



Università degli Studi di Catania
Facoltà di Giurisprudenza

Lotta Westehall

Legal Changes in the Nordic Social Security System during 1950–2000 in the Perspective of Subsidiarity and Solidarity – the Swedish Example

WP C.S.D.L.E. "Massimo D'Antona" .INT –31/2005



© Lotta Westehall 2005
University of Goteborg - Svezia
Lotta.westerhall@law.gu.se

ISSN – 1594-817X

Centro Studi di Diritto del Lavoro Europeo “Massimo D’Antona”

Via Crociferi, 81 – 95124 Catania (Italy)

Tel: + + 39 095 230464 – Fax: + +39 095 313145

centrostudidantona@lex.unict.it

www.lex.unict.it/eurolabor/ricerca/presentazione

Legal Changes in the Nordic Social Security System during 1950–2000 in the Perspective of Subsidiarity and Solidarity – the Swedish Example

**Lotta Westehall
University of Goteborg - Svezia ***

1. Introduction	3
2. Changes During the 1950s and 60s.....	5
2.1 Changes in the View on Need of Support.....	5
2.2 Changes in the View on Insurance Protection.....	7
2.3 Changes in the View on Medical Care and Treatment	8
3. Changes During the 1970s and 80s.....	9
3.1 Changes in the View on Need of Support.....	9
3.2 Changes in the View on Insurance Protection.....	11
3.3 Changes in the View on Medical Care and Treatment	12
4. Changes During the 1990s.....	12
4.1 Changes in the View on Need of Support.....	12
4.2 Changes in the View on Insurance Protection.....	13
4.3 Changes in the View on Medical Care and Treatment	14

* Paper prepared for the EISS 2004 Conference "Federalism and Subsidiarity in Social Security" - Rome, 23-25 September 2004

4.4 Conclusions	14
5. Subsidiarity and Solidarity in the Nordic Social Protection Schemes.....	16
5.1 Legal Rights and Economy	16
5.2 Legal Rights and Politics	18
5.3 The Administration of Social Security	20
6. Final Remarks	22
7. Bibliography	23
7.1 Other literature	23

1. Introduction

In the period 1950–2000 extensive societal changes took place in the Nordic countries. Studies show far-reaching demographic, economic and political changes that have naturally affected the legal regulation.¹ The rules governing the area of social security are the subject of this article and can be described as politicised law. The article will analyse changes within three areas of social security, the individual's possibility of retaining support aid when needed; the possibility of being covered by insurance protection in various situations of risk and of receiving medical care and treatment in the event of illness. The source of knowledge for this analysis is the legal norms and principles which have been created under the influence of actual changes in society, such as demographic and economic changes. Changes in the political ideology and the politicians' trust that the state will guide and achieve societal changes are mirrored in the legal changes during this period of time.

What then is the purpose of studying the legal changes in the social security during the mentioned period? The changes and the force with which they were carried out are based on a constantly changing source of knowledge. The output of knowledge expresses different scenarios of reality, which in turn constitute the foundation of the predominant values at a given time and of the ethical principles that are allowed to affect the structure of society. As a result, structures showing what is interesting or problematic from a legal point of view and what law can regulate emerge. The different scenarios of reality also delimit other images of reality and shape the foundation of opinions regarding relations of causality. The delimitations and relations of causality then function as the foundation of legal patterns of action and solutions.

Thus, I wish to study is how the basic material of knowledge used to determine the legal changes in the area of social security has changed between 1950 and 2000. In this context it is also interesting to examine whether the faith in the ability of the state to govern has changed, and if so, to find out what has replaced this faith.

This examination has an additional purpose. I intend to raise the normative issue of responsibility for social security. In what way has the *collective* and *individual responsibility* for social security manifested itself in the Nordic social security systems throughout the past decades and how is the situation of these relations of responsibility today? In this study, I will employ the two known principles of responsibility that are

¹ See my book 'The Fall of the Strong State? A jurisprudential study concerning Swedish social security 1950–2000' (Den starka statens fall? En rättsvetenskaplig studie av svensk social trygghet 1950–2000). Norstedts Juridik 2002.

part of the principles of subsidiarity and solidarity. The aforementioned principle means, somewhat simplified, that responsibility and decision-making should lie as close to the individual as possible. The individual then assumes a position of power, which enables the social benefit to have maximum effect for that person. But the welfare of the individual must always be balanced with the welfare of everyone, meaning that power sometimes must be relocated upwards to a level where it will do most good for 'the benefit of everyone'. Hence, the principle of subsidiarity must be supplemented with the principle of solidarity, which entails a collective responsibility for everyone's good and thus contributes to the realisation of the common good. Individual and collective responsibility must be balanced in order for the good of the individual and the common good to be seen as fulfilled from the point of view of the prevailing values of justice and effectiveness.

My intention is thus to evaluate the overall legal changes in the Nordic social security systems, using the principles of subsidiarity and solidarity as tools regarding the shaping of social rights and the actual administration of these rights.

Below, I will account for the legal changes and their causes. Changes during 1950-70, 1970-90 and 1990 and forward will be treated in sections 2 to 4. In section 5, I will relate these changes to the principles of subsidiarity and solidarity in order to examine the balance between the two. Is there a balanced relationship between the principles or not? If not, is this connected with the legal changes that have occurred? Closing remarks will be made in section 6.

The following table presents a ruff model of the main structure of the demographic, economic and political changes. Relying on my earlier studies in these fields, I mean that these changes were the basis of the legal changes in, above all, Swedish law but also to a great extent relevant for the rest of the Nordic countries during the period in question. The table sets out the structure and basis of my reasoning in sections 2 to 4.

	1950-70	1970-90	1990-
Demography	Large middle-aged group	Large elderly group	Large elderly group Increased middle-aged group
Economy	Strong growth	Economic justice	Market and competition
Politics	Political democracy	Solidarity democracy	Civic democracy
Law	Rule-of-law state	Welfare state	Service state

2. Changes During the 1950s and 60s

2.1 Changes in the View on Need of Support

People who do not manage their own support have always existed. For a long time, the need of support has been categorised in legislation as an issue concerning the relationship between the community and the individual. During the 19th century and the first part of the 20th century the activity was called social (poverty) aid, meaning that society aided an individual in need as an act of mercy. The legal position of the individual was very weak and he/she had to accept society's help as charity without being able to claim a right to aid. It was entirely a question of society's good will if aid was given. However, extensive changes took place in the middle of the 20th century. In the 1950s and 60s, increased citizen influence had affected a number of areas in society. The ongoing debate concerned influence in work-places, schools, hospitals, and health-care institutions etc. Discussions had particularly focused on the working procedures of the democratic process. The middle-aged were the largest group at that time and they were forcefully engaged in the issues of democracy.

