

**Schriftenreihe  
für Internationales und Vergleichendes Sozialrecht**

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**Band 15**

# **Social Protection by Way of International Law**

**Appraisal, Deficits and Further Development**

**Edited by**

**Bernd Baron von Maydell**

**Angelika Nußberger**



**Duncker & Humblot · Berlin**

**MAX-PLANCK-INSTITUT  
FÜR AUSLÄNDISCHES UND INTERNATIONALES SOZIALRECHT**

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**Herausgegeben von Bernd Baron v. Maydell, München**

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Die Deutsche Bibliothek – CIP-Einheitsaufnahme

**Social protection by way of international law** : appraisal deficits and further development / ed. by Bernd Baron von Maydell ; Angelika Nussberger. – Berlin: Duncker und Humblot, 1996

(Schriftenreihe für internationales und vergleichendes Sozialrecht ; Bd. 15)

ISBN 3-428-08663-5

NE: Maydell, Bernd Baron von [Hrsg.]; GT

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Fotoprint: Berliner Buchdruckerei Union GmbH, Berlin

Printed in Germany

ISSN 0720-6739

ISBN 3-428-08663-5

Gedruckt auf alterungsbeständigem (säurefreiem) Papier  
entsprechend ISO 9706 

## Preface

The colloquium on the subject of Social Protection by Way of International Law was convened by the Max Planck Institute for Foreign and International Social Law at Tutzing from 21 to 23 November 1994. The Evangelische Akademie not only offered its lovely premises for this occasion, but as co-organizer also took up the colloquium theme in its own programme, thus making it clear that the international dimension of social security is not only a question of scientific interest.

This volume contains a collection of the essays presented at the colloquium - in a slightly revised form for this published version. Divergent from previous colloquium publications, summaries of the discussions on the individual papers have been dispensed with. Instead, an analytical report summarizing and evaluating the papers and their discussion is presented at the end of the volume.

In keeping with the subject matter, the composition of the speakers and participants was international. Hence, in order to transcend national boundaries in the discussion of the issues addressed at the colloquium, the language of publication is English. The necessary translations were prepared by Ms. Esther Ihle, to whom we are especially indebted for her work. We likewise thank Ms. Ingrid I. Werner for the volume layout and Ms. Martha Roßmayer for proof-reading the manuscripts.

Needless to say, we are also grateful to the *Evangelische Akademie* for its catering and hospitable accommodation, as well as to the authors of the essays and all the other participants who contributed their thoughts and experience to the discussions. It is to be hoped that this dialogue opened in Tutzing will be continued.

Munich, September 1995

*Bernd von Maydell  
Angelika Nußberger*



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## Abbreviations

ABGB	Allgemeines Bürgerliches Gesetzbuch
AFDI	Annuaire français de droit international
AFG	Arbeitsförderungsgesetz
AJIL	American Journal of International Law
AVAVG	Gesetz über Arbeitsvermittlung und Arbeitslosenversicherung
BAG	Bundesarbeitsgericht
BArbBl.	Bundesarbeitsblatt
BB	Der Betriebs-Berater
BGB	Bürgerliches Gesetzbuch
BGBI.	Bundesgesetzblatt
Breith.	Sammlung von Entscheidungen aus dem Sozialrecht, begründet von Breithaupt
BSG	Bundessozialgericht
BT-Drs.	Bundestagsdrucksache
BUrlG	Bundesurlaubsgesetz
BVerfG	Bundesverfassungsgericht
BVerwG	Bundesverwaltungsgericht
CERD	Committee on the Elimination of Racial Discrimination
cf.	confer
Colum. J. of Transnat'l. L.	Columbia Journal of Transnational Law
CRZZ	Centralna Rada Związków Zawodowych
DAG	Deutsche Angestelltengewerkschaft
DB	Der Betrieb
DÖV	Die Öffentliche Verwaltung
e.g.	exempli gratia
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECOSOC	Economic and Social Council
ECR	European Court Reports
ed.	editor
edn.	edition
E(E)C	European (Economic) Community
EJIL	European Journal of International Law
EPIL	Encyclopedia of Public International Law

