Guest Editorial

International Labour Law and Social Security Standards in Relation to Regional and National Systems: Impact and Shortcomings

This issue contains selected contributions originally presented as papers at an international conference held in Stellenbosch, South Africa in September 2011. The theme of the conference concerned the 'Interaction between international, regional and national labour law and social security: standards and methods.' These contributions form part of a more extensive range of conference presentations published in book form by Juta Publishers (*The role of standards in labour- and social security law: International, regional and national perspectives*).

The contributions in this issue of the Journal deal with the issue of international standards and their interrelationship and interaction with national labour law and social security systems, and with regional regimes. As such, this is a limited enquiry, as the focus falls on a few selected areas and themes. The first two contributions, by *Manfred Weiss* (*International labour standards: a complex public-private policy mix*) and *Marius Olivier* (*International labour and social security standards: a developing country critique*), introduce the topic and deal with some normative and conceptual matters. *Achim Seifert's* contribution then reflects on the relationship between international and regional standards, from the EU perspective (*The still complex relationship between the ILO and the EU: the example of anti-discrimination law*). The remaining three contributions focus on particular problems encountered in the developing world. The first of these, authored by *Ngeyi Kanyongolo* (*Social security, gender and legal plurality: challenges to harmonisation in SADC*), concentrates on the complex operation of international and regional standards in the context of legal pluralism and the plurality of social security measures. The second contribution, by *Karin Calitz* (*The failure of the Minimum Age Convention to eradicate child labour in developing countries, with particular reference to SADC*), focuses on shortcomings in the international standards regime as regards child labour. In the final contribution, *Kitty Malherbe* (*Retirement reform in South Africa: the influence of international social security standards and human rights instruments*) considers the relevance of international standards, in particular the

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guiding principle of intergenerational solidarity, for the envisaged comprehensive reform of retirement provisioning in South Africa.

All the contributions emphasize the importance and impact of international standards, in particular those emanating from the ILO, for the development of regional regimes and the shaping of national labour law and social security systems. *Achim Seifert* refers to the influence of ILO standards as regards the development of EU law on equal pay for women and men, how EU law has promoted the implementation of (certain) ILO standards in the field of anti-discrimination law, and modalities of co-operation developed by the EU and ILO. *Kitty Malherbe* stresses the importance of the widely recognized international principle of intergenerational solidarity for the reform of the South African retirement system. *Karin Calitz* emphasizes the important role that ILO Conventions have played in the eradication of child labour and abuse, and the contributions by *Manfred Weiss* and *Marius Olivier* mention the vast impact of standards laid down by the ILO on the development of labour law and social security systems worldwide.

However, this does not mean that conflicts in the area of legal domains or orders do not exist. To some extent this flows from the increasing regionalization of social policy, as argued by *Achim Seifert*. He discusses in this regard areas of open conflict and inconsistencies between ILO standards and EU law, in particular in relation to ILO Convention 111 concerning Discrimination in Respect of Employment and Occupation (1958). He recommends that co-operation between the ILO and EU be strengthened in order to avoid further conflicts between these two legal orders. Similarly, *Karin Calitz* suggests that the blanket prohibition on child labour contained in ILO Minimum Age Convention 138 (1973) does not fully accord with the African Charter on the Rights and Welfare of the Child (1990), which imposes a duty on a child to work for the cohesion of the family, while the provisions of other international instruments which emphasize respect for the cultural identity of children and children's participation rights also need to be taken into account. On a related issue, *Kitty Malherbe* reflects on the difficulties arising from conflicting positions and advice emanating from different international organizations, in particular the World Bank and the ILO, for example in the field of retirement reform. In fact, deregulation of labour markets became the hallmark of labour law reforms required by the World Bank and the IMF in many African countries in the 1990s, as argued by *Marius Olivier*. He also suggests, in similar vein, that external influence, if not pressure and prescription by international financial institutions, is evident from interventionist approaches adopted by the IMF in the area of social security institutional reform in certain African countries.

Furthermore, in all the contributions, several problems with the current ILO standards framework are highlighted. *Manfred Weiss* and *Marius Olivier* raise a range of issues in their respective contributions. One of these concerns the low level of ratification of ILO standards, particularly by developing countries, and specifically in relation to post-World War II social security Conventions. The reasons for this are not altogether clear, but may have to do not only with the highly technical nature of some of these Conventions, but also their relatively detailed and prescriptive nature, and the operation of the ILO enforcement mechanisms, discussed below.

Whatever the reasons for non- or limited ratification of ILO social security Conventions may be, this is not a universal phenomenon, as is evident from the extensive ratification by developing countries of UN human rights conventions. These UN instruments often also contain labour law and social security provisions. It is therefore clear that the issue of non-ratification of ILO Conventions needs to be thoroughly examined and appropriate solutions found.

If ratification of ILO standards is deficient, the implementation of these standards is also problematic, as suggested by both *Weiss* and *Olivier*. This is caused by limited capacity and weak institutional structures in many developing countries, informed by constrained trade unions, underdeveloped bi- and tripartite regimes, excessive governmental interference, and the absence of proper adjudication mechanisms which guarantee access to justice. All of this calls for a deliberate improvement of institutions, systems and processes, and comprehensive technical assistance. In some areas, in particular in the labour law domain and in certain social security environments progress has already been made.

