LIBER AMICORUM

ESSAYS IN HONOUR OF
PROFESSOR EDWELL KASEKE
AND DR MATHIAS NYENTI

Marius Paul Olivier
Letlhokwa George Mpedi
& Evance Kalula

EDITORS

CHAPTER 2

Intergration of Social Security Law and Labour Law

Manfred Weiss

Abstract

Labour law and social security law in many countries are treated as two separate areas of law. However, there have been calls to deal with or integrate these two areas of law as two sides of the same coin. The call for the integration of labour and social security law dates back to claims made by the founding fathers of labour law. They claimed that, in the broad sense, social security law was inextricably intertwined with labour law particularly because labour law was not viewed from the lenses of employment relations only, but also as an area of law covering the needs and risks which have to be met in an employee's life. In recent times, the integrative understanding of labour and social security law has somewhat heightened; this is primarily because international and regional organisations, as well as some countries, have developed comprehensive labour and social security standards that are aimed at consolidating stronger social protection regimes. Nevertheless, the nexus between labour and social security law continues to present a certain degree of confusion. This chapter therefore seeks to demonstrate that labour law and social security will be more dependent on each other in the future and thus become more integrated than ever before. The chapter claims that labour law and social security law fulfil separate but complementary functions. Accordingly, it explores, especially from a European point of view, issues relating to job security and unemployment insurance, sickness payment, labour law and old age pension, short-time work and short time payment, as well as the digitisation of work among others in order to illustrate and establish the interconnectedness and interdependence of labour law and social security law. The chapter concludes that treating labour and social security law as two sides of the same coin will be a necessary factor and condition to achieve optimal social protection.

Keywords: European Social Charter (ESC), job security, labour law, social protection, social security law, the future of work, unemployment insurance

2.1

Introduction

Social protection is the common primary goal of labour law and social security law. Political protection by social security was the first political reaction to the industrial revolution. The pioneer was the Bismarck legislation in Germany in the late 19th century on social security referring to the risks of old age, sickness, invalidity and work accidents.¹ The first steps into labour law only came later in the first decades of the 20th century.²

However, for the founders of labour law, it was taken for granted that social security and labour law were to be seen as the two sides of the same coin. This approach best can be exemplified by the thinking of one of the most eminent founding fathers of labour law Hugo Sinzheimer,³ a German scholar who was treated badly by the Germans in the Nazi period. He was forced to emigrate to the Netherlands where he died in 1945 in the age of 70.

During the 20s of last century, Sinzheimer tried to sum up his concept of labour law. He insisted that labour law cannot merely be perceived as law for the employment relationship but has to cover all the needs and risks which have to be met in an employee's life. In other words, Sinzheimer understood social security law in its broadest sense as an inseparable part of labour law.⁴ For him, the traditional distinction between public law and private law no longer played a role in this comprehensive understanding of labour law and social security law as an autonomous legal discipline.

Nevertheless, in many countries these two subsystems of law are treated as if they were two totally different entities. Even in Germany, the country of Hugo Sinzheimer, labour law still is conceived as an annexe of private law and social security as part of public law. In the university context, this means that, correspondingly, social security is taught by professors of public law and labour law is taught by professors of civil law. It also means that we have two separate court systems in Germany – a

-
- 1 For a comprehensive overview see Sigerist, H.E. 1943. "From Bismarck to Beveridge: Developments in social security legislation." *Bulletin of the History of Medicine*, 13:365-388.
 - 2 For the pioneer development in Europe see the excellent introduction by Hepple, B. 1986. "Welfare legislation and wage-labour." In: B. Hepple (ed.). *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945*. London, Mansell Publishing, pp. 114-153.
 - 3 See the biography by Kempen, O.E. 2017. *Hugo Sinzheimer. Architekt des kollektiven Arbeitsrechts und Verfassungspolitiker*. Frankfurt: Societaets Verlag. For an assessment in English see Dukes, R. 2014. *The Labour Constitution: The Enduring Idea of Labour Law*. Oxford: Oxford University Press.
 - 4 Sinzheimer, H. 1927. *Das Wesen des Arbeitsrechts* (1927). Reprinted in Sinzheimer, H. 1976. *Arbeitsrecht und Rechtssoziologie*, Volume 1. Frankfurt: Bund Verlag, p. 108 *et seq*.

system of labour courts⁵ and a system of social security courts.⁶ By the way, Mathias Nyenti studied the system of social security courts in Germany for his doctoral thesis. I still remember when he visited these courts and we had a chance to meet during his stay in my country.

