THE NETHERLANDS–PAYS-BAS–NIEDERLANDE

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I. REALITIES

1. INFLUENCE ON THE NATIONAL SYSTEM

a/ The Netherlands has seen an original though not a separate development in the field of modern labour and social security law. The Netherlands are an independent nation, factually since about 1580, formally since 1648 /only interrupted by French domination resp. annexation between 1795 and 1813 and German occupation between 1940 and 1945/. Dutch law however, has been formed apart from a typical Dutch source of law /the so-called Oudvaderlandse Recht/ by 're-ceived' Roman Law and was initially codified on the basis of the famous French codifications, which came into force in the Netherlands through the annexation by Napoleon and remained in force after the Netherlands had regained independence in 1813. Afterwards these codes were superseded by Dutch re-codifications /1838: Dutch Civil Code and Dutch Commercial Code; 1886: Dutch Penal Code; since 1974 step-by-step: New Dutch Civil Code/. Dutch constitutional law has been shaped according to its own national requirements; the development towards a constitutional monarchy and a parliamentary democracy however has been strongly influenced by developments elsewhere in Western Europe, notably in 1848.

The earliest phenomena of 'modern' labour law are of French origins:

- the so-called 'coalition-ban' /combinations ban/, laid down in the French Penal Code /artt. 414-416/ were kept in force after the Netherlands had regained independence in 1813, although it has been seldom applied;

- the principles and the two special articles in the French Civil Code that concerned employment contracts were maintained in the Dutch re-codification of 1838 /only supplemented by one article stemming from ancient Dutch masters and servants law/ and governed Dutch employment law during the entire 19th century;

- the French Mining Order of June, 3rd 1813 /<u>Bulletin des Lois</u>, No. 412/, which prohibited child labour in the mining industry, has been kept in force in the Netherlands, although it was of little avail owing to the insignificance of mining during the 19th century.

The industrial development of the Netherlands during the first 60 years of the 19th century went at an unhurried pace and the Manchester-liberal perception of the role of the State did its bit to secure that no additional statutes in the field of labour law were enacted until about 1870.

Eventually between 1872/1874 the first 'modern' Dutch labour acts were adopted, followed by many others since. Almost all these statutes are products of national developments and not brought about by any formal movement or pressure[1]. But in substance these statutes are not unique. They reflect comparable legal developments that had or were to be taken place in other Western European countries. On every occasion of tabling a new piece of employment legislation the initiators - mostly the Government - were not parsimonious in making references towards comparable legal developments abroad.

To give examples:

- the Act to repeal the coalition ban, 1872, was inspired by predecessors in England /1824-1825/, France /1864/, Belgium /1866/; and Germany /1869/;

- the Child Labour Act, 1874, and the General Labour Acts of 1889, 1911 and 1919, which all contained provisions to

suppress child labour, to restrict labour by women and adolescents and to regulate working hours in general, were heavily inspired by comparable statutes in other Western European countries, particularly the English Factory Acts;

- the Health and Safety Act of 1895 took their example from similar legislation in other Western European countries as did the Health and Safety Act of 1934;

- the Act on the Contract of Employment, 1907 which supplemented the Dutch Civil Code with various provisions as to the payment of wages, dismissal, etc. reached the statute book after a parliamentary discussion in which every provision was scrupulously compared with comparable provisions in several other European countries; later Amendment Acts on the Dutch Civil Code were likewise modelled on foreign examples /notably regarding holidays with pay and extended protection against dismissal and redundancy/.

- the legislation on collective agreements of 1927 and 1937 took their example from similar legislation in Germany /1918/ and France /1919 and 1936/;

- the legislation on arbitration, conciliation and mediation was shaped after statutes on this suoject elsewhere in Europe, both in 1897 and 1923 /Sweden for example/;

- the Works Councils Acts of 1950 and 1971 were not enacted without taking note of the developments in this field elsewhere, particularly Germany and France;

- the Employment of Disabled Persons Act, 1947, fitted in with a range of comparable statutes in England, France and Germany, shortly after the Second World War;

- the Temporary Work Agencies of 1965 corresponded with comparable involvements of legislators in Western Europe with this new phenomenon /in German: '<u>Arbeitnehmerüberlassung</u>'/;

- the legislation in the field of social security was initially heavily inspired by the German concepts of compulsory insurance /Work Accidents Acts of 1899 and 1921; Invalidity, widowhood, orphanage and old age Payments Act, 1919; Sickness Payments Act, 1930/; the various Unemploy-

ment Payments Schemes before the Second World War were even called after their foreign examples /Norwegian system, Danish system, Ghent system/; the modern social security acts, which cover the entire population, are inspired by the English Beveridge-Report.

