



Fourth Study Commission
Public and Social Law

Meeting in Valle de Bravo, 31 October - 4 November 2004

Conclusions

**JUSTIFICATION AND CHARACTERISTICS OF ENTITIES COMPETENT
TO RESOLVE LABOUR AND SOCIAL SECURITY DISPUTES**

SUMMARY REPORT

This theme was chosen specifically by the fourth study group at the Vienna conference for the meeting to be held in Valle de Bravo, Mexico. National delegations were invited to send reports relating to the law of their respective nations.

The following is a synopsis of the reports received at the end of August from 19 different countries, namely: Austria, Brazil, Burkina Faso, Croatia, Finland, France, Germany, Hungary, Israel, the Ivory Coast, Japan, Macedonia, the Netherlands, Niger, Panama, Senegal, Slovakia, and Spain.

From the outset, two points must be underlined: the terminology employed in the questionnaire reflects a compromise arrived at during the last meeting. The agreed-upon language takes into account different ideas about, outlooks on, and understandings of, various legal terms or concepts that came up as the questions were being formulated.

Each delegation was at complete liberty to provide the answers it chose to the questions asked. The international report only makes use of the data provided by the participants.

Delegations from thirty countries have participated to the 4th Commission.

During the congress, other reports have been submitted, namely from: Luxemburg, Norway, Sweden, Switzerland, Slovenia.

Observations and interventions namely from :Canada, Italy, Tunisia, United states of America were going in the same way than written reports.

Four questions, which resulted from the above-mentioned compromise, were submitted to the different associations. They are as follows:

1. What legal and / or judicial entities or authorities in your country have jurisdiction over labour and social security disputes?
2. a. If your country has labour and social security courts, are they separated or part of the general judicial system?
2. b. If your country has no labour and social security courts as part of the general judicial system, what, if any, means exist for resolving labour and social security disputes?
3. If your country has a system of labour and social security courts, what are the structural characteristics of that system?

What are the advantages and disadvantages in your country's systems for resolving the disputes? (For example: does each judge sit alone? Are lay judges in place as decision makers; and so on (elaborate but do not limit your response to the above examples).

4. a. Are there any movements in your country to modify your country's system for resolution in labour and social security disputes?

4. b. If no resolution system exists in your country, do you think it is necessary to create and develop one?

4. c. Is there any need to modify your current system for resolution in labour and social security disputes?

I/ What legal and / or judicial entities or authorities in your country have jurisdiction over labour and social security disputes?

The authorities or bodies that resolve disputes are of two kinds: the jurisdictional authorities and the non-jurisdictional ones, which have competency depending on the nation and legal issues in question. On the basis of the reports, we can divide the countries into two groups:

The first group is made up of countries that combine the competence of jurisdictional authorities with that of non-jurisdictional ones.

In Austria, an administrative procedure takes place before judicial proceedings are commenced in the area of social security. Labour relation and social security disputes are decided by a three-tier set of jurisdictions:

Specifically, the courts of the federal provinces, the regional High courts, and the Supreme court. At all levels, at least one professional judge and two non-professional adjudicators, representing employers and employees, compose the panel.

An administrative jurisdiction is also competent to hear certain matters.

Parallel to these jurisdictions, there now exist mediation facilities and a federal office responsible for conciliation.

In Burkina Faso, all labour and social security litigation, be it individual or collective, is submitted to a labour investigator with a view to conciliation (if the dispute concerns an employee delegate or a union leader, the decision of the labour investigator can be appealed before the minister responsible for labour and social security). Where conciliation fails, the relevant jurisdictional bodies are: in first instance, the labour tribunal for individual labour and social security disputes and an arbitrator for disputes of a collective nature. At the appeal level, the social section of the Court of Appeal deals with disputes involving individuals while the arbitration council resolves collective disputes. Petitions are heard by the social section of the Supreme Court, which is competent to resolve individual and collective disputes.

A judge and two non-professional adjudicators representing employers and employees sit on the labour tribunal. Only professional judges hear appeals.

In the Ivory Coast, as in Burkina Faso, the labour inspector must attempt a conciliation prior to any formal litigation proceedings.

At the labour tribunal level, the professional judge is assisted by two non-professional adjudicators representing employers and employees. Appeal cases, as in Burkina Faso, are heard by specialized tribunals comprised of a president and two assistants, all of whom are professional judges.

