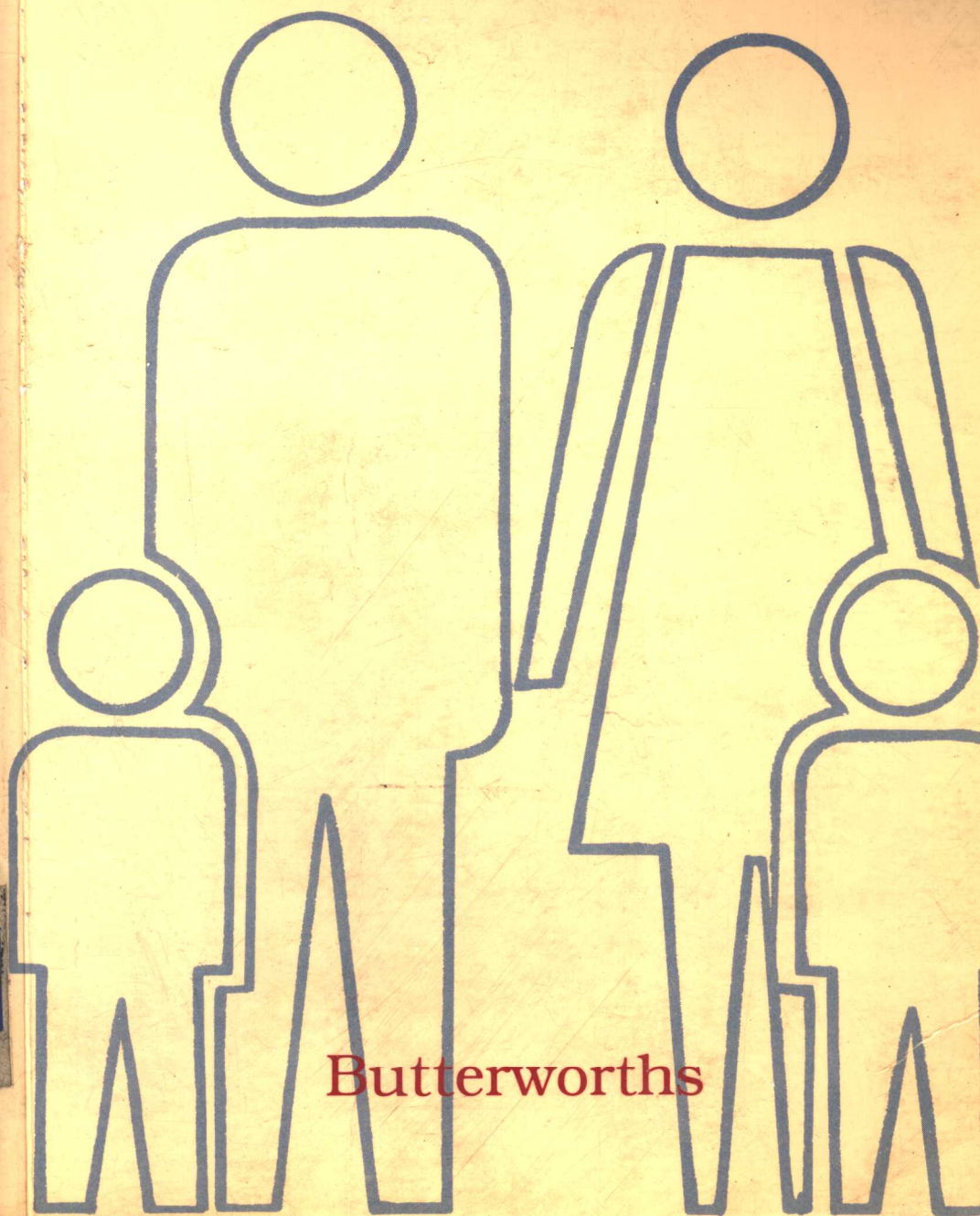


Ogus & Barendt

The Law of SOCIAL SECURITY

Second Edition



Butterworths

The Law of Social Security

(Second edition)

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Preface to second edition

Our main task in preparing this second edition has been to take account of the many and substantial legislative changes which have occurred, particularly since the Conservative government took office in 1979. This has resulted in the almost complete rewriting of chapter 12 (on supplementary benefits) and major amendments to other chapters. Nor does the pace of reform seem to be slackening. At the time of writing the Social Security and Housing Benefits Bill is being considered by Parliament. We provide, at relevant places in the text, an account of the general principles of the two schemes — statutory sick pay and housing benefits — which it is anticipated will be introduced in 1983, but the details will not be available until the statutory instruments consequential on the legislation have been drafted. The parliamentary session 1982–83 is also likely to see a radical restructuring of the industrial injuries scheme; its flavour may be gained from the White Paper published late in 1981, to which frequent reference is made in chapter 8.

