THE LEGAL CHARACTER OF INTERNATIONAL SOCIAL SECURITY STANDARDS

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Abstract

The International Labour Organisation (ILO) and the Council of Europe have developed a number of conventions relating to social security standards. As these standards are international conventions they have legal effects. In this article, we discuss the various dimensions of these effects, including interpretation, problems of supervision and the role of the conventions in national courts. The article considers how these legal effects should be assessed, and how to proceed with international social security standards.

Keywords: international social security standards; social protection; legal effect; interpretation; supervision; ILO; Council of Europe

1. INTERNATIONAL STANDARDS IN THE AREA OF SOCIAL SECURITY

1.1. INTRODUCTION

From the 1930s onwards, and particularly in the 1950s and 1960s, a number of ILO social security conventions were adopted. More recently a number of new social security conventions have been adopted.[1] These conventions were made in order to develop standards at a global level – by setting these standards the ILO wished to encourage Member States to improve their levels of social protection and thus to

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1 Detailed information is available on the conventions on the ILO website www.ilo.org.

contribute to social harmony and avoid new conflicts. After the Second World War, the Council of Europe also started to develop conventions relating to social security.

The instruments of these two organisations contain more fully elaborated standards than those of the United Nations or the European Union (EU) in this area. The Fundamental Declaration on Human Rights and the International Covenant on Economic, Social and Cultural Rights (ICESCR), for example, mention the right to social security but only in a very general way. The EU does not have the competence to develop (binding) standards for social security. For this reason, the conventions of the ILO and Council of Europe are central to the development of international social security standards.[2]

One of the objectives of international conventions is to promote the development of the social security system in countries that have not yet ratified the convention. A convention shows that a global consensus has been reached on the standards it contains and suggests that Member States should adopt these standards. The ILO also provides important technical assistance to Member States to help them develop their social security schemes in order to reach this level.

Another objective is of a more legal nature: a Member State which has ratified a convention must satisfy the standards included in it. Our article focuses on this aspect. Several recent publications have addressed the role of ILO standards in realising the right to social security.[3] These publications give a good overview of how conventions help to elaborate other international norms on social security, such as Article 9 of the ICESCR. These publications concern, as it were, the relationship between the conventions and a 'higher', more abstract, normative level. Our article discusses the relationship of the conventions with the 'lower', national level. The following are therefore of particular relevance:

- interpretation and supervision issues that arise when the standards are applied to national law;
- changes of national legislation as a result of supervisory procedures; and
- cases before national courts in which conventions have been applied.

Since social security conventions have been ratified by a relatively small number of countries, we can only make use of materials from a limited number of cases. In 2006, research was carried out in France, Germany, the Netherlands, Spain and the UK on the impact of the conventions[4] and further research is currently being carried out in other countries. Our findings are based on these materials. Although we draw a disproportionate number of examples from the Netherlands, we think that this is

2 Becker, von Maydell and Nußberger (2006), p. 21 et seq.

3 For example, Kulke (2007) and Riedel (2006).

4 Pennings (2006).

justified, as these examples illustrate the various legal dimensions of the conventions. This is relevant to a discussion of the legal impact of the conventions, even if the conventions do not (yet) have such effects in some other countries.

This overview of the legal meaning of social security conventions is useful in order to learn more about the special character of social security standards. Moreover, it may be relevant to the discussion of the development of the conventions and their future role. Discussions are currently taking place in some international circles as to whether a new convention for social security could, or should, be developed, and whether such an instrument should be limited to broad objectives or, alternatively, whether it should be a full legal instrument.[5] Our article is intended to contribute to this discussion.

More specifically, we discuss the following questions:

- In which ways do conventions have a legal impact?
- Which factors act as barriers to the (successful) impact of conventions?
- Is the legal impact of the conventions positive and if so, could (and should) it be reinforced?

The answers to these questions are given in Section 7.

1.2. THE DEVELOPMENT OF THE CONVENTIONS

Before we discuss the legal character of the conventions, we briefly describe the development of international standards, in so far as this is relevant to their legal impact.

Two periods can be distinguished in the development of international social security standards. During the first, which lasted from 1919 to 1944, most of the conventions considered social insurance to be the route to meeting the specified standards. Their objective was the establishment of compulsory insurance schemes for a specific branch of social security (unemployment, industrial accidents, occupational diseases, sickness, old age, invalidity and death) as covered by the relevant convention.

The second period began after World War II and was, to a large extent, though only indirectly, initiated by the 1942 *Beveridge Report* on the future of the British social security system.[6] The new concept of social security expressed in this report involved universal and comprehensive coverage, unification of social security schemes, guaranteed income security and medical care for the whole population. Social security was therefore no longer limited to employees.

5 See note 3.

6 Beveridge (1942).

The ILO was in favour of this approach, and this led to the adoption in 1952 of the Social Security (Minimum Standards) Convention 102. This convention covers the nine traditional branches of social security in one single instrument: medical care; sickness benefit; unemployment benefit; old-age benefit; employment injury benefit; family benefit; maternity benefit; invalidity benefit and survivor's benefit.

Although, at the time, the ILO intended to make a second general convention, which would contain higher standards for all branches, this proved to be insufficiently supported by the Member States. Instead, over the following years, separate conventions were adopted, each of which concerned a specific risk:[7]

- Convention 103, Maternity Protection, 1952;
- Convention 121, Employment Injury Benefits, 1964;
- Convention 128, Invalidity, Old-Age and Survivor's Benefits, 1967;
- Convention 130, Medical Care and Sickness Benefits, 1969;
- Convention 168, the Employment Promotion and Protection against Unemployment, 1988;
- Convention 183, Maternity Protection, 2000.

From our perspective, it is particularly important to note that these post-War conventions differ from the pre-War conventions in that they only provide minimum standards. Member States were thus allowed more freedom to decide on the form and contents of the national legislation through which they wished to meet the convention standards. Signatory countries can often choose between alternative standards. In other words, in order to give greater flexibility to Member States, these conventions were deliberately designed to allow their objectives to be achieved by a variety of methods. The conventions regard different approaches as equally valid, provided they meet the basic principles and requirements laid down, notably that:

- benefits in cash should be a periodical payment provided 'throughout the contingency'; this excludes – in principle – lump sum payments;
- benefits should be prescribed benefits replacing previous income up to a certain level or establishing a guaranteed minimum; this makes it extremely difficult, if not impossible, for defined contribution schemes to comply with the conventions;
- the costs of the benefits and administration should be borne collectively through insurance contributions or taxation; this excludes schemes based solely on employers' liability;

7 These are the so-called up-to-date social security conventions, listed in a decision of 2002 by the Governing Body of the ILO; previous conventions are still relevant for the ratifying State, but are no longer promoted.