In Spain, conciliation plays only a minor role. Issues respecting elections in the social sector are within the competence of the arbitrators designated by labour unions. When appealed, such disputes enter competent formal jurisdictions.

These jurisdictions are responsible for disputes involving labour and social security law. In first instance (juzgados de lo social), a judge sits alone. At the next level (the tribunales superiores de justitia), however, the panel is composed of several judges. Depending on the dispute at bar, it is also possible to enjoin the audiencia nacional. Finally, there also exists a Supreme court, the tribunal supremo.

In Finland, there coexist four different types of jurisdictions. Litigation respecting collective labour disputes is brought before the labour court, which rules both in first and last instance. Labour relations litigation involving private individuals, on the other hand, proceeds in three different jurisdictions: the District courts, the Courts of appeal, and the Supreme court. Disputes concerning social insurance are first processed in various local offices and then by the national office (note that these are not jurisdictions), while appeals can be brought before the insurance court in last instance. Litigation relating to social security matters generally (the handicapped, minimum wage, social assistance) is initially submitted to the municipal office of social affairs. Decisions can, however, be appealed to the administrative court and, ultimately, to the Supreme administrative court.

These various, multi-tiered instances are part of the judicial system proper. Some are comprised of judges and non-professional adjudicators representing employers and employees.

In Niger, a labour inspector is responsible for attempting to resolve disputes by way of conciliation. Different labour jurisdictions are involved in the conciliation process and, when talks fail, in the litigation that follows. Pension matters are heard by a permanent commission of general oversight. In collective disputes, the labour inspector may intervene, as well as the judge who issued the emergency interim ruling and the arbitration council. All of these actors have different spheres of jurisdiction.

These jurisdictions are entrusted with the resolution of labour and social security disputes, in addition to disputes respecting collective bargaining agreements. Consequently, they are an integral part of the judicial system. In first instance, matters are heard by a joint bench composed of a judge and two adjudicators representing both employers and employees. The composition of the appeals bench, however, differs from this model.

In Panama, aside from the three jurisdictions that decide matters respecting labour law and social security matters (the labour courts of session, the superior court of labour, and the office of abrogation) there exist conciliation forums in which decisions are rendered by employee, employer, and government representatives. The minister of labour and social development also has legal competency. The bureau of social insurance may intervene with respect to the social insurance programme.

In Senegal, labour disputes involving individuals are dealt with via the conciliation process by a labour inspector or the director of the merchant marine (in the case of marine employment contracts). The labour tribunal will attempt to mediate disputes and, when unsuccessful, render a judgment. Certain appeals are heard by the social section of the Court of appeal, others by the social section of the Supreme Court. These jurisdictions are part of the judicial system proper, even though the labour tribunal does enjoy a level of autonomy. The joint tribunal is composed of a professional judge and two adjudicators representing employers and employees.

These jurisdictions are not competent to hear collective labour disputes.

The second group is made up of those countries in which jurisdictions alone are invested with the competency to adjudicate disputes. This group includes:

Germany, in which the social sections of its jurisdictions hear disputes arising from social insurance and social assistance legislation. The labour jurisdictions, for their part, deal with labour disputes (employment contracts and private litigation arising from collective bargaining agreements). The labour jurisdictions, as well as the social jurisdictions, are composed of a professional judge and non-professional adjudicators that come from organizations representing employers and employees. They are organized into three levels: tribunals, superior tribunals, and federal courts.

In Belgium, private disputes respecting labour law and social security are heard by the jointly constituted labour tribunal. Appeals are brought before the labour court, which also has a jointly composed bench. Final appeals to the Supreme Court are examined by members of the social section of the court, which includes professional judges only. The minister of public affairs can also intervene or become involved in cases which raise important questions about the social security regime.

In Brazil, aside from the federal Supreme court, there exist two other jurisdictions. The first, entitled labour justice (judges and courts), groups together 24 regional labour courts and five regional federal courts. This branch deals with labour disputes. The second jurisdiction called "of common justice" (federal in scope) settles social security disputes.

In France, the so-called "Prud'homme" councils are jointly composed of employees and employers who deal, in first instance, with individual labour disputes. Where a plurality of adjudicators cannot be achieved, the professional judge intervenes. Although part of the judicial system, these jurisdictions constitute separate bodies given the preliminary role that they play. There is also a superior Prud'homme council. Appellate proceedings take place before the court of appeal.

