
Preface

Editing a research handbook on European social security law is a challenge, since this is a broad area of the law without much coherence. If we consider the body of European social security laws it appears that there is a diverse set of rules, not only differing fundamentally in nature but also covering a diverse range of subjects. On one side of the scale there are grand principles which have been given legal status, such as the right to social security as a human right. On the other side of the scale we find technical provisions dealing with subjects like the exchange of forms between social security institutions, the mutual recognition of certain statutory definitions of invalidity and the sharing of costs of benefits paid to migrant workers. Furthermore, there are all sorts of legal norms and principles that as such have nothing to do with social security but which directly or indirectly affect the operation of social security law: competition law, property law, the EU regime on the freedom of services, directives on the transfer of undertaking, insurance directives, etc. Just simply describing the layout and substance of the variety of these rules is *not* the idea of the present research handbook. Instead it is our task to highlight issues that are fundamental, controversial or topical for European social security law and therefore relevant to further research.

It is difficult to find a consensus on what is meant by the term *social security*. A well-known approach is to refer to the types of risks listed in ILO Convention 102: medical care, sickness benefit, unemployment benefit, old-age benefit, employment injury benefit, family benefit, maternity benefit, invalidity benefit, and survivor's benefit. However, this convention was adopted in 1952 and since then other forms have been developed that can also be considered to fall under the term social security: minimum income guarantees for all, fiscal welfare, state-regulated private insurance, individual saving schemes, etc. The concept of social security used in this book should offer sufficient intellectual space to accommodate such new approaches. Furthermore, the term *European social security* can refer both to the national social security systems (and the way these systems are regulated by law) and to the law on social security adopted by the EU or by other European organisations such as the Council of Europe. Besides, various bilateral and multilateral treaties, mostly dealing with the protection of social security rights or migrants, play a role as well.

In this book we have simultaneously adopted a broad and a narrow approach. The approach is narrow in the sense that we shall not deal with social security law from a national point of view. Instead the handbook discusses social security law as a subject of EU law and of other treaties concluded by European states. In other words, it is a research handbook on EU and international social security law in Europe, not on national comparative law. At the same time, our approach is broad in the sense that we have allowed the authors to employ a concept of social security that is most suited to their contributions. For example, for those who discuss subjects within the context of the EU regulations on the co-ordination of social security the concept is likely to be confined to the material scope of the regulations as formulated in Article 3 of

Regulation (EC) No 883/2004. But for the authors who are interested in human rights, the concept of social security may well stretch out to the ancillary areas of welfare, health and the protection of the handicapped. In other words, we asked the authors to employ a working definition of the concept of social security which best suits their contribution. Incidentally, the same flexibility was employed with regard to the use of expressions and terms. In other words, we have refrained from imposing any central terminology on the authors, dealing, for example, with the concepts of mobile workers, migrants, irregular stay, etc., but have allowed authors to use their own vocabulary. Thus the collection of the various contributions to the handbook constitutes a testimony to a kaleidoscopic concept of social security. In this approach it includes the whole system of providing protection, as organised, regulated or guaranteed by the State or a public body, including measures to promote individuals' responsibility and their capacity to live without claiming benefits.

While we left considerable autonomy to the authors in composing their chapters, we also made sure their work was critically assessed by their peers. For this purpose in September 2014 we organised a two-day event in Groningen, which was attended by most contributors. During 'opposition sessions' all the chapters were subjected to a process of 'collegial intervision'. This was a useful, stimulating and, above all, enjoyable experience.

This research handbook has brought together a number of themes which, in our view, are relevant to studying European social security law. We have asked the authors to not only reflect upon the present of state of law and the relevant academic literature, but also to map out questions for further research. The various themes and topics are brought together under the following five categories, which constitute the five parts of the handbook:

1. human rights and social security;
2. minimum standards on social security and the principle of equal treatment;
3. social security protection of mobile persons and migrants;
4. European social security law in a global context;
5. the future of European social security law.

I. HUMAN RIGHTS AND SOCIAL SECURITY

The first part covers six chapters. The first one, written by *Eberhard Eichenhofer*, offers a '360° introduction' to the development and meaning of social security as a human right. As such it is also a suitable general introduction to all following chapters. The author concludes that the human right to social security is both an integral and a fundamental part of human rights law. It is an integral part as it coincides with other social rights, and it is a fundamental part as it lays the ground for an economically independent life for individuals, even when they are exposed to contingencies which are beyond their control. Social security may be technical and difficult to grasp, but it is based on an idea that is easy to understand, namely that everyone has a right and hence an obligation to take part in the formation of social rights.

