

NETHERLANDS

CONSTITUTIONAL AND CONVENTIONAL PROTECTION OF SOCIAL SECURITY IN THE NETHERLANDS

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1. Changes in Dutch Social Security and the Crisis

Dutch social security law has been changed considerably since the 1990s, but the crisis itself has so far not had a large impact on the benefit system. In so far as social security laws have been changed in the years since the crisis (1998) or in so far as there are plans for reform, they are not motivated by the crisis as such, but on the wish to reform the scheme in question in order to change the responsibilities of the actors concerned. Although the changes may have led or may lead to lower expenditure for public funds, this is not the major objective.

Fundamental changes in the past decades include:

- The change of the Widows Benefits by the General survivors benefits (since equal treatment of men and women required change and since now more and more women had an income of their own) (1996);
- The replacement of entitlement to Sickness Benefit to sick pay (employers were made responsible for sick pay in order to increase their responsibility) (1994, 1996, 2004);
- An act linking benefit entitlement to residence status in order to make illegal stay less attractive (1998);
- An act reducing export of benefits to countries outside the EU in order to be able to better enforce benefit conditions (2000);
- The new Disability Benefits Act (to encourage partially disabled to keep or find work) (2004);
- Shortening unemployment benefits in order to activate beneficiaries to get back to work (2006; 2014);
- Decentralizing support for living (care, cleaning etc for elderly, disabled) to local communities (since these know better the circumstances and can better make use of the facilities (2015).

Whether the reasons for change mentioned are convincing and whether their objectives have been realized is a matter for long discussions, but for this contribution it is important to note that none of the measures are motivated by the Government by referring to the crisis. Moreover, most of the fundamental changes took place already before the beginning of the crisis.

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Still, it is interesting to investigate how constitutional standards and international standards relate to changes in social security since this may be valuable also for the constitutional protection in case of crisis measures.

2. *The Dutch Constitution and social security rights*

Since 1983 the Constitution (Article 20(1)) provides that public authorities have to ensure that the population has the means for subsistence and it has to take care of the distribution of wealth; Article 20(2) provides that by Acts of Parliament the rights to social security benefits are defined; Article 20(3) mentions that Dutch nationals resident in the Netherlands who are unable to provide for themselves shall have a right, to be regulated by Act of Parliament, to public assistance.

The Constitution thus includes a social fundamental right that ensures a subsistence income and guarantees the legal character of social security, and it gives public authorities, not only at the central level, but also municipalities, the task to ensure a subsistence income and distribution of wealth. However, Article 20 is not worded very specifically and will not easily lead to enforceable rights before a court.

The wording of Article 20(1) deviates significantly from the text proposed by the State Committee Cals/Donner, that wrote a proposal for the Constitution of 1983. Article 81(1) of the proposal provided that public authorities must ensure increasing of the level of subsistence means.

The Government, however, preferred that the Constitution ensures subsistence instead of a continuous increase.² The difference between concern for subsistence and increasing subsistence is that the latter wording requires activities to further increasing it; it would also be an obstacle against cuts in social security. As was remarked, the text of the Constitution as adopted does not require an increase.

Article 20(2) gives the legislature the task to establish a social security system and that entitlements have to be regulated by Acts. This means that the basic elements of a scheme for a particular risks have to be defined by an Act and cannot – even not in case of privatisation – be left to private parties. Thus, even if an Act allows employers to bear their own risk for ill or disabled employees, as is the case with the Disablement benefits act (WIA), the Act gives detailed rules on entitlements and obligations of the employees and employers.

Article 20(3) is the most concrete article and concerns persons who are unable to provide for themselves.

Thus, the Constitution provides for limited protection in case social security rights are affected by the crisis, since the Constitution does not require more than protection of subsistence means and that social security is regulated by Acts of Parliament.

Moreover, the protection given by the Constitution protect social security is limited, since it does not give courts the power to test a national act or proposal against the Constitution and did not establish a constitutional court. Still, the provisions of the Constitution mentioned are relevant in so far as the legislator has to take account of them when drafting new Acts. However, since the text of Article 20 leave much room for defining the exact contents of the guarantees to be given for subsistence means and since the arguments offered for the amending or new Acts are based on the need for structural changes, the Constitution plays only a very marginal role in these debates.