- the insurance contributions to be paid by employees should not exceed 50 per cent of the total costs of the scheme; this excludes schemes financed entirely by employees;
- the State has to assume, at least, general responsibility for the provision of benefits and for the proper administration of social security institutions;
- representatives of the protected persons have to participate in the management of a scheme, or, at least, be associated with it in a consultative capacity in all cases in which the administration is not entrusted to an institution regulated by public authority or a Government department.

These principles are not laid down in particular documents, but follow from the texts of the conventions adopted thus far.[8]

The Council of Europe was established after the Second World War, and has also developed international social security standards. These are laid down primarily in the European Code of Social Security (ECSS), adopted in 1964. This Code was based on, and copied, the provisions of ILO Convention 102. In addition to this instrument, a Protocol was adopted, which lays down higher standards. The ECSS was criticised for not being sufficiently flexible. For this reason, a Revised European Code was adopted in 1990, but although it was signed by 14 States, it has not been ratified, and, consequently, has not yet come into force.[9] The Code has almost the same contents as Convention 102 and supervision is also entrusted to the ILO's Committee of Experts (see next section). [10]

Even if the representatives of a Member State vote for a particular convention (and it is subsequently adopted), this State does not always do its best to adjust its national social security system in order to be able to subscribe to the standards. Governments do not always want to amend their legislation in order to meet the ILO standards. It may also be the case that a convention is simply forgotten, and, if asked, the State concerned is unable to explain why the convention has not been ratified.

Recently, the candidates for EU membership – which are now new EU Member States – ratified the ILO or Council of Europe social security conventions, in order to show that they were ready for to join the EU. In order to become a member of the EU, countries have to achieve an adequate level of social protection and the conventions

8 For instance, in Convention 102, principle 1 is laid down in Articles 65–67; principle 2 in Articles 65–67; principle 3 in Article 71(1); principle 4 in Article 71(2); principle 5 in Article 71(1); principle 6 in Article 71(3).

9 Information on the instruments can be found on www.coe.int.

10 This is carried out on the basis of Article 74(4) of the Code. Since the Code follows the ILO Convention No. 102, the advantages of this common supervision procedure are clear. After its report is received, the Committee of Experts on Social Security of the Council of Europe draws up the draft conclusions for the Committee of Ministers of the Council of Europe. It is this Committee, which draws the conclusions in respect of the Code.

provided them with useful criteria for developing their social security systems.[11] The ILO and Council of Europe conventions are particularly valuable for this purpose since the EU itself has not developed standards for the content of social security systems.

2. SUPERVISION OF THE CONVENTIONS

After an ILO convention has been ratified, Member States have to report periodically on its implementation. These reports are examined by the Committee of Experts on the Application of Conventions and Recommendations, which is composed of twenty independent experts. The Committee does not have the power to impose strong sanctions.

In principle the ILO follows a diplomatic route in realising its aim: it seeks to persuade the Member State concerned to comply with the convention through a continuing dialogue. However, if this does not result in a satisfactory outcome, further measures are possible. For example, if a national scheme appears to be inconsistent with a convention, the Committee of Experts may request additional information from the Government of the Member State concerned. The Government may then bring its legislation into conformity with the convention without too much discussion before the international forum. However, it can also happen that, even after further observations from the Committee of Experts, the inconsistency between the national system and the convention remains, in which case the Committee of Experts will use the diplomatic formula that it 'notes this with concern'. In more serious cases, and only after the Committee has repeated the same point on several occasions, it will express 'its deep concern'.

The conclusions by the Committee of Experts are sent to the Conference Committee on the Application of Conventions and Recommendations. This Conference Committee discusses selected cases of discrepancies noted by the Committee of Experts. The report of the Conference Committee is presented to the International Labour Conference which will then draw its own conclusions.

In most cases in which a Government is confronted with an inconsistency, it eventually brings the legislation into conformity with the convention concerned, although this may take a long time. If not, the International Labour Conference can put a country on a 'non-compliance list'. Although 'naming and shaming' may not on the face of it appear to be a tough legal sanction, States certainly do not like to be mentioned in this context.

Article 37 of the ILO Constitution provides that any question or dispute relating to the interpretation of a convention shall be referred for a decision to the International

11 Leppik (2007).

Court of Justice in The Hague. However, on ILO issues, the Court has to date hardly ever been approached on matters concerning social security conventions. Instead, the Committee of Experts and the International Labour Conference are the most important actors in the supervision procedure, supported by the International Labour Office (the secretariat of the ILO).

3. INTERPRETATION OF THE CONVENTIONS

3.1. THE MANDATE OF THE COMMITTEE OF EXPERTS AS REGARDS INTERPRETATION MATTERS

In supervision procedures, the question naturally arises of how the provisions of the conventions are to be interpreted. More specifically the question is: can particular provisions of the conventions be given a broad meaning, for instance to respond to new developments or to prevent undesirable effects. In answering this question we have to pay attention to the – rather remarkable – discussion of whether the Committee of Experts has a mandate to provide interpretations of the conventions. The discussion arose following the establishment of the Committee of Experts by the Governing Body of the ILO in 1926, in accordance with a Resolution adopted by the International Labour Conference. Its task was to supervise the Government reports on the application of the conventions.[12] This mandate was modified by the Governing Body at its 103rd Session in 1947. Since then the Committee of Experts has had the task of examining the annual reports on the measures through which the Members give effect to the provisions of the conventions to which they are party. On the basis of its construction some authors argue that the Committee is simply a technical committee which prepares advice for the Conference and does not have the competence to give interpretations. Those who support this view claim that the task of providing interpretations requires an additional specific power to do so. [13]

On occasion, Article 37 of the ILO Constitution is invoked as a reason for denying the Committee of Experts the right of interpretation. [14] Article 37 provides that:

(1) Any question or dispute relating to the interpretation of this Constitution or of any subsequent Convention concluded by the Members in pursuance of the provisions of this Constitution shall be referred for decision to the International Court of Justice.
(2) Notwithstanding the provisions of paragraph 1 of this article, the Governing Body may make and submit to the Conference for approval rules providing for

12 ILO, Resolutions adopted by the Conference, Proceedings 1926, appendix V, p. 429.

13 Gravel and Charbonneau (2003), p. 8.

14 Idem.

> the appointment of a tribunal for the expeditious determination of any dispute or question relating to the interpretation of a Convention (…).