ESC	European Social Charter
et seq.	et sequens
EuGRZ	Europäische Grundrechte-Zeitschrift
EuroAS	Europäisches Arbeits- und Sozialrecht (Informationsdienst)
EuZW	Europäische Zeitschrift für Wirtschaft
EWiR	Entscheidungen zum Wirtschaftsrecht
FAO	Food and Agriculture Organization of the United Nations
G.B.	Governing Body
GYIL	German Yearbook of International Law
HGB	Handelsgesetzbuch
Human Rights Q.	Human Rights Quarterly
IAEA	International Atomic Energy Agency
ibid.	ibidem
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
i. e.	id est
ILM	International Legal Materials
ILR	International Labour Review
IMF	International Monetary Fund
InfAuslR	Informationsbrief Ausländerrecht
IO	International Organization
ITU	International Telecommunication Union
JZ	Juristenzeitung
LAG	Landesarbeitsgericht
MP	Monitor Polski
NGO	Non-Governmental Organization
NILR	Netherlands International Law Review
NJW	Neue Juristische Wochenschrift
No.	Number
NSZZ	Niezależny Samorządny Związek Zawodowy
NVwZ	Neue Zeitschrift für Verwaltungsrecht
NZA	Neue Zeitschrift für Arbeits- und Sozialrecht
NZS	Neue Zeitschrift für Sozialrecht
OEG	Opferentschädigungsgesetz
OJ	Official Journal of Poland for publishing Acts and Regulations
op. cit.	opere citato
para.	paragraph
PCIJ	Permanent Court of International Justice
RdA	Recht der Arbeit
RdC	Recueil des Cours de l'Académie de droit international

Res.	Resolution
RGDIP	Revue générale de droit international public
RVO	Reichsversicherungsordnung
SGB	Die Sozialgerichtsbarkeit
SozR	Sozialrechtliche Rechtsprechung und Schrifttum, bearbeitet von den Richtern des Bundessozialgerichts
SozSich	Soziale Sicherheit
UN	United Nations
UNDP	United Nations Development Programme
UNESCO	United Nations Educational, Scientific and Cultural Organization
UNTS	United Nations Treaty Series
UWG	Gesetz über unlauteren Wettbewerb
v.	versus
VGH	Verwaltungsgerichtshof
Vol.	Volume
VwGO	Verwaltungsgerichtsordnung
WTO	World Trade Organization
ZaöRV	Zeitschrift für ausländisches öffentliches Recht und Völkerrecht
ZfSH/SGB	Zeitschrift für Sozialhilfe und Sozialgesetzbuch



## General Introduction

Bernd von Maydell and Angelika Nußberger

*Social Protection by Way of International Law - Appraisal, Deficits and Further Development* formed the motto of a conference that was held from 21 to 23 November 1994 at Tutzing, near Munich, on the occasion of the 75<sup>th</sup> anniversary of the International Labour Organization. Many an observer of the diverse national developments occurring in the fields of labour and social (security) law might ask whether there even is such a thing as social protection through international rules of law. For much as transnational standard-setting activities have come to form a solid part of international legal culture in the field of rights of personal liberty, international obligations in the fields of labour and social law are - still - approached with a great deal of hesitation, all the more so because national conceptions differ widely here. Moreover, social rights, to a much greater extent than personal rights, require sensitive compromises to be made between opposing workers' and employers' interests, as well as between individual demands and the common weal, the acceptance of which, as a rule, is only warranted in the national context. Thus, the steps taken so far by the European Union, the United Nations and the Council of Europe to standardize social rights and to ensure their enforcement must, on the whole, be described as exceedingly hesitant and reserved.

Viewed against this background, the global activities pursued by the International Labour Organization are all the more remarkable. In three-quarters of a century, it has created a comprehensive body of standards in the fields of labour and social law - 175 Conventions, 182 Recommendations and over 6,000 ratifications speak for themselves.

Yet, what role do these protection standards play? Here, one might think of the political debate over the labour law effects of the *Radikalerlaß* (ban on the appointment to the public service of persons holding radical political views), the screening of teachers from the former German Democratic Republic, the deployment of public officials in the event of strike in Germany, the prohibition of trade union activities in Poland under martial law, or forced labour in the former Soviet Union. Nonetheless, we are left with the question: Are these just singular cases in which the importance of international rules governing social rights has been magnified for political motives, or are these

examples of how pioneer ventures in the fields of international labour and social law are complied with on a general scale?