Why the insight of scholars like Sinzheimer failed even in Germany, is difficult to explain. However, it should be stressed that other countries remained much closer to Sinzheimer's integrative concept. For example, in France the notion *Droit Social* comprises both labour law and social security law, thereby indicating how closely both sides of the same medal belong to each other. Also at the international level, this integrative understanding is prevailing. Self-evidently, the International Labour Organisation (ILO) not only develops labour but also social security standards, thereby trying to reach a comprehensive coverage of minimum standards for social protection. And our scientific association, the International Society of Labour Law and Social Security Law (ISLSSL) bring both subsystems together, even on the agenda of its congresses the two fields still are treated separately.

The development on a regional level in Europe is very promising in this respect. The best indication of this development might be the European Social Charter (ESC) which was established in the context of the Council of Europe⁷ and the Charter of Fundamental Rights of the European Union (CFREU).⁸ The ESC contains individual and collective labour rights, for example, the right to just conditions of work and the right to freedom of association and to bargain collectively as well as the right to social security, to social assistance and to benefit from social welfare services. Moreover, the chapter titled 'Solidarity' in the CFREU has the same structure; it also comprises individual and collective labour rights as, for example, the right to fair and just working conditions and the right to collective bargaining and industrial action side by side with the right to social security and social assistance. Or to put it differently; both Charters contain a comprehensive social programme putting labour standards and social security standards in the same box.

Another striking example concerning the European project; from the very beginning in 1957 we not only have freedom of movement of workers between the Member States, but also the guarantee of equal treatment with the workers of the host

5 See Weiss, M. 1994. "Labour Dispute Settlement by Labour Courts in Germany." *Industrial Law Journal*, 15:1-19.

6 See Federal Ministry of Labour and Social Affairs. 2019. *Social Security at a Glance*. Bonn: Federal Ministry of Labour and Social Affairs, p. 190 *et seq.*

7 For a comprehensive analysis of this Charter, see Bruun N *et al.* (eds.). 2017. *The European Social Charter and the Employment Relation*. Oxford: Hart Publishing.

8 For a comprehensive analysis of this Charter, see Dorssemont, F. *et al.* (eds.). 2019. *The Charter of Fundamental Rights of the European Union and the Employment Relation*. Oxford: Hart Publishing.

LIBER AMICORUM

State. This equal treatment, of course, not only refers to labour law and working conditions but also social security law.⁹

In short and to make the point; labour law and social security law fulfil separate but complementary functions. Simply put, labour law governs the employment relationship whereas social security law is aimed at offering protection when a social risk occurs. However, there is still confusion about how labour law and social security law co-exists. First, I would like to have a closer look at this very issue by sketching some problems as examples to illustrate. Secondly, I would like to demonstrate that the integration of the two parts of social protection in the future even might be more dependent on each other than ever before. My remarks are, of course, based on the experience in Europe, but I think they are also relevant in some ways to developments in Southern Africa, particularly South Africa.

2.2

Examples illustrating the problem

2.2.1 Sickness payment

Let me start with an example which shows that not even the demarcation lines between the two subsystems of law are clear. As may be known, the European Union (EU) is empowered by the Treaty on the Functioning of the EU (TFEU) to regulate the transnational coordination of social security claims. The details are specified in Acts of the so-called secondary law. In this respect, a case dealt with by the Court of Justice of the European Union (CJEU)¹⁰ is very enlightening. Italian employees were working in Germany, two brothers belonging to the same family Paletta. According to German labour law in case of sickness, the full salary must be paid for six weeks if within a certain period the sickness is proved by a medical certificate. Every summer the Paletta brothers took home leave. Instead of returning to Germany after the period of holiday, they both sent to the employer a certificate by a doctor from Sicily in the South of Italy indicating that they could not return due to sickness. They stayed for another six weeks in Italy. The first time the employer did not refuse the sick pay. But when the Paletta brothers repeated the same claims, the employer doubted whether the medical certificate is correct and refused payment. According to EU social security law, any certificate by a medical doctor within the EU should be recognised by the employer. When the employer was sued for payment, one of the questions to be adjudicated by the CJEU was whether it was a matter of social security law, because only then the law on transnational coordination applies. The Court decided that the fact that, in Germany, this was dealt with by labour law,

⁹ See Blanpain, R. 2010. *European Labour Law*. 12th ed. Alphen aan den Rijn: Kluwer, p. 276 et seq.

