: Single Market or Protection of National Labour Law Systems*, in *Common Market Law Review*, 1997, 571.
- S. Deakin, *Social Protection: A Race to the Bottom, or Minimum Standards*, in A. Bosco, M. Hutsebaut (eds.), *Social Protection in Europe*, Bruxelles, 1997.
- G. Esping-Andersen, *The Three Worlds of Welfare Capitalism*, New York, 1990.
- M.R. Ferrarese, *Le istituzioni della globalizzazione. Diritto e diritti nella società transnazionale*, Bologna, 2000.
- M. Ferrera, *Modelli di solidarietà*, Bologna, 1993.
- R. Mishra, *Globalization and the Welfare State*, Cheltenham – Northampton, 1999.
- G.W. Smith, J.T. Cuddington, *International Debt and Developing Countries*, Washington D.C., 1985.
- B. Veneziani, *Nel nome di Erasmo da Rotterdam. Le faticosa marcia dei diritti sociali fondamentali nell'ordinamento comunitario*, *Rivista Giuridica del Lavoro e della Previdenza Sociale*, 2000, Vol. 4.

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Confidence and the Question of Political Levels – Towards a Multilevel System of Social Security in Europe?

I. INTRODUCTION: SOCIAL SECURITY – A PROMISE WITHOUT PROMISSOR?

Confidence is crucial to social security. Arguably, it is even a conceptual premise. It is evident, however, that the reliability of any promise is a matter of degree, and in the case of social security, there has frequently been reason to worry about whether the various systems will be able to live up to their promises. To be sure, the challenges change over time: today, it is the aging of our societies, the changes of employment relations, the increase of medical costs, to name but a few. The concern about the (re)current crises of the welfare state or, put differently, the lack of confidence, is by no means a historical novelty, justified though it might be.

1. *The fading of the nation state*

What might be new, however, is that for the first time, the problem is not only in the nature of the challenges, but also in the fading power of the challenged. For, as it was framed in the presentation of the conference, 'the European states' – and not only them, one might add – 'enter the new millennium much weaker than they were some decades ago ...'.¹ Globalization – or its less

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¹ This view is widely shared, see e.g. Ulrich Beck (ed.), *Politik der Globalisierung*, Frankfurt/Main 1998; Wolfgang Streeck (ed.), *Internationale Wirtschaft, Nationale Demokratie, Herausforderungen für die Demokratietheorie*, Frankfurt/Main 1998, both offering various social science perspectives on globalization; on its consequences see also Jürgen Habermas, *Die Postnationale Konstellation*, Frankfurt/Main 1998.

extensive, but more intense version: European integration – weakens the nation state by enhancing the competitive pressure between the various political units.

This development affects many traditional fields of public regulation, and arguably, it is particularly relevant for social policy. Social policy is particularly onerous to those burdened with the necessary levies, and it is particularly alluring to those in need of the support of the community. If that be true and the nation state will indeed prove incapable of guaranteeing social security in future, who will?

2. The alternative responses

There are different ways to deal with this question. In the current debates about globalization and European integration, all of the following approaches can easily be found, albeit not necessarily in their pure and explicit versions.

a) Restoration of the nation state

First, one might object to the premises of the above question. Globalization, so this argument runs, should not be mistaken as an irresistible force, because many of the social developments which form part of this rather fuzzy concept are consequences of deliberate political decisions. The ongoing process of transnational economic integration has not come about by itself, but has been promoted and framed step by step by our political representatives.

From this perspective, the decay of the nation state resembles an incremental suicide, and the political response would be to halt or even to reverse these developments. However, this is a theoretical option at most. One might disagree whether such a step would be feasible at all. Take the example of European integration, where it is an open question whether a Member State would be legally entitled to leave the Union. But in any event, the costs of restoring the nation state by opting out of all the developments of transnational integration would be so high that this alternative appears practically inconceivable.

b) Laissez-faire

This leads us to the second way to respond to the above diagnosis. If globalization thus seems to be a product of deliberate (and presumably rational) political choice, why then shouldn't its consequences for the welfare state be part of that rational plan, too? If so, there would be no need to worry about the fading of the nation state as guarantor of social security.

On a closer look, there are two versions of this approach. One is to play down the consequences for social security, claiming that the gains of economic integration will outweigh the losses. However, the objection to this view is evident. For it might be correct from a collective perspective, but it is highly questionable whether it will hold true for every individual, especially for the needy. After all, isn't the protection of the poor what social security is all about?

This is where the other version of this approach comes in. It is to declare desirable also the losses to the poor, that is, to hail globalization as the long-awaited remedy against a prolific welfare state and its excessively redistributive tendency. In short, this view defines away the problem. Accordingly, there is no point in *arguing* against it. Rather, the appropriate rejoinder seems to be the commitment to the opposite value choice, as identified, for example, by the quote from Albert Jaccard² which was cited in the presentation of the conference: "Social security, adapted to every great challenge and regenerated, has to remain a privilege for every human being in our societies and civilization."

c) Reinvention of government

This commitment shall be the starting point for the following considerations. It leads us to the third way to respond to the weakening of the nation state. It is to inquire into the possibilities to re-establish a political power which is able to take over the functions which have hitherto been ascribed to the nation state. As of now, there is little hope that such a 'resurrection of government' could take place on the international level. Rather, it is in the supranational level that this hope rests, i.e. in the 'unique enterprise of European integration'.³

This does not mean that all that needs to be done is to replace the nation state with a monstrous clone of it on the supranational level. For not only would this at best postpone the problem by transferring it to a geographically higher level. The EU differs so much from the nation state in its social and legal structure that entrusting it with the same tasks would seem hazardous for the moment and might remain illusionary even on the long run.

What is needed, thus, is a new design for the interaction of the various political levels in Europe, that is the supranational level, the various sub-national levels (municipalities, regions etc.) and, of course, the national level.

² Le souci des Pauvres, Calmann-Levy, Paris 1996.