Therefore, it is doubtful whether the Constitution is a useful instrument against deteriorations of the social security system.³ The provisions do not prevent the legislature from changing the laws.

Article 20(3) gives a more specific protection, but it also contains the reservation that the guarantee is given in so far as the persons cannot provide for their income themselves. This reservation gives the legislature considerable room to make assistance dependent on conditions (relevance of possible support by others (family members) and conditions on taking up work).

² *Kamerstukken II 1975/76*, 13 873, nr. 3, p. 11-12.

³ F.M. Noordam en S. Klosse, *Socialezekerheidsrecht*, Deventer: Kluwer, 2008, 50.

Since the courts can test legislation against international treaties these treaties may have the effect that constitutions have in other countries. For this reason this protection by treaties is discussed in the following section.

3. Protection by Social Security Conventions

3.1. Introduction

The Dutch Constitution provides that provisions of international law which, according to their wording are binding for anyone, have direct effect.⁴ This wording leaves it to the courts to decide whether a rule has direct effect or not. National law which is inconsistent with an international provision with direct effect is overruled by that provision and must not be applied. An important criterion for direct effect of a rule is that the rule is so clear and unconditional that it does not require further implementing rules in order to have effect. Below I will discuss the relevant treaties.⁵

3.2. International Labour Organisation

One series of conventions relevant to social security is that of the International Labour Organisation (ILO).⁶ Important is, in particular, Convention 102 on Minimum Standards in Social Security. This convention gives general standards for the traditional branches of social security (ratified by the Netherlands in 1962). Others are Convention 103 concerning Maternity Protection (ratified in 1981); Convention 118 concerning Equality of Treatment of Nationals and Non-Nationals in Social Security (1962 ratified in 1964); and Convention 121 concerning Employment Injury Benefits (ratified in 1966); Convention 128 concerning Invalidity, Old-Age and Survivors' Benefits (ratified in 1969).

These conventions play a role in discussions during Parliamentary debates on social security bills and sometimes courts take account of these conventions. An example of impact in case law is a decision of the Central Appeals Court in 1996 on Convention 103. This convention was invoked by the plaintiffs in order to argue that the rule which required that self-employed women had to contribute to the costs of their treatment in the case of pregnancy and delivery in a hospital was not allowed. The court ruled that the contribution required from the self-employed was indeed inconsistent with the Convention.⁷ As a result it became clear that also ILO conventions can have direct effect; however, that is the case only if, as the Constitution requires, they are clear enough and are unconditional. The rule invoked in the 1996 judgment was that no own contribution was allowed for this type of benefit and this interpretation of the rule was previously confirmed in a report by the Committee of Experts of the ILO. For the Dutch court this report by the Committee of Experts was important for making its decision.

Later, the Central Appeals Court decided that also Article 5 of ILO Convention 118 has direct effect.⁸ The case concerned a Dutch Act, introduced in 1999, which stated that supplements on the basis of the *Toeslagenwet* were no longer exportable. Article 5 of the Convention provides – briefly – that a Member State has to pay the benefits falling within the scope of the convention to persons residing in other Member States which ratified Convention 118. As a result export has to be continued.

Such effect of a convention does not always have lasting effect; sometimes it amounts to a Pyrrhic victory, as in in Autumn 2004 Dutch Parliament agreed with the Government's proposal to denounce

⁴ Article 93 of the Constitution.

⁵ See on the meaning of international standards also U. Becker, B. von Maydell and A. Nußberger (ed.), *Die Implementierung internationaler Sozialstandards*, Baden-Baden, 2006, p. 21 et seq.

⁶ See also Frans Pennings (ed), *Between Soft and Hard Law. The Impact of International Social Security Standards on National Social Security Law*, The Hague, 2006.

⁷ CRvB 29 May 1996, *RSV* 1997/9; AB 1996/501. A translation of the decision is published in Frans Pennings (ed), *International Social Security Standards. Current Views and Interpretation Matters*, Antwerp 2007.

⁸ CRvB 14 March 2003, *RSV* 2003/114, a translation is published in the book mentioned in the previous note.

