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## **The Dutch welfare state: recent reforms in social security and labour law**

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### **1. Introduction**

The Dutch welfare state has changed in the last decades. These changes can be characterized as a slow transformation from a system based on notions of equality and solidarity to a system that is increasingly influenced by the values of freedom of choice and individual responsibility (Jaspers, 2001; Noordam, 2007; Trommel and Van der Veen,

1999; Van Gestel et al, 2010; Clasen and Van Oorschot, 2002). This values shift might be illuminated by a short history of the Dutch welfare state.

The contours of the Dutch welfare state appeared for the first time in the influential Van Rhijn report from 1945. This report argued in favor of a reformed system of social security that ensures a decent life for the entire population (Van Rhyn Committee, 1945). In the years that followed, a collective system was built up that aspired to cover all possible collective risks. This collective responsibility for individual welfare fitted in well with the paternalistic welfare state discourse that was popular at the time: social security should take care of the citizens ‘from cradle to grave’. However, in the mid-1970s, with the social security system ‘completed’, the Netherlands (like the rest of Europe) were struck by an economic crisis. This triggered the first retrenchments of the social security system. In the 1980s, discourses on the widespread improper use of social benefits and the unmanageable costs of the welfare state on the system justified a further reduction of the system. In addition, because of European demands regarding equal treatment of men and women, so-called breadwinner facilities were abolished in favor of more individualized facilities that endorse equal treatment of men and women. In the 1990s the increased labor market participation of women resulted in further changes of social security provisions. For example, allowances for survivors of diseased breadwinners became means-tested (ANW).

The report by the Buurmeijer Committee marked a new shift in the design of the Dutch welfare state (Buurmeijer Committee, 1993). This report revealed how the corporatist organization of unemployment and disability schemes had encouraged welfare dependency, instead of reintegrating unemployed and disabled workers into paid employment. The report advocated the transfer of responsibilities of trade unions and employers organizations to the state. In addition, the report argued for the introduction of market processes in the social security system and an increased emphasis on incentives and disincentives instead of rights and obligations. The governmental actors took the ‘welfare state crisis’ seriously and it would take only a few years before major welfare state reforms were introduced (Kuipers, 2004). From the mid-1990s onwards, responsibilities for the risks of sickness and disability were shifted from the state to individual employers. In addition, sick and disabled employees themselves increasingly

faced duties to reintegration to work. The years 2000 were characterized by further social reforms with the objective to encourage labor market participation of recipients of several types of social benefits. In fact, with respect to social insurances we can observe a few trends in the last two decades. First of all, private bodies, organized according to the corporatist principle, were replaced by state organized public bodies. Secondly, the responsibility for the risks of unemployment and disability shifted from the state and social partners towards individual employers and employees. Thirdly, as a result of the introduction of the Work and Welfare act in 2004, municipalities acquired more discretion with respect to social assistance. Finally, civil society was revitalized as a new act on long-term care stressed the role of volunteer aid and self-organization.<sup>1</sup>

In the seminal classification of Esping-Anderson, the Dutch welfare state was characterized as a corporatist welfare state (Esping-Andersen, 1990). Notwithstanding the changes in the organization of social insurances, where private bodies organized by social partners are replaced by public bodies, the Dutch welfare state still contains a considerable number of corporatist characteristics. That is, the social security system is still made up of occupational social insurance provisions, providing earnings-related benefits to workers and employers which are financed by both employers and employees, such as provisions for disability (WIA) and unemployment (WW). In addition, an obligatory occupational pension scheme organized by the employees and employers provide income protection for employees over 65. Besides these occupational provisions, the Dutch welfare state has universal provisions in the fields of active labor market policy, children, health and long term care, old age, housing, education and social assistance, social support and in case of deceased breadwinners. However, given the increased focus on labour market participation and the emphasis on activation in several welfare state programs, a growing number of welfare state scholars classify the Dutch welfare state as a Nordic welfare state (Sapir, 2006; Draxler and Van Vliet, 2010).

Interestingly, the increased emphasis on civil society and individual responsibility seems to encompass a return to the emergence of the Dutch welfare state in the nineteenth century. In that period, poor relief was organized by religious and other

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<sup>1</sup> For example, the WMO act, which was introduced in 2006, explicitly expressed a preference for individual responsibility, self-organization and volunteer aid in case of disability, psychosocial problems and chronic psychological problems. In addition, a reform in 2012 introduced civic duties for welfare.

private initiatives. Moreover, private organizations and churches strongly resisted a public organization of poor relief, which they viewed as a public interference with their private charity activities. For example, the first poor law of 1854 could only be adopted after the role of private charity organizations and churches was properly addressed. In fact, from 1917 on, when the school funding controversy officially came to an end, the Netherlands were characterized by a pillarization of society (Lijphart, 1968). In this year the state agreed to finance denominational education, such as catholic and protestant schools in a similar way as public education. As a result, Dutch society became increasingly segmented along three pillars: the protestant, the catholic and the socialist pillars. The pillarization of society was visible in the organization of other welfare state arrangements as well, such as housing and healthcare, highlighting the role of civil society with respect to welfare provisions.

The goal of this paper is to assess how shifts in the allocations of welfare state services from the state to other actors have affected individual right claims with respect to welfare state services. As such this paper addresses important questions as to whether it matters who is the debtor towards these rightful claimants: a public body, a private institution or a private actor? Dutch history has shown that non-state actor involvement in the realization of welfare state provisions and services does not automatically preclude claim rights on those provisions and services. For example, after the school funding controversial came to an end all citizens could claim a right to state financed education and citizens retained the freedom to organize education by themselves. In addition, thanks to the organization of social insurance by the social partners, members of trade unions could legally put claims on unemployment benefits as early as the beginning of the twentieth century. On the other hand, however, the private-public collaboration on poor relief inhibited a legally subjective right to social assistance. Only in 1965, when the National Assistance Act (AWB) replaced the poor law, citizens acquired for the first time an individual right to social assistance.

The paper is structured as follows. Section 2 discusses the state of the art of the Dutch welfare state institutions and seeks to provide an answer to questions as: What kind of claim rights on welfare state provisions can be distinguished and where in the law can we find these rights? Section 3 provides an overview of the long term developments of a

number of welfare state programs using data on social expenditures and other welfare state indicators. Section 4 addresses recent shifts in the allocations of welfare services from the state to employers and municipalities. This section also examines the implications of the new allocation of welfare services for the public safeguards of individual claim rights. Section 5 examines if and how, with respect to these new allocations of welfare services, international and European law provide (extra) public safeguards for individual claim rights. Section 6 concludes the paper.

## **2. The state of the art: current Dutch welfare state arrangements**

In Dutch social security law literature, social security law, which contains mainly rights with respect to income protection, is often distinguished from other welfare state arrangements, such as rights on adequate housing, education, or social work (Heerma van Voss and Klosse, 2010). Taken together, these income protection rights and other welfare state arrangements form the heart of the Dutch welfare state. This section presents a brief state of the art of the welfare state rights in the Netherlands, according to the kind of rights (statutory rights, social security rights and other welfare state rights), the way in which these rights can be realized (cash benefits, in-kind benefits or services) and the organization of those rights in the law. First we will examine some general features of Dutch welfare state rights.

### **2.1 Varying welfare state rights and public safeguards**

Welfare state rights can be realized in different ways. Rights which are part of social security law mostly concern rights to cash benefits. However, in some cases these rights are realized in kind, such as provisions with respect to long-term care, or in the form of services such as reintegration activities. Other welfare state rights, such as education and housing rights, mostly involve in-kind benefits. Yet, these welfare provisions also include cash benefits, such as study grants and rent subsidies. These rights, irrespective of whether they concern claims on cash benefits, in-kind benefits or services, can all be characterized as individual claim rights. That is, the rightful claimant is entitled to certain provisions which, in most cases, are delivered by a public body.

Welfare rights can also be differentiated in other ways. For example, whilst most rights are laid down in public law, some rights are fixed in private law. In addition, welfare rights which are part of public law may involve either laws passed by the national parliament, administrative measures or local acts, such as municipal regulations. Another differentiation concerns the regulation of welfare rights in either (private or public) statutory law or in collective agreements.

To a great extent, the specific regulation of welfare state rights reflects the differences in allocation of welfare services. That is, they show us if:

- the rights are to be realized by public bodies and/or other private institutions and actors,
- if either central or decentralized public bodies are involved,
- and how the scope of competence is divided between the government and the social partners.

It must be noted, however, that the regulation of a specific welfare state right claim by public law does not mean that these claim rights are entirely protected by public law. For example, whereas the right to sufficient health insurance has been laid down in public law, citizens have to realize their right claims against private health insurers in civil law procedures.