³ See Joseph Weiler, The Transformation of Europe, 100 Yale L.J. 2403 (2480) – reprinted in Weiler, The Constitution of Europe – 'Do the New Clothes Have an Emperor?' and Other Essays on European Integration, Cambridge 1999, pp. 10–101, praising as 'the unique contribution of the European community to the civilization of international relations ... (that the idea of community) ... does not extinguish the separate actors who are fated to live in an uneasy tension with two competing senses of the polity's self, the autonomous self and the self as part of a larger community, and committed to an elusive search for an optimal balance of goals and behavior between community and its actors. A similar view has lately been expressed by Jean-Marie Guéhenno, Die neue Machtfrage, in the German weekly DIE ZEIT (No. 51/1999, pp. 11–12: 'Wollen wir, daß es morgen wirkliche 'Bürger der Globalisierung' gibt, so müssen wir rasch Stufen zwischen dem Individuum und der Globalitätsebene einbauen. (...) Dank des europäischen Projekts besteht Europas Trumpf darin, daß es bereits seit fünfzig Jahren in einer ständigen Spannung zwischen der funktionalen Logik einer supranationalen Integration und der historischen Bindung an die Idee der Nation lebt'.

For despite its decay, the nation state will certainly continue to play an important, if reduced, role.

Fortunately, this is not an entirely new task. For already now the provision of social security is typically spread among different political levels. This is not only true for the current Member States of the EU, and especially, of course, for the federal ones, whose past experiences might afford some guidance for the future of the EU. It also applies to other places of the world, and, again, especially to the federal countries such as, for example, the USA. There, the choice of the appropriate political for the various branches of social security has been a fiercely debated issue for decades.

In the following, I shall investigate whether there are lessons to be drawn from the American experience for the future shaping of a multilevel system of social security in the EU.⁴ First, I will identify the conflicting aims which have to be balanced when choosing appropriate political level for the provision of social security. Second, I will briefly describe the various modes of interaction between state and federal level in the US system of social security. Third, I will conclude by asking which role these arrangements could play for the future shaping of social security in the EU.

II. THE APPROPRIATE POLITICAL LEVEL FOR SOCIAL SECURITY

1. The 'magic triangle'

Obviously, it not an easy task to choose the appropriate political level for any specific branch of social security. It may be less evident, though, *why* this choice is a hard one. The following section tries to answer this question on a theoretical level, suggesting that there is a conflict of three aims. It will argue that while any two of these aims are reconcilable, the respective third one will always have to be compromised. As a short-hand description for this relationship, I will use the term 'magic triangle'.

The three goals are

- (the preservation of) social security,
- (the promotion of) economic integration, and
- (the principle of) subsidiarity.

'Subsidiarity' shall have a meaning close to the one which it is usually given

⁴ This question has been part of a larger research project carried out by the author as a doctoral dissertation. The following will summarize some of its results. The study itself, containing a more thorough discussion and more comprehensive references, is titled *Dezentrale Wohlfahrtsstaatlichkeit im föderalen Binnenmarkt? Eine verfassungs- und sozialrechtliche Untersuchung am Beispiel der Vereinigten Staaten von Amerika*, Berlin 2001.

in the context of European integration. It refers to the principle that within a multilevel political entity, political competences should be allocated to the smallest unit possible. Thus, it might differ from the legal concept (Art. 5 EC Treaty) in that it does not in itself contain any restrictions.

Also economic integration shall have the meaning which it has got in the context of European integration. Accordingly, it means the process of establishing a common market, which in turn shall be understood as a space within which the movement of goods, capital, services and labor is not inhibited by regional barriers.

What is more complicated, now, is to define social security. The exact meaning of this term is crucial to the above assertion, and it will become clearer in the course of the following considerations. Suffice it for now to rather loosely describe it as the multitude of regulatory goals which have traditionally been pursued by the welfare state, such as to correct the distributional effects of liberal market economy, in particular to guarantee the basic means of subsistence to its citizens, and further to enable the individual to insure against certain risks and thus render the future more secure.

2. The desirability of the three aims

The above suggestion implies that there would not be a conflict if any of the three aims were given up. Thus, the assertion of a conflict assumes that the pursuit of each of these aims is considered desirable, at least as long as one does not take into account the consequential restrictions in the pursuit of the other two goals. Plainly, this assumption contains a value judgement. Even if it is not necessary to require that indefinite maximization of the respective aims be desirable, it is by no means self-evident that this value judgement would be generally accepted.

a) Economic integration

Looking at economic integration, there seems to be hardly any problem. At least if one accepts the market as the primary mechanism of the (self-)steering of the economy, there is no reason why its scope of operation should not be (geographically) extended. For this should further promote the general wealth by improving the allocation of all factors of production. The picture changes, of course, once one takes into account the price of economic integration with regard to the conflicting aims, e.g. the weakening the nation state.

b) Subsidiarity

Turning to subsidiarity, the case seems similarly plain. The arguments for its desirability are well-known from the debate about the contents and justification of the principle of subsidiarity in the EU.

As in many other fields of state regulation, and arguably even more so, political decisions about social security entail value choices, and the larger the political community, the lower the chance for the individual to influence these decisions.⁵ At the same time, it is plausible to assume that the smaller the community, the better the chances for it to be relatively homogenous with respect to its members' set of values.⁶ Moreover, as social policy involves redistribution, the acceptance of a system depends upon the sense of solidarity within the community. This sense, in turn, is likely to be stronger in smaller communities. Finally, there are limits to the extension of the borders of a political community which go beyond these merely practical considerations. For the legitimacy of any political power depends upon the acceptance of the underlying definition of the political community, an essential part of which is the question of its borders.⁷

On the whole, subsidiarity is likely to be generally considered desirable. Taken to the extreme, however, there are limits to it other than those resulting from the pursuit of the conflicting aims. For there may be a minimum size for a political community, below which it would be impossible to achieve certain goals or inefficient to administer their pursuit. With regard to social security, such a minimum size might for example be an implication of adequate risk spreading.

c) Social security

Among the three aims, social security seems at present to be the most disputed one. Although there would presumably be little dispute about the desirability of at least some degree of social security, it has been mentioned before that from a liberal perspective, one might well advocate a reduction of its current level. As long as one agrees to this, the other two goals of the magic triangle can be pursued without any restriction.