In sum, there was a connection between the demands for increased influence and social issues in a larger context. To a large extent, the democratic debate had focused on how the citizens could affect the social environment in an industrialised society. This was an international trend that could be seen in most industrialised countries and largely came to affect social politics.

The legal changes occurring in the area of 'poor aid' and social assistance were extensive and were carried out in a society characterised by change and new points of view. The society on which the concept of social aid was to be applied was a society marked by poverty and disease from the start. Increasingly, the state began to see it as its task to come to terms with these problems. The acts of charity employed so far were not sufficient to build a 'strong' state. At the same time, there was a development towards parliamentary democracy. Poverty, disease and high mortality created opposition between different classes and groups in society. It was simply essential to eliminate these oppositions in order to establish political democracy. One way of achieving this was to try to level the uneven distribution of income. The truly poor had to be given help to support themselves. Poverty had to be restrained. This would be accomplished with strong state governance and thus the public sector grew. Large economic ventures were made. Society invested itself out of difficulty, which was possible thanks to the strong economic growth

during the 1950s and 60s. These decades were characterised by a seldom seen economic development. The state could afford extensive social investments.

This social politics was highly dominated by state governance and demanded new administrative authorities with new tasks. In order for these authorities to work satisfactorily social politics had to be regulated. It went so far that the expression 'Fuss-Sweden' was created. During this period, the principle of legality – the most important distinctive feature of a state governed by the rule of law – was concerned not so much with the material rules as with the procedural ones. Detailed and extensive procedural rules were required to achieve formal legal safety and equality of treatment. Justification and legality were seen as essential in order to fulfil the demands of the constitution.

However, it did not suffice that the state for its survival merely overcame the opposition caused by severe poverty and large differences in income in order to avoid overt conflict, ie to create political stability and democracy and to make way for democracy through legality and legal safety. It was also necessary to deal with the idea of the 'Swedish Welfare State'. A new humanistic way of thinking emerged, based on different theories of social science, which would become a vital part of the social democratic construction of the 'Swedish Welfare State'. Solidarity, fraternity and consideration marked this 'Swedish Welfare State'. However, the concepts were mostly used in political rhetoric.

The strong middle-aged group, the forceful economic growth, the impetus placed on participation in decision-making and political democracy and the emergence of Sweden as a state guided by the rule of law made the idea of caring for the poor through charity impossible. The social-political considerations behind social assistance implied that an unsatisfied need of support had to be satisfied by the state on other grounds than before. The aid was not to be regarded as charity but as a legal right that belonged to the individual. This right was based on the principal of equality, according to which it was not enough merely to treat like cases alike irrespective of the factual circumstances. On the contrary, it was an idea of equality based on objective criteria of likeness. Formal justice would prevail between those who had an unsatisfied need of support and those who did not. Formal justice would exist between these categories, and since the need of support always had to be tested from the individual's point of view, there was *formal individual justice*. It was never a question of material individual justice, which was clear from the occasionally conflicting statements in the preparatory works. During this period, an explicit idea of material justice was not reached either in the making of the law or in the application of the law in this area. The legal

basic structure was thus formal individual justice. This basic structure characterised the legal management of the need of support during the latter part of the 1950s and throughout the 60s.

2.2 Changes in the View on Insurance Protection

During the 1950s and 60s, insurance protection was considered the best way of achieving financial safety for the citizens. To protect oneself against risks through insurance was a social-political system that had been broadly accepted in the Nordic countries as well as in rest of Europe. The insurance could be construed in different ways. General social insurance was long regarded as the best way of achieving social security for the ordinary citizen. It also satisfied the demand for social justice. Such insurance systems distributed the resources evenly and had an equalising effect on financial and social differences between different groups of citizens. This was thought to contribute to higher solidarity between these groups. Through the victory of the insurance idea over that of support, social politics followed a completely new track. It no longer concerned only the lower classes but came to include everyone. The general pension was a similar insurance benefit even if it actually served many as a means of support. However, this did not change its characteristic features of insurance. Certain insurance benefits provided a kind of basic safety while others primarily protected against the loss of income. The sickness insurance belonged to the latter category.

Irrespective of category, the insurance was not based on an estimated need, which in some cases stigmatised the individual. The most important reason for introducing general insurance benefits was the wish to avoid segregation between different groups in society, which would be created by a more targeted scheme, based on actual need. The political purpose of the insurance scheme was to create an even distribution, which was thought to level the financial and social differences. Benefits compensating a lack of income and politics aiming at full employment rendered a positive content to the state's 'working line' (it is better to be working than to receive benefits from the public).

Thus, the state had a strong interest and dedication when it came to the creation of an extensive and general system of social security. This could be seen in the extensive legal norms, the supervision by state authorities, the procedure of appeal, and the increased process of justification. This was also illustrated by the creation of a court system in this area, which meant that the state had to give up some of its powers.

The sickness and maternity insurance covered the risk of being ill and having/caring for children. It had been shown in the old system of social aid that people with illnesses and those giving birth/tending their

children often were a burden on society. The largest category of all those who received benefits were the sick, probably because the state saw people's health, including childbirth, as a matter of democracy. This was connected to the fact that it was important for the state to protect people's ability to work. A state could not function without a population fit for work. This had early been recognised in Germany where insurance protection for workers emerged already in the 1870s as a political necessity. The increased number of people at work, especially women, depended on both demographic conditions and economic growth. The sickness and maternity insurance could be seen as the state's way of showing its will and ability to satisfy the growing expectations of welfare.