¹⁰ CJEU judgment of 3 June 1992 (Case C-45/90), *European Court Reports* 1992 I, 3423.

was irrelevant. According to the Court, it substantially is a matter of social security, and in quite some Member States sickness payment is a matter for social security institutions and not for the employer.

This somewhat strange case shows how arbitrary it is to put an employee's right into the box of labour law or social security law. Let me now shift to examples for the interrelationship between labour law and social security law to illustrate that many problems only can be resolved satisfactorily if the interface between both subsystems is properly understood.

2.2.2 The link between job security and unemployment insurance

A good example of this interaction is the close link between job security and unemployment insurance. The weaker the protection against unfair dismissals, the bigger is the likelihood to become unemployed. The stronger this protection is, the lesser is the danger to end up unemployed. The impact on the shaping of unemployment insurance is evident. This interface has become particularly important when, in the EU, the notion 'flexicurity' was created which led to a shift from job security to employment security in quite a few countries, meaning that the focus is no longer on the maintenance of a specific job but on the chance to be employed, possibly by a job elsewhere.¹¹ The underlying philosophy of this change of paradigm is the promotion of external flexibility to allow companies to better adapt to market needs and to establish utmost mobility in the labour market. It may, of course, be doubted whether this concept deserves support. This, however, is not the issue to be discussed here. It is helpful to take a look at the country where this 'flexicurity' model has been applied to its extreme – Denmark.¹² There, protection against unfair dismissals has been weakened significantly, and the focus has shifted on income protection and re-skilling to reach employability for the transition to another job. In other words, deregulation of job security only has been possible by extending the tasks of the unemployment insurance and significantly improving its efficiency.

2.2.3 Short-time work and short time payment

A similar close link is between short-time work and short time payment. Short time work means a temporary reduction of working time. This could probably be a very efficient tool to prevent redundancies in times of crisis. For example, in Germany during the financial crisis,¹³ it has helped to maintain the employment relationships

11 See Blanpain *op cit.*, p. 260 *et seq.*

12 Bredgaard, T. *et al.* 2006. "Opportunities and challenges for flexicurity – The Danish example." *Transfer: European Review of Labour and Research*, 12:61-82.

13 See Crimmann, A. *et al.* 2012. "Resisting the Crisis – Short-time Work in Germany." *International Journal of Manpower*, 33:877-900.

LIBER AMICORUM

and, thereby, give the German economy a much better head start after the crisis.¹⁴ Of course, the preconditions for short work are to be regulated by labour law. However, to get accepted by the workforce it needs payments to at least partially compensate for the loss of remuneration due to short work. This is a task of social security, but only both elements together allow the instrument to work.

2.2.4 Labour law and old-age pension

The link between labour law and social security is particularly evident if we look to an old-age pension. In several countries, old-age pension is based on contributions by employers and employees. The amount of contributions usually is a percentage of the employees' remuneration. Normally, a decent pension is calculated as the result of a full-time working life up to pension age.

This classic model, however, is more or less falling apart if the trend to part-time jobs is increasing. For example, in my country, there is a low wage sector in instances where so-called 'mini-jobs' have been established or when there is no continuous job biography but a sequence of jobs and many unemployment periods in between.¹⁵ This implies by necessity a reconstruction of the original model to prevent poverty in old age, one of the most debated problems, not only in Germany, but also in many other countries.

Many more examples could be given. However, this should be sufficient to make the point – labour law and social security law must be seen as two closely interrelated elements of the same entity.