At this point, we should address the question concerning the implications of these differentiations for the safeguards of welfare state arrangements. First of all, with respect to individual claim rights, we can make a broad distinction between individual claim rights in administrative law procedures and individual claim rights in civil law procedures. In administrative law, citizens who do not agree with a decision taken by a public body (including decisions originating from municipalities, welfare agencies, and functional decentralized institutions) can lodge an objection in writing. They can additionally motivate their objections in a public hearing. If these citizens also disagree with the decision on their objection (by the public body), they can go to the court and subsequently to the court of appeal (Central Appeals Tribunal). Yet, not all individual claim rights are fixed in public law. Some rights are fixed in private law, such as the right

to 70 per cent of the wages during the first two years an employee is not able to work due to sickness. In case the employer does not pay, the employee can go to the civil court and appeal two times to a higher court. Citizens should also follow the civil law procedure if it comes to a dispute on the interpretation of a collective arrangement.

There are some important differences between the civil and administrative law procedure though. In the first place, public appeal is more accessible, because in first instance citizens do not need to go to court, but can lodge an objection in writing. In addition, the costs of higher appeal are lower in an administrative law procedure and the administrative law judge plays a more active role than civil law judges. That is, whereas the administrative law judge actively attempts to construct the material truth, the civil law judge seeks to construct something which has to count as the truth between the parties. The administrative law procedure also contains some General Principles of Good Administration, such as the prohibition of arbitrariness and a prohibition on the *detournement de pouvoir*. In sum, compared to the civil law procedure, the administrative law procedure is more accessible to citizens and holds more safeguards. The safeguards of welfare state rights will be further addressed in the next section as we discuss some recent changes in this respect.

## **2.2 Constitutional welfare state rights**

In the Dutch Constitution of 1983 the following articles are related to social rights:

Article 18: Legal aid

Article 19: Employment, protection thereof and free choice of labor

Article 20: Social security

Article 21: Environment and housing conditions

Article 22: Public health, housing and social and cultural flourishing

Article 23: Education

Of these Constitutional rights, most of them point at individual rights.<sup>2</sup> Article 20 (3) is important in this respect as it provides a right to social assistance for all Dutch citizens. It

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<sup>2</sup> Dutch Constitutional rights have both horizontal and vertical effect.



should be noticed, however, that article 20 does not entail a claim right for social assistance. Instead it charges the State with the positive obligation to provide for basic social assistance for needy Dutch citizens living in the Netherlands. Therefore it could be argued that the Constitutional right to social assistance is only important in a theoretical sense. In fact, the governmental task to legislate dominates. Thus, claim rights are generally founded on other regulations (Klosse, 2012). Another important feature of article 20 is that it does not hold that social security should be organized by the State. It has even been suggested that it ‘is more plausible to interpret article 20 as implying that the right to social security could also be implemented by means of contractual rights and obligations between citizens and private parties’ (Vonk and Marseille, 2010: 372).

Other Constitutional social rights also stipulate that rights have to be regulated by legislation, such as article 18 which refers to the right to legal aid and article 23 which refers to the right to state financed private education such as denominational education. Finally, article 19 orders the government to encourage sufficient employment. On the other hand, article 19 (3) does stipulate a right to a freedom with respect to the choice of employment. It is further important to notice that article 120 of the Constitution forbids the judge to test a law against the Constitution. Hence, the judge cannot overrule the legislator. Still, as will be explained in section 5, the Dutch judge may test national law against international treaties.

## **2.3 Social security law**

As mentioned above, social security law can be distinguished from other welfare state arrangements. This subsection discusses individual claim rights which are laid down in social security law. Claim rights related to other welfare state arrangements are examined in section 2.4.

### **2.3.1. Income protection schemes**

To income protection schemes we reckon social insurances and provisions which protect employees against the risk of income loss because of the risk of unemployment, disability, aging or the death of the breadwinner. First, we will consider the differences between

national insurances, social insurances and social provisions. Subsequently, we will address specific income protection schemes.

Income protection schemes may involve national insurances, social insurances, social provisions and tax credits. These insurances, provisions and tax credits can be distinguished in diverse ways. First of all, some social provisions such as social assistance can be distinguished from social insurances, because of its complementary function. That is, citizens are only entitled to social assistance provisions in case they do not have a right to social insurances. The distinction between employees insurances, national insurances and social provisions is further important because it tells us how the arrangements are financed. While social insurances are financed by contributions of employers and employees, national insurances are financed by mandatory contributions and tax payments and, finally, social provisions are entirely financed by tax payments. Furthermore, the distinction between social provisions on the one hand and (social and national) insurances on the other, informs us on the governmental influence on the organization of these arrangements. Then, whereas most social provisions are directly governed by the government, which stipulates the policy, legislates, and implements the provision, social insurances are implemented by functionally decentralized public bodies, which are characterized by a diminished governmental involvement. The most important functional decentralized public bodies are in the first place, UWV, which implements social insurances, such as the unemployment insurance and the disability insurance and, secondly, SVB which implements so-called national insurances, such as the old age benefits and child allowances. A relatively new instrument entails tax-credits. These are publicly financed funds, which are implemented by tax authorities. Citizens can only effectuate these rights in case they pay enough taxes.

Let us start with the protection against the risk of unemployment. The unemployment insurance (WW) is stipulated in public law and insures employees against the risk of income loss after getting unemployed. Employees who have been working for at least six months preceding their unemployment can claim unemployment benefits at UWV. The benefits amount to 75 per cent of the wage during the first two months and 70 per cent of the wage thereafter. The length of the right to benefits depends on the age and employment record and is at a maximum of 38 months.

In contrast to the protection of income loss due to unemployment, the risk of income loss due to disability is for most employees regulated by civil law, at least during the first two years when the employer is obliged to pay 70 per cent of the wage. Some (former) employees have right to a social insurance in case of sickness in this period (ZW).<sup>3</sup> After two years employees may claim a disability benefit (WIA) at the UWV, which amounts to a maximum of 75 per cent of the wage. Although claim rights on disability allowances are based upon a public act, the implementation of the disability insurance is either organized in administrative law or in civil law. That is, if the employer decides to become an own-risk bearer, he/she will in most cases conclude a private insurance. However, UWV remains responsible for the allowance payments: UWV pays the allowances and passes the costs on to the employer. These issues will be further addressed in section 4.1.

Unemployment and disability benefits, whether paid by UWV or by the individual employer, are sometimes completed as a result of collective agreements. Most collective agreements stipulate that employers pay 100 per cent of previous earned income during the first year that an employee is unable to work due to disability. In addition, in case allowances fall below the social assistance level, benefits may be completed by a social provision that, by way of exception, is executed by UWV (TW).

Employees who are no longer entitled to unemployment or disability benefits and whose income fall below the social assistance level may be entitled to social assistance benefits (WWB). There are some special forms of social assistance for elderly and partly disabled former employees (IOAW) and self-employed (IOAZ). Citizens may also invoke additional rights to cash or in-kind benefits, in case their income has not exceeded the social minimum in the last 5 years or in case of special needs. All (social assistance) provisions are implemented by the municipalities, who are authorized to formulate more detailed regulations with respect to those provisions. As a result, safety-net regulations may differ between municipalities. Next to these social assistance provisions implemented by municipalities, there exists a special public provision, financed by tax

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<sup>3</sup> For example, employees who have become sick just before or after the contract ended, can claim sickness allowances at the UWV. Also pregnant women, who are sick because of their pregnancy can claim sickness allowances, which, in contrast to other (former) employees, amount to 100 percent of the wage.

incomes, for young disabled with and without a work history, which is implemented by UWV (Wajong).

Finally, we have to address two important national insurances which are implemented by the SVB and which are fixed in public law, the ANW and the AOW. The ANW stipulates a right to cash benefits for surviving relatives of deceased insured persons. Secondly, the risk of income loss because of old age is covered by the AOW, a national insurance which provides for a minimum income for citizens who reach the age of 65 (first pillar).<sup>4</sup> In most cases former employees are also entitled to occupational pension schemes which are organized by the social partners (second pillar). Others, especially self-employed, may have concluded additional individual pension insurances with private insurers (third pillar).

### **2.3.2. Rights with respect to active labor market policy**

Active labor market policies are aimed at increasing labour market participation and at reducing the amount of claim rights on public and private income protection schemes. Activation programs such as public employment services and training are also expected to improve the match between demand and supply on the labour market. Active labour market policies mainly apply to people who are unemployed or who receive disability benefits. In the case of disability, these rights can be invoked against a private employer, during the first two years of disability. The employer is obliged to reintegrate the disabled employer in his/her own company or in another company. If, according to the employee, the employer does not fulfill his reintegration duties, he can start a civil law procedure against his/her employer. Reintegration obligations of employers who have chosen to become own-risk bearers stretch beyond the first two years of sickness. This employer may also impose sanctions on the employee if the employee neglects his duty to reintegrate. If the employee disagrees with the employer he can start an administrative law procedure against the employer. The own-risk bearer is thus considered a public body. Employees of employers who have not chosen to become an own-risk bearer (the majority) can invoke rights to reintegration after two years of disability against UWV.

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<sup>4</sup> From 2013 onwards, the retirement age for the public pension scheme (AOW) will gradually be increased.