For the following, however, I will assume that at least the present level of social security be desirable. This can be justified by two practical considerations: First, given the diversity of views on social policy in any community, it

⁵ For a thorough discussion of this idea see Weiler, *The Transformation of Europe*, in: Weiler, *The Constitution of Europe*, (fn. 3), pp. 81 seq.

⁶ For an early discussion of this idea see Charles Tiebout, *A Pure Theory of Local Expenditures*, 64 *The Journal of Political Economy*, 416 (418): "The consumer voter may be viewed as picking that community which best satisfies his preference pattern for public goods. This is a major difference between central and local provision of public goods. ... the consumer-voter moves to that community whose local government best satisfies his set of preferences. The greater the number of communities and the greater the variance among them, the closer the consumer will come to fully realizing his preference position." It is worth mentioning, though, that Tiebout did not apply his theory on redistributive social policy.

⁷ On the problem of defining the boundaries of a polity and its implications for democratic theory, see Weiler, *The Transformation of Europe*, in: Weiler, *The Constitution of Europe*, (fn. 3), pp. 83 seq.

seems plausible to define as desirable the level which has actually been chosen by this community. (This stipulation would get circular, however, if external influences on social security, such as competitive pressure due to economic integration, were taken as deliberately chosen by the affected community. Accordingly, they shall be excluded here.) Second, this definition is useful for purposes of presentation. For if there is any point at which more social security would be desirable, the magic triangle would come into play. So, in order to demonstrate its operation, why not stipulate the status quo to be this point?

3. The conflict of the three aims

The next step is to illustrate why there is a conflict between these three aims, and in particular, why they form a magic triangle.

a) Economic integration versus social security

Provided that subsidiarity be fixed at any non-minimal level, there is a tension between economic integration and social security. It has already been mentioned in the introduction that the current debates reflect the fact that this tension is actually felt in practice today.

The theoretical explanation roughly runs like this: In an integrated market, rational self-interested individuals will choose to produce, invest, and offer their services and labor in the region which offers the most favorable conditions for them. If the political decision-taking is not fully centralized, the various regions within that market will differ with respect not only to their natural conditions (climate, density of population etc.), but also to the political ones. Part of these political conditions is the degree to which social security is guaranteed in any given region, that is, more specifically, the level of taxes and contributions on the one side and the kind and amount of state benefits on the other.

One option, then, is to maximize economic integration. The consequence would be that low-tax and low-benefit states will attract wealthy people and capital, whereas high-tax and high-benefit states will attract poor people but deter wealthy people and capital. In order not to collapse, all will try to outbid their competitor regions in terms of low taxes and benefits, and social security would be condemned to a ruinous race to the bottom.

If social security is to be protected against this competition, this can be done by reducing the degree to which the regional borders are permeable for the factors of production. Looking at labor, for example, this could be done by denying equal access to a certain state benefit for migrants from another region.

b) Varying the degree of subsidiarity

This tension between economic integration and social security can be alleviated if the above assumption of a constant level of subsidiarity is abandoned. This becomes obvious if one imagines a system in which the provision of social

security is fully centralized. Then, neither would economic integration force any restrictions upon social security, nor vice versa. Subsidiarity, however, would be lost. In practice, one might identify this option with the vision which has been touched upon above, i.e. the monstrous European clone of a centralized nation state.

Conversely, it can be expected that the more decentralized the provision of social security, the larger the tension between economic integration and social security becomes. Thus, under this precondition of maximized subsidiarity, one of the other aims would have to be compromised even more than before. The result could either be the resurrection of impermeable borders, i.e. the protectionist dream of a revival of the pre-globalization order. Or one could go for the neo-liberal dream and renounce to social security.

c) *Objections to the model*

There are several objections to the above model, theoretical and practical ones. They will require some qualifications and refinements of the above considerations.

i) *Theoretical objections*

First, the model predicts a race to the bottom for social security in an economically integrated, politically decentralized system. Even from a theoretical perspective, one might object that this metaphor is misleading in several ways.

Indeed, the metaphor is exaggerated. For the race will be slowed down by the fact that economic prosperity, which might be expected at least in the low-tax-low-benefit state, could improve the economic position of many, thus rendering social policy both, more affordable and more dispensable. Also, the term 'bottom' is not quite accurate in that it suggests that the racing competitors will ultimately arrive at a place where there is no social security at all. However, some kinds and levels of social security also serve to improve the conditions of production. This is plainly the case for, say, educational grants, but to some extent it also applies to benefits meant to secure the basic means of subsistence. For, arguably, they improve social stability, prevent crime etc. So, some minimum level of social security is immune against the competitive pressure.

Further, the picture is incomplete. For exposing the regional provision and administration of social security to competitive pressure will not only reduce the overall amount spent in that area. Also, it should improve the efficiency of the administration.

In sum, this first set of objections forces some qualifications upon the prediction of a race to the bottom. The race might be less speedy than initially expected, never really reach the bottom, and even turn out to have some healthy effects.

Second, it has become clear from the above that the magic triangle is not

equally valid for all branches of social security. While a *pure insurance system* without any redistributive elements would be immune to the problem of alluring free riders, a purely tax-financed benefit would be affected most. Further, a *voluntary insurance system* does not run the risk of burdening too much and thus maybe deterring the entrepreneurs.

These observations may be seen as an attempt at a closer definition of how the term 'social security' shall be understood here. If the magic triangle is of any use, this is the case primarily for compulsory and non-contributory systems. The lower the degree to which a system complies with these criteria, the less applicable the model gets.

ii) *Practical objections*

From a practical perspective, one could object that the competitive pressure might in fact be much lower than the theoretical considerations suggest. Indeed, there are good reasons which support this objection. Take for example labor as one factor of production, or, translated into legal terms, free of movement of persons. Certainly, people do not in practice move as freely as the model assumes, even if they are entitled to do so. There are personal bonds to the region where they live and, this applies to the other factors of production as well, dislocation is expensive and information about the other places may be insufficient.