However, the state's responsibility went further than a worker's insurance based on *fees*. The help given to achieve self-help was important but not enough. The principle of insurance was therefore supplemented with the principle of support, meaning that the state would add funding so that the insurance would cover the costs for those with low or no income at all. From being considered as a private issue, the sickness insurance became a central task for the state. It would cover almost all residents in the state irrespective of whether they were able to pay insurance fees or not. The general application of the insurance was justified by the demand for collective justice between different categories in society. The notion of collective justice could be seen as a basic value that foremost interacted during this period, namely the idea of creating formal justice. The notion of collective justice as a basic value interacted with the issue of whom to cover by the insurance and the basic construction of the insurance scheme. Those who could not work due to illness and therefore suffered a loss of income would be compensated for this, ie the compensation would be proportionate to the loss of income. Those who did not suffer any loss of income (such as a spouse caring for her home) were granted an amount from the insurance in order to secure a minimum level of standard, equal for everyone. There were some considerations of material welfare, but it was foremost the formal character of distributive justice that was pointed out as the most important basic value of the legal set-up of the insurance protection. The empiric and normative background of the emergence of a public, general insurance during the 1950s and 60s was thus the idea of *formal collective justice*.

2.3 Changes in the View on Medical Care and Treatment

The health care of the 1950s and 60s was marked by a strong willingness to expand and develop the medical care without the accompanying of individual legal norms. Medical care did not seem to

need a legal base to stand on. Since the need of health and medical care is universal, measures to alleviate suffering, prevent disease and promote and restore health were seen as almost self-evident.

The basic structure affecting the legal regulation of the need of support resembled the one that shaped the legal regulation of medical care. Like poverty disease could create antagonism between different classes and groups in society. It was vital for the functioning of the state to deal with antagonism between different categories and to create order and security. Therefore, the state saw it as an important task to be responsible for the health care. Public health care could fall back on hundreds of years of tradition. Alleviating and preferably curing illness was thus necessary in order to achieve political democracy. The state chose to shape the health and medical care from another starting-point than a legal one. The expansion of the health and medical care was made possible by extensive ventures of capital, personnel, equipment and facilities. Economic growth was the major reason for the strong expansion of the health and medical care during the 1950s and 60s.

Meanwhile, the state regulated the organisation of the health and medical care in detail in order to control the area where so many recourses were invested. This regulation concerned issues of organisation. However, such a stringent regulation of the public medical-care organisation did not allow for any thoughts of mercy. The duty of the provider of care to give care to all in need of it was regulated legally, but there was no corresponding right for the person in need of care. This mirrored the state's caution in regulating what was legally most vital from the point of view of the person seeking care. The public care-providers were charged with the task of providing care to those who needed it, but this group was never defined. The collective in question consisted of those who were resident within the state (county councils in Sweden) and in need of health care, but apart from these characteristics they were anonymous. The basic legal construction of the medical care and treatment can be described as a *social service*, neither based on a notion of individual nor on collective justice but solely on the duty of the care-provider to offer medical care and treatment as a service.

3. Changes During the 1970s and 80s

3.1 Changes in the View on Need of Support

The population in Sweden during the 1970s and 80s was characterised by a growing amount of elderly people. The previously strong group of middle-aged people who to a large extent had contributed to the economic growth and growth in productivity, now

started to be less economic important. The economic culture was no longer marked by the expansion of the previous decades but rather by the idea of economic justice.

Political democracy grew stronger in the 1970s and 80s through the incorporation of the idea of parliamentarianism in the Swedish Constitution Act of 1974. But what characterised these decades was above all a dimension of solidarity in democracy. This was expressed through the conclusions of the committee investigating the issue of low income, the constitutional rights and freedoms, the institutionalisation of the public policy of equality based on solidarity and justice and last but not least through social service, a central piece of legislation. The social service was based on solidarity and justice and came to characterise the 1970s, during which period the legislative process continued, and the 1980s when the Social Services Act was applied in real life. Whilst the political culture could be described as a solidarity democracy during this period, the legal culture was dominated by rational targets regarding welfare. Legislation within the area of social services was strongly affected by the legal culture of the welfare state. Solidarity democracy, economic justice and criteria of the welfare state marked the politics, the economy and the law during the 1970s and 80s. These cultures created the framework of the basic legal values of the system of social assistance during the 1970s and 80s.

What characterised the legal culture of the welfare state? The answer could be constructed as follows. In the welfare state there was a transition from negative to positive freedom. The central point of the positive freedom was that citizens lived a life offering freedom and the possibility of living a meaningful life. Formal likeness and formal legal safety were still important values but they were not seen as sufficient during the 1970s and 80s. Instead, they had to be combined with other ethical values and principles of justice. If this composition was not performed in an ethically acceptable manner the formal possibility of predicting the impact of a legislation could be great while the application in each case could lead to injustice and therefore unethical results.

An ethical, careful balance between the values of formal likeness/formal justice and those of material likeness/material justice – meaning each individual's *suum* – was seen as necessary. The material justice that characterised the social support of the 1980 Social Services Act was composed of several values of a distributive, commutative and corrective nature. The balancing of different issues varied from time to other, as did the values of reasonableness and justice that marked society at a given moment. It was, however, clear that the material criteria of justice dominated the formal ones during the 1970s and 80s.

Therefore, it is justified to point out *material individual justice* as the basic value that determined the legal issue of need of support during this period. Unlike the previous decades, materially ethical values had been given a prominent place in the legal sources. The state's (the municipalities') legal management of the individual's need of support had obtained a firm ethical ground to stand on.

3.2 Changes in the View on Insurance Protection

In the 1950s and 60s, social or collective risks had been emphasised in the economic and political as well as legal discussions as central phenomena of state governing. Illness was seen as one of the most important social risks against which the state had to take measures. The working part of the population was seen as especially important to protect. During the 1970s and 80s, a political majority also considered parenthood and in some cases pregnancy as conditions deserving protection. The financial compensations paid in these cases were used by the state for distributive and goal-orientated purposes. They were conceived as rights since the insured individual had been given the possibility of appeal. The state, however, had unrestricted authority over these rights and distributed them in order to achieve collective goals. The law was used as a tool to achieve the goals of social security for people in situations of illness, parenthood or pregnancy.