In the second chapter, *Dimitry Kochenov* discusses the link between citizenship on the one hand and social security (and in a wider sense solidarity) on the other hand. His contribution was originally intended as an introductory chapter for Part III, dealing with the protection of mobile persons and migrants, but as it outstretches the notion of EU citizenship as included in the TFEU and fits rather in the rich historical, legal and philosophical debate on the meaning of social citizenship in Europe as a whole, we felt that it was suitable as a separate introductory chapter within our human rights block.

The two chapters that follow have a more legal positivist approach. *Lieneke Slingenbergh* systematically discusses the impact of the European Convention on Human Rights on social security from the angle of a number of articles included in the convention, such as Article 3 (prohibition of degrading treatment), Article 14 (non-discrimination) and Article 1 of the First Protocol (protection of property rights). According to the author, 'a cautious development can be detected in the Court's case law towards a more autonomous protection in the field of social security', which surely is a new and exciting prospect. *George Katrougalos* focuses in Chapter 4 on the findings of the European Committee on Social Rights in relation to one single article of the European Social Charter: Article 12 dealing with the right to social security. The European Committee of Social Rights has had considerable influence in the reaffirmation of this right, but this does not mean that the potential of the right has already been fully realised. According to Katrougalos, 'a genuine, subjective and fully enforceable right to social security would be not only an important guarantee against regression of social protection, but also a major contribution to the establishment of a new, European social citizenship, leading to a more fair, equitable and just society'.

In Chapter 5 *Ida Elisabeth Koch* broadens the spectrum by comparing the approaches adopted by the European Court of Human Rights, the European Committee on Social Rights and the Court of Justice of the European Union in applying the right to social security. Do these approaches compete or move in the same direction? It is too difficult to tell: 'the interpretation of the ECHR, the ESC and the EU Charter on Fundamental Rights has hardly reached its final stage and might never come to a halt'. Nonetheless, the author considers the inclusion of the entire range of human rights in the EU Charter as a confirmation of the conception that human rights are indivisible, interrelated and interdependent. Also she is convinced that the monitoring bodies of the instruments seem perfectly aware of the existence and importance of provisions in all three instruments.

In the last chapter in this part *Frans Pennings* gives the relation between the ECHR and the EU a more concrete dimension by asking what the consequences for social security would be of the (possible) accession of EU to the ECHR. His contribution shows that while the paths of the case law of the two high European courts mostly run parallel, there are also marked differences. For example, the Court of Justice is much more critical of residence conditions in social security schemes than the Court of Human Rights.

II. MINIMUM STANDARDS ON SOCIAL SECURITY AND THE PRINCIPLE OF EQUAL TREATMENT

In the second part, first of all, the minimum standards in social security are addressed. These standards have been developed, although not solely, by the Council of Europe and an important question for study is how a minimum income (benefit) is defined for the Member States. For this purpose the European Committee of Social Rights has undertaken pioneering work, by developing a general standard for all Member States. Such concrete minimum standards are an interpretation of the general human right to social security, but since they are laid down in concrete norms in a convention, it is possible to question Member States that have ratified it on their compliance with the standard. For this purpose this is a valuable elaboration of the general standard. The issue of development of the standards and their enforcement in the framework of the International Labour Organization and the Council of Europe are discussed by *Matti Mikkola* in Chapter 7 and *Tineke Dijkhoff* in Chapter 8.

In EU law there are hardly any minimum standards on social security. Instead soft law instruments, such as the open method of coordination (OMC), are applied. In Chapter 9 *Paul Copeland* and *Beryl ter Haar* give an overview of the present state of affairs with the various forms of OMC. One of the issues is what is meant by soft law and how the OMC relates to the soft law category. In any case OMC is used to increase the level of protection in some areas, but compliance with the recommendations and guidelines following this instrument is difficult to enforce.

Separate attention is given to the principle of equal treatment, which can be considered to be a standard within its own right. Equal treatment provisions of the TFEU constitute an important source of protection for groups that are considered to be disadvantaged. Of course, in order to realise equal treatment a Member State could repeal an act with discriminatory rules, but since this is often politically not feasible, equal treatment rules require new approaches. Still, as we can see in Chapters 10, 11 and 12, full equal treatment has often not been realised yet and the present equal treatment law has become quite complicated in some areas. In Chapter 10 *Susanne Burri* discusses this for EU equal treatment law in general, in Chapter 11 *Mies Westerveld* focuses on equal treatment of women and in Chapter 12 *Elisabeth Kohlbacher* discusses the position of the disabled.