Even if the competitive pressure is likely to be much lower in reality than in theory, one should not abandon the model too easily. For its predictions might hold true even if its assumptions are not particularly close to reality.⁸ In fact, the magic triangle can operate without a single factor of production ever crossing any border, as long as people *believe* that it actually happens or that it could happen.

This can be illustrated by an example from the American experience: There, all states maintain a certain tax-financed benefit for needy families.⁹ However, the amount varies a lot from state to state. There is evidence that the mobility of the recipients of this benefit is rather limited. So, if a state has to grant access to this benefit for needy families who moved there from other states, the additional costs of doing so would be negligible.¹⁰ Still, there is evidence that

⁸ For an abstract discussion of this phenomenon see *Robert Merton, The Self-fulfilling Prophecy*, pp. 475 seq. in: *Merton, Social Theory and Social Structure*, New York 1968.

⁹ For more details on this program, see below III.4. (for its former shape) and III.5. (for its present shape).

¹⁰ In a recent case, the U.S. Supreme Court found that the state of California would have had to cut the benefit level by 72 cents per month and recipient in order include all newly arrived migrants without incurring any additional costs; see *Saenz v. Doe and Roe*, 119 S.Ct. 1518 (1528), decided in 1999. For a review of this decision and a short description of its history see *Graser, Do hard Cases Make Bad Law? Zur Entscheidung des Supreme Court in Sachen Saenz v. Roe* (including an English

the overall level of these benefits has fallen considerably since the Supreme Court held¹¹ that interstate migrants had a constitutional right to equal access to such benefits,¹² and that changes in the level of this benefit in one state influence its level in other states.¹³ One way to explain this is that the fear to become a welfare magnet is ubiquitous in state politics in the US¹⁴: in other words that politicians apply the magic triangle reasoning, regardless of its factual premises.

It seems that in this respect, the situation is quite similar in EU. For regardless of the factual mobility of people, which no doubt will be much lower here than in the culturally more homogeneous US, there is a wide-spread fear of free riders from outside (currently mainly the east) driving the social security systems into bankruptcy.¹⁵

In order to bring this consideration under the above theory, the theory needs to be extended. The competitive pressure can not only be transmitted by actual factor mobility, but also by its anticipation. In a decentralized, economically integrated system, financing a social security system becomes harder even if those burdened do not actually leave, but only *threaten* to do so. Conversely, even if high benefit levels are only thought to allure free riders from outside, this may in fact lead to a decrease of the benefit levels.

summary), *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht – ZaöRV* (= Heidelberg Journal of International Law – HJIL) 2000, pp. 367 seq.

¹¹ The first decision of the U.S. Supreme Court on this question was in *Shapiro v. Thompson*, 394 U.S. 618, in 1969.

¹² See *Paul Peterson and Mark Rom, Welfare Magnets – A New Case for a National Standard*, Washington D.C. 1990, pp. 8 seq.

¹³ This is the result of a recent study of *Paul Peterson* (see *Devolution's Price*, 14 *Yale Journal on Regulation* 111 (117)), measuring the impulse of a benefit reduction in one state on the level of the respective benefit in the neighboring states. For example, it found that between 1976 and 1989, a change of \$100 in AFDC-benefits lead to an average change of \$30 of these benefits in adjacent states. For Medicaid, the effect amounted to a \$13-impulse.

¹⁴ On the ubiquity of these arguments in the political debate in the US, see e.g. *Anne Alstott, Federalism and U.S. Social Welfare Policy: Fundamental Change and New Uncertainties*, 2 *Columbia Journal of European Law* 441, in particular her footnotes 70, 72; see also: *Devolving Welfare Programs to the States: A Public Choice Perspective* 109 *Harvard Law Review* 1984 – 'note' without discernable author (in particular 39 there); *Todd Zubler, The Right to Migrate and Welfare Reform: Time for Shapiro v. Thompson to Take a Hike*, 31 *Valparaiso University Law Review* 893 (935).

¹⁵ See for example *Danny Pieters, Reflections on the Methodology of Social Security Law Comparison*, in: *Franz Ruland, Bernd Baron von Maydell, Hans-Jürgen Papier* (Ed.); *Verfassung, Theorie und Praxis des Sozialstaats, Festschrift für Hans F. Zacher zum 70. Geburtstag*, Heidelberg 1998, p. 715 (734), who reports that right before the completion of the common market in Europe, nine out of (then) twelve Member States considered their own system to be the most generous or costly one and thus anticipated a downward pressure.

Conclusion

Simplistic though the model certainly is, it is submitted that it might be useful in rendering more transparent the political options between which an economically integrated multilevel polity can (and has to) choose. This becomes plain if the above thesis (i.e. the magic triangle) is framed as follows: Whenever it is sought to pursue any of the three aims, this requires to compromise one of the other two – but there is a choice which one.

III. COOPERATIVE FEDERALISM AND SOCIAL SECURITY IN THE US¹⁶

This last statement of the magic triangle shall be the basis for the following analysis of the US system of social security. It will focus on one particular aspect of this system, viz. the various modes of interaction between state and federal level in the provision of social security. Within the magic triangle, one might interpret such interaction as partial reduction of subsidiarity. This aspect might be particularly interesting from a European perspective because, according to the model, every reduction of subsidiarity should alleviate the tension between social security and economic integration, i.e. the very problem from which we started.

Admittedly, what is good for the US need not be good for the EU as well: there are still important differences between both systems. Despite all rhetoric of a European citizenship, the EU is far from the state-like integration of the US, to highlight just one of the key differences. This has to be borne in mind when comparing both systems, and even more so when discussing the transfer of some legal arrangements from one to the other. For no doubt, it does not make sense to expect that any legal instrument copied from the US system would work the same way in the EU.

So, even if one might draw some inspiration from the US experience with the partial (de-)centralization of social security, it remains necessary to critically examine whether any specific instrument would be suitable here. Besides, even if its suitability were guaranteed, its desirability had still to be discussed.