Convention 118. Here we can see that awarding direct effect to a convention can have adverse effects, as Member States do no longer want to be bound by it.

In other decisions, the Dutch court denied direct effect to Conventions 121 and 128. This concerned the new survivors benefit act (mentioned as the first reform in Section 1). This new Law was considered necessary after a landmark decision of the Central Appeals Court, that the limitation of its predecessor, the *Algemene Weduwen- en Wezenwet* (AWW – General Widows’ and Orphans’ Benefits Law), to widows (i.e. women only) was contrary to Article 26 of the International Convention on Civil and Political Rights of the United Nations.⁹ As a result men – widowers – became entitled to survivors’ benefit. This led to an increase in recipients. Under the ‘old law’ benefits were not means tested; as widowers most often had their own sources of income, this approach was no longer deemed acceptable.

The Central Appeals Court made a general statement in its decision: Conventions 121 and 128 will normally not have direct effect, since many terms are uncertain, like what is meant by widow, and since the conventions leave Member States choices.

Also in respect of Convention 128, the court ruled that the provisions of this convention do not have direct effect. A country is considered to satisfy the requirements of this convention, the court ruled, if the collective level of protection is adequate, without having to investigate what is paid in the individual case.¹⁰

3.3. Council of Europe

Also the Council of Europe has developed provisions that are relevant to social security; an important document is the European Social Charter (ESC).¹¹

Article 12 ESC concerns the right to social security and provides that with a view to ensuring the effective exercise of the right to social security, the Parties undertake: (1) to establish or maintain a system of social security; (2) to maintain the social security system at a satisfactory level at least equal to that necessary for the ratification of the European Code of Social Security; (3) to endeavour to raise progressively the system of social security to a higher level. (...)

Also this provision was invoked before the court. The outcome was disappointing: the Central Appeals Court decided that Article 12 ESC does not have direct effect. It considered that this provision does not impede deteriorations of national law, since Member States have the power to distribute the scarce means of their residents.¹²

Article 13 ESC provides that the States Parties undertake to ensure that any person who is without adequate resources and who is unable to secure such resources either by his own efforts or from other sources, in particular by benefits under a social security scheme, be granted adequate assistance, and, in case of sickness, the care necessitated by his condition.

Also Article 13 does not have direct effect, according to the Central Appeals Court.¹³ Since these provisions have a content comparable to Article 20 of the Dutch Constitution, we may expect that if the Central Appeals Court had the power to test the national laws against the Constitution, the outcome would not be different.

The Impact of Article 12 according to the Committee of Social Rights

Article 12 was not only relevant in the case law of the Dutch court, but also in the conclusions of the European Committee of Social Rights, that is the supervising body for the Charter (initially called Committee of Independent Experts). The Committee gave an important interpretation of the relevance of

⁹ CRvB 7 December 1988, *RSV* 1989/67, *idem*.

¹⁰ CRvB 13 June 2003, *RSV* 2003/275, *idem*.

¹¹ See also A. Świątkowski, *Charter of Social Rights of the Council of Europe*, Alphen aan den Rijn, 2007.

¹² CRvB 14 February 1999, *JB* 1999/110.

¹³ CRvB 21 January 1994, *RSV* 1994/192.

Article 12 in view of the Dutch changes that involved that employers were made responsible for sick pay for their sick employees, this replaced entitlement to benefit under the Sickness Benefits Act.¹⁴

This reform was intended to help curb social security expenditure and the government seeks to reduce absenteeism for reasons of sickness or invalidity by removing certain persons from the protection arrangements and making the employers responsible.

The Committee first referred to its general approach that alterations to social security systems in so far as they are necessary in order to ensure the maintenance of a given system of social security and where any restrictions still permit effective protection of all members of society against social and economic risks and do not tend to generally reduce the social security system to one of minimum aid.

The Committee considered that because of the close links between the economy and social rights, the pursuit of economic objectives is not necessarily incompatible with this requirement and that Contracting Parties may consider that the consolidation of public finances, in order to avoid increasing deficits and aggravating the debt service burden, is a way of helping to maintain the system of social security. They may in particular consider that the adoption of measures aimed at reducing the costs of the health system fit into this context.