2.3

New challenges

2.3.1 The inclusion of 'solo' self-employed

Instead of adding more examples, I would like to draw the reader's attention to new developments in the labour market which are becoming a challenge for labour law and social security law at the same time.

For some time now it has become evident that the demarcation line between employment and self-employment is very difficult to draw.¹⁶ The simple recourse

14 It is this good experience which led to a renewal of this concept in the present Corona crisis where it plays a dominant role. See Klettmaan, A. & Leder, T. 2020. "How Germany is addressing short-time work in the Covid-19 crisis." Available online: <https://bit.ly/36iGDvX>

15 For details, see Weiss, M. & Schmidt, M. 2008. *Labour Law and Industrial Relations in Germany*. 4th ed. The Hague: Kluwer, p. 58 *et seq.*

16 See for a comprehensive discussion of this problem the articles in Davidov, G. & Langille, B. (eds.). 2006. *Boundaries and Frontiers of Labour Law*. Oxford: Hart Publishing.

to subordination is no longer sufficient. Due to changes in work organisation and due to technological changes the degree of autonomy in employment relationships has increased. This has made it more difficult to distinguish between employment and self-employment. Whether somebody is employed or self-employed depends on how the relationship factually looks like. The contractual label is irrelevant. Many who are labelled self-employed are in reality employees, so called bogus-self-employed. They, of course, are to be included in the scope of application of labour law and, thereby, fall under the roof of social security law.

Problematic are those who undoubtedly are self-employed but economically in a similar position as employees. Therefore, in many countries, a specific category has been invented for economically dependent self-employed. In Germany, they are called “employee like persons”.¹⁷ However, only some rules of labour law are applied to them, and they are not included in the social security system.

The problem of drawing a demarcation line between employment and self-employed will further increase in the era of digitalisation. The degree of autonomy in performing work makes it more and more difficult to categorise the persons involved in such work, even if a closer look reveals that the autonomy is ambiguous because new mechanisms of more efficient control are in place. This is particularly evident in the context of digital work, for example, many of the crowd workers in the platform economy are not employees in a traditional sense, but rather self-employed.¹⁸ So far, neither minimum wage rules nor health and safety standards apply to them. In addition, in most countries, they are not covered by social security systems.

In many countries, the notion of employee has been widened to include groups which traditionally might have stayed outside of the employment relationship. The many lawsuits on the status of Uber drivers all over the world are a test of this exercise. However, it will not solve the problem. There are limits for widening the notion of employee and many, particularly in the platform economy, will remain outside.

There is a growing consensus that the traditional demarcation line between employment and self-employment makes less and less sense. It does not fit into the reality of digital work¹⁹ and many other modern working patterns. The solution in my view is not the further widening of the notion of an employee but a change of paradigm. Instead of asking who belongs in which category we rather should ask what kind of protection is needed for those at the labour market who offer their services in person without employing anybody, be they employees or so-called ‘solo’

17 See Weiss & Schmidt *op cit*, p. 46 *et seq*.

18 For a comparative overview, see Waas, B. *et al*. 2017. *Crowdwork – A Comparative Law Perspective*. Frankfurt: Bund Verlag.

19 For the difficulty of categorisation, see Aloisi, A. 2016. “Commoditized workers: Case study research on labor law issues arising from a set of ‘On Demand/Gig Economy’ platforms.” *Comparative Labor Law & Policy Journal*, 37:653-690.

LIBER AMICORUM

self-employed. This is also the approach of the report of the ILO Global Commission on the Future of Work which, by the way, was co-chaired by President Ramaphosa.²⁰

It is evident that this is a challenge for social security and labour law in the same way. It not only needs protection for the risks to be covered by social security but also a guarantee of a minimum wage or a regulation of health and safety at work, to only mention a few examples for labour law regulation. Of course, it will be a difficult task to define in detail the range of social security and labour law protection, as well as to define the groups which are supposed to benefit from these protective schemes. As far as the labour guarantees are concerned, it might be necessary to go beyond traditional employers if those are to be identified in order to determine who is responsible for providing the protective schemes, a problem which is well known in the context of the informal economy. It is not necessary to elaborate on these difficult problems. All I want to show is the challenge for social security and labour law as an integrated mechanism. Incidentally, issues flowing from the difficulties of demarcation between employees and self-employed are not alien to South Africa. Such issues have already been confronted in South Africa as well as in Namibia.