The court of inherent jurisdiction intervenes in collective labour disputes.

With regard to social security, the tribunal of social security matters has jurisdiction. It is presided by a professional judge assisted by two adjudicators representing employees, employers, and independent workers. If necessary, the Court of appeal rules upon all subsequent proceedings.

In Israel, five regional labour tribunals hear labour, insurance, and social security litigation. Appellate proceedings are reserved for the Court of appeal only. The tribunals are jointly constituted and form part of the judicial system. They are, however, separate from the common law jurisdictions. The Supreme court has the role of overseeing these specialized jurisdictions.

In the Netherlands, social security and labour law litigation are heard partly by the common law courts, partly by special administrative tribunals.

In Hungary and in Luxemburg, labour jurisdictions hear labour and social security disputes. A professional judge sits with two adjudicators representing employers and employees. The proceeding begins with an attempt at conciliation.

These jurisdictions are part of the larger judicial system but, at the trial level, are kept separate from the common law courts. Where appeals are concerned, however, the Court of appeal alone is competent to rule upon disputes.

In Croatia, Japan, Macedonia, Slovakia and United States of America, common law jurisdictions intervene in labour and social security matters. In Croatia, only cases involving labour law can be heard by the Supreme court.

It follows that, depending on the country, labour and social security litigation can be dealt with by the same authorities or different ones depending on the circumstances. Similarly, it is worth noting that few countries allow their jurisdictions to hear collective labour disputes.

In Slovenia, specialized labour and social security courts have jurisdiction over labour and social security disputes. They are part of the general judicial system. At the first level, the professional judge is assisted by two lay judges. The court of appeal has a panel of three professional judges. In certain cases, decisions can be reviewed by a separate department for labour and social security disputes at the supreme court composed with five professional judges.

In Switzerland, the competency of the organisation of the judiciary (except for the last instance), comes to the " cantons". In the field of labour disputes (individual and private), half of the cantons have specialised labour jurisdictions at the first level. Appeal cases can be heard by a non specialized canton. The federal court, third instance, has no specialized bench in this matter.

In social security disputes, insurers themselves decide at the first level. Appeals are heard by the insurance court of the canton. The federal court of insurances is the last level, the autonomous social insurance branch of the federal court .It is the only specialized (last level),federal court.

II-a/- If your country has labour and social security courts, are they separated or part of the general judicial system?

In those countries where specialized jurisdictions are competent to resolve labour and social security disputes, they are part of the national judicial system. Nonetheless, they are sometimes characterized by a degree of autonomy, especially in first instance.

II-b/- If your country has no labour and social security courts as part of the general judicial system, what, if any, means exist for resolving labour and social security disputes?

The common law jurisdictions are usually competent when there are no specialized jurisdictions or when the latter are not structured in a multi-tiered manner.

III/- If your country has a system of labour and social security courts, what are the structural characteristics of that system?

What are the advantages and disadvantages in your country's systems for resolving the disputes? (For example: does each judge sit alone? Are lay judges in place as decision makers; and so on (elaborate but do not limit your response to the above examples).

1. Where specialized jurisdictions do exist, they are organized jointly: namely, one (or more) professional judges who preside over proceedings and two (or more) adjudicators representing employers and employees. Sometimes, this jointly structured model exists at every jurisdictional level. More often, however, it is reserved for the first instance only. With the rare exception of Germany and Austria, only professional judges may rule on appeals. The limitations placed on non-professional adjudicators are criticized, notably by Niger. Even though jointly structured tribunals better understand the disputes at issue and the expectations of the parties, the decisions of these tribunals are often reversed on appeal because of the composition of the appellate bench.

In terms of the advantages of a jointly constituted tribunal, much emphasis is placed on the fact that non-professional adjudicators bring with them enriching experience from their workplace backgrounds. This benefits the presiding judge and, seems to help make the decisions more acceptable to the parties.

2. Another feature that characterizes specialized tribunals is the fact that parties may choose their own representatives who may not be attorneys.

3. The proceedings surrounding these types of disputes are often free of charge or involve modest expenditure. In Burkina Faso, the fact that proceedings are cost-free has produced unfortunate results: appeals have become automatic and now place a significant burden on the system.