However, the Committee considered that the means chosen by the Netherlands to attain these objectives are inappropriate. In its view, the goal of effective social protection for all members of society, which all States that have accepted Article 12(3) must pursue, presupposes that the Contracting Parties maintain social security systems based on solidarity, as this constitutes a fundamental guarantee against discriminatory treatment in this area. The collective nature of social security funding, through contributions and/or taxation, is a key factor in this guarantee, ensuring an apportionment of the cost of the risks between the members of the group. Another important factor is the participation of the persons protected in the management and supervision of the system. The Committee raised this question in connection with the above-mentioned reform of the supervision of the application of social insurance legislation, which since 1995 has been the responsibility of a board of experts from which the social partners are excluded, and refers to the questions raised above on this point. On the other hand, the Committee is already able to observe that the funding of the sickness branch in the Netherlands is no longer secured on a collective basis for the majority of workers. It considers that by linking the risk of sickness to the company, this reform calls the very foundation and spirit of social security into question, and that it is not, in principle, in conformity with Article 12(3) of the Charter.

Moreover, the Committee called the attention of the Dutch Government to the fact that this minimum requirement is recognised by the main international social security instruments, i.e. the European Social Security Code and ILO Convention 102 (Social Security, Minimum Standards) and that the level set by these instruments and the compliance of Contracting Parties to the Charter with the standards they set down are to be taken into account with respect to Article 12(3).

The Committee asked that the next report contain information on the practical implementation of the new system and, in particular, describe the guarantees which should prevent against any risk of abuse by employers such as dismissing a worker in order to avoid paying benefits or the possibility of contractually limiting workers' rights to protection, deal with the employer's or insurer's insolvency and prevent a person's state of health from becoming a criterion for recruitment selection.

However, since then there has been no final answer to whether the Dutch system is allowed or not. The Committee asked the Dutch Government for further information on how the measures work out.¹⁵ Thus the problems with the Charter solely lead to a continuous monitoring of the rules (are sufficient people protected, are there no gaps in legal protection, is there a problem with risk selection etc etc).¹⁶

¹⁴ Committee of Independent Experts, Conclusions XIV-1, Vol. 2, Strasbourg, 1998, p. 113 ff.

¹⁵ See also B. Hofman and F. Pennings, *Privatisering en activering in de Nederlandse sociale zekerheid en solidariteit – een internationaal perspectief*, Deventer: Kluwer, 2013.

¹⁶ See for the most recent report, European Committee of Social Rights, European Social Charter (revised), Conclusions 2013 (The Netherlands), articles 3, 11, 12, 13, 14, 23 and 30 p. 21, that does not make any principal remark on the case anymore, but only provides some statistical information, page 21.

The Committee also interprets Article 12 in the sense that the minimum benefit is at a sufficient level (50% of the median equivalised income, i.e. €846 per month for the Netherlands). It investigates whether this is the case. So far the Dutch benefits have satisfied this standard. This interpretation provides for some protection of the minimum benefits.¹⁷

3.4. *The United Nations*

Article 9 of the International Covenant on Economic, Social and Cultural Rights provides that the States Parties to the present Covenant recognize the right of everyone to social security, including social insurance.¹⁸ Article 11 of the Covenant provides that The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. Thus this provision is mainly aimed at protection against poverty. The Central Appeals Court provided that Article 9 Ivescr¹⁹ did not have direct effect.

4. *Protection of property rights*

Another type of protection can be found in human rights conventions, and this concerns in particular the question whether existing social security rights of individuals can be affected by an amending act.²⁰ Have existing rights to be maintained or is a transitional period required in case of a revision?

In particular the First Protocol of the European Human Rights Convention of the Council of Europe has appeared to be important for this purpose. This appeared after the *Gaygusuz* judgment²¹ of the European Court of Human Rights; in this judgment the Court decided that the First Protocol of the European Human Rights Convention of the Council of Europe is also relevant to social security. Article 1 of Protocol No. 1 of the Treaty provides: ‘Every natural or legal person is entitled to the peaceful enjoyment of his possessions...’