As can be understood from the above, the basic structure of the social insurance was made up of formal collective uniformity. During the 1950s and 60s, when public insurance was created, the basic value was formal collective justice. The legal structure was mostly about formal likeness, such as likeness between loss of income and compensation, but also formal likeness as regards compensation between different groups. But the notion of illness and disability to work changed over time and mirrored the change in values. During the 1970s and, above all, during the 1980s an ideology was integrated in the concept of illness, emphasising a holistic view on the insured, considering both medical and psychosocial factors. It was considered important to create material justice between those who were on sick-leave based on an objective verifiable diagnosis and those who only had a diagnosis of their symptoms.

Analysis of the concept of working disability and of the conditions of the pregnancy and parental insurance pointed to ideologies of the welfare state with the purpose of achieving material as well as formal justice. Therefore, it would be correct to emphasise *material collective justice* as the basic value of the legal administration of the insurance protection during the 1970s and 80s.

3.3 Changes in the View on Medical Care and Treatment

Social service was the basic value characterising the legal administration of medical care and treatment during the 1950s and 60s. As mentioned above, the demographic culture during the 1970s and 80s was characterised by a growing number of elderly people, the political culture by solidarity democracy, the economic culture by economic justice and the legal culture by welfare state criteria. How did these surrounding ideas affect the structural values regarding medical care and treatment?

Also during the 1970s and 80s, regulations of medical law lacked rules about individual decision-making concerning care benefits. This means that the traditional guarantees of legal safety did not exist in this area. Other ethical values could, of course, exist within the material categories of justice and legal safety. However, material justice is based on what is formal and since formal justice did not exist, the criteria that created a welfare state and a rule-of-law state were not satisfied. In this sense health and medical care was not included in the otherwise dominant legal culture, ie in that of the welfare state. The individual seeking care/the patient received care as a service dependent on financial resources. Thus, the basic value was that of a social service also during the 1970s and 80s. The duty of the supplier of health care was to provide a service, not a right, although the supplier 'always' fulfilled this duty. Consequently, to the individual the service appeared to be a 'right'. Since the individual lacked the right to appeal, there was no legal right to health and medical care, however, as care was 'always' provided the supplier's duty in fact functioned as a quasi-right. Since the patient was made visible in the health and medical care legislation in a completely different way than earlier, I think it is more justified to speak of *individual quasi-justice* than only of a social service.

4. Changes During the 1990s

4.1 Changes in the View on Need of Support

The social services legislation changed a great deal during the 1990s. This decade was characterised by a continued growth of the elderly population, by the idea that decision-making should be closer to the individual – and therefore of a civic democracy – and by the fact that the principles of the welfare state and the rule-of-law state diminished and were replaced by ideas of a service state. These ideas meant that the possibility of a material *appeal* diminished and that the social assistance was formalised by the creation of a national norm while it had different applications for different categories. One could no longer speak of

material justice based on legal rights. Although some categories of people receiving assistance had the possibility of administrative appeal, social assistance had lost a lot of its character as a legal right. The justice created by the new legislation was no formal justice nor was it a mixture of formal and material justice dominated by the latter. Instead, to the extent that one can speak of likeness and justice, it had a predominant character of a service or a quasi-right and not of a legal right as earlier. We can therefore speak of *individual quasi-justice* as the basic characteristic of the need of support during the 1990s. For that purpose, the concept of quasi-justice means justice based on both legal rights and social service but with different prerequisites for different categories to receive social assistance. Since an assessment of the need had to be made in each case, quasi-justice was seen as individual just like formal and material justice.

4.2 Changes in the View on Insurance Protection

During the 1990s, the legal regulation of the insurance protection regarding sickness and parenthood was more complex and contradictory than during the previous decades. In Sweden, the legislation went through several changes that often depended on large financial savings. Legal control of the sickness and parenthood insurance was exercised through general quality assurance. The changes in formal as well as material rules negatively affected the development of the principles of the welfare state and the rule-of-law state. The 'camouflage' targets presented by the legislator covered the dismantling of earlier welfare targets and the weakening of formal legal security. The previous compensation of 90 per cent that had been thought as ethically well balanced reached a lowest level of 65 per cent during this period. This in addition to many other changes in the legislation, which diminished the welfare and affected the size of the sickness and parental benefits during the 1990s, justifies the question whether there was an ethically balanced consideration behind the rules of compensation for loss of support. Such other matters were, *inter alia*, the expansion of the waiting period, changes in the calculation of income (posts that had previously qualified as income entitling to benefits no longer gave such entitlement), a strong circumscription of the ability to compensate the lack of income not compensated by the state through additionally agreed sickness insurances called the 'diminishment rule', less compensation during holidays, parents having smaller possibility to plan their parental leave in a way that financially benefited them mostly and last but not least the ongoing discussions regarding the ceiling for a maximum and minimum level in the insurance. These rules excluded many young people from the

insurance scheme, and due to increased wages it prevented a growing number of people from receiving compensation above the sum equal to 7.5 times 'the basic amount geared to the price index'. An administration of justice that applied these rules expressed an unclear, insecure and unstable benefit system. In addition, this system of benefits did not reach an ethically acceptable level of the contemplations made even in the light of the purposes of the insurance principles that it was based on.

The basic value of insurance protection during the 1990s can be described as *collective quasi-justice*. Insurance benefits were not primarily engineered to satisfy as high demands of formal and material justice as possible. Compared to earlier schemes both the formal and material justice was weakened. Formal likeness and material justice were in many respects mixed with other targets that were not characteristic of either a welfare state or a rule-of-law state. Such a structure of values could thus be described as collective quasi-justice.

4.3 Changes in the View on Medical Care and Treatment

As pointed out above, the legal culture was generally characterised as a service state during the 1990s. This was true for all three areas analysed here and not only for health and medical care. The change in this area during the 1990s compared to previous decades was the introduction of a prioritisation regulation. This can be a strength as well as a weakness. The strength is that visible and accepted ethical principles decide the order in which those in need of medical care and treatment receive it. The weakness of this system is that its character of duty is made stronger by 'justifying' that those with lesser needs are left without care in situations of financial difficulty. The legislation's character of duty was enhanced through the prioritisation regulation.

Several clearly patient-focused rules were introduced together with the prioritisation rule. Even though they were not shaped as legal rights, their purpose was to improve the legal status of the patient and to create as just and safe conditions of care as possible. During the 1990s, the basic value could therefore, to a higher extent than before, be characterised as individual quasi-justice focused on *individual priority-based quasi-justice*.