In our view authors who deny the Committee the right to interpret conventions allow it less scope than Article 37 of the ILO Constitution. Article 37 does not give exclusive competence to the International Court. The Constitution obliges all questions of interpretation to be sent to the International Court of Justice. In practice this obligation is not followed and is not practical. In any case, it does not prevent other bodies from giving interpretations, rather it makes it clear that the International Court of Justice has, if approached, the last word on interpretation. If it is not given the opportunity to comment, we must rely on the observations of the Committee of Experts. These can be overruled by the International Conference, but as long as this does not happen, the observations have the status of interpretation. Thus the Constitution does not prohibit interpretation by the Committee of Experts.

The fact, however, that the Constitution does not mention the Committee – let alone its competence – allows room for continuing discussion to take place.[15] This situation should be remedied, since the debate about the competence of the Committee is not helpful for its authority and, moreover, makes it difficult to establish real case law. In our view, the Governing Body should take steps to clarify and confirm the competence of the Committee. We recommend that a system is developed, in which there is no doubt that the views expressed by the Committee are supported by the Conference, or by appointing a tribunal as foreseen in Article 37 of the Constitution. Preferably, the International Conference would confirm this mandate.

The present situation can limit the Committee's ability to give a broad interpretation of convention provisions, i.e. an interpretation which deviates from the text of the conventions. Therefore a literal interpretation is often followed, and only arguments based on the history of the adoption of the convention concerned (the preparatory works) are allowed as a basis for a freer interpretation.

Another method of interpretation, which allows interpretations beyond the literal text of the conventions, is the so-called dynamic interpretation method. This method seeks an interpretation which fits with current developments of, in this case, present social security systems. An example could be that the provisions in conventions on survivors' benefits are not applicable anymore, since in many countries both men and women have to be responsible for their own income. Supposing that a dynamic interpretation method is correct, it will very soon lead to disputes. However, a convention may contain rules that are seen as outdated, and in that case it is difficult

15 See Nußberger (2007) p. 33 et seq. and Schoukens, (2007), p. 71 et seq.

to come to an adequate interpretation. We provide examples of this in the following sections.[16]

The problem with a literal interpretation is obvious: it does not provide a solution to most of the problems of interpretation discussed above, since the texts of the conventions do not provide such a solution.

While a dynamic interpretation can, in principle, resolve all interpretation issues, it in turn gives rise to other problems. For example, what are the limits within which interpretation can take place and on what principles, objectives, criteria, etc. can it be based? The conventions give little guidance about the extent and direction in which dynamic interpretation is allowed. Such guidance should be found in the text of the conventions themselves (in particular in the preambles) and should be elaborated in well-founded decisions. Such guidance is lacking, however, in the conventions of the ILO and Council of Europe.

Finally, supervisory committees have an additional problem with dynamic interpretations, since they consist of experts (often university professors) who do not represent particular organisations. They are not judges in the sense of an international court. This makes it difficult to defend a departure from the literal texts of the conventions even if it is important to come to an adequate interpretation.

3.2. THE INTERNATIONAL LABOUR OFFICE

While the International Labour Office has no official role in the supervision procedures, its role in the interpretation of conventions should not be overlooked. Apart from its function in preparing the work of the Committee of Experts, the Office gives, independent of the Committee, advice to governments when requested to do so. This advice is known as an *informal opinion*. When giving such advice, the Office always stresses that it is not authoritative. Nevertheless, its advice plays an important role, especially since, in many cases, there is no other guidance from the ILO. The advice given by the Office is not systematically and/or explicitly considered by the Committee of Experts. We give some examples of the informal advice of the Bureau in Section 5.

[16] For both interpretation methods alternative terms exist, such as realistic for literal and evolutionary for dynamic interpretation. We have not found any sharp differences in the meaning of these alternative terms. For a discussion of these interpretation methods, *see* also the contributions in Pennings (2007).

4. MEMBER STATES' COMPLIANCE AND NON-COMPLIANCE WITH THE CONVENTIONS

There are several examples where a country has changed its legislation after the Committee of Experts has expressed its view on the application of the convention. One example concerns Article 69(f) of Convention 102, allowing suspension of benefit only where the contingency has been caused due to wilful misconduct. The Committee of Experts questioned certain British provisions authorising suspension of unemployment benefit on the grounds of misconduct and referred in particular to examples of misconduct in the Adjudication Officer's Guide (AOG), where the loss of work was caused not by deliberate acts of the claimant, but rather by his or her negligence or carelessness.[17] For example, claimants who were accidentally late for work may be found guilty of misconduct, even if there was no deliberate intention to be late. The Committee requested the Government to modify the Guide so as to bring it in line with the Adjudication Officers' case law, sanctioning in practice only wilful misconduct in accordance with Article 69(f) of the convention.[18] The Adjudication Officer's Guide has since been replaced by the Decision Makers Guide, in which the wording of the corresponding paragraph has been amended.[19]

There are examples of Member States failing to comply with their obligations under the conventions. Sometimes this may be simply explained by the government's lack of interest; while on other occasions it may be that bureaucratic processes prevent a more accurate application of the standards. In the reports of the Committee of Experts,[20] it is frequently observed that a country failed to give any information about conventions. Sometimes, it is a deliberate choice of a State not to pay benefits as generously as requested by a convention, and therefore not to follow the observations of the Committee. An example is the *Poirrez* case,[21] in which a citizen of the Ivory Coast, adopted by French nationals, was refused a disability benefit, on the ground that he did not have French nationality. France did not want to change its legislation, although the Committee of Experts noted repeatedly that the equal treatment provisions of Convention 118 were being infringed. The French national courts did not apply this convention either. M. Poirrez had to wait until the European Court of Human Rights applied Article 14 (concerning non-discrimination) of the European Convention on

17 Roberts (2006), p. 65.

18 Report of the Committee of Experts on the Application of Conventions and Recommendations: Social Security (Minimum standards) Convention 1952 (No. 102) CEACR 2002/73rd Session.