The same is true for recipients of unemployment benefits. Recipients of social assistance benefits (WWB), surviving relatives benefits (ANW) and unemployed citizens who are not entitled to public benefits (so called ‘Nuggers’)<sup>5</sup> may claim rights on reintegration and employment-finding instruments against municipalities.

### **2.3.3. Rights related to children and other dependents**

The Dutch welfare state includes a broad range of children-related welfare state arrangements. These arrangements can be divided in two broad categories. First of all, rights to cash benefits to cover the costs of children, and, secondly, rights with respect to the reconciliation of work and private life. Starting with the first category, the most important cash benefit designed to cover the costs of children, concerns the right for all citizens on child allowance, the AKW, which is a national insurance. In addition, households with children may be entitled to tax credits.

Rights with respect to the reconciliation of work and private life concern, first of all, rights on subsidy for day care. Other rights are regulated in the Work and Care act. According to this act, pregnant women can claim a right to a pregnancy allowance according to 100 per cent of their income during 16 weeks. This allowance is financed by employers and employees. Self-employed women also have a right to publicly funded pregnancy allowances, which, at the most, amounts to a minimum wage. In addition, employees have a right to paternity leave of maximum 26 weeks. Employees are also entitled to 6 weeks leave in the period of 12 months in order to take care of family members and partners suffering from a life-threatening illness. They are however not entitled to either remuneration or an allowance during this period, unless this has been agreed upon in a collective agreement.

### **2.3.4 Rights related to health and long-term care**

According to the Dutch health insurance law (ZVW), a national insurance, citizens do not only have a right to be admitted to health insurances, they are also obliged to insure themselves for medical expenses. To comply with these obligations citizens have to enter a contract with a private health insurer. The health insurance is financed by the insured

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<sup>5</sup> For example, because their partner earns above minimum wage.

persons and the employers and for a small part by the national government, which covers the insurance costs of children under 18. Citizens with low income have a right to compensation for the costs against the national government, a social provision which is implemented by the tax authorities (Zorgtoeslag).

In addition to rights to a health insurance, citizens are entitled to benefits (cash and in kind) related to long-term care. These rights are fixed in the AWBZ, which is a national insurance. The AWBZ is executed by private health insurers, which exercise a statutory competence. A public body (CIZ) judges the right to provisions. Since 2007 some provisions are regulated in a new public act (WMO) which is implemented by the municipalities. The WMO stipulates rights to services for handicapped persons and persons suffering from a chronic psychiatric disease. The provisions vary from in-kind provisions, such as a wheelchair, to cash benefits, such as individual budgets. Further conditions are stipulated in municipality regulations.

#### **2.4 Other welfare state arrangements: education, housing and social support**

Apart from the rights which are laid down in social security law, citizens can also invoke rights to affordable education, housing and rights to social support/social work. This section will examine these 'other' welfare state rights.

The Compulsory Education Act stipulates that children between the age of 5 and 16 years old have to be educated. Thus, the Constitutional right to education (see section 2.2) has been translated into an obligation. Next to this obligation, parents with low income are entitled to compensation in the education costs for children younger than 18 years old in secondary and vocational education (WTOS). In addition, students between 18 en 30 are entitled to a study grant (WSF). The level of the grant is determined by the income of the parents. Also, according to some collective agreements employees may invoke rights to the financing of education and vocational training.

The Dutch Constitution does not stipulate a right to housing, it only obliges the government to promote sufficient housing facilities. This obligation is further elaborated in rules which open up the housing market for citizens with a low income. For example, according to the housing legislation (huisvestingswet), citizens are entitled to free settlement. This right can, however, be restricted in the interest of a well-balanced and

just distribution of housing accommodation. In order to keep housing affordable, the housing legislation further stipulates that housing corporations have to reserve 90 per cent of the houses with a low rent for citizens with lower incomes.<sup>6</sup> Further legislative acts on housing are delegated to the municipalities, which can stipulate additional conditions with respect to the application for an affordable house. In addition to the obligation to promote sufficient housing facilities, the access to affordable housing is facilitated by public rent subsidies (huurtoeslag). The subsidies are implemented by the national tax authorities. The level of these social provisions for social housing depends on the household income and the rent.

Finally, rights to social support including public mental health care and social work are regulated in a public act, the WMO. According to this act, the municipalities should delegate social support activities as much as possible to third parties. The WMO also stipulates that some assigned municipalities receive money for the organization of reception centers for the homeless and the care and treatment of addicts. These municipalities are ordered to guarantee that these centers and provisions are accessible for all persons living in the Netherlands. Thus the WMO indirectly lays down a right to have access to reception centers for homeless and to provisions with respect to the care and treatment of addicts.

### **3. Social expenditures and other welfare state indicators**

To provide an overview of the long-term developments of the Dutch welfare state programs, we use a number of quantitative indicators. First, we present the developments in social expenditures, for which we use data from the OECD Social Expenditure database (OECD, 2012). This database contains expenditure data on a number of social policy areas. Policies are classified as social when two conditions are simultaneously satisfied (Adema et al., 2011). First, they have to be intended to serve a social purpose. The main social policy areas included are old-age, survivors, incapacity-related benefits, health, family, active labour market policies, unemployment, housing and a category of

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<sup>6</sup> In 2013 the maximum rent for social housing is €681,02 and the maximum annual income for households applying for these houses is €34.229. Once people live in these houses, the maximum income does not apply anymore.

other social policy areas such as social assistance.<sup>7</sup> Both expenditures on cash benefits and on benefits in kind are included. Second, programs have to involve either interpersonal redistribution or compulsory participation. The database contains expenditures on public and private social security programs. The distinction between public and private social security is based on the institution which controls the financial flows, namely public agencies or private bodies. Private programs include mandatory and voluntary programs.<sup>8</sup> For the Netherlands, private social expenditures mainly consist of expenditures on old age programs, incapacity related programs and health care.

In the tables presented below, social expenditures are expressed as a percentage of GDP or as a percentage of total government expenditures. These ratios are conventional in the international comparative literature, because they provide a number of advantages compared to absolute expenditure levels. Most importantly, these ratios give an indication of the financial efforts on welfare state programs relative to the national income or to the total government expenditures, while factors such as inflation or changes in the population size do not complicate comparisons over time or across countries.

Table 1 shows the developments in the total gross public and private expenditures on social programs as a percentage of GDP in the Netherlands. Public social expenditures have decreased from 24.8 per cent of GDP in 1980 to 23.2 per cent in 2009. Changes in social expenditures reflect both discretionary policy changes and changes in the number of beneficiaries as the results of ageing of the population or changes in unemployment levels due to cyclical factors (Van Vliet, 2010). The private social expenditures increased from 4.1 per cent of GDP to 6.7 per cent in 2009. The relatively strong increase (63 per cent) in the private social expenditures is mainly due to higher expenditures on old age programs such as pension provision. In addition to a public pay-as-you-go system (AOW), the Netherlands have a relatively large funded system. The relative share of private supplementary pensions in the total pension provision, both mandatory pension schemes (second pillar) and voluntary pension schemes (third pillar), has been growing

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<sup>7</sup> The dataset does not contain expenditure data on social assistance specifically.

<sup>8</sup> Because voluntary private social security arrangements are classified as 'social', they have to contain an element of interpersonal redistribution. This implies that purely private insurance which is the result of direct market transactions by individual people given their individual risk profiles is not included.



(Goudswaard et al., 2010). Over the whole period, the total social expenditures increased with 1 percentage point to 29.9 per cent of GDP in 2009.

Table 1. Public and private social expenditures as percentage of GDP, 1980 - 2009

	1980	1990	2000	2009	Change 1980 - 2009
Public	24.8	25.6	19.8	23.2	-1.6
Private	4.1	6.0	7.4	6.7	2.6
Total	28.9	31.6	27.2	29.9	1.0

*Source:* OECD Social Expenditure Database (2012).

Table 2 shows that between 1980 en 2009, public expenditures on social policies amount around 45 per cent of the total government expenditures. Furthermore, Table 2 presents social expenditures at the program level. Public expenditures on old age have remained fairly stable. Since the 1990s, expenditures on programs for survivors have considerably decreased. This reflects the aforementioned major reform of the Survivor Act, the ANW, in the 1990s. Expenditures on incapacity related programs are strongly decreased from 11.8 per cent of total government expenditures in 1980 to 6 per cent of total government expenditures in 2009. This is the result of a number of major policy reforms since the 1990s, which we referred to in the introduction. The public expenditures on health care show an increase of roughly 65 per cent; from 9.3 per cent of the total government budget in 1980 to 15.3 per cent in 2009. Empirical analyses indicate that this increase is mainly the result of technological progress in the health care sector and of the ageing of the population (CPB, 2007).