1. Overview

In the US, hardly any branch of social security has been left entirely to the states. Arguably, there is only one exception, viz. workers' compensation, and even here some qualifications may be necessary (see below). This does not mean, however, that there were not at least some programs within the other branches which are run exclusively by the states. For example, many states have programs of so-called General Assistance, tax-financed programs, that is, meant to provide some minimum support for certain groups of particularly

¹⁶ For a more detailed analysis see *Graser*, fn. 4, pp. 137 seq.

needy persons. Little surprisingly, the regional variation of these programs is considerable so that general statements are hardly possible. The conditions to be met by the recipients (work requirements, most frequently) tend to be relatively strict, and benefits are rather modest even by American standards.

As a general rule, however, there is some form of federal¹⁷ involvement in practically all major legislation in the area of social security. However, the actual shape of the federal involvement varies a lot from program to program. These various modes of interaction will be described in more detail below. First, however, two key aspects of the general legal background in the US should be highlighted. First, there is practically no *legal* barrier which prevents the federal legislature from regulating any branch of social security whatsoever.¹⁸ There are *political* ones, though, especially due to the strong emphasis on regional representation within the federal legislature.¹⁹ Second, not only has economic integration reached a very high degree in the US. Free movement of persons has also become a matter of *political* integration, i.e. an implication of US citizenship. In particular, the constitutional right to travel requires every state to make available (most of)²⁰ its benefits to all its residents,²¹ and every US citizen (whether employee or not) has a constitutional right to establish residency in any of the states.²²

¹⁷ In US terminology, 'federal' means 'central'.

¹⁸ For more detailed information on the question of federal competences see *Hans-Heinrich Trute, Zur Entwicklung des Föderalismus in den Vereinigten Staaten von Amerika, Zeitschrift für ausländisches öffentliches Recht und Völkerrecht – ZaöRV (= Heidelberg Journal of International Law – HJIL), 1989, pp. 191 (233 seq.); see also Graser, fn. 4, pp. 133 seq.*

¹⁹ For more detailed information on the question of the regional representation within the federal legislature see *Jörg Annaheim, Die Gliedstaaten im amerikanischen Bundesstaat – Institutionen und Prozesse gliedstaatlicher Interessenwahrung in den Vereinigten Staaten von Amerika, Berlin 1992, pp. 118 seq.; also Graser, fn. 4, pp. 132 seq.*

²⁰ The case law of the U.S. Supreme Court is inconclusive on this question. Possibly, benefits that are 'portable' could be excluded from the general rule of equal access; see *Saenz v. Doe and Roe, 119 S.Ct. 1518 (1527)*: 'Moreover, because whatever benefits they receive will be consumed while they remain in California, there is no danger that recognition of their claim will encourage citizens of other states to establish residency for just long enough to acquire some readily portable benefit, such as divorce and college education, that will be enjoyed after they return to their original domicile'; for a critical appraisal of this decision see *Graser, fn. 10*.

²¹ This has been the general rule for more than thirty years now. For despite all attacks, the landmark decision in *Shapiro v. Thompson, 394 U.S. 618*, has never been overruled in this respect. Lately it has even been explicitly confirmed in *Saenz v. Doe and Roe, 119 S.Ct. 1518*; for a detailed analysis of the 'right to travel' jurisprudence of the U.S. Supreme Court see *Graser, fn. 4, pp. 192 seq.*

²² Constitution of the US, Amendment XIV section 1: 'All persons born and naturalized in the United States ... are citizens of the United States and of the State wherein they reside'. ...

2. Complete centralization

One obvious way to prevent any race to the bottom from the outset is to fully centralize the provision of social security. To be sure, this is not a way to evade the conflict described above. Rather, it simply means to compromise not on social security, but on subsidiarity instead.

The US have taken this road in various fields of social security. Most prominently, their 'Old Age, Survivors and Disability Insurance (OASDI)'²³ is a totally centralized social insurance program with uniform contributions and benefits nationwide. In the field of non-contributory, means-tested welfare benefits, the approach of complete centralization has also been adopted for several programs, all of which specifically address a particular need of the recipients. The Food Stamps Program,²⁴ for example, is designed to guarantee a nutritionally adequate, low-cost diet to needy households. Although partly administered by the states, it operates nationwide on essentially the same conditions and offers identical benefits. It is funded from the federal budget. Similarly, most of the different programs of housing assistance,²⁵ which generally pay part of the rent of needy households, are wholly funded from the federal budget. They are administered locally, but in accordance with uniform national standards. Apart from these two programs, there are several others which are similar in structure, but significantly less important in terms of both, their total costs as well as the average amount of the benefit provided. These include additional programs to ensure an adequate nutrition of certain groups considered especially deserving or needy, such as small children and pregnant women,²⁶ programs which support the heating (or cooling) costs of needy households,²⁷ etc.

Admittedly, total centralization is not a particularly inventive answer to the above conflict. Still, as far as very basic benefits (such as food, shelter, heating) are concerned, the case for their decentralized provision is considerably weaker than otherwise. For in these cases, local tastes are not likely to vary

²³ See Committee on Ways and Means, U.S. House of Representatives, Overview of Entitlement Programs – 1998 Green Book – Background Material and Data on Programs within the Jurisdiction of the Committee of Ways and Means, 105th Congress, 2d Session, Washington 1998, pp. 1 seq.; the Green Book is the most comprehensive source on the law of social security law in the US. It is updated biennially. For purposes of convenience for the reader, reference shall be made primarily to this source here.

²⁴ Green Book 1998 (fn. 23), pp. 923 seq.

²⁵ Green Book 1998 (fn. 23), pp. 989 seq.; for a critical analysis of its recent developments see *Thomas Kingsley, Federal Housing Assistance and Welfare Reform: Uncharted Territory*, No. A-19 of the series 'New Federalism: Issues and Options for States', edited by The Urban Institute, 1998, available online under: <<http://newfederalism.urban.org/html.anf19.html>>

²⁶ Green Book 1998 (fn. 23), pp. 998 seq.