The foreign influence on Dutch Labour Law cannot be attributed to political or ideological factors. They derive merely from the 'open orientation' of the Dutch, who are well aware of the fact, that they are living on a small territory in the heart of Western Europe, in close contact with the surrounding nations and economies. This explains why it is notably the legal development in other Western Eurpoean countries that serves as a model for Dutch Labour law. Developments in the United States, Australia, Japan and other O.E.C.D.-countries are less important as models /although they do serve as a model incidentally/; still less important are those of Eastern Europe, because of the ideological gap; those in the Third World are supposed to be of little significance because of the wide economic and social differences.

The attentive observation of foreign labour law has never resulted in the integral take-over of any given foreign system. Although Dutch labour law resembles that of other Western European countries, when looked at 'in detail' it shows many specific Dutch features:

To give some examples of them:

- the employment law of merchant seamen in the Dutch Commercial Code of 1838 harked back to old Dutch law in this field;

- in several areas, where other countries have enacted specific labour legislation, the Netherlands could make do with general legislation: trade unions are subject to the general law on associations; the judiciary in labour cases is held by the courts, which are competent for ordinary civil, penal and administrative cases;

- Dutch labour law, more than labour law in most other Western European countries, bears the marks of corporative

thinking /conferment of executive and even legislative powers to joint councils of trade unions and employers' associations/;

- labour and social security law in the Netherlands show typical Dutch preoccupation with matters of consciene, morality and ethical justification of the intervention of the legislator. As Marius G. Levenbach the eminent Dutch labour lawyer, from whom most of the afore-mentioned is borrowed[2], put it: 'We are theologians also in the field of labour law'!

It might be assumed that Dutch labour law before the Second World War had little influence on foreign countries. This lack of influence must be attributed to the cautious character of Dutch labour law in those days: in almost no aspect of this field of law did the Netherlands take the lead. Since the Second World War this has changed. The Dutch system of wage policy /1945-1965/ was, after 1950, unique in Western Europe and attracted students from abroad. Also the advanced system of social security that has been constructed following the Second World War attracted foreign interest and the same can be said of the Dutch approach to workers participation in company affairs. It is difficult to trace to what extent all this has influenced legal developments elsewhere. Possibly other countries are less prone to borrow from foreign models and in the case of the Netherlands there is also the language barrier which is difficult to surmount.

Maybe this will be changed by the E.E.C. of which the Netherlands are a member. The services of the E.E.C.-Commission tend to make an inventory of existing national legislation in the member-states each time a new Community regulation is being prepared. That way knowledge of Dutch law /in translated form/ is now gradually becoming more wide-spread and may henceforward more often influence labour law abroad[3]. An example of that may already have been noted in the field of worker participation in company affairs: the latest proposals for the composition of the supervisory

board in the so-called 'European Company' /Societas Europe/ and in the Fifth Directive on the harmonisation of company law all bear the marks of the Dutch model of workers participation at the top of companies.

The only country in Western Europe that possibly more regularly faces Dutch labour law, is Belgium, because of its geographical proximity, lingustic affinity and partnership in Benelux. Perhaps the Belgian report reveals to what extent Dutch labour law has influenced Belgian labour law. It is noteworthy however, that Belgian labour law has never exercised a significant influence on Dutch labour law.

In the past Dutch labour law has surely served as a model for the development of labour law in the former colonies of the Netherlands. Indonesia was a Dutch colony until about 1950. The old labour law of this country has unmistakably been influenced by Dutch labour law. Whether there are still remnants of this influence in present Indonesian labour law and whether in Indonesia the Netherlands are still watched as a possible model in this field is unknown to the author of this report. Perhaps the Indonesian report deals with this. Surinam was a Dutch colony/dominion until 1975 /when it became independent/ and the Dutch Antilles are still a Dutch dominion. Labour law in both these territories has certainly been modelled in Dutch style. However already in 1954 both Surinam and the Dutch Antilles got self-administration in internal affairs, so since then the development of labour and social security law in these territories followed its own pace and took its own shape.

b/ As in the past /see under a./ so today the legal developments abroad are carefully watched during the preparatory stages of new labour law statutes in the Netherlands. In the exceptional occasions that a major legislative reform is prepared by a Royal Commission, such a Commission will already take foreign developments into account /for example the Verdam Report on changes in company law, 1965/. In the more usual way of preparing new legislation it is the Social and Economic Council /a tri-

partite body made up of employers and trade union representatives and independent members/, which is consulted by the Government on every change in social-economic regulations, that will consider relevant legal developments abroad /for example: the report of the Social and Economic Council on the obligatory registration of job vacancies/. And in the last resort reference to foreign law is made in the Governmental White papers, which accompany new labour law bills /for example: the explanatory document on the Disabled Workers Bill/.

In contrast to this case law only seldom takes foreign law into account, apart from those cases in which foreign law has to be applied. In very few cases the Solicitor-General, who submits his opinion on pending cases to the highest Dutch court, the Hoge Raad, refers to foreign law.