The Court ruled that entitlement to benefit, which is linked to the payment of contributions to the unemployment insurance fund, falls under the protection of property. The *Gaygusuz* judgment made it possible to invoke the protection of property under Article 1 in respect of social security.

This was further elaborated in the *Ásmundsson* judgment²² of the ECHR, where reduction of benefit rights was challenged by invoking the protection of property provision. The case concerned a person who was first awarded a full disability benefit, but then the law as changed, and his benefit was withdrawn. Of the 336 re-assessments on the basis of this Act, 104 had a different disability benefit and 54 persons lost their benefit.

The Court considered that Article 1 of Protocol No. 1, which guarantees in substance the right of property, comprises three distinct rules. The first rule lays down the principle of peaceful enjoyment

¹⁷ See for the most recent report, European Committee of Social Rights, European Social Charter (revised), Conclusions 2013 (The Netherlands), articles 3, 11, 12, 13, 14, 23 and 30 p. 21, page 21 and 22.

¹⁸ Treaty of 19 December 1966. See also Eibe Riedel, *Social Security as a Human Right. Drafting a General Comment on Article 9 ICESCR – Some Challenges*, Berlin, et al. 2006.

¹⁹ CRvB 1 November 1983, RSV 1984/147.

²⁰ See also Angelika Nußberger, *Sozialstandards im Völkerrecht. Eine Studie zu Entwicklung und Bedeutung der Normsetzung der Vereinten Nationen, der Internationalen Arbeitsorganisation und des Europarats zu Fragen des Sozialschutzes*, Berlin, 2005; Angelika Schmidt, *Europäische Menschenrechtskonvention und Sozialrecht Die Bedeutung der Straßburger Rechtsprechung für das europäische und deutsch Sozialrecht*, Baden-Baden, 2003.

²¹ European Court of Human Rights, Case 39/1995/545/632, *Reports* 1996- iv, p. 1129. On the consequences of this judgment, see also S. van den Bogaerd (ed.), *Social Security, Non-discrimination and Property*, Antwerp, 1997; H. Verschueren, ‘EC Social Security Coordination Excluding Third-Country Nationals: Still in Line with Fundamental Rights after the *Gaygusuz* Judgement’, *CMLREV* 1997, p. 991; F. Pennings, ‘The Potential Consequences of the *Gaygusuz* Judgment’, *EJSS* 1999, p. 181.

²² EHRM 12 oktober 2004, nr. 60669/00, AB 2005/102.

of property. The second covers deprivation of possessions and subjects it to certain conditions. The third recognises that the Contracting States are entitled, among other things, to control the use of property in accordance with the general interest. The second and third rules, which are concerned with particular instances of interference with the right to the peaceful enjoyment of property, are to be construed in the light of the general principle laid down in the first rule.

In that connection, the Court first noted that the introduction of the new pension rules had been prompted by legitimate concerns about the need to resolve the Fund's financial difficulties. Furthermore, the changes made to disability entitlements were based on objective criteria, namely, an obligatory renewed medical assessment of each disability pensioner's ability to carry out not just the same work he had performed before his or her disability but work in general, the standard that already applied in other sectors in Iceland. The Court was, however, struck by the fact that the applicant belonged to a small group of 54 disability pensioners whose pensions, unlike those of any other group, were discontinued altogether on 1 July 1997. The above-mentioned legitimate concerns about the need to resolve the Fund's financial difficulties seem hard to reconcile with the fact that after 1 July 1997 the vast majority of the 689 disability pensioners continued to receive disability benefits at the same level as before the adoption of the new rules, whereas only a small minority of disability pensioners had to bear the most drastic measure of all, namely the total loss of their pension entitlements. In the Court's view, although changes made to pension entitlements may legitimately take into account the pension holders' needs, the above differential treatment in itself suggests that the impugned measure was unjustified for the purposes of Article 14 of the Convention, which consideration must carry great weight in the assessment of the proportionality issue under Article 1 of Protocol No. 1. The discriminatory character of the interference was compounded by the fact that it affected the applicant in a particularly concrete and harsh manner in that it totally deprived him of the disability pension he had been receiving on a regular basis for nearly twenty years. Consequently, the Court found that, as an individual, the applicant was made to bear an excessive and disproportionate burden which, even having regard to the wide margin of appreciation to be enjoyed by the State in the area of social legislation, cannot be justified by the legitimate community interests relied on by the authorities.