2.3.2 Totally new patterns: The organisation of continued learning

The digitalisation of work will confront us with a challenge which will make it necessary to establish totally new patterns which will not use traditional instruments to serve the goal of social protection, but will require instruments which go beyond the classic set of instruments of social security and labour law.

The prognosis of job losses due to digitalisation of work is unclear. It will, of course, not be the same in all sectors, certainly more significant in the manufacturing sector, for example, in care-providing and nursing professions. Some experts expect the job loss to be dramatic, others predict that the volume of new jobs due to digitalisation will be bigger than the loss, but all this is speculation.²¹

In all this uncertainty, it is uncontested that the content of work will be very different compared to traditional patterns and that other skills will be needed than nowadays and the requirement for new skills will change quickly. One implication of the new scenario is certain: de-skilling and re-skilling will be of utmost importance. This means that training will have to play a much bigger role than ever and that its content and its organisation has to be reconceptualised. Acquiring skills at a young age to make use of them for whole working life will no longer be possible. Therefore, there is a consensus that life-long-learning is the option to meet the challenges of digitalisation.²²

20 Establishing a Universal Labour Guarantee in Global Commission on the Future of Work. 2019. *Report on Work for a Brighter Future*. Geneva: International Labour Organization, p. 38 *et seq.*

21 For an overview on the different positions, see Degryce, C. 2016. *Digitalisation of the Economy and its Impact on Labour Markets*. Brussels: ETUI Research Paper – Working Paper 02.

22 This is also stressed by the ILO Global Commission (footnote 20).

This simple insight raises many questions to be answered: What has to be done to ensure that an optimal number of people can be integrated into lifelong learning? Who would offer such training? Who would pay for such training? Or how could such training be combined with the normal working life? And perhaps most important, what should be taught in such training programmes?

Empirical data from my own country where a highly elaborated training system exists²³ show that the more one is already skilled and educated, the better is the chance to participate in programmes of further training. The reasons are many; teaching the unskilled may be considered too difficult or the unskilled themselves might not be motivated to engage in further training. Be it as it is, this imbalance between skilled and unskilled given continued training is an alarming situation particularly because the risk of being substituted by digitalisation is most probably the highest for those who are unskilled or semi-skilled. It evidently is easier to educate those who are already educated. Tremendous efforts will be needed to significantly enlarge participation. The report of the global commission indicates some possibilities.²⁴ Whether they can be implemented and whether they will have the expected results, remains to be seen.

I fully agree with the report by the ILO Global Commission when it recommends an entitlement to train during working hours as a new instrument of labour law. This is to be understood as an individual right for training during working hours, of course without loss of remuneration. However, such a right might not be sufficient. Employers still might be hesitant to engage in additional tasks – unskilled or low skilled employees in particular might not be motivated to participate in educational measures. Therefore, it might be necessary to combine the entitlement to continued training with incentives for both employers and employees. For employers, this might consist of tax privileges or subsidies, for employees it might be additional free time or monetary incentives.

A big problem is, of course, the financing of such a system. The establishment of an 'employment insurance', as suggested by the report,²⁵ seems to be a good idea. Thereby, the costs for such a training scheme may be covered to a great extent by contributions of employers and employees, as it is the case for other parts of the social security system. The question whether and how far such a training scheme, which is not only in the interest of workers and employers but for the society as a whole, is to be subsidised by the system of taxation, remains to be answered.

The content of continued training has to be reconceptualised. So far, the training has been focussing on skills required for the different well-known professions. In

²³ For a short description of the system of apprenticeship, see Weiss & Schmidt *op cit.*, p. 70 *et seq.*

²⁴ Life Long Learning for All in Global Commission on the Future of Work *op cit.*, p. 30 *et seq.*

²⁵ *ibid.*, p. 31.

LIBER AMICORUM

the future, it will no longer be possible to focus on well-established patterns. The new skills, which are needed, are unknown to a great extent, and they will quickly be replaced by others. Therefore, the report of the global commission is again correct by insisting that in the future the focus must be much more on “learning how to learn” to become able to adapt to new situations. This, of course, requires highly qualified teachers – an enormous challenge for all who are responsible for the educational system.