19 Other examples can be found in Gomez-Heredero (2007) and Gravel and Charbonneau-Jobin (2003).

20 Available on www.ilo.org.

21 *Koua Poirrez v. France* – 40892/98 [2003] *ECHR* 459 (30 September 2003), www.worldlii.org/eu/cases/ECHR/2003/459.html.

Human Rights and concluded that discrimination on the basis of nationality was not permitted by this article.

5. THE ROLE OF CONVENTIONS WHEN DRAFTING OR AMENDING NATIONAL LEGISLATION

We now shift to the meaning of the conventions within the national legal order, examining firstly, the role of the social security conventions in discussions on draft national social security legislation. The application of the conventions by the national judiciary is discussed in Section 6.

A ratified convention can play a role in the internal discussions of a Member State, for instance, when a Ministry prepares new legislation or wishes to change an existing statute, and in reports by advisory bodies for the Government. It can also be referred to in Parliament, in discussions on proposals for making or revising legislation. The Dutch Parliament, for instance, has repeatedly discussed whether amendments to the Dutch Disability Benefits Law and the Survivors' Benefits Bill are consistent with ILO Convention 121.[22] Convention 121 gives protection to victims of employment injuries and occupational diseases. Since the Dutch Laws do not distinguish between the different causes of incapacity for work, they have to satisfy the requirements of Convention 121. However, this convention does not require a qualifying period for benefit; consequently, a person who becomes fully disabled on the first day of work is entitled to full benefit. Some proposals for changing disability law were rejected because they were inconsistent with this provision. Thus, the conclusion can be drawn that conventions can be important by having 'a conservative role' in that they can prevent national legislation from falling below the standards of a convention.

If a convention proves to be 'inconvenient' for a Government on the grounds that it impedes desired changes to legislation, the Government may wish to denounce it. For example, in 1988, the Dutch Government proposed to denounce Convention 121. However, denouncing is not easy, as according to many conventions, it is only possible during one year in every ten. If the desire to denounce a convention arises in the 'wrong' year, the Government may have to wait a considerable period of time before it can realise its wish. This gives time for 'cooling off'. Moreover, denunciation has a political dimension, as was the case in the Dutch situation: Parliament did not agree with the proposal to denounce the convention. It argued that 'denouncing a convention is the worst possible way of promoting ILO conventions and problems, if any, should be resolved in other ways'.[23] Thus, in the Netherlands, international standards are seen as having an important value, which should not readily be denounced.

22 *See* Pennings (2006), p. 104.

23 *Parliamentary Debates* 1997/98, p. 4381.

During parliamentary proceedings, the already mentioned 'informal advice' of the International Labour Bureau can be requested. An example can be found in the Dutch Parliamentary Debates on a Bill for a new survivors' benefits law. In an earlier landmark decision, the Central Appeals Court did not uphold the restriction of the General Widows' and Orphans' Benefits Law to widows, as this was seen as inconsistent with Article 26 of the International Convention on Civil and Political Rights of the United Nations.[24] In response to this development, a Bill was drawn up for a new Act. The problem with the Bill was that, contrary to the 'existing law', it included a means-test on benefits. This means-test led to extensive discussion in Parliament on its consistency with Convention 121. Article 19(10) of Convention 121 provides that no periodic payment shall be less than the minimum amount prescribed by the Convention, which is sixty per cent of the reference earnings. It was argued that this provision does not permit a means-test.

In order to close the discussion, the Government asked the International Labour Office for advice. The Office replied that means-testing of survivors' benefits was not inconsistent with the Convention.[25] This statement was based on the argument that benefit had to be a periodic payment to a 'widow as prescribed', as stated in Article 18 of Convention 121. This term was meant to allow a means-test, since, as the Office noted, in the preparatory stage of the Convention it was proposed that benefits be limited to widows who were financially dependent on a breadwinner before his death and remained financially dependent. Some of the participants at the conference were opposed to this condition; others argued that it was necessary, given their system. A compromise was to use the term 'widow as prescribed', which allows the national authorities to prescribe the conditions according to which a widow is entitled to benefit, including a means-test. The Office emphasised that, in the exercise of their discretionary powers, national authorities have to act in good faith. This means that they must take into account the objective of this provision, *i.e.* guaranteeing for prescribed widows a level of replacement income at least equal to the level mentioned in the convention. This advice was, of course, very helpful for the Government. The Bill, including the means-test, was adopted by Parliament and became Law, the *Algemene nabestaandenwet* (General Survivors Benefits Law).

This example shows that a request for informal advice can bring the Office into political discussions. At present the Office seems to have become cautious, as evidenced by its reaction to a request for advice on the compatibility of a proposal for a new disability benefits act in the Netherlands with Convention 121. The Office took a long time to provide this advice and when, after seven months, it contacted the Dutch Ministry in order to obtain further information, it appeared that the bill had already been adopted. The Office then wrote to the Government that it no longer wished to give

24 CR v B, 7 December 1988, ***RSV*** 1989/67.

25 *Kamerstukken (Dutch Parliamentary Papers) II* 1991/92, 22 013, No. 22.

advice now the Act was already in force. It was then up to the Committee of Experts to give its view.[26] This was a surprising development, as there are examples where the Office did not hesitate to give advice on existing laws (*see* Section 6.3 below). Since the Office does not have a special competence to give informal advice, why should there be a limitation to draft laws?

Given the political background of the discussions, the approach of the Office is understandable. Since the advice is made public by the Member State, the Office could become a political football between supporters and opponents of a proposal and this is not a pleasant situation, in particular if the Office wants to maintain a dialogue with the Member State. This problem can only be solved by giving the Committee of Experts the task (and the facilities) to answer requests for advice on a short term basis.

6. APPLICATION OF THE CONVENTIONS BY NATIONAL COURTS

6.1. SOCIAL SECURITY STANDARDS AND DIRECT EFFECT

The impact of a social security convention increases considerably if its provisions are applied by a national court. If a judge decides that the convention can be invoked, the provision concerned is given direct effect. It depends on the legal system of the State concerned, most often the Constitution, whether a judge is able to give a provision of a convention direct effect. In this respect, there is an important difference in the ways in which States implement international law. In monist systems, a provision of international law works directly in the national legal order – no further legislation is necessary – provided (as is normally required) that its wording is sufficiently concrete and that it is not conditional. Thus, if there is a conflict between international and national law, international law prevails. In dualist systems, for international law to apply in a national case, the convention has to be translated into national law. In this system the convention itself does not play a role in national procedures; but it can be relevant as guidance if there is uncertainty on the interpretation of the implementing Act.[27]

The discussion on the direct effect of international standards refers to those countries with monist systems. In a monist system the key question is whether an international provision has direct effect. It is for the national judge exclusively to decide whether a provision 'can bind everyone'. In practice, courts appear to be hesitant about

[26] Letter of 14 March 2006, annex to Parliamentary Papers (*Kamerstukken I*, 24 497).