In the *Goudswaard-van der Lans Case*²³ the *Ásmundsson* approach led to the conclusion that there was no infringement of the right to property. The case concerned the effects of the replacement by the Survivors Benefits Act of the old Widows Benefits Act, a deterioration of benefit rights already discussed supra when tested against ILO Conventions 121 and 128. At the time when the Widows Benefits Act was adopted, the assumption was that families' breadwinners were normally men. The Act was intended to protect vulnerable groups (their widows and children) from destitution by providing them with a guaranteed income sufficient to maintain a modest but decent standard of living. A further assumption, applicable to widows aged 40 or over, was that they were not otherwise provided for; that is to say, that they were not maintained by another adult or by income from paid employment. By the time of the events complained of, more than three decades later, those assumptions had been overtaken by developments in Dutch society. The European Court of Human Rights noted that it suffices to note that many widows were cohabiting with a person to whom they were not married, in a relationship comparable in economic terms to a family unit, or else themselves had income from another source: normally either paid employment or social benefits, such as unemployment or disability benefits, replacing income from earlier employment. Moreover, by this time it was not only widows who could qualify for a Widows Benefit Act pension but – following developments in domestic case-law based on human-rights considerations (Article 26 of the International Covenant on Civil and Political Rights) – widowers as well.

The new Act entailed for former recipients of benefits under the old Act a reduction in disposable income if they received additional income in the form of other social benefits or from paid employment or were born after 1940 and were cohabiting in a common household with another person.

The Court now decided that this case was different from the *Ásmundsson* judgment.

²³ ECHR, Application no. [75255/01](#).

Firstly, it has not been argued, nor is it apparent, that the number of individuals whose old pensions have been reduced by the new Act is so limited that their impact can be considered insignificant. Secondly, provision has been made to ease the effects of the new legislation on persons in the situation of the applicant. Thirdly, and more importantly, the Court accepts that the introduction of the new Act has had effects on the applicant's disposable income. However, although the Convention, supplemented by its Protocols, binds Contracting Parties to respect lifestyle choices to the extent that it does not specifically admit of restrictions, it does not place Contracting Parties under a positive obligation to support a given individual's chosen lifestyle out of funds which are entrusted to them as agents of the public weal. In conclusion, the Court does not find that the applicant was made to bear an "individual and excessive burden".

In the Dutch case law Article 1 of the First Protocol has mainly had an impact on requirement on transitional rules. An example can be found in a series of decisions²⁴ on an Act that terminated the right to social security benefit for those who were imprisoned (Act on social security rights of imprisoned persons, 2000). The Central Appeals Court decided that the infringement on of property rights by this act is generally acceptable. However, the Court also ruled that the legislature should have implemented a larger transitional period for those who were, at the time the Act came into force, already entitled to benefit. This transitional period was one month. The Court considered that this period did not adequately realize the principles of proportionality and subsidiarity that have to be satisfied in case of infringement of the right to property in the sense of Art. 1 of the First Protocol. Instead, the Court ruled that a transitional period of six months since the coming into force of the Act would be consistent with this article.

5. Summary and conclusions: the Constitutional Guarantees of social security rights in the Netherlands

The constitutional guarantees are very limited. It is only up to Parliament, and not to courts, to decide whether the guarantees of Article 20 have been infringed. These guarantees are very limited. They require ensuring a subsistence income, but this does not prevent the legislature from imposing conditions on claimants to undertake steps to provide for a living themselves. Such conditions can seriously influence the legal character of benefits.

Protection by international treaties can sometimes be invoked, provided that these rules are unconditional and clear enough. In practice this means that rules that are contrary to an equal treatment provision or prohibition of cost sharing are overruled.

Changing complete acts is not prevented so far, provided there is a legitimate reason and the effects are proportional for the persons affected. In this respect an adequate transitional period is required.

Although this is very important in individual cases, this does not principally prevent deteriorations of social security provisions.

²⁴ CRvB 15-07-2004, ECLI:NL:CRVB:2004:AQ508900/56.