Expenditures on family policies seem to have decreased between 1980 and 2009. However, the annual data (not shown in Table 2) reveal that these expenditures follow a quite fluctuating path rather than a decreasing trend, as the presented data years might suggest. In 2007 for instance, 4.3 per cent of total government expenditures was spent on family policies, showing the increased government expenditures on child care during the mid-2000s. Furthermore, it should be noted that a number of family policies are

instrumented as deductions on the tax income, such as the tax credits we mentioned in section 2.3.3. Because the social expenditures presented are gross public expenditures, they do not reflect tax deductions.<sup>9</sup>

Between 1980 and 2000, expenditures on active labour market policies increased considerably. After 2000, these expenditures decreased again. As mentioned above, these expenditure ratios are to some extent a function of the number of unemployed people. Hence, these lower expenditures on active labour market policies are partly the result of lower unemployment rates in the period 2000-2009. Furthermore, this decrease in spending also reflects the reduction of the activation budget by the government with the introduction of the new social assistance act (WWB, see section 4) (Van Berkel, 2006). Nevertheless, expenditures on activation programs in 2009 are more than twice as high as in 1980, indicating that labour market policies have become more aimed at activation.

The expenditures on unemployment protection have increased between 1980 and 1990, but they have decreased again after 1990. As is the case for activation programs, expenditures on unemployment benefits strongly depend on the unemployment rate. To explore the changes in the level of unemployment benefits, we use net unemployment benefit replacement rates. The net unemployment replacement rate is the ratio of the net income from unemployment benefits to the net income from work.<sup>10</sup> Data are taken from the Unemployment replacement rates dataset (Van Vliet and Caminada, 2012). The measure indicates the generosity of unemployment benefits in the initial phase of unemployment.<sup>11</sup> Figure 1 shows the net unemployment benefit replacement rates between 1971 and 2009. Over the whole period, the net income for unemployed people has become lower. A major reform of the unemployment benefits has taken place in 1987. As a result, the level of net benefits dropped considerably. Finally, Table 2 shows that the public expenditures on housing and on other social policy areas are slightly increased.

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<sup>9</sup> The OECD provides net social expenditures, but not at the programme level.

<sup>10</sup> The calculations assume a worker, aged 40, who earns the average production worker wage.

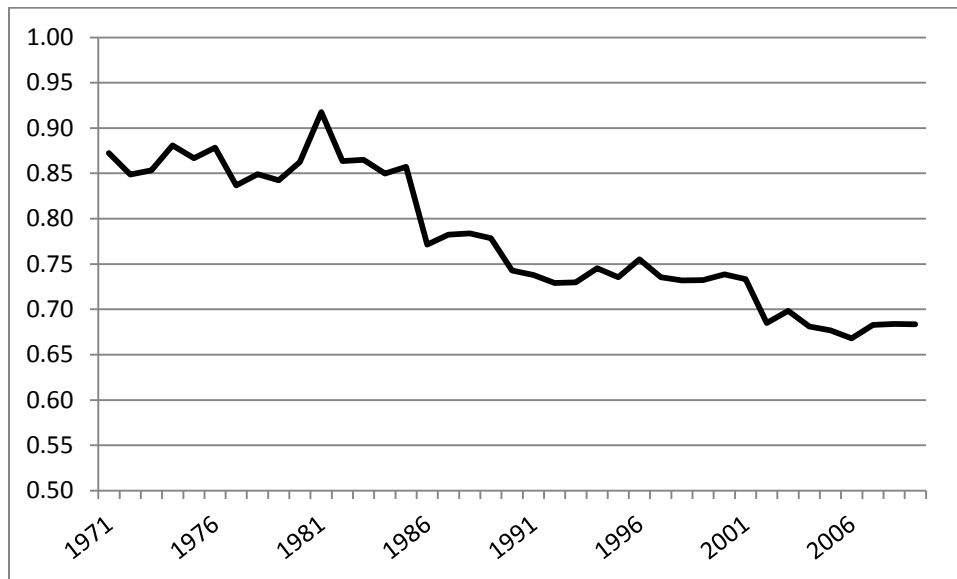
<sup>11</sup> A limitation of this indicator is that it does not take the duration of the benefits into account.

Table 2. Public social expenditures as a percentage of total government expenditures, 1980 – 2009

Program	1980	1990	2000	2009	Change 1980 - 2009
Old age	11.1	11.5	11.9	11.3	0.2
Survivors	1.5	1.7	0.9	0.4	-1.1
Incapacity related	11.8	11.5	8.8	6.0	-5.8
Health	9.3	9.8	11.4	15.3	6.0
Family	4.5	3.0	3.4	3.3	-1.2
Active labour market programs	1.0	2.3	3.3	2.4	1.4
Unemployment	2.9	4.6	2.9	2.8	-0.1
Housing	0.5	0.6	0.8	0.7	0.2
Other social policy areas	2.3	1.5	1.4	2.6	0.3
Total	44.9	46.5	44.8	44.8	-0.1

Source: OECD Social Expenditure Database (2012).

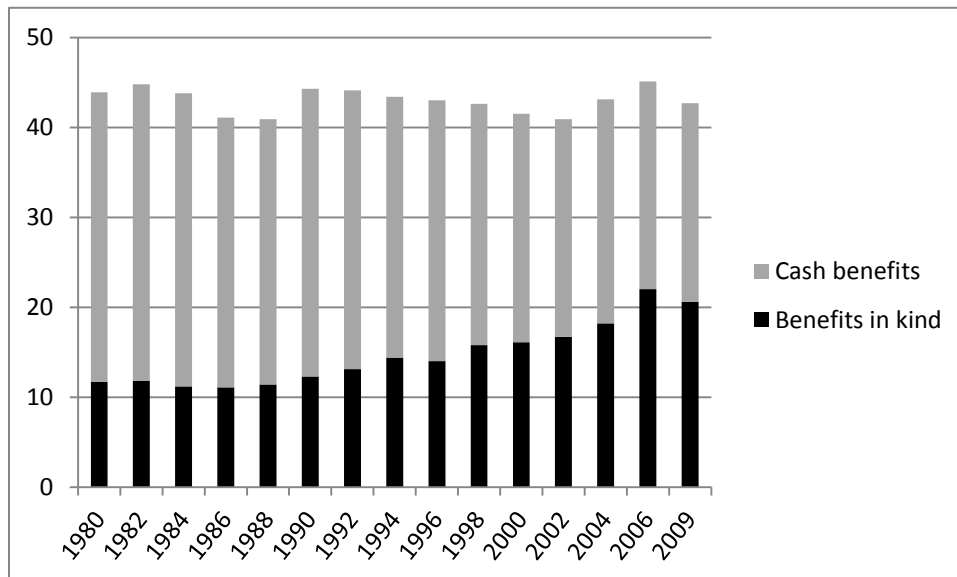
Figure 1. Net unemployment benefit replacement rates, 1971 - 2009



Source: Unemployment replacement rates dataset (2012).

Public social expenditures as a percentage of the total government expenditures are also presented in Figure 2, where we make a distinction between expenditures on cash benefits and expenditures on benefits in kind. Between 1980 and 2009, the expenditures on cash benefits have decreased, whilst the expenditures on benefits in kind have increased. As a result, the share of expenditures on benefits in kind has increased from roughly a quarter of the public social expenditures in 1980 to roughly half of them in 2009. This indicates a relative shift from the provision of welfare state programs through cash benefits to a more services oriented welfare state. In line with the data presented in Table 2, the decrease in the expenditures on cash benefits is mainly the result of decreased expenditures on survivor benefits, capacity related benefits, family benefits and unemployment benefits. The increased financial resources for benefits in kind are mainly spent on residential care and home-help for the elderly, rehabilitation services for disabled people and health care.

Figure 2. Expenditures on cash and in-kind benefits as percentage of total government expenditures



Source: OECD Social Expenditure Database (2012).

Because expenditures on education are usually not classified as social expenditures, we present them separately. Furthermore, we use data from Eurostat instead of OECD data here, because Eurostat has more data on expenditures on education available than the OECD (Eurostat, 2013). Table 3 presents the development of public expenditure on education as a percentage of GDP. Between 1995 and 2009, the expenditures on primary and secondary education increased, whilst the expenditures on tertiary education slightly decreased. This decrease is not a result of fewer students, because the number of students in tertiary education actually increased with more than 20 per cent in this period. Taken together, the total expenditures on primary, secondary and tertiary education increased with 0.7 per cent of GDP.

Table 3. Public expenditure on education as percentage of GDP, 1995 - 2009

	1995	2000	2005	2009	Change 1995 - 2009
Primary education	1.17	1.24	1.42	1.48	0.31
Secondary education	1.99	1.98	2.17	2.42	0.43
Tertiary education	1.67	1.39	1.47	1.63	-0.04
Sum	4.83	4.61	5.06	5.53	0.70

*Source:* Eurostat Statistics on Education and Training (2013).