[27] On the role of conventions in dualist systems, see Robyn Layton, *When and How Can Domestic Judges and Lawyers Use International Law in Dualist Systems*, available at http://training.itcilo.it/ils/ils_judges/training_materials/english/Dualist_Systems_Layton.pdf.

giving international social security standards direct effect.[28] One reason may be that a decision which gives a standard direct effect may have major financial implications for the country concerned. Another reason is that a court may be uncertain about the interpretation of the provision concerned.[29] We discuss interpretation matters in more detail below.

As courts are reluctant to give direct effect to the conventions, there are only a very few reported cases in which international social security standards have been given direct effect. In the ILO publication, *The Use of International Law by Domestic Courts*,[30] only national labour law cases are cited in which ILO conventions are applied (except for one case, in which the convention on social security for migrant workers is applied). This publication is, however, not complete, since there are some other cases in which international social security standards are given direct effect (see Section 6.2). We discuss some cases in which direct effect was denied in Section 6.3.

6.2. COURT CASES IN WHICH CONVENTIONS ARE GIVEN DIRECT EFFECT

The first decision we wish to discuss in which direct effect was accepted occurred in 1996 and concerned a Dutch scheme, which required self-employed women to contribute to the costs of their treatment during pregnancy and delivery in hospital. Women wishing to have this rule removed, invoked Conventions 102 and 103 before the Central Appeals Court.[31] In this case, it was relevant that Article 10 of Convention 102 provides that the beneficiary or his breadwinner may be required to share in the cost of the medical care that the beneficiary receives in respect of a morbid condition; the rules concerning such cost-sharing must be designed to prevent hardship. From this provision, the *a contrario* conclusion is drawn that in case of pregnancy and delivery, which are not morbid conditions, no cost sharing is allowed. This interpretation can also be found in the preparatory documents of Convention 102.[32]

In answering the question of whether the relevant provisions of the conventions have direct effect, the Central Appeals Court examined the description of the benefits and the wording of the provisions. It concluded that these provisions can be invoked by protected persons in order to test entitlements on the basis of the national law against the standards of the convention. The Court argued that a discussion of the contents and extent of the disputed provisions, in particular in respect of the possibility of cost

28 For a discussion of the case law of several Member States, see Pennings (2006).

29 An interesting discussion of the problems for judges is de Vries, (2007), p. 91 et seq.

30 ILO International Training Centre, *The Use of International Law by Domestic Courts*, Geneva, July 2007.

31 CRvB, 29 May 1996, *RSV* 1997/9; a translation of the decision is reproduced in Pennings (2007), p. 217 et seq.

32 Report Va(1), p. 212.

sharing, was no longer relevant. In this respect it was important that the Committee of Experts had informed the Dutch Government on three occasions of its view that these provisions prevented cost sharing (Direct Requests of 1988, 1990 and 1993). An additional argument was that in the meantime the Government had accepted the view of the Committee of Experts and withdrawn the disputed scheme; the decision that was the subject of the pending procedure was, however, not changed.

The Court considered that it no longer had a role in interpreting the provisions of the conventions involved, as it could only give a more restrictive interpretation than that of the parties to the convention.[33] The interpretation of these parties was consistent with that of an authoritative body of the ILO, the Committee of Experts. It is interesting to see that the Dutch court did not have concerns about the mandate of the Committee (as discussed in Section 3.2) and that the report by the Committee of Experts was decisive for the interpretation. In other words, although the ILO has no involvement with the question of whether a provision has direct effect, the very fact that the Committee of Experts provides what is accepted as an authoritative interpretation, is essential for assuming direct effect by the national court.[34] This effect of its reports gives supervisory committees (indirectly) an extra responsibility, for which they were not originally established. Nevertheless, the approach of the national court is a sensible one, since following the Committee of Expert's view favours a uniform interpretation of the provisions under dispute in different countries.

In 2003, the Dutch Central Appeals Court accepted the direct effect of Article 5 of ILO Convention 118, which requires the export of benefits. The case concerned the *Toeslagenwet*, a non-contributory benefit. There was some doubt whether this type of benefit should be exported on the basis of the convention, as non-contributory benefits are excluded. The Court decided that this uncertainty could not be to the disadvantage of the persons concerned, since the Netherlands could have removed this uncertainty by notifying the *Toeslagenwet* as a non-contributory benefit to the Secretary-General of the ILO. By not doing so, the Netherlands hindered supervision by the ILO on this issue. On these grounds Article 5(1) must be considered to have direct effect under the Dutch Constitution.

International standards were also given direct effect in two Swiss cases.[35] The Swiss Tribunal decided that Article 68(f) of the European Code of Social Security

33 Indeed, *a contrario* interpretation(s) are not obvious.

34 During the proceedings the disputed scheme was repealed and therefore the material impact of the Court decision was minimal. Still, the Dutch Government appeared to be upset by the judgment, as it had not expected that provisions of an international treaty with standards on social security could have direct effect. Subsequently, it decided to denounce Part VI of the European Code, which has comparable provisions. It feared court decisions stating inconsistencies with this convention. Parliament, however, decided otherwise and did not approve the denunciation.