In short and to make the point, the increasing, speedy and ever-changing transformation of work in the digital era requires a totally new system of lifelong learning which needs a regulatory framework somewhere in between labour law, social security and education. Or to put it differently, it requires a framework which not easily can be classified by traditional categories.

2.4

Conclusion

For the founding fathers of our field of research, it was evident that labour law and social security are to be understood as interrelated parts of the same system. This insight, however, got lost in quite a few countries and led to a separation of the two parts leading them on ways of their own. Therefore, it is necessary to go back to the roots and bring the two sides of the same coin together again to achieve optimal social protection, which is the common overarching goal of both fields. In addition, it has to be understood that new developments at the labour market imply challenges, which only can be met in a way, which overcomes the thinking in the traditional categories and requires a more comprehensive understanding of our field of research.

2.5 Bibliography

- Aloisi, A. 2016. "Commoditized workers: Case study research on labor law issues arising from a set of 'On Demand/Gig Economy' Platforms." *Comparative Labor Law & Policy Journal*, 37:653-690.
- Blanpain, R. 2010. *European Labour Law*. 12th ed. Alphen aan den Rijn: Kluwer.
- Bredgaard, T., Larsen, F. & Madsen, P.K. 2006. "Opportunities and challenges for flexicurity – The Danish example." *Transfer: European Review of Labour and Research*, 12:61-82. <https://doi.org/10.1177/102425890601200107>
- Bruun, N., Loercher, K., Schoemann, I. & Clauwaert, S.(eds.). 2017. *The European Social Charter and the Employment Relation*. Oxford: Hart Publishing.
- Crimmann, A., Wießner, F. & Bellmann, L. 2012. "Resisting the crisis – Short-time work in Germany." *International Journal of Manpower*, 33:877-900. <https://doi.org/10.1108/01437721211280362>
- Degryce, C. 2016. *Digitalisation of the Economy and its Impact on Labour Markets*. Brussels: ETUI Research Paper – Working Paper 02. <https://doi.org/10.2139/ssrn.2730550>
- Dorssemont, F., Loercher, K., Clauwaert S. & Schmitt, M. (eds.). 2019. *The Charter of Fundamental Rights of the European Union and the Employment Relation*. Oxford Hart Publishing. <https://doi.org/10.5040/9781509922680>
- Dukes, R. 2014. *The Labour Constitution: The Enduring Idea of Labour Law*. Oxford: Oxford University Press. <https://doi.org/10.1093/acprof:oso/9780199601691.001.0001>
- Global Commission on the Future of Work. 2019. *Report on Work for a Brighter Future*. International Labour Organization Geneva.
- Hepple, B. 1986. "Welfare legislation and wage-labour." In: B. Hepple (ed.). *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945*. London: Mansell Publishing, pp. 114-153.
- Kempen, O.E. 2017. *Hugo Sinzheimer. Architekt des kollektiven Arbeitsrechts und Verfassungspolitiker*. Frankfurt: Societaets Verlag.
- Klettmaan, A. & Leder, T. 2020. "How Germany is addressing short-time work in the Covid-19 Crisis." *Lathan Germany*. Available online: <https://bit.ly/2EOvV53> [accessed on 24 August 2020].
- Sigerist, H.E. 1943. "From Bismarck to Beveridge: Developments in social security legislation." *Bulletin of the History of Medicine*, 13:365-388.
- Sinzheimer, H. 1976. *Arbeitsrecht und Rechtssoziologie*, Volume 1. Frankfurt: Bund Verlag Frankfurt.

LIBER AMICORUM

Waas, B., Liebmann, W.B., Lyubarsky, A. & Kezuka, K. 2017. *Crowdwork – A Comparative Law Perspective*. Frankfurt: Bund Verlag.

Weiss, M. 1994. "Labour dispute settlement by Labour Courts in Germany." *Industrial Law Journal*, 15:1-19.

Weiss, M. & Schmidt, M. 2008. *Labour Law and Industrial Relations in Germany*. 4th ed. The Hague: Kluwer.