Finally, we show the development of the income inequality in the Netherlands over the last few decades. Several measures can be used to study income inequality, but the Gini coefficient of household income is the most often used summary measure of income distribution. The values of the Gini coefficient range from 0 (no inequality) to 1 (maximum inequality). Table 4 presents Gini coefficients of household incomes after taxes and transfers. Data are taken from the OECD (2012). Among the total population and the working age population, the level of income inequality has increased between the mid-1970s and the late-2000s. In contrast, the level of income inequality among people aged 65 and above has decreased since the 1990s. Interestingly, comparable trends of decreasing income inequality among older people have been observed in other European

countries as well. A tentative explanation for these trends could be that the coverage of private supplementary pensions has increased (Van Vliet et al., 2012). However, empirical research for the Netherlands has indicated that the level of income inequality among retirees has increased in the most recent years (between 2008 and 2013) as a result of a growing group of retirees with relatively low private supplementary pensions (Knoef et al., 2013).

Table 4. Gini coefficient after taxes and transfers

	mid-70s	mid-80s	around 1990	mid-90s	around 2000	mid- 2000s	late- 2000s
Total population	0.26	0.27	0.29	0.30	0.29	0.28	0.29
Working age population: 18 - 65	0.26	0.27	0.29	0.30	0.29	0.29	0.30
Retirement age population: above 65	0.27	0.27	0.29	0.27	0.26	0.26	0.25

*Source:* OECD Income distribution statistics (2012).

#### 4. Shifts in the allocation of welfare services

The data presented in the last section indicate some major changes in the Dutch welfare state. Overall, the expenditures on cash benefits decreased as a result of major reforms in public insurances for, amongst other things, the risk of unemployment and disability in the 1980s en 1990s. These reforms also implied that social assistance has become more important as a last safety net. In addition, the data showed that expenditures on active labour market policies have strongly increased since the 1980s. However, after 2000 active labour market policy expenditures have decreased, which is partly the result of a cut in the reintegration budgets after the introduction of the new social assistance act in 2004 (WWB). These changes also reflect two shifts in the allocation of welfare services in the Netherlands which will be further examined in this section, namely the movement of the allocation of welfare services from the state to the employers and from the state to the municipalities. These new allocations of welfare services were considered crucial to

activate welfare recipients. We will in particular address the implications of these shifts for the public safeguards of welfare state provisions. In addition, section 5 examines if and to what extent European Union law and international treaties put limits to these shifts.

#### **4.1 From the state to employers**

As mentioned in the introduction, the report by the Buurmeijer Committee revealed how the corporatist organization of unemployment and disability schemes had encouraged welfare dependency, instead of reintegrating unemployed and disabled workers into paid employment (Buurmeijer Committee, 1993). This report triggered some major reforms in the disability and sickness schemes in the 1990s and the years 2000. One of the most important reforms involved the introduction of the WULBZ in 1996 which compelled the employer to pay 70 per cent of previous earned income during the first 52 weeks of disability, the so-called 7:629 Civil Act procedure. Since 2004, this employers obligation was further extended to a period of 104 weeks. In addition to the increased responsibility for the income of the sick employee, the report by the Buurmeijer Committee also initiated increased reintegration obligations of both employers and employees. In this section both changes will be examined. We will consider in particular if this new allocation of welfare services has affected the public safeguards for income maintenance.

First of all, the introduction of the WULBZ changed the legal procedures in case of conflicts over payments during absence due to sickness. Whereas before the introduction of the WULBZ in 1996 conflicts over payments were regulated in an administrative law procedure, after the introduction of the WULBZ, these conflicts are regulated in the 7:629 Civil Act procedure. As was noted in section 2.1, generally speaking, administrative law procedures are more accessible and offers more safeguards than civil law procedures. For example, in administrative law procedures citizens do not need to go to court immediately, but can lodge an objection in writing. Administrative law procedures further contain some General Principles of Good Administration which offer specific protection to citizens, such as the prohibition of arbitrariness and a prohibition on 'detournement de pouvoir'. The administrative law judge also plays a more active role compared to civil law judges.

In addition to these general differences the 7:629 Civil Act procedure also contains some specific features. In the first place, in most cases legal charges are lower in public procedures compared to civil procedures. Yet, in the 7:629 Civil Act procedures, legal charges are reduced. As a result, the costs of the 7:629 Civil Act procedures are comparable to the costs of administrative law procedures. Hence, in this respect the accessibility of civil law procedures are similar to administrative law procedures. On the other hand, however, the 7:629 Civil Act procedure contains more obstacles for employees seeking justice. For example, unlike administrative law procedures, civil law procedures do not require mandatory legal representation. In addition, the burden of proof to show that the employee is sick has been increased in 7:629 Civil Act procedures, which has made it more difficult for employees to win a case.

Still, the most important change concerns the introduction of a so called second opinion requirement from a medical doctor of UWV before a 7:629 Civil Act procedure can be started at all. Empirical research shows that after the introduction of the second opinion the number of cases on wage/benefit claims during periods of sickness has diminished enormously (Minderhoud et al., 1999; Huizinga, 2010). It seems plausible to conclude that the second opinion requirement has had a deterrent effect on employees wanting to start a civil procedure. The decrease of wage/benefit claims may also be due to the employees' fear that a civil law procedure has a negative impact on their relationship with the employer. Before 1996 the risk that the relationship with the employer would be affected was much smaller, as sick employees would not start a procedure against their employer but against the industrial insurance board.

Possibly, the responsibility of employers to pay 70 per cent of the wage during periods of sickness and the second opinion requirement have also increased employment termination, because the financial incentives to terminate employment have increased substantially. In addition, whereas UWV requires 3 weeks to deliver a second opinion, a labour dispute easily arises in case the employee does not work during this period and the employer, following the advice of the health and safety officer, holds that the employee is not sick. Indeed, research has shown that juridical cases that involved a second opinion delivered by UWV often concerned dismissal cases (Huizinga, 2010). Yet, it remains difficult to investigate the 'real' reason for employment termination.



All in all, the introduction of the WULBZ seems to have decreased the public safeguards of wage/benefit claims during periods of illness. On the other hand, regarding the reduction of absence through illness<sup>12</sup>, the argument can also be put forward that the public safeguards have increased, because the employers have more incentives to re-integrate their employees.<sup>13</sup>

In addition to the privatisation of the sickness insurance, the report by the Buurmeijer Commission also initiated new incentives for the employer to prevent employees becoming dependent of the disability insurance (WAO/WIA) after two years of sickness. In the remainder of this section we examine if and to what extent the Pemba act of 1997 has affected public safeguards to income protection in case of disability.

As a result of the Pemba act employers became fully responsible for the risk of long-term disability. The premium employer has to pay for the public insurance varies by industry. The Pemba act also introduced the possibility of employers to become an own-risk bearer with respect to the risk of long-term disability. In 2010, 27 per cent of the employers had chosen to become own-risk bearers (Veerman, 2011). This means that these employers have chosen to pay the disability benefits by themselves. Since the introduction of the reformed disability act (WIA) in 2006, the responsibility for employers who have chosen to bear the risk of disability has been extended to the period after the contract with the employee has ended. In practice, next to the old category UWV-insurants, a new category of disability insurants have emerged, namely employees who are insured by an own risk bearer (ORB - insurants). What are the consequences of this shift of the allocation of welfare services (disability benefits) from a state actor (UWV) to a private employer?

First of all, it is important to notice that the employer who chooses to be an own-risk bearer, becomes a public body in the sense of the General Administrative Law Act, which means that ORB-insurants follow the same objection and appeal procedure fixed in administrative law as UWV- insurants. The Act on Independent Public Bodies stipulates in this regard an important safeguard: public power must be executed independently from

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<sup>12</sup> Absence through illness has decreased from more than 6 per cent of the working population in the early 1990s to a little bit more than 4 per cent in 2011 (CBS statline).

<sup>13</sup> Although it still might be argued that the reduction in absence through illness has also been due to rising termination cases.

other duties. Yet, in the literature the question has been raised whether the own-risk bearer is able to differentiate between his obligation to behave himself as an impartial public body and his role as an employer (regulated by private law). Moreover, not only the private interests of the employer may impede his role as an impartial public body, also ignorance with respect to the statutory periods may prevent employees from proceeding against their employer (Roozendaal, 2006). These latter fears are sustained by empirical evidence. In 2010 for instance, there were hardly any legal proceedings between ORB-insurants and their employers before the public court, despite the fact that own-risk bearers imposed roughly 200 sanctions (Veerman, 2011). In the literature, it has therefore been proposed to test in advance if an employer is capable of performing the duties of an Independent Public Body (Rijkema and Tollenaar, 2012) .

We can also point at some differences between own-risk bearers and UWV which may affect the public safeguards of ORB-insurants. For example, unlike the sanctioning power of UWV, the sanctioning power of own risk bearers is not regulated by a legal act.<sup>14</sup> In addition, reintegration rights of ORB – insurants differ from those of UWV-insurants as the latter group has the right to all kinds of reintegration support by UWV which is not accessible to ORB- insurants. Finally, whereas both UWV and the own-risk bearers have duties with respect to the reintegration of the disabled employee, the National Inspection agency only controls the legitimacy and effectiveness of the activities of UWV whose reintegration obligations has additionally been stipulated in detail (Roozendaal, 2006).