4.4 Conclusions

The above analysis shows that the basic values of social law are about justice in one form or another. Social protection benefits – such as social assistance in situations where the individual needs support that he/she cannot satisfy in any other way; insurance protection in case of sickness, pregnancy or parenthood and medical care and treatment when

needed – are provided as an expression of justice. Formal justice, material justice and quasi-justice are legal expressions of ethical principles of justice such as likeness, equal treatment and equal worth. The justice upon which social benefits are based is, above all, distributive justice, meaning like distribution according to need.

In all modern societies many individual needs emerge. Many needs are basic and 'have to be' satisfied independently of the character of the society, such as physiological needs in order to survive, but society and its structures also create needs. One such need is the need of security. The need of security is materialised as a financial, physical and social-psychological need.

Between 1950 and 2000, the area of social security has become more and more legalised. Social law as politicised law can be explained by its close connection to the power of finance in Chapter 1 paragraph 4 of the Constitution Act. Factors such as demography, growth and recession together with the democratic structures of politics have strongly influenced the law, which has come to mirror these areas significantly.

During the economic growth of the 1950s and 1960s, a very active social policy was pursued in Sweden in the area of social aid, social insurance and health and medical care. The state wished to create a strong society filled with strong people. To this end the state used the law and carried out an extensive 'normalisation'. This was done through legislation, through the normative power of state authorities, through the application of the law, through the creation of local and regional committees and organs and through the chain of administrative courts. In carrying out the legalisation of social politics the state used its experience from other, already well-established areas of law, such as civil and procedural law. The established guarantees of a rule-of-law state within these areas served as models during the legalisation of social politics. After setting such a base, the state could proceed its normative work from a welfare-state point of view. Welfare targets were brought into social politics and they were realised in the social law. The legal safety of the rule-of-law state founded the legal safety of the welfare state. These legalised politics demanded a strong economy. Eventually, when the expansive social politics no longer could be run due to limited financial resources this also left a trace in the law. The welfare state, which rested upon the rule-of-law state, was succeeded by a service state in which the state 'marginalised' its legalisation on the welfare benefits. The legalisation of public social politics has thus diminished.

	1950-70 (Rule-of-Law State)	1970-90 (Welfare State)	1990- (Service State)
Need for support	Formal individual	Material individual	Individual quasi-justice
Insurance protection	Formal collective	Material collective	Collective quasi-justice
Medical care and treatment	Social service	Individual quasi-justice	Individual priority-based quasi-justice

From the above analysis of legal changes in the area of social security during the latter half of last century one can draw the conclusion that the foundation of knowledge in terms of images of reality, limitations, relations of causality, definitions, ways of action and formulation of problems has changed markedly. As a consequence, the politicians' faith in the ability of the state to govern through legal tools has also changed during the above-mentioned period. Based on material regarding the 1990s and onward one can conclude that the basic values extracted from the examined areas of social security to a lesser extent contain a basis for the principles of the welfare state and the rule-of-law state compared to the basic values of previous decades.

5. Subsidiarity and Solidarity in the Nordic Social Protection Schemes

Below, the principles of subsidiarity and solidarity will be related to the material of knowledge presented in the previous section. It has been stressed above that administration and decision-making should be made as close to the individual as possible in order for him/her to obtain maximum legal security and justice without diminishing the good of the collective. Therefore, the principles of subsidiarity and solidarity must always be in balance. If one principle is stressed in a certain decision, the effects of such a decision must be assessed. One has to position oneself if and how these effects can or should be balanced by using the other principle. It can be done by applying the ethical ideas in the base of that principle (either subsidiarity or solidarity).

5.1 Legal Rights and Economy

The diminished importance attached to legal rights during the 1990s has been pointed out above. The legal technique with legal rights subject to appeal that had grown based on the principles of the welfare state and the rule-of-law state and previously had been employed meant protection

against financial attacks of power. For a long time, this legal technique could stand out against the financial influence from 1950 to 1990. After this time, it began to crumble. The financial exercise of power pierced the legal protection of the individual created by that right. This happened in several ways. The areas protected by law grew smaller, the possibility of administrative appeal diminished, individual flexibility disappeared, the basic prerequisites for qualifying for the legal right were changed and interpreted more narrowly, and the guiding principles served the purpose of financial savings instead of the purpose of creating the best social security possible for the individual. The law had stepped back for the economy. The area of legal rights had been weakened and partly merged with the area of service. This meant that there was no possibility of legal consideration in court and therefore the characteristics of a legal right were lost.

Social service does not offer any protection against financial power attacks. Health and medical care has always been exposed to financial attacks since there were never any legal patient rights, but the most ominous consequences took place during the 1990s and at the beginning of this century. Health and medical care is in a state of crisis that has financial causes. The law has never been able to create a tenable protection for the seeker and receiver of care. Although they belong to the group of legal rights, the other two areas, the need of support and insurance protection, materially have the same weak legal protection in many regards as the areas expressly placed within the group of services.

Today's legal regulation of social security is characterised by increasingly weakened protection of the individual due to financial obstructions. However, we have noted that this did not have any repercussions on the area of social law at the end of the 1970s and during the 1980s when economic growth became stagnant. Legal rights then offered an effective protection of the individual against the intrusion of economic power into social law. The reason was probably both the economic and political culture during this period. The economic culture was characterised by (financial) justice, a culture well in line with the welfare state's concepts of rights. The same went for the political culture, which was characterised by solidarity democracy. Politics were filled with the thought of creating social security in solidarity with the individual. Financial savings were not allowed to pierce the prevalent economic and political cultures.

This was first allowed during the 1990s when the economic culture no longer was justice but competition and the political, solidarity democracy had been replaced by civic democracy based on the dismantling of the public sector and of bureaucracy. The legal culture was

marked by these other cultures and thus the idea of the service state was a fact.

Today, the financial power and its influence on the individual's social security heavily affect the legal governance. The economic cultures of growth, justice and competition have each been influential in a different way. Thus, social law has been transformed from an extensive formal legal regulation into an extensive material legal regulation and finally into a service regulation that leaves many issues of social security open. Competition and the play of the free market forces are now mirrored in the deregulation of rights. A social service can be left deregulated in an entirely different way than rights since one can always refer to lacking financial resources.

