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### Foreward: Lessons from Other Countries: Comparative Pension Law

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## FOREWORD

### LESSONS FROM OTHER COUNTRIES: COMPARATIVE PENSION LAW

Paul M. Secunda†

In 2008, in discussing issues of extraterritorial application of American employee benefits law, I wrote: “Global employee benefits law is an emerging field of study.”<sup>1</sup> No longer is this the case. As the recent publication of a casebook on global employee benefit law,<sup>2</sup> and now this series of comparative pension law papers, prove, this field of study is rapidly expanding. Conferences, lectures, and symposiums are being held not only in the United States, but across the globe concerning how to make employee benefits more secure through learning from the pension experiences of other countries.<sup>3</sup>

Although it appears that the AALS Section on Employee Benefits and Executive Compensation program in San Francisco on January 7, 2011, may have been the first international and comparative pension law panel held by the AALS Section, I am certain it will not be the last. As scholars from the European Union, Commonwealth Countries, Asia, and South America, continue to consider the best ways to deliver adequate retirement and welfare benefits to their countries, the publication of global benefits papers will likely become even more frequent.

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† Visiting Professor of Law, University of Wisconsin Law School; Associate Professor of Law, Marquette University Law School. I wish to thank Dana Muir, Kathryn Moore, and Ron Davis, for agreeing to participate on the 2011 AALS Section on Employee Benefits and Executive Compensation Panel on comparative pension law and for submitting thought-provoking and superbly written pieces.

1. Paul M. Secunda, *“The Longest Journey, With a First Step”: Bringing Coherence to Sovereignty and Jurisdictional Issues in Global Employee Benefits Law*, 19 DUKE J. COMP. & INT’L LAW 107, 107 (2008).

2. See PAUL M. SECUNDA, SAMUEL ESTREICHER & ROSALIND CONNOR, *GLOBAL ISSUES IN EMPLOYEE BENEFITS LAW* (2009).

3. For instance, on June 18, 2009, Katholieke Universiteit Leuven in Belgium held a conference entitled, “Protecting Pension Rights in the Economic Crisis.” The Symposium included presentations from many different countries from across the globe and sought to “either introduce new pension structures or review existing ones . . . [and] to learn about the experiences of different European and other developed countries.” See [http://www.fiap.cl/prontus\\_noticia/site/artic/20090107/asocfile/20090107100553/protecting\\_pension\\_rights\\_call\\_for\\_papers\\_enrsp\\_leuven\\_2009\\_1.pdf](http://www.fiap.cl/prontus_noticia/site/artic/20090107/asocfile/20090107100553/protecting_pension_rights_call_for_papers_enrsp_leuven_2009_1.pdf). The Symposium was sponsored by the European Network for Research on Supplementary Pensions (ENRSP).

In thinking about how to systematically study the field of global employee benefits law, many have maintained that we should consider the values that countries seek to promote in providing pension and other types of benefits to their citizens and employees. This “values perspective” emphasizes the values of responsibility, protection, solidarity, non-discrimination, and participation.<sup>4</sup>

As far as responsibility, the idea is that various pension actors (employees, plan trustees, and government employers) should share in the responsibility for providing pensions, including the responsibility of investment selection. The second value, protection, means both asset and income protection and a regulatory structure which includes a dispute resolution mechanism. Solidarity, the third value, is really a concept that is foreign to United States pension discussions. It involves both the willingness to share resources through redistribution<sup>5</sup> and also broadly encompasses the alignment of the interests of the trustees of pension funds with the interests of account holders. Perhaps the closest example we have in the United States is the Social Security System which is based on a pay-as-you-go redistribution system.

The fourth value, nondiscrimination, means equal treatment in pension programs for all covered employees. For instance, either all employees have to contribute a certain percentage of their pay to the pension fund or none at all. There are not different contribution levels for different level of employees. Finally, the fifth value of participation concerns both whether individuals are taking advantage of plans they are offered and the ability of employees to take part in pension plan governance.

As can be seen from just this initial and cursory examination of social pension values, there are many factors to consider when analyzing whether a given pension plan does an adequate job of providing a fair and effective pension system. The three papers that make up this series of comparative pension papers apply a values-based approach to pension issues in the United States, Canada, and Australia. The same approach would of course also apply to the pension system in any country, but the values that a country chooses to emphasize may differ. The benefit of such an approach, as is clear in these papers by Professors Kathryn L. Moore, Dana M. Muir, and Ronald B. Davis, is that there are lessons to be had for all countries in how they establish, operate, and maintain their respective pension systems.