From the contributions contained in this issue, in particular those reflecting on the developing world, it appears that the very standards emanating from the ILO, as is the case with the process of standard-setting itself, reveal a number of shortcomings, with specific reference (but not restricted to) social security standards. At the conceptual level, it is argued by *Ngeyi Kanyongolo* that the standards do not reflect the lived experiences of women, as well as the multiplicity of legal regimes and the range of social security arrangements informing their social security position or status. This flows among others from the narrow risk-based social security concept used by the ILO, its (over)emphasis on employment-related insurance-based interventions, and a legal centralist approach that does not appreciate informal arrangements. These and other shortcomings are also discussed by *Marius Olivier*. Similarly, *Karin Calitz* is critical of the failure of Convention 138 to appreciate that non-detrimental work by children is regarded as beneficial in the (Southern) African context; the complexity of the measures contained in the Convention, allowing for light work undertaken by children between 12 and 15 years of age; and the fact that

the Convention does not address the root cause of child work, that is, poverty. As the reference to light work above illustrates, as discussed in some detail by *Marius Olivier* and *Manfred Weiss*, the flexibility arrangements contained in many ILO Conventions have often not succeeded in addressing the inherent shortcomings of the Conventions and improving the ratification record. In fact, as *Marius Olivier* indicates, the ability of developing countries to rely on available flexibility clauses contained in the mother or core social security Convention of the ILO, the Social Security (Minimum Standards) Convention (1952), may have the effect that insurance-based social security schemes will apply to employees in large enterprises and the public sector only, leaving the bulk of workers in most developing countries outside the sphere of protection due to the preponderance of informal workers and micro-enterprises in these very countries.

Furthermore, many of the relevant Conventions were adopted without properly taking into account the historical and socio-economic context, the deeply segmented nature of labour markets, and the cultural characteristics and perspectives of developing countries. The result is that certain categories of core beneficiaries of these Conventions are in fact marginalized, if not excluded – working children below the age of 15 are pushed into unregulated forms of irregular work (*Karin Calitz*), social security measures and legal instruments have a gender-disproportionate effect as women are largely left outside the protective sphere of social security (*Ngeyi Kanyongolo*), and informal workers do not enjoy appropriate social security coverage (*Marius Olivier; Manfred Weiss*). Soft law instruments employed by the ILO have been helpful, but are insufficient to address the shortcomings of the ILO conventional framework: they achieve little in terms of addressing the above deficiencies and fall short of creating a legally binding protective net. A reconceptualization of the social security definitional and instrumental context may therefore be required, which needs to be appropriately sensitive, appreciative and accommodating of the realities of the developing world. This reconceptualization may also be required at the regional and at times the country level, as the limited ILO standards framework has found its way into the provisions of regional instruments and national constitutions and laws – as aptly described by *Ngeyi Kanyongolo* in the context of among others the SADC Charter of Fundamental Social Rights, which fails to properly heed legal pluralism and social security plurality in relation to the position of women.

Enforcement of international labour law and social security standards is another area of concern raised by some of the contributors. It has been suggested that the formal ILO approach, comprehending the submission of reports, assessment of same on the basis of universally applicable standards, and naming and shaming tactics to direct countries into compliance, is inappropriate in a context where developing countries in particular struggle to meet the relevant

standards (*Manfred Weiss; Marius Olivier*). While the need for *universal* standards may be understandable, it is equally important to realize the limited ability of many developing countries to comply. The evolutionary and gradual nature of in particular social security reform initiatives must also be appreciated. Therefore, a revised and flexible enforcement and monitoring framework which should inform supervising compliance with ILO standards is advocated by *Marius Olivier*. He argues that much can be gleaned from the UN approach in this regard, in particular with regard to the relevance of country-specific contexts, achievements and target-setting. Instead of an interventionist and prescriptive approach, in some cases linked to the financial muscle which particular international organizations may have, there is a clear call for supportive interventions that realistically address the need for underlying reforms, system improvement and alignment with the international standards framework.

It is also argued that enforcement of international standards should be strengthened by three further measures: complementary monitoring and enforcement mechanisms; the need for sufficient and suitable technical assistance; and the requirement of appropriate dialogue. *Manfred Weiss* suggests that the combination of ILO hard and soft law approaches does not achieve sufficient outcomes: complementary mechanisms in the form of codes of conduct and union-initiated international framework agreements are required. Even if these mechanisms are legally non-binding, they imply a more thorough and rigorous engagement with labour standards at (multinational) company and workplace level, also as a result of their ability to focus on the identification of responsible and liable role-players in supply chain configurations. Both he and *Marius Olivier* raise the need for technical assistance and appropriate dialogue. Without comprehensive and suitable technical assistance being made available to countries, especially in the developing world, the goal of understanding, ratifying and implementing international labour and social security standards will not be reached. This is supported by the view expressed by *Karin Calitz* that SADC countries need to be assisted in order to develop an appropriate definition of light work for purposes of allowable work by children. Finally, dialogue with weak and to some extent unrepresentative trade unions is not sufficient to guarantee appropriate voice and representation. Indeed, as argued by *Karin Calitz*, *Ngeyi Kanyongolo* and *Marius Olivier* respectively, it is necessary to ensure that the views and voice of children should be heard in relation to arrangements concerning work undertaken by them; that women should be consulted with regard to dealing with gender elements prevalent in social security design and provision; and that coverage extension to informal workers cannot be achieved without granting those affected by the extension debate a sufficient voice in the design of appropriate standards and interventions.

We remain indebted to all the contributors for their thorough and thought-provoking contributions and to the peer reviewers for so ably commenting on and recommending improvements to the texts of the contributions. We also express our sincere appreciation to Mia Rönnmar, editor-in-chief of the Journal, for her invaluable advice and support, as well as to Olga Rymkevitch and William Bromwich, for their dedicated editorial assistance. Ockie Dupper and Avinash Govindjee, co-editors of the e-book referred to above, kindly assisted with the selection of these contributions. In addition, Avinash Govindjee needs to be thanked for the editorial support provided.

Marius Olivier
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