In sum, notwithstanding that it is most likely that the privatization operations have had a positive effect on the reintegration of sick and disabled employees, it seems fair to conclude that both the WULBZ and the Pemba Act have affected the public safeguards for (some) sick and disabled employees in a negative way. In case of disagreement between the sick/disabled employee and the (former) employer, civil law procedures have replaced administrative law procedures which offer less safeguards. In addition, the second opinion requirement seems to have had a threshold effect for employees to start procedures in case of disagreement. Moreover, sanctions and reintegration obligations of

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<sup>14</sup> The sanctioning power of UWV is regulated by ‘maatregelenbesluit’ which stipulates what kind of sanctions (fines and measures) should be imposed.

employers who have chosen to become own-risk bearers are less well regulated. Perhaps most important, it seems likely that the transference of procedures from public law to civil law has contributed to a conflict of interests as a result of which the public safeguards of the involved employees have deteriorated.

## **4.2 From the state to municipalities**

A second shift in the allocation of welfare services which we will examine in more detail, entails the shift from the state to municipalities. We will focus on this process of decentralization of social assistance provisions which has taken place since the introduction of the new social assistance act, WWB, in 2004. An important goal of this new act is the activation of welfare recipients and their reintegration to paid employment. For illustration, the literal translation of the name of this act is ‘Act Employment and Income’. This trend is also important regarding recent welfare state retrenchments as a result of which the WWB has become the main source of income protection in case of unemployment for many so called outsiders on the labour market.<sup>15</sup>

The WWB delegates rules with respect to reintegration, sanctions and extra allowances to municipal regulations. In addition, the WWB has given local officials more discretion with respect to, amongst other things, reintegration measures and sanctions. As a result, rights to social assistance may differ between municipalities and may even depend on the appointed official. An advantage of decentralization and municipal discretion is that it encourages tailor made provisions. On the other hand, however, decentralization may give rise to inequalities between municipalities which are due to arbitrary differences in the interpretation of national policy. In this respect, Van Berkel raised the question if ‘social assistance recipients in municipalities that adopt a more disciplinary approach [are] less deserving than in others?’ (Van Berkel, 2006). In addition, the question can be raised to what extent different treatments for individual recipients reflect different individual capabilities and potentials. In view of these complications it

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<sup>15</sup> This growing importance of social assistance provisions can also be observed in other continental welfare states, which has caused a social divide between the so called insiders on the labor market who have indefinite contracts and are entitled to unemployment and disability insurances and outsiders on the labor market who have fixed term contracts for short periods or work on commission and who (quickly) fall back on social assistance in case of unemployment and disability. Welfare state retrenchments have increased these divides. See Palier (2010: 359).

has been proposed in the literature that differences between municipalities should always be reducible to conscious and explicit considerations of municipal bodies. It has further been argued that these municipal differences due to municipal discretion tend to be relatively small and they are subjected to administrative law and the General Principles of Good Administration (Vonk, 2012: 2127).

The decentralized financing system that accompanied the introduction of the WWB gave rise to further changes. The Dutch state hoped that financial responsibility would increase the incentives for municipalities to reduce social assistance dependency. Before the introduction of the WWB in 2004 municipalities bore only financial responsibility for reintegration programs. The reintegration performance of municipalities was assessed on both the number of job-entries realized *and* the number of trajectories realized. Under the new financing system municipalities receive two budgets from the national authorities. One budget for benefit payments and one budget for active labour market policies. At the same time the available budgets for reintegration programs have decreased. If municipalities spend less on benefits than the amount they received from this specific budget they may keep these funds. However in case there is deficit the municipalities have to fill the shortage from their own budget. With respect to the reintegration budget 25 per cent of the budget which has not been spend may be carried forward to the next year.

Blommesteijn et al. have summarized some adverse effects of the new financing system, which they characterize as ‘quick wins rather than long-term investments’ (Blommesteijn et al., 2012):

- a. *Stringent admission policy.* People who would have been entitled to social assistance under the National Assistance Act which preceded the WWB are now denied access, whereas at the same time the number of unemployed has not decreased.<sup>16</sup>
- b. *Artificial volume decrease.* Reintegration budgets are used for wage subsidies, as a result of which the volume of welfare recipients were reduced. Thus the income budget is reduced without increasing the regular work participation.

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<sup>16</sup> Part of the applicants who are denied access have entered the Wajong, a provision for young disabled persons which is executed by the state.

- c. *Selective client approach.* Municipalities use reintegration budgets for people who are likely to find work –with some support- as soon as possible, as a result of which other welfare recipients at a larger distance to the labour market do not receive reintegration activities.

Above all, this ‘quick wins’ approach has encouraged the introduction of so called Work First programs. Most municipalities believed these programs would contribute to cost reduction (Research voor Beleid, 2008; Sol et al., 2007). In fact, in 2009 88 per cent of the Dutch municipalities carried out Work First programs (Borgers and Lemmens, 2009). The WWB provides the legal basis for Work First programs as it allows municipalities to enforce welfare recipients to participate in labor activities, without receiving ‘normal wages’ for a maximum of four years. Work First programs may entail real labor or labor activities which are exercised in a simulated surrounding. Other variants are also possible such as work programs combined with supportive courses. In most cases, the welfare recipients maintain their allowance as a form of remuneration. It is, however, also possible that they receive (subsidized) wages.

With respect to activation policies, such as Work First programs, researchers distinguish a ‘carrot’ and a ‘stick’ approach. Whereas the carrot refers to investments in human capital, which increase the opportunities of welfare recipients on the labor market, the stick refers to obligatory participation in (work)programs to make welfare dependency less attractive (Graversen and Van Ours, 2008). The increased emphasis on cost reduction in municipalities, together with the cuts in reintegration budgets suggest that compared to the earlier social assistance law (Abw) the ‘stick’ approach has become more important in municipal policies. For example, research has shown that after the introduction of the WWB the number of schooling programs offered within WWB activation policies has decreased (IWI, 2007). In addition, municipalities have argued that cost reductions imply that finding the shortest route to work has become a priority (Work First). Hence, improving the labor market position of welfare recipients is not an independent aim of activation policies (Research voor Beleid, 2008).

The stick approach implies, amongst other things, that Work First activities are linked to sanctions, which are, above all, used to incentivize welfare recipients who miss

the motif to work (Research voor Beleid, 2008; Sol et al., 2007). In this respect it must be noticed that the WWB has allowed the municipalities far reaching sanction rights which go beyond their earlier sanction competence. In addition, some welfare recipients experience enforced participation in Work First programs as a sanction itself (Sol et al., 2007). As such Work First programs may also scare of new applicants.<sup>17</sup> The legislator has furthered the stick approach as welfare recipients are obliged to accept any socially acceptable job, regardless of any former job experience or education.<sup>18</sup> Instead under the Awb welfare recipients were obliged to accept all ‘suitable work’.

Some studies have found that Work First programs have encouraged the outflow of welfare recipients in regular jobs, while, limiting the inflow of new applicants at the same time (Van der Klaauw and Van Ours, 2013). Other researchers, however, have criticized the ‘stick’ approach because it does not result in a structural participation on the labor market (Blommesteijn et al., 2012; Van Berkel, 2006). That is, a relatively high percentage of ‘former’ welfare recipients who have participated in work first projects have returned to the WWB (Bruttel and Sol, 2006), an effect which has even been acknowledged by supporters of Work First (Borgers and Lemmens, 2009). Therefore, critics hold that activation in the context of the WWB encourages and strengthens a flexible labour market, rather than investing in the capabilities of welfare recipients with the object of realizing a long-term labour market participation (Van Berkel, 2006).

The decentralization of social assistance thus seems to have affected public safeguards in different ways. In the first place decentralization has given rise to inequalities between municipalities with respect to the right to social assistance. Secondly, the new financing system triggered a Work First approach supported by increased municipal sanction discretion, which on the one hand has encouraged the outflow of welfare recipients in regular (temporal) jobs, while, on the other hand, these developments have resulted in the reduction of rights to social assistance and a deterioration of rights to (long-term) reintegration.

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<sup>17</sup> Some evidence is provided by Kok and Houkes (2011). In addition, a number of reports mention the need of further research on withdrawals of social assistance applications.

<sup>18</sup> Article 8, paragraph 1 a WWB. In practice this means that the welfare recipients may only refuse socially unacceptable jobs such as work in the prostitution, illegal work and work which remuneration is below the statutory minimum wage.

### 4.3 The new allocation of social welfare services and the Dutch Constitution

Section 2.2 argued that Constitutional social rights only contain subjective claim rights in a theoretical sense as social rights which are stipulated by the Constitution need further regulation. The Constitution is however also important in another way as, generally speaking, the legislator tests changes in social security law against the Constitution. The WULBZ was for instance tested against the Constitution.<sup>19</sup> Hence, according to the Dutch legislator, the fact that ORB-insurants have to start civil law procedures in case of conflicts over wages, which may put them in a vulnerable position with respect to their employers, was not considered contrary to Dutch Constitutional social rights.