²⁷ Green Book 1998 (fn. 23), pp. 1011 seq.

significantly. Thus, subsidiarity loses much of its thrill. The only potential advantage which remains is the increase in the efficiency of administration, and only to the extent that the allegedly higher efficiency is due to the competitive pressure, not merely due to the proximity of administration. For, as the above examples have illustrated, national uniformity with respect to the essential standards does not rule out a decentralized administration.

Roughly the same reasoning applies to the centralized social insurance programs. This is not to say that the provision of pensions were *as such* considered the very core of social security and that there were no scope for significant local variation. Rather, the similarity to the above programs rests upon the fact that the public pension system in the US is primarily designed to secure a basic income. Benefits are low and their computation is strongly redistributive.²⁸ Accordingly, private forms of insurance play a large role in this field. So, to the extent that there actually is a public pension scheme in the US, it can be viewed as a *basic* program.

3. Federal socket plus optional state supplementation

A mitigated version of centralization is exemplified by the so-called Supplemental Security Income (SSI),²⁹ a federal program under which aged, blind or disabled persons are entitled to a monthly cash grant which is meant to cover their essential costs of subsistence. In principle, the program is administered and funded federally. However, the states are free to supplement the federal grant and to use the federal administration for the distribution of these additional benefits. Most states do so, but the extent differs considerably. Since the late seventies, the states have de facto been compelled to maintain the respective levels of supplementation they once adopted. For then, federal law made such maintenance a precondition to the availability of federal grants in other fields of social security.

4. Federal matching grants

Still less intrusive from the states' perspective is the approach adopted by two further welfare programs. One of them is Medicaid,³⁰ which provides basic medical services to certain groups of needy persons, such as recipients of

²⁸ This is illustrated best by the variation of replacement rates: today, a person retiring at the normal age after a full time career with steady earnings at about half the average wage will get almost 60% of the last wage, whereas the rate for a person whose wages were exactly at the maximum considered for contributions would get only 25%; for details see Green Book 1998 (fn. 23), pp. 26 seq.

²⁹ Green Book 1998 (fn. 23), pp. 261 seq.

³⁰ Green Book 1998 (fn. 23), pp. 950 seq.; for a detailed analysis see also Jürgen Kruse, *Das Krankenversicherungssystem der USA – Ursachen seiner Krise und Reformversuche*, Baden-Baden 1997.

income support under SSI and formerly AFDC (see below); in recent years coverage has gradually been extended especially to children in low-income households.

Until recently,³¹ there used to be another program, Aid for Families with Dependent Children (AFDC).³² This offered cash assistance to needy children who were deprived of parental support because at least one of their parents was absent from home continuously, incapacitated, deceased or unemployed. Additional payments were possible for the adult actually taking care of the child.

In both cases, states were formally free in deciding whether to establish such a program at all. However, the federal unit offered them to pay between 50 and 80% of the costs³³ (so-called matching grants) if they did establish one, provided that they complied with a set of basic federal rules. Practically all states have chosen to run such programs.³⁴ Generally speaking, eligibility was governed predominantly by federal standards, whereas the states had considerable freedom with respect to the benefits provided. Under the AFDC program, for example, it was left to the states to determine the amount of assistance. Regional variation used to be enormous: In 1994, the monthly benefit for a family of three ranged from about \$120 in Mississippi to more than \$900 in Alaska.³⁵ Only a relatively small part of this variation could be explained by corresponding differences in the costs of living.³⁶ Even in adjacent states, the differences used to be significant. If, for example, a family of three simply moved from Arizona to California, their AFDC benefit almost doubled.³⁷

Presumably, regional variation would have never reached such an extent without the federal participation in funding the costs. There has been much empirical research in the US on the question whether a downward pressure could still be felt with respect to these programs. The results have briefly been outlined previously.³⁸ They are not fully conclusive, but they tend to suggest that at least on a long-term perspective, the effects of such a pressure can be proven.³⁹

³¹ The program has recently been reformed and is now called TANF – for details, see below 4.

³² Green Book 1994, pp. 324 seq. (except for the year, the complete reference is as in fn. 23).

³³ *Ibid.*; inversely related to the per-capita-income of the respective state. Of the administrative costs, the federal share was fixed at 50%.

³⁴ Except for Arizona, which instead of Medicaid runs an experimental program for the provision of basic medical services – it does so with considerable federal support, see Green Book 1998 (fn. 23) p. 950.

³⁵ For a comprehensive overview, see Green Book 1994, (fn. 32), pp. 368 seq.

³⁶ See Peterson/Rom, *Welfare Magnets* (fn. 12), pp. 11 seq.

³⁷ From \$347 to \$607, see Green Book 1994, (fn. 32), p. 368.

³⁸ See above II.3. c ii.

³⁹ See above fn. 13.

5. Federal block grant

In 1996, AFDC was reformed. It is now called Temporary Aid for Needy Families (TANF)⁴⁰ and, as the new title already suggests, basically serves the same purpose as its predecessor. Yet there are major differences with respect to both, the substantive rules as well as the interplay between the federal unit and the states. The overall aim of the reform was to get AFDC recipients off the welfare rolls. Accordingly, the work requirements, which had been in force under AFDC already, were tightened and a maximum period of support was introduced. Furthermore, several measures have been taken to reduce the rate of out-of-wedlock births and teenage pregnancies, which had for long been considered major causes for long-term AFDC dependency. Apart from these new substantive requirements, federal standards have been loosened so that the States can use the increased freedom for experimentation.

Funding has also been reformed. The federal share no longer depends on the actual amount spent by the states, but is a fixed sum now (so-called block grant).⁴¹ Foreseeably, this will enhance the competitive pressure on the family assistance programs run by the states, even if in total the federal share remained the same.⁴² For the states now bear the full costs of any dollar spent on these programs in excess of the federal block grant. Accordingly, states can save much more now by cutting back these benefits.