Quite apart from the revisions made necessary by reform, we have sought to improve the quality of the text by eliminating a number of errors which crept into the first edition (critics and colleagues have been most helpful in drawing our attention to them), and by reformulating discussion in many areas as our views on the subject-matter and the best way of presenting it have changed. Our basic aims have, however, remained unaltered. We are conscious that there are some who would prefer us to concentrate more on the technical detail of the law and others who suggest that our concern with the theoretical and policy issues is not taken far enough. Maintaining the appropriate *via media* between these two positions is not easy, but we are consoled by the fact that now, as never before, there are publications available which attempt to meet all the very diverse needs of those interested in social security law.

We are happy again to record our gratitude to the officials of the Department of Health and Social Security who have kept us liberally — sometimes embarrassingly so — supplied with information and materials, and to the staff of Butterworths for the expeditious handling of our manuscript and their constant reassurance when time and the whims of government seemed to be gaining the upper hand. We are no less indebted to Ashley Wilton who commented on several chapters and Christine Markham, Helen Farr and Audrey Hiscock for their uncomplaining ordering of our often untidy efforts.

vi *Preface*

We have divided the responsibility between us on slightly different lines from the first edition: A.I. Ogus prepared chapters 1–4 and 6–10, and E.M. Barendt chapters 5 and 11–16. We have attempted to state the law as we understand it to be in January 1982, though we have been able to incorporate references to later developments either in the text or in the Appendix. The rates of contribution and benefit which we state for 1982–83 are those in force from the last week of November 1982.

A.I.O.
E.M.B.
January 1982

Foreword to the first edition

by the Rt. Hon. Lord Scarman, OBE, Lord of Appeal in Ordinary

Social security is now the subject of rights and duties. Inevitably, therefore, it is a legal subject. Anthony Ogus and Eric Barendt by this work have committed themselves, without compromise or condition, to this basic proposition: and I commend their work to all who understand the need of a legal approach to a legal subject. But they do not — nor I for that matter — under-rate the value of the contributions other disciplines make to the development of a coherent and well-grounded national system of social security; and, of course, no lawyer can understand, or help forward, the law unless he is capable of an inter-disciplinary approach.

I expect this book to become one of the indispensable textbooks of the law. Certainly an authoritative, and independent, work is needed. At present, tribunals and practitioners have to rely heavily on the material produced, but not invariably published, by the Department of Health and Social Security. The department does a fine job: but it is not, and never has been, the office of a government department to declare or interpret the law. If law is to be administered justly, the independence, as well as the skills, of the lawyer must be mobilised. *Ogus and Barendt* will become, I hope, a name as familiar to the lawyer as Chitty, Salmond, Buckley, and Simon.

Finally, this work gives us an opportunity of measuring the extent to which our social security law satisfies the obligations accepted by the United Kingdom as a signatory of the European Social Charter 1961 and the International Covenant on Economic, Social, and Cultural Rights 1966. If any doubt should continue to be entertained that social security has to be part and parcel of English law, our international obligations are the answer.

I commend this book to lawyers primarily — but also to members of the other disciplines concerned with the behaviour of man in society; to politicians; and to all who are concerned to ensure that humanity and compassion are secured by law as well as by generosity.

Scarman

Extract from preface to the first edition

The growth of interest in social security law, both of teachers and practitioners, has been rapid in the last few years. The process has not been free from controversy: opinions differ both as to the academic merit of the subject and to the preferred method of presentation. Some contend that the social security system has not sufficient intellectual weight for the serious student of law; others view the educational objective more in terms of fostering the arithmetic ability to calculate the entitlement of a given individual to benefit rather than of providing any analysis of the principles of the system as a whole. A third approach stresses the desirability of covering, within one university course, broad and diverse areas of the welfare system including not only social security but also housing, education and legal services. We do not adopt these perspectives. The book has been written from a conviction that social security should take its place alongside other, more traditional, legal subjects as fully worthy of critical study, and its unity and technical character make it, in our view, more suitable for this purpose than the necessarily vague outlines of 'welfare' or 'poverty' law.