35 BGE 119 V 171 p. 171 et seq. and BGE 120 V 128 et seq. reproduced in Pennings 2007, p. 259 et seq.

and Article 32(1)(e) of ILO Convention 128 are directly applicable and overrule Article 7 of the Swiss Law on Invalidity Insurance. For this reason, they do not allow the reduction of an invalidity pension for a serious fault, which was not intended by the insured person. The Tribunal noted that almost all Swiss authors on this issue consider the international standards concerned (Article 68(f) of the European Code and Article 32(1)(e) of ILO Convention 128) to have direct effect. As a result, misconduct which is not wilful, does not allow suspension of benefit. The views of academic commentators appear to have been influential in the Tribunal's decision to give direct effect in these cases.[36]

Finally, we discuss a Dutch case of 2006 in which a provision of the European Code of Social Security is given direct effect. The case concerned a man who suffered from an industrial accident in which he was seriously hurt. The Court held that Articles 32, 34 and 38 of the Code, taken together, prevent insured persons from having to share the costs of medical treatment necessary because of an occupational disease or industrial accident. This interpretation is based on the fact that Article 10(2) of the Code – comparable with Article 10 of Convention 102 – allows cost sharing for medical treatment of sickness *in general,* but the scope to allow cost sharing by insured persons for industrial diseases and occupational accidents is not mentioned. Thus, as in the first Dutch case discussed above, an *a contrario* argument is followed. In addition, the Court based its view on a Resolution of the Council of Europe which says 'Since the code makes no provision for sharing by insured persons in the cost of medical care in cases of occupational injury, it should be made clear whether the above-mentioned provision [i.e. the costs sharing provision in the disputed national scheme] applies in practice only to the victims of non-occupational accidents.' [37]

It can be seen, in both 1996 and 2006 cases, that the international provisions concerned were unclear and the decision had to be based on an *a contrario* argument. In both cases it was important that there was a report of an international authoritative supervisory body which gave clear interpretations of the provisions in question.

6.3. CASES IN WHICH NO DIRECT EFFECT WAS ACCEPTED

There are also decisions in which direct effect has been denied. The Committee of Experts has not yet made observations on the legislation that was the subject of these cases. Again, we discuss a Dutch case, in which international standards were invoked and the court had to discuss the effect of these standards. In Section 5 we discussed

36 See also Section 4 on the interpretation of this term by the Committee of Experts. The Swiss court does not refer to this interpretation.

37 CRvB, 8 September 2006, *AB* 2006/417, a translation of which is included in Pennings (2007), p. 253 et seq.

the replacement of the Dutch General Widows' and Orphans' Benefits Act by the *Algemene nabestaandenwet* (General Survivors Benefits Act).

In this case, the Dutch Central Appeals Court approached the Office for advice.[38] In reply to this request, the Office sent its letter to the Dutch Government, which forwarded it to the Court. The Secretary of State wrote in a covering letter that, in his view, the Office should advise only Governments and not courts. In its advice, the Office replied that, under Convention 128, the deduction of unemployment benefit from survivors' benefit is only allowed if a considerable part of the unemployment benefit is not deducted. The Dutch rules were therefore not consistent with the convention. The second letter is consistent with the first one insofar as the earlier letter required the national legislator to 'act in good faith'. The second letter is, however, much more specific than the first one and leads to different conclusions. This example shows that the advice does not always lead to fully satisfactory outcomes, since the first letter of the Office led Parliament to adopt the Bill, while later it appeared that the previous letter was not fully understood and should have led to a more moderate means-test.

Subsequently, the Court decided that the relevant provisions of Convention 121 did not satisfy the conditions for direct effect, i.e. that they can, given their content, bind everyone. In the view of the Court the provisions were insufficiently concrete and needed to be interpreted. We saw in Section 5 that the way the term ´widow´ was interpreted by the International Labour Office did not make clear to what extent a means test is permitted. A further problem is that several provisions leave considerable room for the discretion of the legislator. The Court made an even more general statement in this decision: Conventions 121 and 128 will normally not have direct effect. Although this approach is understandable – considerable sums of money may be involved in social security cases and some outcomes could have the effect that benefit is paid to persons and in circumstances which the legislator considers to be an inappropriate use of the funds. This judgment is disappointing, since these terms do not appear to be so difficult that they cannot be interpreted; while a theory on precisely when a social security convention has direct effect or not is not easy to formulate.

7. ARE THE CONVENTIONS MODERN ENOUGH?

In previous sections we hinted at discussions on principles underlying the conventions which some Member States consider to have become outdated. An example is that of the privatisation of the Dutch *Ziektewet*. In fact it is a '*pièce de résistance*' for the supervision of the conventions, and we therefore pay some further attention to it.

38 CRvB 4 April 2003, USZ 2003/169, the (translated) text of the case is reproduced in Pennings (2007), p. 231 et seq.

Under the 'privatised' Dutch law the employer is obliged to continue to pay 70 per cent of the wage to sick employees for a maximum period of 104 weeks; the Sickness Benefit Act still serves in some cases as a safety net. The Dutch Government takes a very firm stand towards privatisation since it is meant to reduce the previous relatively high sickness absence rate by making employers (and employees) responsible for the supervision and re-integration of sick employees.

The international supervisors have been very much opposed to this development. For example, the Committee of Experts has periodically made comments on this and asked for further information. It must be acknowledged that the Dutch privatisation was accompanied by many guarantees, which meant, among other things, that the obligation of employers to pay wages can be enforced and that, in some situations, sickness benefit is payable. If other countries were to follow this privatisation example without such guarantees, the protection of workers would be seriously harmed.

In this discussion, the principles mentioned in Section 1.3 are relevant. Privatisation of the Sickness Benefits Act causes tensions with the principle that the costs of the benefits have to be borne collectively by means of social security contributions and taxes. There are also problems with the principle that the State must at least take general responsibility for the provision of benefits and for the proper administration of the social security. The final principle at stake is that representatives of the protected persons have to participate.

Of course, one can dispute these principles and consider them outdated. The principle of common funding, however, is an elaboration of the solidarity underlying social security. For sickness benefit/pay schemes this is important, as common funding prevents an overly sharp selection of 'bad risks'. If employers become responsible for sick pay, they will be more cautious in recruiting persons with health impairments and they can even decide to dismiss persons with a high record of sick absenteeism. Indeed, a study from 1995 showed such results. In later study from 2000, it appears that selection of bad risks plays a role in one third of all enterprises.[39] It also appears that the employer supervises employees more critically during the probation period (so that they can dismiss these employees in time) and that they recruit temporary workers in order to escape the risk of absenteeism because of sickness. It is not clear what the present situation is, but it is quite likely that selection still takes place. We can thus see that international standards play an important and sensible role as they keep pointing to important values which also have to be respected in the case of modernising social security. This is true even if the Dutch government has good reasons for proposing and elaborating a privatised sickness benefit scheme.

