

Frans Pennings (Ed.)

Between Soft and Hard Law

*The Impact of International Social
Security Standards on National
Social Security Law*

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Social Security Standards on
National Social Security Law**

Edited by
Frans Pennings

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Between Soft and Hard Law

Studies in Employment and Social Policy

In the series Studies in Employment and Social Policy this book
*Between Soft and Hard law – The Impact of International Social Security Standards
on National Social Security Law* is the thirtieth title.



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PREFACE

The International Labour Conference has adopted almost 200 conventions on labour law and social security law. These conventions contain minimum standards to be implemented by the Member States that have ratified these conventions.

These standards reflect the level of protection on which there was consensus among the Member States and serve as aspirations for those countries which have not yet reached these standards. In this way, they serve, in line with the objectives of the ILO Constitution and the Philadelphia Declaration, to realise social justice and increase the level of living conditions.

The conventions serve as universal standard setting instruments. Consequently, they have to take account of the diversity of social security systems and the differences between the Member States, in particular the position of the developing countries.

In this study we will consider the ILO conventions from a more particular point of view: their legal meaning within the ratifying Member States. In other words: what is the role of the conventions in: preparing national legislation; amending this legislation; in discussions in parliament; and in case law?

In the first three chapters of this book we describe the role and the meaning of the conventions and the points of discussion arising.

Subsequently, we undertake a study of the legal impact of ILO Conventions in national law. Such comparative studies are very rare and there are very few publications on this issue. For this purpose a sample of countries with well-developed social security systems was selected: the: United Kingdom, France, Germany, Spain and the Netherlands. In each case a detailed study was undertaken by a local social security expert.

These countries are not necessarily representative of all Member States of the ILO. Consequently, the conclusions that we draw on the legal impact of the conventions cannot be generalised across all Member States.

Still, the study shows that the conventions have a certain legal impact and describes the different ways they are used in the Member States. It also shows the dilemmas which occur in respect of the supervision of social security standards.

In the last chapter the conclusions from this study are drawn together and suggestions are made for ways in which the meaning of the conventions can be improved.

There appear to be very few academic studies of the meaning of ILO conventions. This book gives a first insight in the working of the conventions. It should form a useful basis for discussion and further research.

I have to thank Ursula Kulke (ILO) who was very helpful in commenting on earlier drafts of this book; the final responsibility of the texts remains, of course, with the authors. I am also grateful to Audrey MacDougall from the University of Edinburgh who made an indispensable contribution to this book by editing the text and through her suggestions for clarifications and additions.

Tilburg/Utrecht, November 2005

Frans Pennings

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LIST OF ABBREVIATIONS

AAW	Algemene Arbeidsongeschiktheidswet (General Law Relating to Incapacity for Work)
AGIRC	Association Générale des Institutions de Retraite des Cadres (General Association of Institutions for Managerial Staff Retirement Pensions)
AKW	Algemene Kinderbijslagwet (General Family Benefits Law)
Anw	Algemene nabestaandenwet (General Survivors Benefits Law)
AOG	Adjudication Officer's Guide
AOW	Algemene Ouderdomswet (General Old-Age Pension Law)
ARRCO	Association des Régimes de Retraites Complémentaires (Association of Complementary Retirement Schemes)
AWW	Algemene Weduwen- en Wezenwet (General Widows and Orphan's Benefits Act)
BW	Burgerlijk Wetboek (Civil Code)
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CDSS	European Social Security Committee
CRvB	Centrale Raad van Beroep (Central Appeals Court)
DWP	Department for Work and Pensions
EEA	European Economic Area
EC	European Community
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECR	European Court Reports
EJSS	European Journal of Social Security
ESC	European Social Charter
EU	European Union
FNS	National Solidarity Fund
FRG	Federal Republic of Germany
GDR	German Democratic Republic
GG	Grundgesetz
ILB	International Labour Bureau
ILO	International Labour Organisation
ILR	International Labour Review
JSA	Jobseekers Allowance
LILS	Committee on Legal Issues and International Labour Standards
MSA	Agricultural Mutual Social Insurance