Legal education has tended in the past to concentrate on law as a method of determining relationships between individuals. While public law — the relationship between the state and the individual — has not been neglected, attention has been focussed for the most part on the formal or constitutional nature of the relationship rather than on its substance. The emphasis has been on the individual's ability to invoke judicial controls over unlawful executive activity rather than on the content of the rights conferred on the individual by the state within the proper exercise of its powers. While social security law raises problems of the constitutional limits of executive powers, it also lays down in considerable detail rules which materially affect the lives of all members of the community. As a body of law, it consists of a complex network of primary and subordinate legislation and case-law (notably Commissioners' decisions, though in some areas judicial rulings are not unimportant), the scrutiny of which provides an excellent training in the handling of a variety of legal instruments. As a reflection of competing social and economic policies, it reveals the way in which a very important branch of state activity has evolved, and how general objectives and strategies are translated into particular principles and rules of law.

In contrast to their counterparts in most other countries, the British universities have accepted 'social administration' as an intellectual disci-

pline in its own right, though necessarily it has relied on other disciplines such as economics, history and sociology for its tools of analysis. Social security, in the context of general social policy, has featured prominently in its publications. This work does not attempt to compete with such studies. Quite apart from the limits to our own competence, we have not the space here both to expound a complex area of law and to subject the policies on which it is based to rigorous interdisciplinary analysis. At the same time, we have sought to explain the law in terms of its policy background and the insights offered by other disciplines, as we believe that the functioning of a social security system cannot be understood without reference to the objectives and values which it incorporates.

This goal has, with other factors, created the problem of preserving a satisfactory balance between historical and policy background, general principle and technical rules. In writing this book we have had in mind not only law students but also practitioners and other professional groups with an interest in this area. To accomplish these various objectives, we have adopted a compromise solution. We have inset not only, as is customary in legal texts, quotations and case summaries, but also technical rules which do not raise issues of legal principle.

As we explain in the opening chapter, the term 'social security' is open to several interpretations, and the scope of this book proceeds from no precise and unchallengeable definition. We have decided to confine ourselves to an account of those financial benefits which are administered by the Department of Health and Social Security. This means that, on the one hand, we do not treat the National Health Service, the various housing allowances, or redundancy payments, but on the other hand we do include the war pensions and industrial injury schemes.

A.I.O.
E.M.B.

Oxford
April 1978

Note on citation of Social Security Commissioner Decisions

Reported decisions of the Social Security (formerly National Insurance) Commissioners provide a most important source of social security law. There has been a standard method for citing these decisions since 1951. It starts with the prefix 'R', indicating that the case is reported. There then follows in parenthesis the series initial, denoting the particular social security benefit involved in the case. There are now ten series:

- (A) Attendance allowance
- (F) Family allowances and child benefit
- (FIS) Family income supplement
- (G) General — miscellaneous benefits (maternity benefit, widow's benefit, guardian's allowance, child's special allowance, invalid care allowance and death grant)
- (I) Industrial injuries benefits
- (M) Mobility allowance
- (P) Retirement pensions
- (S) Sickness and invalidity benefits
- (SB) Supplementary benefit
- (U) Unemployment benefit

After the series initial, the number and (after an oblique stroke) the year of the case follow. For example, *R(P) 9/55* refers to the ninth reported retirement pensions case in 1955, and *R(I) 12/75* refers to the twelfth reported decision on industrial injuries benefits in 1975. The decisions are published individually by HMSO, and then bound every four years. Industrial injuries cases are bound in separate volumes.

Numbered decisions of the Commissioners are not published, but may be read at the Commissioners' offices (see p. 595, and Appendix). A few of these decisions are discussed in this book. They are identified by reference to two letters ('C' standing for 'Commissioner', and the relevant series letter), followed by the appropriate number and year. Thus, *CG 17/69* refers to the seventeenth numbered case in 1969 concerning one of the miscellaneous benefits, e.g. maternity, widow's benefit.