Thus, we can see that the conventions do not merely raise technical questions, for instance whether instead of the word 'benefits' the word 'pay' can be read in the relevant conventions. Instead, the discussion is about important principles. Sometimes

39 Veerman (2001).

it is argued that by means of a dynamic interpretation method the principles should be replaced by other considerations; a privatised scheme with sufficient guarantees could thus be considered to comply with the conventions. It is clear that, on the basis of the discussed doubts on the competences of the Committee, there is no room for doing so. Even if there were such room, it would be very doubtful whether the international community would take this step, given the intrinsic value of the principles at stake. The example shows that the conventions are too soon called outdated and that it is up to the Member State to elaborate modernisation in such a way that there is no problem with the conventions.

8. THE FUTURE OF STANDARD SETTING

From the previous sections it follows that the traditional conventions still have a role to play in setting standards that are also relevant in relation to present developments in social security. This does not detract from the issue that Convention 102 is not really successful in respect of another aim, i.e. the reduction of poverty worldwide. For this purpose a new convention needs to be developed, with new standards aimed at precisely those issues that are relevant to the poorest countries. Examples are provisions which give protection against poverty and hunger and which require basic medical services for all. For many of the developing countries the standards of Convention 102 are too high. Although this idea is getting support within ILO circles, this new convention should not replace the existing conventions. An example of a new convention can be found in Convention 182 on the worst forms of child labour. The idea is that the reduction of child labour is such a fundamental issue that all Member States should subscribe to it. For this reason the standards of this convention are lower than those of previously adopted conventions on child labour; unlike in the case of adoption of other conventions, the adoption of Convention 182 does not lead to a replacement of the previous conventions by the new one. Convention 182 seems to be quite successful. It has been widely ratified and it even seems that Member States which initially ratified only this convention subsequently subscribed to the other child labour conventions as well. This could serve as an example for a new convention on social security. We envisage continuing our research on such new standards.[40]

[40] During the international Decent Work conference on 14 April 2008 in Hague there was considerable support for this way of modernizing standards.

9. CONCLUSIONS AND RECOMMENDATIONS

9.1. GENERAL

International standards continue to be important for social security. The process of globalisation, which is becoming ever stronger, is giving rise to increasing competition, and if we still believe that competition should not take place in social security (social dumping), there need to be international standards. That this principle is still supported can be seen, in particular, in the new role of the conventions as 'tests' for EU candidate countries. In our view, the countries which have recently emerged as economic powers will have to accept that their growth cannot continue to be based on a form of social dumping (which results in further social dumping in other countries). For this purpose Convention 102 is a very valuable instrument.[41] Secondly, some countries see ratification of ILO Conventions as confirmation that they belong to a particular group of developed countries, as is the case with the States that were formerly under Soviet influence. Thus, developing social standards is – as is confirmed in the Philadelphia Declaration and the stated aims of the Council of Europe – necessary for safeguarding and fostering common values, and the ILO conventions are relevant to the EU.

If we compare the supervision procedures for social security standards of the ILO and the Council of Europe with those of the European Union and those in respect of the European Convention on Human Rights of the Council of Europe, it is clear that the former are considerably weaker, since no international court is involved. On the other hand, the ILO and Council of Europe social security conventions provide far more detailed provisions than those of the European Union. Indeed, several EU Member States have ratified social security conventions of the ILO and/or Council of Europe, while at the same time refusing to give the EU the power to make rules in this area. This is a paradox: the weaker the enforcement procedures, the more detailed the standards.

It could be argued that the general weakness of the supervision procedure is, in the area of social security, also a strength. An international organisation, which has more powers to enforce standards, such as the European Union, is, in practice, given fewer competences to develop social security standards than the ILO and Council of Europe, since its Members fear that these standards will be effectively enforced. Since this fear is weaker within the context of the Council of Europe and the ILO, these organisations have been able to develop standards which could not be established elsewhere. As a result standards have been developed on the content of social security schemes and these can lead to further development of the schemes. Particularly in candidate Member States, the conventions are a useful instrument as an elaboration of the European Social Model, which the European Commission requires as part of

41 Kulke, Cichon and Pal (2007), p. 27.

the *'acquis communautaire'* that new Member States have to implement. A further advantage of ILO conventions is that Member States are not bound by all conventions adopted by the International Labour Conference, but only by those they have ratified. Although this is a weakness from the point of view of developing a general, world-wide set of standards, this freedom enables Member States to adopt more standards than is possible under the EC Treaty or in a Constitutional Treaty.

In conclusion, we can consider the development of the standards and their interpretation as a continuing process, in which progress can be made as a result of economic developments, previous experiences and exchange of information, which is better than having no international standards. Indeed, the standards have contributed to substantive improvements in national social security systems and contain the potential to inspire future progress.

9.2. IN WHICH WAYS CAN CONVENTIONS HAVE A LEGAL IMPACT?

In Section 1.1 we set out the research questions. The first of these refers to the ways in which conventions can have a legal impact. If a Member State has not ratified a social security convention, this convention will not have a strong legal impact on the legal order of that Member State. However, this could be otherwise if a very large majority of the Member States has ratified a particular convention. In that case, it could be argued that Member States that have not ratified it will nevertheless have to comply with it. Examples may be found in the area of child labour or forced labour. However, social security conventions are, at present, a long way from having that kind of status. If, on the other hand, a Member State has ratified a convention, the country concerned has to comply with its standards. In principle, a social security convention will not have a weaker legal impact than conventions in other areas. The supervision procedure of the ILO is effective in the sense that, in many cases, Member States are ultimately willing to adjust their system if required to do so.[42] However, if a Member State really does not want to comply with a convention, it is hard to enforce its standards, as the stronger sanctions are reserved for what are seen as more fundamental rights.[43] Thus, the international legal impact of the conventions can be described as falling between soft and hard law.

At the national level, a convention may also have a legal impact. Civil servants working in Ministries and/or in Parliament may use the standards as an argument for raising the level of social protection of their system (progressive function). Likewise,

42 From the ILO Office we learned that there have been 75 cases since 1964 in which countries have changed their laws.

43 See, for the limitation of the fundamental rights to labour standards Alston (2004).

conventions can also be used by governments as an argument that proposals for changing the law are inconsistent with the conventions (conservative function).