The circumstances just mentioned clearly show the great changes in the balance between the principles of solidarity and subsidiarity. The purpose of social rights – normative both individually and collectively – is to promote the good of the collective. A certain restraint on these rights could be thought to increase the feeling of responsibility of the individual. However, the weakening of solidarity as a cause of action has been so extensive that an ethically well considered balance no longer is beforehand. Financial considerations have not been based on a wish to create the best possible balance between the common good and that of the individual.

5.2 Legal Rights and Politics

The state also has political power in relation to the individual in the area of social security. Here, the legal regulation can be described as legalised politics. Politics and law are very close. Therefore, politicians have tried to use social law as a political regulator of the market during the 1990s. It goes without saying that politics has a determining role on the law, in our case the social law. All legal norms are based on political decision-making. All changes in legislation have their ground in politics. Social law is created and altered by political decision-making. The will of the majority determines the extent of social benefits. These are the rules of the game.

The wish to use social law as a political regulator of the market or even alter, amend or restrict it for financial or political reasons presupposes that the law has not been made too 'legally stable'. What does this mean? My answer foremost applies to Swedish conditions as this issue looks somewhat different in Norway and Finland, where social rights are partly given constitutional protection.

In one area, Swedish politicians have not used all available means to inspire confidence in the social legal regulation, and that is the

constitutional area. There has been a lack of political will to make Sweden a state with a strong constitution. The social rights in chapter 1 paragraph 2 of the Constitution Act were not stated as legal rights but rather as targets. In the preparatory works regarding human rights and freedoms there is no connection to the area of public insurance or other securities. It would have been easier for the courts to apply these rights in the area of social law if there had been a political will to use the rules on prohibition of retroactive legislation in chapter 2 paragraph 10 of the Constitution Act or the rules on protection of property in chapter 2 paragraph 18. This never happened and Swedish administrative courts have always been very cautious and little inclined to act in a political manner.

If there had been a political will that the many changes in the Swedish social security system during the 1990s would not have taken place without satisfying the constitutional principles of trust and likeness, this could have been made possible. The social security system could also have been brought closer to the European Convention on Human Rights if there had been a political will.

It is true that political democracy was a solidarity democracy during the 1970s and 1980s since the state took upon itself a solidarity responsibility for the social needs of the individual or the social risks that he or she might encounter. But there was no political will to go any further. Political decisions were to be altered easily, ie a parliament should be able to change the social security system in part or completely irrespective of the individual trust in the system. Solidarity did not comprise constitutional protection. There must not be any connection between the entitled trust of the individual and the extent of an alteration nor between the justice of having balance and equality and the extent of the alteration.

In several European states the principles of trust and equality are accepted by the political systems. This is, however, not the case in Sweden. Political power can thus be a powerful counterbalance in relation to the individual and her/his social security. However, this power could also create tools with which the individual could protect himself/herself against interference from the state itself. This means that political culture could include constitutional protection against too much, more or less well-balanced political interference in social law. The culture of politics could be made up of a constitutional democracy. However, evolution has not proceeded in this direction. Political power has obstructed legal power from growing strong enough to be able to prevent social law from being used as a market regulator.

Also in this respect and due to political considerations, social rights have been used to restrict the norms of action prescribed by the principle of solidarity.

5.3 The Administration of Social Security

The balancing of collective goals and individual interests marked the welfare state. This balance manifested itself as a tension between the consideration for the individual on one side and the consideration for democracy and state governance on the other. It also affected the administrative law of the welfare state. It came to be about the relationship between the state and the individual, about organising this relationship and about the balance between collective goals and individual interests. Earlier, administrative law had assumed a clear opposition between the state and the individuals. A change of perspective made the administration appear as more and more of a tool for the political ruling over the citizens. However, the opposition between the state and its citizens disappeared during the 1980s and was replaced by an administration whose function was not (solely) to control the citizens but also to be at their disposal and service. There was by large a balance.

During the 1990s, the opposition between individualism and collectivism and their different demands grew more obvious again, which resulted in tensions within the administrative system. Today, the law of social administration is increasingly about handling conflict-solving issues. From having been target-orientated it has grown more norm-orientated again. Instead of distribution of growth based on legal rights-criteria, public resources are now objects of prioritisation. The increased internationalisation creates new conflicts that are solved either through negotiations and treaties or through national and international courts. The basis for solving these conflicts has new relevant criteria that integrate basic political, ethical and international principles. As a result, people's faith in the ability of experts to change and govern society has been greatly reduced, as has their faith in what the state can achieve, both normatively and in fact. The administration of social security is characterised by reorganisations and internal activity in order to secure an adaptation to the market and the users. This entails opposition between individual interests and central solutions. In many instances the result is separate solutions brought in each case. Social security and its administration have developed so as to meet market demands, demands of usage, and demands of balancing collective goals and individual interests. Thus, the struggle between solidarity collectivism on the one hand and individualism on the other characterises the administration of social security. Today the balance between solidarity and subsidiarity is

not optimal because of the obvious fragmentation of the legal administration of social security.

The opposing couple of collectivism on the one hand and individualism on the other is related to another opposing couple, that of central and detail administration on the one hand and self-administration on the other. At the end of the 1990s and at the beginning of this decade, the state increased its detailed administration of social security. This is true for all three areas of security. Central and detail administration has two consequences. The more central the administration the more difficult it is to co-ordinate different projects so that they do not oppose each other formally or in their application. Furthermore, the more the state governs through detailed rules about action in every possible situation the more difficult it is to get an overview of the system. This means that it is more problematic for the individual to use his/her rights. The lack of overview also has a negative impact on different legal actors in their application and supervision of the law as well as in their consideration of appeal. This situation is very tangible today. Above all, it creates insecurity and confusion for the individual about who is the object of the governance since he/she stands in the middle of a vast system of inexplicable rules over which there is no overview.

During the 1990s, self-administration increased in fact, although in modest size. It should be evident that self-administration entails a lesser burden for an overly bureaucratized and enlarged state power that increasingly tries to solve all possible and impossible tasks. However, what to 'put in the place' of this administration has proved problematic. Self-administration gives rise to problems of both a legal and a practical nature as well as in principal. The legal safety of citizens is also difficult to fully realise even though one has tried to maintain the basic guarantees of legal safety during the transition from a public-law activity to a private-law activity. The state alleges that the maintenance of the demand for likeness, especially in the shape of distributive justice, assumes forceful governance and that such governance is easier carried out through public central administration. Those in power today stress that social security as a common interest would be more difficult to market in a system of extensive local self-administration.