III. SOCIAL SECURITY PROTECTION OF MOBILE PERSONS AND MIGRANTS

In the previous parts we discussed the right to social security as a human right and standards requiring minimum provisions, of which the source could be either EU law or International Labour Organization or Council of Europe instruments; the social security schemes under study are national schemes. Part III of this volume addresses the protection of migrant persons, which concerns EU law dealing with free movement provisions. The provisions related to free movement are connected with the fundamental freedom of movement of persons and have been part of the Treaty from the very

establishment of the European Economic Community: Articles 48 and 51 of the EEC Treaty, now Articles 45 and 48 TFEU. These provisions are necessary in order to allow the functioning of the economic community and therefore it was required from the beginning of the EC to make binding rules on social security for migrant workers. An important aspect of this category of rules is that in principle the national systems are not changed by the rules based on Article 48, but only the negative effects of crossing borders are (sometimes only partly) compensated. This area of law constitutes a major part of the case law of the Court of Justice.

This Court has developed several coordination principles; the coordination Regulation also frequently uses the term ‘principles’. In Chapter 13 *Frans Pennings* investigates how the term ‘principle’ is used in coordination law and what the meaning of this term is. Is it a real principle in the sense that rules must not infringe these principles or is it solely a description of a particular rule? And what is the relationship between a principle and the Treaty provisions on free movement or discrimination? A second major question is whether alternative principles can be developed and what these would entail in the context of EU coordination. Such an exercise sheds light on the implicit value of the principles developed within the coordination context.

In Chapter 14, *Rob Cornelissen* and *Guido Van Limberghen* examine how the coordination rules relate to labour law. This topic has become of increasing importance now that the border line between social security and labour law is fading due to developments such as the activation of beneficiaries and privatisation of social security. The chapter also shows the different approaches adopted in social security law and in labour law.

After this general discussion of coordination it is also relevant to discuss specific issues that have been the topic of recent debates and research. One such issue is that of pensions. Chapter 15 discusses how EU rules, including those on competition law, have an impact on pensions. *Pascal Borsjé* and *Hans van Meerten* raise the question of how much room there is at national level for legislation in the field of pensions and whether a more common EU approach would solve some of the current problems for pensions.

Another area is that of the impact of free movement rules on particular categories of persons. How are persons with low incomes affected by the coordination rules? This is addressed by *Herwig Verschueren* in Chapter 16. This chapter discusses at length the case law of the Court of Justice in this area and whether the approaches in the various judgments are consistent.

Another category is that of third-country nationals, or in a wider sense of persons from outside Europe. This is the topic of *Gijsbert Vonk* in Chapter 17. The central question of his contribution is how EU social security law impacts upon the legal position of people moving between the EU and other regions of the world. This is dealt with not only in a technical manner, but also with reference to strategic options for protecting migrant workers moving between the EU and other regions in the world, which go beyond existing EU co-ordination law. These options vary from adopting unilateral protective standards to signing up to the major global instruments on the protection of migrant workers. Attention is also paid to the possibility of linking up regional co-ordination standards, establishing an EU-Ibero-American pact.

We have seen in the introduction that the scope of social security has been growing in the past years. Two specific areas of new benefits on which there is now considerable

case law are those of study grants and health care. In Chapter 18 *Anne Pieter van der Mei* discusses the study grants that have been the topic of case law of the Court of Justice. Persons who claim study grants are mainly not economically active. As a result of provisions on citizenship in the Treaty, these persons can now also invoke the non-discrimination rule of the Treaty. This is often not successful and therefore raises questions as to what free movement means for citizens, to what extent Member States can protect their systems and which approaches are possible in this area.

Co-ordination and free movement (of services) rules also apply to health care, even though for a long time health care was often not considered as an economic good but rather as a collective good. The Court of Justice approached this differently and now there is case law and even a directive on cross-border health care. The topic remains very interesting, as *Oxana Golyunker* shows us in Chapter 19, since there is a possibility that individuals make use of health care to the detriment of citizens in other Member States. Application of EU law creates new tensions, but may also lead to improvements in this area, such as reducing waiting lists.