NHS	National Health Service
NICE	National Institute for Clinical Excellence
OJ C	Official Journal of the European Communities, Information and Notices
OJ L	Official Journal of the European Communities, Legislation
Pemba	Wet premiedifferentiatie en marktwerking bij arbeidsongeschiktheidsverzekeringen (Law on Differentiation of Contribution Rates and Market Functioning in Disability Insurances)
RSV	Rechtspraak Sociale Verzekering (Dutch magazine with law reports)
RVO	Reichsversicherungsordnung
SGB	Sozialgesetzbuch (Social Security Code)
SVB	Sociale Verzekeringsbank (Social Insurance Bank)
Trb.	Tractatenblad (Official Journal of Treaties)
TW	Toeslagenwet (Supplements Act)
UK	United Kingdom
UN	United Nations
Wajong	Wet Arbeidsongeschiktheidsvoorziening Jonggehandicapten (Invalidity Provision (Young Disabled Persons) Act)
WAO	Wet op de Arbeidsongeschiktheidsverzekering (Law Relating to Insurance Against Incapacity for Work)
WGA	Werkhervatting gedeeltelijk arbeidsgeschikten (Resuming of work by partially disabled scheme).
Zfw	Ziekenfondswet (Health Insurance Act)
ZW	Ziektewet (Sickness Benefits Act)

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CHAPTER 1

International Social Security Standards: An Overview

FRANS PENNINGS AND BERND SCHULTE¹

1.1 THE OBJECTIVES OF INTERNATIONAL STANDARDS ESTABLISHED BY THE ILO

Among the international organisations that set international standards for social security the International Labour Organisation (ILO) takes a leading position.² At present, almost all countries of the world are members of this organisation,³ which means that the geographical area in which ILO standards apply is incomparably large.

The ILO was established after the First World War, with the aim to promote social peace and to prevent a new war. Social unrest was considered a serious threat, and the Russian Revolution of 1917, which took place shortly before the creation of the ILO, confirmed the founders of this organisation in their view that measures had to be taken in order to raise the standards of living in the world. This view was laid down in the Preamble of the Constitution of the ILO, in the famous phrase: 'Whereas

¹ The authors are indebted to Ursula Kulke, ILO, for her comments and advice on earlier drafts of this text. The responsibility for the final result remains entirely with the authors.

² See, for an overview, B. von Maydell, 'Das Sozialrecht in der Normsetzung der IAO', in: Bundesministerium für Arbeit und Sozialordnung (ed.), *Weltfriede durch soziale Gerechtigkeit: 75 Jahre Internationale Arbeiterorganisation*, Bonn 1994, pp. 47; see, for social security provisions established by international organisations in general, A. Nußberger, 'Das Sozialrecht der internationalen Organisationen', in: B. von Maydell and F. Ruland (ed.), *Sozialrechtshandbuch (SRH)*, 3rd ed., Baden-Baden 2003, p. 1677 et seq.

³ At present the ILO has 177 Member States.

universal and lasting peace can be established only if it is based upon social justice . . .'. The Preamble continues by stating that conditions of labour exist, involving injustice, hardship and privation to such large numbers of people, as to produce unrest so great that the peace and harmony of the world are imperilled. Improvement of those conditions is therefore urgently required, including the prevention of unemployment, the protection of workers against sickness, disease and injury arising out of employment, provision for old age and injury, and protection of workers when employed in countries other than their own.

This concern was reaffirmed in 1944 by the International Labour Conference in the Declaration of Philadelphia, which endorsed a very broad view of social security in calling, among other measures, for the provisions of 'a basic income to all in need of such protection'.

In the light of the objective to promote social justice, the prevention of distortion of competition by Member States is also relevant: States might wish to lower their labour costs in order to increase their competitive powers ('social dumping').

Already the very first bilateral trade agreements, made before the establishment of the ILO, included clauses that were meant to prevent social dumping, in order to guard against the destruction of social protection. The ILO's concern about unfair competition shows from the Preamble to the Constitution: 'Whereas also the failure of any nation to adopt humane conditions of labour is an obstacle in the way of other nations which desire to improve the conditions in their own country' the provisions of the Constitution are necessary.

Clearly, social security has always been one of the principal concerns of the ILO and social security as part of the wider concept of social protection is still today one of the main pillars of the ILO's Decent Work Agenda. This concern is confirmed in the recent publication by the ILO, *Social Security, A New Consensus*, which includes the conclusions of the 2001 International Labour Conference, which was mainly dedicated to social security.⁴

A characteristic of the ILO is that all its bodies are composed on a tripartite basis, i.e. of representatives of Governments, employers and employees. This means that the views of the workers, employers and Governments are heard when developing standards and deciding on interpretations of standards. The representatives of these parties of each Member State form a national delegation, but each representative is free to follow his or her own view. In other words, the employers and employees of a country may vote differently on a particular issue.

The body which has the power to adopt ILO legislation is the International Labour Conference. This body adopted a large number of standards in the form of conventions and recommendations in order to realise the objectives mentioned in the Constitution.⁵ As of 30 September 2004, 7,237 ratifications of conventions had been registered.

⁴ ILO, *Social Security, A New Consensus*, Geneva 2001.

⁵ I.e. 185 conventions and 195 recommendations.