In spite of the ILO's great success, documented by the many anniversary celebrations in a number of different countries, its mission of achieving a world-wide standardization of labour and social conditions has nevertheless also encountered its share of criticism. The welfare state model underlying the entire concept is in itself often viewed with scepticism. In the light of the wide economic and social divergence between developing countries, industrialized nations and East European transformation states, the universalist approach taken by the ILO is opposed on the grounds that standard-setting activities could be carried out more efficiently at a regional level if certain groups of countries with comparable starting positions were to join forces. Particularly the collapse of the Communist bloc has led to a questioning of the ILO's *raison d'être*, which originally had been conceived by some as a sociopolitical response to the challenges posed by the Communist model following the 1917 October Revolution. Moreover, it is argued that the tripartite composition of its delegations, consisting of employers', workers' and government representatives, no longer reflects the actual societal structures existing in the majority of countries owing to the declining importance of trade unions. Hence, both the ILO as a whole and its fundamental structural principles such as universalism and tripartism are now being queried.

Such discussion concerning the ILO is embedded in fundamental reflections on reforms in the fields of labour and social law. In view of the global interpenetration of national economies and the increasing mobility of workers, it becomes clear that international rules are not only justifiable, but have already become inevitable - even in those legal fields which, so far, have primarily been considered matters of internal policy. Apart from the ILO, other intergovernmental and international organizations such as the European Union, the Council of Europe and the United Nations are urged to give up their restraint and to collaborate in the agglomeration of normative structures. The ILO itself, as indicated in the Report of the Director-General to the International Labour Conference of 1994: *Defending Values, Promoting Change*, must reassess such issues as the extension of its instruments and the adaptation of its supervisory mechanisms to the fast pace of modern working and social life reflected in the constant flow of national statutory amendments.

Nevertheless, debate on the introduction of reforms requires a comprehensive appraisal of existing circumstances. Possible questions here would be:

How are the weights distributed among the individual actors within the realm of international working and social life? How are the rules they create coordinated? How are these rules implemented and how is their enforcement ensured? How do they affect the individual national legal systems?

Just as important as determining the relationship between national and international rules is how they couple back to general public international law. Thus one may ask:

What are the special features of international labour and social law? To what extent can more recent developments in public international law also be made profitable to the better understanding of labour and social legislation, and, vice versa, to what extent does labour and social law create new impulses that benefit the theoretical and dogmatic structures of public international law? Can the inclusion of different societal groups in international decision-making processes - a cornerstone of ILO policy - serve as a model for framing more realistic rules of international law?

All these questions clearly show that the subject of appraising and further developing social protection with the help of international law requires an extensive scientific dialogue that also takes economic and political considerations into account. Hence, the declared aim of the Tutzing Colloquium was to intensify such an exchange of thought between legal theorists and legal practitioners, and to bring together representatives of different international and supra-regional organizations, national and foreign specialists in the above-mentioned fields of law, as well as representatives of management and labour.

The colloquium agenda was organized in line with the main subjects, on the basis of which the contributions to this volume have likewise been classified.

The first set of papers is devoted to the comparative analysis of the diverse protection standards.

In contrast to the ILO body of standards, which has been extended more and more over the past few decades, explicit norms governing labour and social law within the framework of the European Union tend to be the exception. Rather, the engine of development here has been the Court of Justice of the European Communities, which has come to establish social protection standards in a large number of its case decisions. However, owing to the authority vested in the Court of Justice, the enforcement of rights in this domain is warranted to a much greater extent than is possible under the supervisory procedures available to the ILO, which, on the whole, tend to be based on long-term persuasive effects, rather than on direct cogent mechanisms of enforcement. Thus, the non-linear development of EC law in the social field is also subject to much fiercer criticism compared with the standard-setting and supervisory activities pursued by the ILO. The Council of Europe model, too, is characterized by political restraint in the transnational standardization of social rights. Thus, for instance, the Council of Europe has created binding rules, modelled on ILO standards, through its establishment of the European Social Charter, which was signed in Turin in 1961. Yet this step forward was so half-hearted in its inten-