On the other hand, however, the legislator has not tested the WWB against the Constitution. The question can therefore be raised if the WWB, in particular its sanction system and labor obligations, conflicts with the Constitution. Under the old social assistance act, the Abw, municipalities were bound to the 'Measures Act', a national Act which allowed municipalities to cut allowances varying from 5 per cent to 100 during maximum one month.<sup>20</sup> Yet under the new social assistance act, the WWB, the only condition for cutting allowances is that the municipality reconsiders its decision within a period of three months.<sup>21</sup> For the rest, municipalities are free to draft their own sanction regulations. The legislator thought that this new municipal discretion would increase the effect of the WWB. It can, however, also be argued that sanctions which amount to a 100 per cent cut of allowances seriously affect public safeguards of a right to social assistance. Then, despite the fact that the court is competent to review the legality of municipal decisions, only a very marginal judicial review may be exercised. In addition, the Dutch court is not allowed to test municipality decisions against the Constitution. This raises the question if and how rights to social assistance can be safeguarded in case of strict municipal sanction policies?

Fairly recently the Central Appeals Tribunal, the highest court in the Netherlands in social security cases, solved this problem in a creative way. In this case a welfare recipient faced a 100 per cent allowance cut during three months for refusing an offer on reintegration which entailed the participation in a Work First program. In its judgment the

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<sup>19</sup> Parliamentary Papers 1994-95, 24 169, No.3, p. 16-20.

<sup>20</sup> Article 5 Maatregelenbesluit.

<sup>21</sup> Article 18 (3) 3 WWB.

Central Appeals Tribunal recalled that the explanatory memorandum of the WWB, holds that ‘anyone who cannot make it on his own, is entitled to freedom from poverty’. The court continued that the municipal sanction was detrimental to the character of the guarantee of a minimum income. Therefore, the municipality should not have sanctioned the appellant for more than one month.<sup>22</sup> The Central Appeals Tribunal thus formulated some safeguards for municipal discretion by explaining the WWB in the spirit of Article 20 of the Constitution.

## **5. International and European law**

In the last section, we examined two shifts in the allocation of welfare services. We argued that the privatization of sickness and disability insurance and the decentralization of social assistance may have affected the right to an adequate income during periods of sickness and disability to work and the right to social assistance. In this section, we will examine to what extent international and European law provides (extra) public safeguards. To understand the possible impact of international law provisions it is important to notice that the Netherlands is a monist state. This implies that international law does not need to be translated into national law. This can be inferred from article 93 and 94 of the Dutch Constitution. Article 93 stipulates that provisions of treaties and of resolutions by international institutions which may be binding on all persons by virtue of their contents shall become binding after they have been published. And according to article 94, statutory regulations in force within the Netherlands shall not be applicable if such application is in conflict with provisions of treaties that are binding on all persons or of resolutions by international institutions. From relevant case law we can further infer that international provisions can only bind Dutch citizens in case these provisions are sufficiently precise and do not need further implementation in national legislation (Fleuren, 2004). Article 93 en 94 of the Constitution are not relevant with respect to EU law, as European community constitutes a new legal order of international law for the benefit of which the States have limited their sovereign rights.<sup>23</sup>

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<sup>22</sup> CRVB 14 March 2011 *LJN* BP 6843.

<sup>23</sup> European Court of Justice 5 February 1963 C-26/62 (*Van Gend en Loos*).



## 5.1 Privatization of sickness and disability insurance

The privatization of the Dutch sickness and disability insurance has given rise to comments from social rights supervisory bodies, such as the ILO Committee of Experts, and the European Committee on Social Rights (European Social Charter).

According to article 25 of ILO Convention 121 on industrial accidents and occupational diseases, each member has to accept general responsibility for the due provision of the benefits provided in compliance with the Convention and for this purpose the Member State must take all required measures. With respect to the Dutch transference of the responsibility of income protection to the employers during the first two years of sickness in the 1990s (WULBZ), the ILO Committee of Experts recalled the State responsibilities ensuing from article 25 of ILO Convention 121. According to the Committee, article 25 implies that the State should take effective supervisory measures to ensure the entitlement of protected persons against all risks of abuse or of failure of the system.<sup>24</sup> Thus the ILO Committee of Experts concluded that the private organization of disability insurance is not contrary to ILO Convention 121, on the condition that the State takes effective supervisory measures.

However, the European Committee of Social Rights has been more critical on the Dutch reforms. The Committee concluded that the privatization of the sickness insurance in the Netherlands has definitively eroded the collective nature of social security.<sup>25</sup> The committee referred in this respect to article 12 (3) of the European Charter, according to which States should ‘endeavour to raise progressively the system of social security to a higher level’. For the Committee WULBZ is contrary to article 12, because this article foresees that the principle of collective funding is a fundamental feature of the social security system. That is, this principle ‘ensures that the burden of risks are spread among the members of the community, including employers, in an equitable and economically appropriate manner and contributes to avoiding discrimination of vulnerable categories of workers’.<sup>26</sup> The Dutch system would encourage risk selection as employers would be less willing to hire workers with a history of medical problems. In addition, the Dutch report

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<sup>24</sup> Direct Request (CEACR) adopted 2000, published 89th ILC session (2001).

<sup>25</sup> ESC *Conclusions* XV-1, 2000 p. 97; ESC *Conclusions* XVII-1, 2004, p. 321-322; ESC *Conclusions* XVIII-1, 2006 p. 554.

<sup>26</sup> ESC *Conclusions* XVII-1, 2004, p. 321.

on the implementation of the WULBZ and the Pemba act did not convince the Committee that the ‘right to sickness and invalidity benefits is effectively secured as a social security right under the new system.’<sup>27</sup>

It can be concluded that ILO convention 121 and Article 12 ECH allow for the Dutch privatization of the sickness and disability insurance as long as the State supervises this new allocation of welfare services. The State should in particular prevent risk selection by employers. According to the European Committee of Social Rights, the Dutch state has not fulfilled his obligations in this respect.

## **5.2 Decentralization of social assistance**

In section 4.3 we discussed two consequences of the delegation of social assistance provisions to municipalities which was accompanied by an increased financial responsibility of municipalities for social assistance benefits. In the first place this policy resulted in an increased municipality discretion to impose sanctions and, secondly, this policy encouraged the introduction of Work First programs. Regarding these consequences, this section examines, first of all, if and to what extent international and European law provides public safeguards against cutting of allowances for longer periods. Secondly, we will examine if international and European law provides safeguards against compulsory work.

Table 5 provides an overview of diverse relevant provisions in European and international law, which safeguard a right to social assistance. Let us consider first article 34(3) of the EU Charter according to which the Union recognizes and respects the right to social assistance. The EU Charter has become part of European Union law since the Treaty of Lisbon of December 2009.<sup>28</sup> According to article 52 (1), the Charter only applies to Member States when they are implementing Union law. Article. 52 (2) further provides that ‘[r]ights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties. In this respect, it is important to note that European Union law does not provide rules on social assistance, except for discrimination prohibitions. The Charter furthermore

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<sup>27</sup> ESC *Conclusions* XVIII-1, 2006, p. 554.

<sup>28</sup> See article 6 (3) VEU.

distinguishes between rights and principles. Citizens can only invoke rights before the court. Whereas article 34 (3) must be conceived as a principle, it is unlikely that Dutch citizens can effectively invoke this article before the court.<sup>29</sup>

Table 5. Provisions in European and international law concerning social assistance

<p><b>ICESCR</b></p> <p><b>Article 11(1)</b> The States Parties to the present covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing and to the continuous improvement of living conditions (...).</p>
<p><b>UN Convention on the Rights of the child (CRC)</b></p> <p><b>Article 27</b></p> <p>State Parties shall recognize the right of every child to a standard of living adequate for the child's physical, mental, spiritual, moral and social development.</p>
<p><b>European Social Charter (ESC)</b></p> <p><b>Article 13</b> With a view to ensuring the effective exercise of the right to social and medical assistance, the Parties undertake: <b>(1)</b></p> <p>To ensure that any person who is without adequate resources and who is unable to secure such resources either by its own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance</p>
<p><b>Charter of the Fundamental Rights of the EU</b></p> <p><b>Article 34 (3)</b></p> <p>In order to combat social exclusion and poverty, the Union recognizes and respects the right to social and housing assistance so as to ensure a decent existence for all those who lack sufficient resources, in accordance with the rules laid down by Union law and national laws and practices.</p>

What about the other provisions? Article 11 (1) ICESCR and article 13 ESC provide for a right of everyone to either an adequate standard of living (ICESCR) or social assistance (ESC). The supervisory bodies of these Treaties have expressed some concerns with

<sup>29</sup> *OJ EU* 2007, C. 303, 14 December 2007.

respect to the WWB. For example, the Committee on Economic, Social and Cultural Rights has urged the Netherlands ‘to strengthen the ongoing evaluation of the consequences of the Work and Social Assistance Act, so as to ensure adequate entitlement and duration of social assistance benefits for vulnerable members of society as well as support during the administrative procedure of entitlement to the benefit’ (Committee on Economic, Social and Cultural Rights, 2006). The European committee of social rights has even been more critical. With respect to the WWB the committee commented in 2006 that

‘it is in conformity with Article 12 to establish a link between social assistance and willingness to seek work or undertake vocational training, so long as the conditions are reasonable and fully consistent with the objective of providing a long-lasting solution to the individual problems. However, reducing or suspending social assistance benefits is only compatible with the Charter if this does not deprive the individual concerned of means of subsistence’ (European Committee of Social Rights, 2006: 564).