Before 1951 a reported case was referred to simply by its number and series initial, with the addition of the suffix 'K' or 'KL'. For both numbered decisions, and reported decisions up to the end of 1950, the letter 'S' or 'W' is added after the 'C' to denote a Scottish or a Welsh case. For example, *CS 11/49 (KL)* refers to the eleventh English decision of the Commissioner on

sickness benefit during 1949, a case which has been reported; *CSU 14/48 (KL)* refers to the fourteenth Scottish case on unemployment benefit in 1948 — and a decision which has been reported. Now a reported decision merely indicates in the heading whether it is a Scottish or a Welsh case.

Some reference is made in this book to decisions of the Northern Ireland Commissioners. Such decisions are cited in much the same way as British cases, though the number and year precede the series initial. These initials also differ from those used in citing British decisions. They are:

- (AA) Attendance allowance
- (DG) Death grant
- (FA) Family allowances
- (ICA) Invalid care allowance
- (II) Industrial injuries benefits
- (IVB) Invalidity benefits
- (MB) Maternity benefit
- (NCIP) Non-contributory invalidity pension
- (P) Retirement pensions, widow's benefit, guardian's allowance, child's special allowance
- (SB) Sickness benefit
- (UB) Unemployment benefit

Thus, *R 1/71 (FA)* refers to the first reported Northern Ireland decision during 1971 on family allowances. Before 1960 the letter 'R' was omitted. There have not hitherto been any reported decisions on supplementary benefit or family income supplement; the series initials will be (Supp Ben) and (FIS) respectively.

Abbreviations

Statutes

CBA	Child Benefit Act
FAA	Family Allowances Act
FANIA	Family Allowances and National Insurance Act
FISA	Family Income Supplements Act
IIDA	Industrial Injuries and Diseases (Old Cases) Act
NAA	National Assistance Act
NHIA	National Health Insurance Act
NIA	National Insurance Act
NI(II)A	National Insurance (Industrial Injuries) Act
NISBA	National Insurance and Supplement Benefit Act
SBA	Supplementary Benefits Act
SSA	Social Security Act
SSBA	Social Security Benefits Act
SSCA	Social Security (Contributions) Act
SSHBA	Social Security and Housing Benefits Act
SS(MP)A	Social Security (Miscellaneous Provisions) Act
SSPA	Social Security Pensions Act
UIA	Unemployment Insurance Act
WCA	Workmen's Compensation Act

Books

Atiyah	<i>Accidents, Compensation and the Law</i> (3rd edn)
Calvert	<i>Social Security Law</i> (2nd edn)
Dupeyroux	<i>Droit de la Sécurité Sociale</i> (8th edn)
George	<i>Social Security: Beveridge and After</i> (1968)
Handbook	DHSS, <i>Supplementary Benefits Handbook</i> (1980)
Harris	<i>William Beveridge</i> (1977)
Kaim-Caudle	<i>Comparative Social Policy and Social Security</i> (1973)
Lynes	<i>The Penguin Guide to Supplementary Benefits</i> (4th edn)
Micklethwait	<i>The National Insurance Commissioners</i> (1976)
Ogus	(ed) Köhler and Zalher <i>A Century of Social Insurance</i> (1982) pp. 150–264
Townsend	<i>Poverty in the United Kingdom</i> (1979)
Walley	<i>Social Security: Another British Failure?</i> (1972)

Reports and Papers

Beveridge	Social Insurance and Allied Services (1942, Cmd 6404)
Finer	Report of the Committee on One-Parent Families (1974, Cmnd 5629)
Fisher	Report of the Committee on Abuse of Social Security Benefits (1973, Cmnd 5228)
Industrial Injuries Compensation	DHSS Discussion Document, <i>Industrial Injuries Compensation</i> (1980)
McCarthy	Report of the Royal Commission of Inquiry: Social Security in New Zealand (1972)
Pearson	Report of the Royal Commission on Civil Liability and Compensation for Personal Injury (1978, Cmnd 7054-I), vol I
Reform of the Industrial Injuries Scheme	White Paper: Social Security Act 1975 — Reform of the Industrial Injuries Scheme (1981, Cmnd 8402)
Social Assistance	DHSS Review of the Supplementary Benefits Scheme (1978)
Social Insurance, Part I	White Paper: Social Insurance, Part I (1944, Cmd 6550)
Social Insurance, Part II	White Paper: Social Insurance, Part II, Workmen's Compensation (1944, Cmd 6551)

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