IV. EUROPEAN SOCIAL SECURITY LAW IN A GLOBAL CONTEXT

This part contains two contributions. In Chapter 20 *Marius Olivier* addresses an issue that up until now has been almost entirely ignored by European social security specialists: the EU promotion of social protection in the world. After a critical and compelling analysis Olivier comes to the conclusion that the EU constitutional basis for social protection involvement in the developing world is evident: a range of comprehensive policy documents, mostly of recent origin, have given clear and explicit guidance on how development cooperation, also in the social protection area, should be conceptualised and concretised. ‘Stop talking and start walking’, Olivier seems to suggest: ‘What is needed is not more policy direction, but actual and effective implementation and prioritisation of development cooperation and social protection along the lines indicated above and endorsed by these very instruments’. While calling for action, Olivier does not lose sight of the importance of national ownership and capacity. In this context, he advocates the approach adopted by the 2012 ILO Recommendation on social protection floors allowing for much national flexibility. He also observes that the Recommendation foresees in particular that, in implementing the Recommendation, Member States may seek technical assistance from the ILO and other relevant international organisations in accordance with their respective mandates. This accentuates the important role that EU Member States have to play in this regard.

The second chapter in this part, Chapter 21, raises the question of whether European social security law can act as a source of inspiration for other parts of the world. For the authors, *Danny Pieters* and *Paul Schoukens*, this is mostly a rhetorical question and had they raised it more fundamentally their answer would probably be ‘no’. Pieters and Schoukens are critical of present social security standards in Europe. They observe that these standards do not touch (any more) upon the heart of the legal and social policy debate related to social security which is problematic as there is a strong need to be able to change the basics of social security legislation. The authors do not show much

interest in the discussion about alternative routes explored by global institutions such as the United Nations and the International Labour Organization to make social security standards more relevant for the developing countries. For example, in their view, the 2012 Recommendation No 202 on national floors of social protection contains ‘nice principles’ but lacks compelling force and hence is not likely to have much impact. Instead Pieters and Schoukens advocate a set of completely new (and presumably more compelling) standards partly derived from their own research on core principles of social security. According to the authors these are not necessarily ‘social security standards as such, but standards establishing the relations between this very important area of societal and public concern, and other policy areas. Those standards would also establish direct connections between economic development and social protection levels.’ In this sense the contribution is most suitable for a research handbook such as this one. Clearly, there is still a lot of work to be done to develop these standards in such a manner that they can count as the beginning of a consensus between states and various stakeholders involved.

V. THE FUTURE OF EUROPEAN SOCIAL SECURITY LAW

A final chapter, entitled ‘The land of four quarters’ contains a free-thinking exercise about the future of European social security law. It partly reflects some of the proposals, suggestions and views presented by the authors. In what direction will European social security law evolve? According to a matrix raster presented by *Gijsbert Vonk* this depends on two questions. Firstly, will European integration move on or grind to a halt? Secondly will social security systems consolidate as homogeneous national state systems or will they become fragmented over regional and local levels of government, private institutions and alternative protection systems such as tax law, labour law, etc.? In his view the present state of social security reflects a model which is based upon consolidated national social security schemes held together by a loose set of European rules based on limited EU supranational competences. This is the co-ordination model (referring simultaneously to EU co-ordination law and the open method of co-ordination). But no one can predict the future and one has to take account of the possibility that the model might shift. It may evolve in the direction of a supranational model in which the EU takes direct responsibility for the benefit system. Even a Europe-wide basic income is a possibility. But we must also allow for the possibility that the integration process will stop or even reverse, in which case the development of social security will be determined by uncontrollable forces or invisible hand mechanisms. A shift towards a European regulatory model is another scenario. This would allow for a fragmentation of social security under stricter European control. While the regulatory model may be implicitly embraced by many authors in this book, it is difficult to predict how such a shift in governance will affect the realisation of European social objectives, the extent of solidarity between groups and between states, protection of social risks, facilitating economic growth, etc. This is not exactly a question about which lawyers have expert knowledge. We must console ourselves with another thought: in whatever direction the model of governance evolves, European social security law is likely to remain a lawyers’ paradise.

The aim of the handbook has been to give food for thought and to identify areas and questions that require further research. For this reason we have refrained from adopting descriptive overviews but have favoured in-depth analyses and suggestions for new approaches, also when these are provocative in nature. We hope we have succeeded in this approach and that the handbook may serve as a basis for several further projects and studies.

Frans Pennings
Gijsbert Vonk