At first sight, the new situation resembles the one under the 'federal socket plus optional state supplement' mode which is used for the SSI-program. On a closer look, however, the competitive pressure under the block grant system of TANF can be expected to be higher. This is not only due to the fact that the mobility of recipients, perhaps the major mechanism to transmit this pressure, is likely to be much higher for TANF than for SSI, the beneficiaries of which are elderly or disabled persons. Structurally, both programs differ in at least one relevant respect. Whereas under TANF, the additional costs of an increase of the number of recipients is borne solely by the respective state, under SSI such costs will be met primarily from the federal budget.

In sum, this new setting for family assistance is likely to result in an overall reduction of benefits. It might not trigger a race to the bottom, but almost certainly at least a stately walk downwards, as one commentator put it.⁴³

⁴⁰ Green Book 1998 (fn. 23), pp. 494 seq.

⁴¹ However, there are some exceptions: For example, it is provided that if the number of recipients rises extraordinarily, in particular due to high unemployment, some additional grants may be available for a limited period; *ibid.* at pp. 503 seq.

⁴² Which is not the case: In real terms, the total amount of federal funding is being reduced; *ibid.*

⁴³ See *Paul Peterson*, in: *Devolution's Price*, (fn. 13), pp. 118, 120 seq., and in: *The Price of Federalism*, The Brookings Institution, Washington D.C., 1995 p. 195; for the same conclusion see also *Devolving Welfare Programs to the States: A Public Choice Perspective*, (fn. 14), p. 1985; *Zubler*, (fn. 14), 31 *Valparaiso University Law Review* 893 (1999); *Jonathan Romberg*, *Is there a Doctrine in the House? Welfare Reform and*

6. Federal tax incentives for the provision of social insurance

Yet another mode of interaction has been chosen in the field of unemployment compensation.⁴⁴ Here, the federal unit levies a uniform payroll-tax from all employers throughout the US. However, if the states establish an unemployment insurance scheme in accordance with some federal guidelines, employers can credit the contributions to such a system against most of their federal tax obligation. The consequence is that all states have such an unemployment insurance scheme and that, in practice, the federal payroll-tax is reduced to a minimum.

However, there is some indication that the downward pressure is still effective even in that field. More than half of the states have set the regular employers' contribution at exactly the rate which can be deducted from the federal tax. In short, the states' position seems to be: "No gifts to the federal budget, but no additional burden to our employers".

7. Threat of a national standard

Let us return, finally, to workers' compensation.⁴⁵ As mentioned above, there appears to be no federal involvement in that field. All states have adopted specific rules for work-related injuries and diseases replacing the general fault-based rules of the law of torts. Further, in almost all states insurance for employers is compulsory, but may usually be purchased on the private market. Surprisingly, there is little evidence at present for any race, or even a walk, to the bottom. To be sure, benefits are not extraordinarily generous, but they rarely are in the US anyway. So, does that constitute an objection to the initial thesis of the inevitable conflict of subsidiarity, economic integration and social security?

First, one might reply that in this particular branch of social security, there are fewer mechanisms to transmit the competitive pressure. For potential recipients are unlikely to take into account the standard of workers compensation when deciding whether to move to another state. And even if so, since this type of insurance need not be redistributive at all, an influx of bad risks would not necessarily do any harm to the respective state's system. On the other hand, roughly the same could be said about unemployment insurance. There, however, regional competition is a topic even in spite of the federal involvement. Moreover, in both cases the other mechanisms which transmit the pressure (free movement of capital and goods) are still in operation.

the Unconstitutional Conditions Doctrine, 22 *Fordham Urban Law Journal* 1051 (1058); *Stephen Sugarman*, *Welfare Reform and the Cooperative Federalism of America's Public Income Transfer Programs*, 14 *Yale Journal on Regulation* 123.

⁴⁴ Green Book 1998 (fn. 23), pp. 327 seq.

⁴⁵ Green Book 1998 (fn. 23), pp. 1020 seq.

A second way to explain this apparent peculiarity of workers' compensation might be simply to maintain that is not that peculiar after all. For, not too long ago, there had been indications of a race to the bottom in this field as well. In fact, they were sufficiently strong that the federal legislature prepared the enactment of a federal standard for workers' compensation. Even though such a federal law has never been enacted, several low-standard states raised their levels of protection considerably during these preparations. So, one might conclude that the mere threat of federal involvement sufficed to outweigh the competitive pressure.⁴⁶

8. Summary

Table 1 serves as a summary of this section.

IV. COOPERATIVE FEDERALISM AS A VIABLE OPTION FOR THE EU?

It as been said before that the idea behind analyzing the US system of social security was to seek inspiration for the future shaping of the EU. Accordingly, this section will ask whether and how the concept of cooperative federalism could be applied in the EU as well, that is, whether and how the provision of social security could be (partially) centralized in the EU.

1. Too far-fetched?

Admittedly, this idea might seem somewhat far-fetched, at least at first glance. For in the current debates about the future shape of the EU, the (partial) centralization of social security has hardly been considered.⁴⁷ What is not far-fetched, however, is the apprehension that the present decentralized model might lead to an erosion of the national systems of social security. Yet this consequence can only be averted by either cutting back economic integration or by compromising subsidiarity and partially centralizing social security. Since a reversal of economic integration would not only have severe consequences for the *political* integration, but also does not seem a politically feasible option anyway, it might be not be that illusionary after all to at least consider the other alternative. In addition, the need to do so might soon become more pressing, if the promise contained in the introduction of a European citizenship in the Treaty of Maastricht⁴⁸ be kept and the remaining

⁴⁶ For this conclusion and the relevant historical facts, see *Sugarman* (fn. 43), 14 *Yale Journal on Regulation* 123 (130).

⁴⁷ A recent exception is *Miguel Poyares Maduro*, *Striking the Elusive Balance Between Economic Freedom and Social Rights in the EU*, pp. 449 seq. (471 seq.); in *Phillip Alston with Mara Bustelo and James Heenan*, *Human Rights in the EU*, Oxford 1999.