Moreover, the role of conventions gains even more importance if national courts give provisions direct effect. If they do so, the social security standards have full weight. However, social security conventions have so far not often been given direct effect. There are no essential reasons for not increasing the occasions when they are given direct effect. Therefore, increased knowledge regarding the conventions, improvement of aids to interpretation and better access to the views of the supervisory bodies are important ways in which courts can be encouraged to apply the conventions more frequently.

9.3. ARE THERE IMPEDIMENTS TO THE IMPACT OF THE CONVENTIONS?

The second question raised in Section 1.1 was which factors act as barriers to the (successful) impact of conventions. The requests for guidance from States to the International Labour Office show that there is a need for more authoritative support from the ILO. The relationship between the Office and the Committee is, in practice, not clear since the Committee does not systematically consider (confirm or reject) the advice of the Office. Because of lack of time, lack of good principles and, sometimes, dissenting opinions within the Committee, the observations of the Committee are not all elaborated or, for that matter, even clear (since the underlying files are not published). An obstacle to the legal impact is that the conventions give little insight into the underlying principles; which makes it difficult to establish consistent interpretation. It also makes it difficult to develop an interpretation that fits better with present developments.

Some terms of the conventions have become outdated and are sometimes imprecise. It is, however, very difficult to change a convention even if there are (technical) reasons for doing so. The ILO and, in particular, the trade unions are afraid of such an enterprise as they fear that as a result of the revision all standards adopted so far become subject to discussion and, given the present political climate towards social security conventions, removal. Fear provides bad guidance, however. We would recommend trying some technical revision projects that take away important barriers for application and ratification because of outdated terms. Another problem is that useful interpretation instruments (compendia etc.) are lacking. This makes it very difficult for outsiders, such as the courts, to apply the conventions.

9.4. HOW TO ASSESS THE LEGAL IMPACT OF THE STANDARDS?

The third question raised in Section 1.1 concerns the assessment of the standards. The weak points of the conventions are the low number of ratifications, the negligent

way in which some Member States report on the conventions[44] and the time limits for enforcement of the standards.

The strong point of the conventions is that they provide an elaborate set of concrete standards. Occasionally they inspire a State to reach a higher level of protection or they may prevent a reduction in its level of protection. Furthermore, the standards for laying down a particular set of principles on which there is consensus leads to discussion of the development of the systems at a relatively high level. This is, in our view, is an important argument for continuing along the road of the conventions. After all, it should not be difficult to develop policy to deal with some of their weak points, such as non-ratification through negligence. There are no principled reasons against the legal approach, only practical and some political problems.

9.5. PROMOTING RATIFICATION OF CONVENTIONS

In order to strengthen the supervision procedure and introduce new standards, the number of ratifications of conventions is important. Thus, further action should be undertaken to promote the existing conventions. Most Member States are not particularly active in investigating whether they can ratify new conventions on social security. Nor do they always publish the reasons why they do not want to ratify a particular convention. In fact, many States seem ignorant about why they have not ratified a given convention. Sometimes they give incorrect arguments for not ratifying it (e.g. because the perceived problem does not exist). This means that there is room for promoting the number of ratifications through an active approach of the ILO.

The fact that many countries do not have information about why they have not ratified a convention is remarkable, since the ILO Constitution requires Member States to present a newly adopted convention to the competent authorities (in the countries under study: Parliament) for a decision on its ratification. Subsequently, they have to report on this to the ILO. If Governments have indeed failed to present conventions to Parliament for a decision on ratification; there is outstanding work for national Parliaments, the social partners, academic experts and the International Labour Office itself to do. Consequently, it is recommended that information on non-ratification should be published on the ILO website, along with information on the ratification of the conventions. Furthermore, trade unions should encourage their Governments to submit the relevant reports on the implementation of conventions to the ILO and should also comment in a systematic way on inconsistencies between

[44] From the ILO Office we have learnt that answers from the Member States to a questionnaire as to why they had not ratified social security conventions reveal considerable misunderstanding. In other words, the reasons not to ratify the conventions were not correct.

national and international law.[45] Employers' organisations also have a responsibility in this as well as they are one of the constituents of the ILO.

9.6. THE SUPERVISION PROCEDURE AND THE NEED FOR MORE GUIDANCE

One important impediment to the conventions having a strong legal impact is the relatively weak supervision procedure. If a Member State refuses to obey the conventions, 'naming and shaming' is the strongest available sanction. As noted above, for political reasons there is not much room at present for the stronger supervision of standards in the area of social security. However, we recommend that the functioning of the committees should be improved. First of all, all remaining doubts concerning the mandate should be removed. Secondly, it should be investigated whether one Committee for all ILO conventions is the best solution. A special committee for social security with, for instance, 10 experts, increases the working power and also gives room for representation of more continents by social security experts, and more comprehensive and detailed discussions.

9.7. THE DEVELOPMENT OF INTERPRETATION AIDS

In this area there are various actions which could be undertaken. We start with the most difficult. We suggest that the terminology of the conventions should be regularly revised. It is clear that revising conventions is a time consuming process, which may discourage their modernisation. However, it is important that the terminology of the conventions does not lead to their obsolescence. For that reason, the processes in place for updating the text should not become an obstacle. It is suggested that the ILO Constitution should allow for an easier and more flexible way to modernise the texts than is possible at present. Otherwise, the conventions are in danger of losing their relevance in the near future.

Another issue is the uncertainty about the lack of principles underlying the conventions and also the outdated, vague and abstract terminology, which make them difficult to interpret. Reaching consensus on the principles underlying the conventions that have been adopted would help the supervisory committee and other users of the conventions interpret their meaning and application.

A third and less difficult recommendation to implement is the development of aids to interpretation, such as compendia, which are very important for the actual use of the conventions.

45 Bijleveld (2007), p. 101 et. seq.

10. CONCLUSIONS

In our research in recent years, it appears that, for many people (fellow scholars, judges, persons working in ministries, trade unions etc) international standards appear rather obscure. In so far as they are known about, it is often assumed that they are fully complied with and that they do not need further investigation.

From our research, it appears that the standards are still very important for an adequate social security system and that they contain values which need continuous attention. We are aware that we have focused primarily on the Netherlands. The Dutch experience embodies a paradox: because the country takes the conventions seriously, it encounters more criticism and remarks. This provides us, however, with valuable materials on the issues that arise from the legal impact of international standards.

We think that the process of investigating the role of the conventions should continue, and that new standards should be promoted. This article should be seen as a contribution to this development.

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