At present, the different forms of governance, such as central administration and self-administration, the latter not yet finally defined, create insecurity and uncertainty for the individual both regarding material and formal legal safety. The shaping of the principle of subsidiarity in today's Nordic security systems leads to a tangible unbalance between the good of the individual and the common good.

6. Final Remarks

The reader is by now familiar with the fact that I have devoted myself to observation and analysis of the legal administration of social security during the last half-century in the perspective of subsidiarity and solidarity. The observations and analyses have concerned past and present time. However, I have not indulged in any prognosis for the future and I will refrain from doing so in these closing lines. But I wish to make some personal comments on what I have presented above.

The adventure of social law that seriously began in 1950 has fifty years later more or less seized to exist and the entrepreneurial fervour that characterised the state has considerably died down. The structural façade built during the 1950s and 60s served well during the 1970s and 80s but partly wither during the 1990s. From the mid-1990s, the direction of the social project has changed considerably. When the project turned out to be in full scale the activity was fantastic, a social 'revolution'. Nowadays, the state is an administrator and not an entrepreneur. In my opinion a reconstruction of the social project is necessary. The reasons for this are as previously mentioned demographic, financial, legal, and last but not least ethical. A related question is what criteria should be considered as central, considering the development of the social project in the past fifty years. What is required to recreate the entrepreneurial state, a state that is not only administrative but also creative, a state that launches new projects and is open to new needs, demands and possibilities? This is, of course, a central question to answer, but for me it will be in another context. Finally, I only wish to point out some circumstances that I mean will be central in a future structural building.

In order to revitalise the social law certain, basic facts must lie beforehand, such as trust not only in economic growth but also in the creative power of solidarity, collective participation, and more or less stable structures. However, some more concrete facts must also exist, such as the ability to explain why social security is needed and the attempt in the application not to turn individual legal rights too individual in the sense of being egocentric demand-focused. These factors are closely connected. They are all based on a *common base for values*. This in turn not only forms the basis of the content of the concept of solidarity but also of the concepts of collectivity and individuality. A common base for values also creates stability as well as consciousness of the deeper meaning of a collective social-security project. An intensive and deepened debate on this issue is necessary for the future social-security system.

7. Bibliography

7.1 Other literature

- Aubert, Vilhelm. 1986. Rättssikkerhetssyndromet. In *Samfunn, Rett, Retterdighet*. Honorary writing for Torsten Eckhoff's 70th birthday, pp 38–54. Otta.
- Bernt, Jan Fridtjof & David Roland Doublet. 1998. *Vitenskapsfilosofi for jurister – en innføring*. Bergen–Sandviken: Fagbokforlaget.
- Blomqvist, Paula & Bo Rothstein. 2000. *The New Face of the Welfare State* (Välfärdsstatens nya ansikte). Stockholm: Agora.
- Castells, Manuel. 2001. 'The Age of Information' (Informationsåldern). Ekonomi, samhälle och kultur. Part I. *The Growth of the Network Society* (Nätverkssamhällets framväxt) 2nd ed. Göteborg: Daidalos.
- Christensen, Anna. 1999. 'Protection for an Established Position – A Normative Basic Pattern' (Skydd för etablerad position – ett normativt grundmönster). In *Tidsskrift for Rettsvitenskap 1999* (4).
- Dahlberg-Larsen, Jørgen. 1991. *Ret, styrning og selvforvaltning. Rettsociologiske artikler og en introduction til emnet*. Aarhus.
- Dahlgren, Göran. 1994. *The Health-care Markets of the Future. Winners and Losers*, (Framtidens sjukvårdsmarknader. Vinnare och förlorare). Stockholm: Natur och kultur i samarbete med Institutet for framtidsstudier.
- Dworking, Ronald. 1977. *Taking Rights Seriously*. Cambridge, Mass: Harvard U. P.
- Eichenhofer, Eberhard. 2000. *Sozialrecht*, 3. Auflage. Jena: Tubingen, Mohr Siebeck.
- Eskeland, Ståle. 1992. Rettsikkerhet, velferdsstat og kommunalt selvstyre. In *Retfærd nr 59. Nordisk Juridisk Tidsskrift 1992* (4) pp 69 ff.
- Esping, Hans. 1994. *Frame Regulations in Administrative Politics*, (Ramlagar i förvaltningspolitiken). Stockholm: Studieförbundet Näringsliv och Samhälle.
- Ewald, Francois. 1989. 'Die Versicherungsgesellschaft'. In *Kritische Justiz* 1989 pp 385–393. Frankfurt am Main.
- Frändberg, Åke. 2000. 'Of Legal Security' (Om rättssäkerhet). In *JT* 2000 pp 269 ff.
- Glavå, Mats & Ulf Petrusson. 2002. 'The Illusion Regarding the Law! – The Legal Profession and Responsibility for the Legal Constructions' (Illusionen om rätten! – juristprofessionen och ansvaret for rättskonstruktionerna). In *Erkjennelse og Engasjement*.