The committee thus recommended a minimum threshold: sanctions may not result in depriving individuals of means of subsistence. Furthermore, from the 2009 report we may infer that the committee is not sure that Dutch social assistance recipients do not fall below a minimum subsistence level. The committee requests the Dutch State to provide information on the measures taken in case social assistance recipients refuse to ‘accept generally accepted work’, (..) whether the assistance is withdrawn in its entirety (..) and whether the withdrawal of [social] assistance amounts to the deprivation of means of subsistence for the person concerned.<sup>30</sup> There is no final judgment yet.<sup>31</sup>

With respect to article 11 ICESR and article 13 ESC, the Central Appeals Tribunal decided that these provisions were not binding on all persons within the meaning of article 93 and 94 of the Constitution.<sup>32</sup> Only article 27 CRC has been successfully invoked in a few cases where parents were denied social assistance allowances because they did not possess a valid residence permit.<sup>33</sup> Hence, international

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<sup>30</sup> Conclusions 2009 Vol.2, p. 29.

<sup>31</sup> The reports on the situation in the Netherlands which have appeared since 2009 have not addressed article 13 ESC.

<sup>32</sup> CRvB 22 December 2008, LIN BG 8776.

<sup>33</sup> CRvB 24 January 2006, LIN AV 0197.

law only seems to provide safeguards for social assistance rights for minor children before the court.

In addition to these explicit rights to social assistance, article 8 ECHR may also be relevant with respect to the safeguarding of the right to social assistance. According to article 8 ECHR, everyone has the right to respect for his private and family life, his home and his correspondence. The ECtHR has held that article 8 also contains a positive obligation:

[Article 8] does not merely compel the state to abstain from (..) interference: in addition to his primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and family life. In addition to the negative obligation to protect the individual against arbitrary action by the public authorities, art 8 also contains positive obligations that is the State may also have to act affirmatively to respect the wide range of personal interests.<sup>34</sup>

This implies that Article 8 may contain an indirect right to social assistance. Still, States have a margin of appreciation, which means that the State may strike a balance between public interest to refuse or cut social assistance allowances and the interest of the involved claimant. In the Netherlands, the Central Appeals Tribunal has decided that it is possible to derive a right to social assistance from article 8 ECHR. It can, however, be questioned whether sanctioned welfare recipients can effectively invoke article 8 ECHR, especially regarding the required balancing of interests.<sup>35</sup> In sum, European law and international law do not seem to be much of a help to individual litigants who are cut off of social assistance benefits for a longer period.

In the final part of this section we will consider to what extent municipal reintegration obligations are contrary to the ban on compulsory labor in ILO convention 29 and European Convention of Human Rights (ECHR). Article 4 (2) ECHR, provides that no one shall be required to perform forced or compulsory labour. Since article 4 ECHR can be directly invoked in court, we will assess in particular if and how art 4 ECHR provides extra safeguards with respect to social assistance rights.

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<sup>34</sup> ECtHR 26-3-1985, X & Y v. the Netherlands, para 31.

<sup>35</sup> Most article 8 ECHR cases with respect to the right to social assistance involved right claims of persons staying illegal in the Netherlands and in almost all these cases the balance was struck in favor of public interest to refuse social assistance.

There is not much ECtHR jurisprudence with respect to article 4 ECHR. One of the few cases, which is also relevant for this paper, concerns the Van der Mussele case. Van der Mussele was an attorney who in the context of his traineeship was obliged to take so-called pro-deo cases. Referring to ILO Convention 29, the ECtHR decided that Van der Mussele did not perform ‘compulsory labour’. The ECtHR held that the question if work should be labeled as ‘compulsory labour’ depends on a balance of interests. At any case the required labour must be reasonable in terms of the burdens put on the person in question and the purpose of the compulsory labour. In case an excessive burden is put on the person in question the labour must be considered contrary article 4 ECHR (Eleveld, 2012).

The Dutch Central Appeals Tribunal has followed the ECtHR argumentation in the Van der Mussele case in a case where a welfare recipient refused to participate in a disciplinary project that regarded ‘closely supervised labor in greenhouses’. In its ruling, the Tribunal, first of all, stated that the offered project increases the employment possibilities of the person involved. Subsequently, the Tribunal tested the provision against article 4(2) ECHR and concluded that there is no question of a violation of the ban on compulsory labour. Only when, considering all circumstances of the case, it cannot (or no longer) be expected from a participant to perform the activities or work that he or she is instructed to do because of their excessive or disproportionately taxing nature and/or the total lack of perspective towards employment that they offer, one could call it a situation of compulsory labour. Thus, invoking article 4(2) ECHR, this ruling imposed some restrictions on municipal Work-First measures. These measures are only permitted on the condition that they are geared to the individual situation and are not excessive or disproportionately burdensome. Moreover, the measure should offer ‘some’ perspective of employment. Thus the Central Appeals Tribunal has provided a framework of criteria for judging the validity of obligations imposed on the beneficiaries. To put it differently, international law has offered some minimum standards for testing the legality of Work-first projects (Vonk, 2009).

## **6. Conclusion**

The data presented in section 3 and the allocation shift of welfare services from the state to employers and municipalities which we examined in section 4 seem to be in line with the trend that we discussed in the introduction, namely, a slow transformation from a system based on notions of equality and solidarity to a system that is increasingly influenced by the values of freedom of choice and individual responsibility. Major reforms in the 1980s and 1990s have resulted in several benefit cuts. Responsibilities have been shifted towards individual citizens and, in the case of sickness and disability, also to employers. The reforms have also resulted in lower unemployment benefits. As a result of these changes social assistance provisions have become more important as a safety net, whereas at the same time rights to social assistance have been eroded.

The reforms of the Dutch welfare state were triggered by several factors. In addition to political and ideological motives for reforms, financial considerations play a significant role in welfare state reforms. Worsening economic situations increased the pressure on government budgets because of lower tax revenues and higher expenditures on unemployment benefits. On the other hand, demographic trends, such as the ageing of the population, led to higher welfare state expenditures with respect to health and old age. All in all, as section 2 and 3 have shown the Dutch welfare state is still a quite extensive welfare state, spending throughout 1980-2009 45 percent of its budget on social policies.

The allocation shift in welfare state services indicated, above all, that the Dutch welfare state is increasingly aimed at activation. Notwithstanding that activation measures have had a positive effect on the reintegration of disabled employees and social assistance recipients, we also expressed some concerns as regards to the safeguarding of rights to an adequate income. It was argued that some of (the consequences of) the allocation shifts in welfare state services might be contrary to the Dutch Constitution and international law provisions. However, in most cases individual litigants cannot invoke these provisions before the court. In addition, international law does seem to allow privatization of the sickness and disability insurance as long as the State supervises this new allocation of welfare services which are based on the principle of solidarity. The European Committee of Social Rights has been critical in this respect. Supervisory bodies of international treaties have also expressed some critique on the introduction of Work-

Fist policies in conjunction with sanctions, resulting from the decentralization of social assistance. In addition, a fairly recent judgment of the Central Appeals Tribunal has shown how international law can offer some minimum standards for testing the legality of Work-first projects.

An issue which we have only slightly touched upon, concerns the changes in the welfare state provisions related to children and family. Whereas breadwinner provisions were abolished in the 1980s and 1990s due to European demands regarding equal treatment of men and women and the simultaneous increased female labour market participation, these provisions were hardly replaced by extra provisions for children and other dependents. Of course, the Work and Care act (section 2) provides various leave rights, however, without granting rights to payments during leaves. Section 3 showed that expenditures on family policies even decreased between 1980 en 2009.

Further reforms of the Dutch welfare state can be expected in the near future. As in most European countries, the severe recession has created considerable fiscal pressure. In addition, the ageing of the population increases this pressure even further. Hence, the cabinet of liberals and social democrats that was installed in 2012 has announced major reforms of several welfare state programs. The proposals include for instance a shortening of the duration of the unemployment benefit scheme and a higher retirement age. Such reforms are not only supposed to reduce the government expenditures on welfare state arrangements, they should also increase the labor force participation rate in order to broaden the funding basis for the welfare state. There are no indications of new allocations of welfare state service in this respect. Yet, other reforms may also have repercussions for the public safeguards of welfare state rights. In any case, it seems likely that for an increasing part of people living in the Netherlands social assistance rights become the main source of income protection. From this perspective it is imperative that, in accordance with European and International law, individual rights to social assistance remain guaranteed in the Dutch welfare state.



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