The general conclusion therefore must be that comparison plays a much more important role in the stage of preparing new statutes in the field of labour and social security law than it does in the fields of interpreting and applying the law.

Those who are involved in the functioning of the Dutch system of industrial relations, such as trade union leaders, employers and State officials often have international contacts and they will not hesitate to mention foreign experiences they can draw on. Sometimes study visits are paid to foreign countries /for example the one to FRG in the late sixties to study the system of '<u>Konzertierte Aktion</u>' in that country/.

In academic writing comparison boasts a rich tradition in labour law. The first prominent Dutch labour lawyers like Levenbach, Molenaar and J. van der Ven, have always paid much attention to developments in foreign legal systems and maintained many international contacts. In the sixties a certain shift could be noticed from interest in pure legal comparison towards interest in aspects of industrial relations abroad, such as the study of the Yugoslavian system

of workers' control, the English phenomenon of shop stewards, the Swedish manpower policies etc. which tended to be more sociopolitical than legal in character. In the course of the seventies increasingly more lawyers took an interest in comparative labour law. Reference can be made to the Ph.D.-writings of Houtman, De Jong, Arendsen de Wolf Hart and Gevers and to the studies of Bakels and Jacobs.

From a methodological point of view a distinction can be made between 'vertical' and 'horizontal' comparison. In 'vertical' comparison the law of various countries is described separately and placed in its context of domestic industrial relations, whereas in a final section parallels and contrasts are evoked. In the Netherlands De Jong's book about the strike law in Great-Britain and the Netherlands[4] may serve as a fine example of that method.

In 'horizontal' comparison a given legal subject is being treated and in the course of the treatise numerous references to foreign law are made. O. Kahn-Freund's book 'Labour and the Law' is an outstanding example of this method, which in the Netherlands has notably been followed by the writings of Jacobs[5].

c/ The influence of foreign law on Dutch labour law by way of international sources is certainly present. The oldest source of international labour law, viz. the Conventions and Recommendations of the International Labour Organization /and even its predecessors, the few multilateral Conventions on labour law before 1914/ have in several instances provoked changes to and adaptations of Dutch labour law. To mention only three examples:

- the Convention of Bern of 1906 on night work by women inspired the 1911 General Labour Act Amendment Act;

- the international maritime conferences of the twenties and the conventions adopted by them caused the review of employment provisions for seafarers in the Dutch Commercial Code, 1937;

- I.L.O.-Convention No. 26 provoked the enactment of the Home Labour Act, 1933.

The impact of I.L.O.-standards on Dutch labour law has been scarcely researched up to now and nothing has been published on it comparable with the articles in the series 'The influence of International Labour Standards on Legislation and Practice in...', which is published in the <u>International Labour Review</u>. Three years ago at the Law School of Tilburg University a start was made for researching this field.

After the Second World War new sources of international labour law began to flow: the United Nations, the Council of Europe and the E.E.C. The Convention of the United Nations /notably those on civil and political and on economic, social and cultural rights/ and of the Council of Europe /notably that on Human Rights and the European Social Charter/ have been strong stimuli for the study of fundamental rights in the field of labour law in the Netherlands. These, among others, inspired the recognition of the right to strike as a fundamental right in Dutch case law and the insertion of a catalogue of social rights in the Dutch constitution /1983/. Finally the E.E.C. with its often directly applicable law has considerably influenced Dutch labour and social security law. Most strikingly this has occurred in the field of migrant workers' rights /as far as they are nationals of E.E.C.-Member States/ and in that of equal treatment of men and women; besides that in various areas such as working conditions in road transport, collective redundancies and workers' rights on transfer of undertakings.

d/ Dutch labour and social security law has certainly been influenced by foreign legal systems by way of the experiences of multinational companies, given the fact that on the one hand the Netherlands are the seat of several important Dutch-based multinationals and on the other foreign-based multinationals have numerous subsidiaries in the Netherlands. The precise extent of this influence however is difficult to assess. It is largely brought about via the employers associations of which these multinationals or their subsidiaries tend to be active members.

2. TEACHING - RESEARCH - DOCUMENTATION OF COMPARATIVE LABOUR LAW

a/, b/ At only one place in the Netherlands a regular course in comparative and international labour law exists, viz. at the Law School of the University of Tilburg /Hogeschoollaan 225, Tilburg/ under responsibility of Mr. A.T.J.M. Jacobs /1977-1982/ and Mr. L. Betten /since 1983/. In this course attention is paid to the social law and politics of the E.E.C., the social aspects of the Conventions of the Council of Europe and the United Nations and to the Conventions and Recommendations of the I.L.O. and on their impact on Dutch labour and social security law. Additionally, from time to time, Dutch labour law is compared with that of other countries, notably those of neighbouring countries in Western Europe. Participation in this course is optional for students in almost every section of legal studies. Because of the emphasis that is being laid in Tilburg on an international orientation the course is always followed by a sizeable number of students even from the faculties of economics and sociology. From time to time scripts are produced on a comparative subject. Besides this Tilburg has a regular exchange with the University of Louvains Institute of Social Security /Belgium/.