- Minnesseminar for David Roland Doublet (1954–2000)*. Bergen: Fagbokforlaget.
- Graver, Hans Petter. 2000. 'Mellom individualisme og kollektivism – forvaltningsretten ved ingangen til et nytt århundrade'. In *Lov og rett. Norsk Juridisk Tidsskrift* 2000 (8) pp 451–482.
- Hydén, Håkan. 2002. *Science of Norms* (Normvetenskap). Lund: Sociologiska institutionen, Lunds universitet.
- Hägerström, Axel. 1935. 'The Concept of Declaration of Will in Private Law' (Begreppet viljeförklaring på privaträttens område). In *Theoria*.
- Höjer, Karl. 1953. *A Swedish Citizen's Protection against Want* (En svensk medborgares trygghet mot nød), 5th ed Stockholm: Norstedts.
- Inghe, Gunnar. 1960. *The Poor in the People's Home; A Study of Long-term Benefit Receivers in Stockholm* (Fattiga i folkhemmet; en studie av långvarigt understödda i Stockholm). Stockholm: Stadsarkivet.
- Jonsson, Gustav. 1971. *The Social Inheritance* (Det sociala arvet). Stockholm: Tiden.
- Ketscher, Kirsten. 1998. *Socialret*. Köpenhamn: Gad Jura.
- Kjønstad, Asbjørn, ed 1994. 'Trygderettighetens grunnlovsvern'. In *Constitutional Protection of Social Security Benefits*. Oslo: Ad Notam Gyldendal.
- Kjønstad, Asbjørn, Jan Fridtjof Bernt, Alice Kjellevoid & Harald Hove. 2000. *Sosial trygghet og rettssikkerhet*, 2nd ed. Bergen: Fagbokforlaget.
- Landelius, Ann-Charlotte. 2002. 'Private Law Subjects within Social Service' (Privaträttsliga subject inom socialtjänsten). In *Issues of Legal Security in Social Law* (Rättssäkerhetsfrågor inom socialrätten), edited by L Vahlne Westerhäll, pp 48–76. Stockholm: Norstedts Juridik.
- Lavin, Rune. 1992. 'Two-party Cases in the Administrative Process' (Tvåpartsmål i förvaltningsprocessen). In *Honorary writing for Håkan Strömberg* (Festskrift tillägnad Håkan Strömberg) pp 97–120. Stockholm: Norstedts.
- 'The Administrative Process before the 21st Century. Notes regarding the official report of the court committee' (Förvaltningsprocessen inför 2000-talet. Anteckningar med anledning av domstolsutredningens betänkande). State Public Commissions Series, SOU 1991:106. 1991. In *FT* 1992 p 455.
- Lindqvist, Rafael. 'Conflict and Compromise at the Creation of the General illness insurance' (Konflikt och kompromiss vid den allmänna sjukförsäkringens tillkomst). In *Archive for Studies of the history of*

- the workers' movement* (Arkiv för studier i arbetarrörelsens historia) pp 41–42, 52–81.
- Myrdal, Gunnar & Alva Myrdal. 'Crisis in the issue of population' (Kris i befolkningsfrågan). In *Archive of the workers' movement* (Arbetarrörelsens arkiv) 11:1934–1935.
- Nasenius, Jan. 'Social aid and Unemployment' (Socialhjälp och arbetslöshet). In SOU 1971:44.
- Olsson, Sven Erik. 1990. *Social Policy and Welfare State in Sweden*. Lund: Arkiv
- 'When Power was Corrected' (När makten lades till rätta). 1991. In *Vision meets Reality. Of Social Governance and Actual Evolution of Society* (Vision möter verkligheten. Om social styrning och faktisk samhällsutveckling), ed S-E Olsson and G Therborn, pp 235–260. Stockholm: Allmänna förlaget.
- Olsson, Sven Erik & Göran Therborn, ed 1991. *Vision meets Reality. Of Social Governance and Actual Evolution of Society* (Vision möter verkligheten. Om social styrning och faktisk samhällsutveckling). Stockholm: Allmänna förlaget.
- Peczenik, Alexander. 1995. *What is Right? On Democracy, Legal Safety, Ethics and Legal Argumentation* (Vad är rätt? Om demokrati, rättssäkerhet, etik och juridisk argumentation). Stockholm: Fritze.
- *Legal Argumentation* (Juridisk argumentation). 1990. Stockholm: Norstedts.
 - *Legal Theory and Method* (Juridikens teori och metod). 1995. Lund: Fritze.
- Petersson, Olof. 1996. *The State of Law* (Rättsstaten). Stockholm: Publica.
- Petrén, Gustaf. 'The Normative Power of Authorities' (Myndigheternas normgivning). 1988. In *Article series of the Legal Fund* (Rättsfondens skriftserie) nr 21. Stockholm: Rättsfonden.
- Rosas, Allan. 'How is the State Doing?' (Hur går det för staten?). 1986. In *Samfunn, Rett, Rettfærdighet* pp 529–539. Festskrift til Torstein Eckhofs 70-årsdag. Otta.
- Rothstein, Bo & Jonas Bergström. 1999. *The Fall of Corporatism – and the Crisis of the Swedish model* (Korporatismens fall – och den svenska modellens kris). Stockholm: Näringsliv och Samhälle.
- Simmonds, Nigel E. 1988. *Legal Matters of Principle. Justice, Current Law and Rights* (Juridiska principfrågor. Rättvisa, gällande rätt och rättigheter). Stockholm, Norstedts.
- Therborn, Göran. 1991. Samhällelig styrning. In *Vision meets Reality. Of Social Governance and Actual Evolution of Society* (Vision möter verkligheten. Om social styrning och faktisk samhällsutveckling), ed

- S-E Olsson and G Therborn, pp 29–51. Stockholm: Allmänna förlaget.
- Tuori, Kaarlo. 1992. 'The Welfare State, Risk Society and Social Law' (Välfärdsstaten, risksamhället och den sociala rätten). In *Retfærd* nr 58. *Norway Legal Series* (Norsk Juridisk Tidsskrift) 1992 (3) p 3 ff.
- Vahlne Westerhäll, Lotta. 2002. 'State and Municipal Governance of Social Security – Need of Support as an Issue of Legal Security' (Statlig och kommunal styrning av social trygghet – försörjningsbehov som en rättssäkerhetsfråga). In *Issues of Legal Security within Social Law* (Rättssäkerhetsfrågor inom socialrätten), ed L Vahlne Westerhäll, pp 22–47. Stockholm: Norstedts Juridik.
- 'Legal Security in the State of Law/ Welfare State – the Example of Need for Support' (Rättssäkerhet i rättsstaten/välfärdsstaten – exemplet försörjningsbehov). 2000. In *Nybrott og Odling*. Festskrift till Nils Nygaard. Bergen.
- Weber, Max. 2000. *Power and Bureaucracy* (Makt och byråkrati). Oslo: Gyldendal.
- Westerhäll, Lotta. 1987. 'Normative Power and Normative Consideration in Social Security Law' (Normgivning och normprövning inom socialförsäkringsrätten). In *FT* 1987 pp 104–124.
- Wilhelmsson, Thomas. 2001. *Late Modern Law of Liability. Private Law as tool for Micro Politics* (Senmodern ansvarsrätt. Privaträtt som redskap för mikropolitik). Uppsala: Iustus.