4. In many countries, the procedural requirements have been simplified and are quicker .

The situation in Israel is noteworthy: labour tribunals are not subject to ordinary procedural requirements. The law allows them to use all effective means to resolve disputes.

5. Belgium emphasises the role played by the minister of public affairs, specifically when it comes to social security litigation.

6. Conciliation is often attempted before trial in order to encourage an amicable settlement. In certain countries, it is a required preliminary step. Conciliation does not always take place in the jurisdictional setting.

7. Mediation is also coming to the fore in certain countries like Austria and Croatia.

A. Some problems respecting jointly composed tribunals have also been underlined, such as the poor quality of certain decisions (in France, for example, no professional judges sit on the "Prud'homme" councils).

B. As well, delays in issuing judgments have also been noted in Germany and Israel. Belgium, Brazil, and Spain, however, process litigation proceedings in a speedier fashion.

C. In some cases, the non-professional adjudicators are not always completely objective, and attempt to promote the interests of the corporate sector at the expense of steadfast impartiality.

IV/- a) Are there any movements in your country to modify your country's system for resolution in labour and social security disputes?

b) If no resolution system exists in your country, do you think it is necessary to create and develop one?

c) Is there any need to modify your current system for resolution in labour and social security disputes?

The answers to these questions are not uniform.

Germany is currently considering merging the labour tribunals with the common law court system.

In Belgium, even though specialized jurisdictions and the quality of their output are not seriously questioned, certain reforms are nevertheless being contemplated. One idea that has been put forward is to create a general tribunal that would group together all the trial court jurisdictions. This would undermine the autonomy of labour jurisdictions, especially at the first instance level. Apparently, the tentative project is based on practical management considerations (buildings, libraries, information technology), as well as on personnel issues; i.e. relieving the workload of judges. A second idea involves regrouping under one department head all the labour tribunals situated in a particular borough. If these reforms ever materialize, jurisdictions entrusted with social matters will face problems that they have heretofore been able to avoid, like a significant backlog of cases.

In Brazil, it is the judges themselves who want to bring together the labour and social security jurisdictions. Reforms are currently underway to broaden the competency of these jurisdictions.

In the Ivory Coast and Burkina Faso, only improvements to the current system are being considered.

In Croatia, judges of common jurisdictions favour the idea of creating specialized labour tribunals.

In Spain, the simplicity and efficiency of social sector jurisdictions is a model for others to follow.

In Finland, the objective is to bring social security litigation within the framework of the administrative jurisdictions. There is also talk of abolishing jointly composed panels.

In the Netherlands, a lively discussion is underway in order to determine whether the existing systems ought to be preserved or completely reformed.

In Israel, employer organizations are lobbying to abolish labour jurisdictions, which they consider to be partial towards employees. The Minister of Finance and the Minister of Justice are considering the amalgamation of labour tribunals with the common law court structure. A commission has been mandated to examine this issue.

In Japan, a push to institute a specific system for labour disputes has arisen in the context of recent judicial reforms. The panel would be composed of a judge and two adjudicators representing employees and employers. Either party could object to the decision, which would bring the dispute before the common law courts. There are also calls to reform administrative procedures.

In Macedonia, the reestablishment of specialized tribunals is being discussed, but no concrete proposals have yet taken shape.

In Niger, a vast programme of justice reforms will result in the creation of independent labour tribunals in order to better deal with the specific disputes that arise in the workplace. These bodies will be independent and empowered with an exclusive competency in respect of labour issues.

In Switzerland, the government proposes to have one federal court only, competent for social insurance law. The abolishment of specific procedures concerning social insurances disputes at the federal level is lively underway.

The remaining countries made no specific observations.

Conclusions

There is no significant international movement afoot which aims at the abolition of specialized social authorities and competent bodies.

It even seems that several countries favour an increased role for representatives of the civil society within these specialized settings, although this cannot be said to constitute a general rule.

Few significant drawbacks have been mentioned as far as jointly-composed tribunals are concerned.

Rather, several advantages appear to result from the specific approach provided by specialized social competent bodies and authorities.

Topic for next year:

What are the consequences of privatization of public companies and, or public functions regarding the parties rights in labor relations ?

What are the consequences of the change of legal structures of a private enterprise regarding the parties rights in labor relations ?