At other Law Schools in the Netherlands only incidentally attention is paid to comparative and international labour law. To mention one instance: a course, which between 1978 and 1981 was given by Prof. Bakels at the Law School of Groningen University, in which Dutch and English laws on dismissals and redundancies were compared. Likewise at the Law Schools of the Universities of Nijmegen, Leyden, Utrecht and Amsterdam comparative research has been made in the field of the law on dismissals and redundancies - a part of labour law that enjoys much interest at the moment because of the unsatisfactory legal situation on this score in the Netherlands. Finally half a dozen of Ph.D.-writings are at the moment under preparation with substantial comparative

components.

c/ The libraries of all Dutch University Law Schools possess a great deal of documentation about foreign and international labour law. The average library has even several times more foreign labour law textbooks on the shelves than Dutch ones. Almost all leading foreign periodicals on labour and social security law are present in one or other library of a University Law School and easily to hand owing to an exchange system. With regard to documentation on social security law mention should be made of the documentation available in some administrative and judiciary institutions of social security. The most striking gap in the availability of documentation is to be found in the collections of case law /decision of foreign courts in matters of labour and social security law/. All this applies however only to the countries most suitable for comparison with the Netherlands, such as Belgium, France, Germany, Great-Britain and the United States. For other countries the available documentation is far less and for many more remote countries it is almost nil.

II. PURPOSES

The questionnaire mentions the various purposes of comparison in labour law, which to the author of this report seem to be rather exhaustive and to which he has nothing to add. It seems to him impossible to give an order of priority to the purposes mentioned. This is owing to the fact that the motivation for comparing labour law may vary according to the social position of the person making the comparisons. The purposes mentioned ad 1, 2 and 6 may be the motives of scientific researchers; the purpose, mentioned ad 3 may inspire employers, that mentioned ad 4 those who are involved in the national legislature; the purpose mentioned ad 5 may be a good reason for those involved in the legislative process of international organisations to carry out comparative work, whereas the purpose mentioned

open mind towards foreign countries. There is however a kind of national complacency, considering the Netherlands to be a 'social paradise', a 'leader' in the field of social law which has little to learn from other countries.

This explains the lack of interest in the labour law of Third World countries /which is not justified regarding for example the developments in the Far East/. 'Ideological hangovers' are certainly responsible for the fact that labour and social security law of the communist states is mostly overlooked in the Netherlands.

As far as western legal system are concerned the foremost impediment to comparison is the notion that it is so difficult to truly compare. Labour and social security law is very much connected with constitutional law, the general state of private, penal and administrative law, with the economy and the industrial relations of a country. One feels that a minimum level of knowledge of all these connections is necessary in order to skate on the thin ice of comparison.

It is insufficient to compare only rules and institutions with each other. One has also to compare the functions of these rules and institutions. In addition a sociological out-look is indispensable: how do the written rules and institutions relate to their practical function in the countries being compared?

Comparison in matters of labour and social security law is not necessarily methodologically different from that in other fields of the law. But it requires a broad orientation, considerably broader presumably than in many other fields of legal comparison. To achieve this kind of orientation participation in multinationally composed study-groups is without doubt a useful method to carry out comparative research in labour and social security law.

But the ready help of others, who are at home in their own domestic legal system, however valuable, can never discharge the researcher of the responsability to study personally the primary materials of the countries to be compared.

NOTES

1. However it is admitted that the revolutionary events in Europe, 1917/1918 more or less urged the Dutch legislator to speed up the process of protective labour law; moreover in the period between 1940 and 1945 the German occupation brought about some changes in existing Dutch labour and social security law /amongst others the centralisation of manpower policies, wage restraint and control of dismissals and redundancies, introduction of obligatory health costs insurance/, which have been kept in force, albeit in a democratic context; finally, mention must be made of some adaptations in Dutch labour and social security law, which have been more or less forced upon the Netherlands by the E.E.C. /see § 1.c./.
2. Cf. M.G. Levenbach - Het Nederlandse in onze arbeidswtgeving, in: Arbeidsrecht, Alphen a/d Rijn 1951, p.283.
3. Strictly speaking the same happens at the I.L.O. but until now a model-function of Dutch labour law seems less apparent in this institution.
4. E.P. de Jong - Een inleiding tot het denken over arbeids conflictenrecht, Deventer 1975.
5. For example, A.T.J.M. Jacobs - Grenzen aan de regelingsmacht der C.A.O.-partijen, Deventer 1982.