⁴⁸ Art. 17 seq. of the post-Amsterdam version, formerly Art. 8 seq.; for a critical appraisal of its current contents see *Guido Schulz*, *Freizügigkeit für Unionsbürger*,

Table 1.

Mode of interaction	Field of social security
1. No interaction (total centralization)	Old age, survivors and disability insurance (OASDI); old age health insurance (Medicare); food stamps; majority of housing assistance programs; last two non-contributory and means-tested
2. Partial funding by the federal unit	
a) Federal matching grant (conditional)	Basic health services to specified needy groups (Medicaid); until 1996: cash grant to needy families (AFDC); both non-contributory and means-tested
b) Federal provision of benefit with optional state supplementation	Cash grant to disabled or elderly persons (SSI) non-contributory, means-tested
c) Federal block grant (conditional)	Cash grant to needy families (TANF); non-contributory, means-tested
3. Federal tax incentive (contributions to a state insurance scheme can be offset from employers' federal tax obligation if scheme complies with federal rules)	Unemployment insurance
4. Threat of federal involvement	Workers' compensation (insurance system)
5. No interaction (fully decentralized provision)	General assistance, means-tested, non-contributory programs providing basic means of subsistence to certain groups, large regional variation

obstacles to the free movement of persons be torn down. Another scenario which could have similar effects is the envisaged enlargement of the European Union.

2. A tentative suggestion

To mould this into a concrete suggestion: Imagine the EU were to take this further step towards integration and free movement of persons were to become

Frankfurt/Main 1997, *Joseph Weiler*, *To Be A European Citizen: Eros and Civilization*, pp. 324 seq. in: *The Constitution of Europe*, (fn. 3).

an implication of EU citizenship. Then, needy EU citizens would be entitled to reside wherever they prefer and to receive public assistance at this place from this community. Consequently, the national standards of this basic assistance, especially in high-benefit states, would presumably be lowered due to the rising competitive pressure.

If, however, part of the benefits were to be funded by the EU, the competitive pressure would be alleviated and benefits less likely to be lowered. Evidently, there is a price for that. It is to be paid in terms of regional autonomy. It might, however, not be that high. If, for example, the EU finances only a socket which is fixed to the lowest common denominator of such cash grants among its Member States (a model close to the first mode of interaction described above⁴⁹), none of them will be forced to introduce a benefit level they do not consider appropriate. Even though the EU needs to raise the respective funds, if it shall finance a part of the grant, this does not entail any substantial loss of autonomy for the Member States. For they will save the corresponding amount of their own expenditures for such grants.

Of course, the alternative ways of shared funding known from the American practice could also be adopted. If the matching grant approach⁵⁰ be taken, the pressure could be alleviated even more. However, the price in terms of regional autonomy would be higher as well. First, it would require more flexibility on the part of the EU with respect to the overall spending on that grant, and, correspondingly, lead to a potential need to raise more funds. Second, regional redistributive effects could occur if the Member States tried to enlarge their absolute share of EU-funding by raising their benefit level. The block grant approach,⁵¹ on the other hand, would alleviate the pressure to a lower degree, but one would have to compromise less on subsidiarity as well.

Finally, if this scenario does not seem utterly unrealistic, another device described above, that of total centralization, might have become less unthinkable than in the beginning. For what is the difference between fully centralizing a benefit which covers one out of many basic needs (such as the Food Stamps Program in the US⁵²) and partly centralizing a more comprehensive cash grant? Further, once the ice is broken and redistributive welfare regulation is no longer a 'non-issue' for the EU, the political mechanism which might have influenced the US workers' compensation (i.e. threat of intervention⁵³) could on the long run become available here as well.

⁴⁹ See above III.3. (the SSI program).

⁵⁰ See above III.4.

⁵¹ See above III.5.

⁵² See above III.2.

⁵³ See above III.7.

3. Open questions

The above suggestion is based on the idea that one can trade losses in subsidiarity for gains in social security. Within the magic triangle as set out before, this option is available. However, the magic triangle is a model only, and one might raise doubts about the practical feasibility of this plan.

The key objection seems to be that by trading in subsidiarity and thus softening the boundaries of the political community, one might risk the sense of belonging, the solidarity of its members. More pointedly: In trying to restore social security, one might end up destroying the very basis of the political community, and of social security in particular.

To assess the likelihood of such a failure is plainly beyond the scope of this article and even further beyond the author's capacities. May it suffice, therefore, to add two concluding remarks.

First, the above objection should not be taken to rest solely upon the redistributive implications of the suggestion. For already now, the EU engages in redistributive policies on a large scale.⁵⁴ The difference seems to be that so far, redistribution has taken place rather covertly in the EU, whereas the above suggestion would, if carried out, be likely to attract much more public attention.

Second, given the present constitution of the EU, a loss of subsidiarity is virtually equivalent to a loss of democratic participation. For it is still primarily the nation state which provides the democratic legitimization for *all* political decisions, including those of the EU. At the moment, this is a crucial objection to entrusting the EU with any further task, but it is not an insurmountable one, because both, the social and the procedural component of democratic legitimacy⁵⁵ might be improved: The procedural one by the ongoing process of institutional reform, the social one by promoting the public interest in the actions of the EU and ultimately the formation of a 'European public'. With respect to this latter goal, it could help to give a hard core social policy program to Brussels.

⁵⁴ See Ewald Nowotny, Zur regionalen Dimension der Finanzverfassung der EU, in Alois Oberhauser (ed.), Fiskalföderalismus in Europa, Berlin 1997, p. 134, concluding, 'daß mit den EU-Haushalt bereits jetzt erhebliche, wenn auch nicht systematisch eindeutige Umverteilungseffekte verbunden sind'. For an overview of the current expenditure of EU in its various policies and its development see Manfred Kraff, Der Finanzausgleich in der Europäischen Union, Bonn 1997, p. 513.

⁵⁵ On these concepts see Weiler, The Transformation of Europe, in: Weiler, The Constitution of Europe, (fn. 3), pp. 80 seq., who distinguishes between 'social' and 'formal' (which is called here 'procedural') legitimacy.