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4. See Dana M. Muir, *Building Value in the Australian Defined Contribution System: A Values Perspective*, 33 COMP. LAB. L. & POL'Y J. 93 (2011).

5. See STEINAR STJERNØ, *SOLIDARITY IN EUROPE 2* (2004) (defining solidarity as “the preparedness to share resources with others by personal contribution to those in struggle or in need and through taxation and redistribution organised by the state”).

In the first paper, *An Overview of the U.S. Retirement Income Security System and the Principles and Values Its Reflect*, Professor Moore considers the characteristics of the American social security program, its employment-based pensions, and the individual savings habits of its citizens. Moore points out that there is no general agreement as to the values supporting the U.S. retirement income security system and that, in any event, such discussions are rare. She therefore takes up the challenge and explores the values of the American system through the lens of the European-inspired, social pension values. Moore concludes that although some of these pension values are reflected in the current U.S. retirement income system, others are not. This may be part in due to the employer-centric nature of the U.S. system, but also due to the emphasis America places on individual rights and responsibility in this context.

Heading north of the Border, Professor Ron Davis next applies these pension values to the Canadian pension system in *Balancing Competence and Representation: Trustees and Fiduciaries in the Era of Financial Engineering*. In discussing the five pension values, Professor Davis explains that the Canadian system, unlike its European counterparts, relies and supports voluntary, private pension arrangements in order to meet the public policy goal of providing adequate retirement income to its citizens. Because Canada relies on private parties to support this public policy goal, Davis maintains there is some difficulty in meeting some of the underlying pension values and, therefore, in providing the promised pension income.

More specifically, Davis maintains that, “the institution of the trustee and plan fiduciary administrator need to be examined for their ability to provide adequate protection in the face of the growing predominance of specialized expertise in global financial markets in which pension assets are invested.”<sup>6</sup> The paper proceeds by considering the problem for pension fund governance by lay trustees and fiduciaries given the increased complexity of modern financial markets and how this situation undermines the ability of the Canadian pension system to meet the values it seeks to promote through its pension system. To allay this “expertise deficit,” and to lessen the tension between representation and expertise in pension fund governance, Davis concludes by proposing the creation of cooperative non-profit pension funds large enough to employ their own experts in a cost-effective way, while at the same time requiring lay trustees to undergo intensive financial training.

In the final paper, *Building Value in the Australian Defined Contribution System: A Values Perspective*, Professor Dana Muir applies

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6. Ron Davis, *Balancing Competence and Representation: Trustees and Fiduciaries in the Era of Financial Engineering*, 33 COMP. LAB. L. & POL’Y J. 49, 49 (2011).

the pension values approach to Australia's mandatory, employment based defined contribution system. Recognizing that "[d]ifferences in business and social practices around the world arguably are decreasing as business becomes more global and countries confront similar demographic issues,"<sup>7</sup> Muir considers the Australian experience with its defined contribution system to not only examine what social values motivate that system, but how recent pension system changes may even more accurately reflect the values that Australia wishes to enshrine in its pension system. Thus, there might not be a one-size fits all approach to how to structure pensions in different countries, but by examining which social values are most important to its citizens, a country can develop an effective pension system consistent with those values. Although this approach necessarily leads to different pension systems in different countries, it permits all resulting pension systems to meet the basic European social protection values, which in turn lead to promotion of fair and effective retirement income security systems.

In all, then, the objective of this AALS comparative pension law panel and its resulting papers has been to explore common issues in pension plan governance through a values-based perspective. Considering the values of responsibility, protection, solidarity, non-discrimination, and participation, these papers help to explain not only why the recent global financial crisis adversely impacted so many countries' pension systems, but also why some systems were better able to respond to the challenge posed by this crisis than others. In any event, and as Professor Muir observes in her paper, "the crisis led to a push for increased uniformity in banking, accounting, and other regulatory standards."<sup>8</sup> Such uniformity may someday exist in global pension law, but for the time being there remains a bewildering array of different approaches to supplying adequate retirement income to the citizens of different countries. The hope is that the discussion in these papers will set the groundwork for future convergence in pension systems throughout the world, based on common underlying social protection values. These pension systems will then be able more easily to survive the next and inevitable global financial crisis.

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7. Dana Muir, *Building Value in the Australian Defined Contribution System: A Values Perspective*, 33 COMP. LAB. L. & POL'Y J. 93, 94 (2011).

8. *Id.* at 94 (citing Ojo).