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Review Essay

Back to the Future of EU Labour Law?

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From Labour Law to Social Competition Law?

Michael Doherty*

INTRODUCTION

In the prologue to *From Labour Law to Social Competition Law?*,¹ Marc Rigaux prudently begins by pointing to the dangers of expressing oneself on the future of labour law, which is in seemingly perpetual crisis and flux. Happily, the contributors are not cowed by the challenge of gazing into the future, and what follows is a wide-ranging exploration of a series of interrelated themes focusing on the legal, and extra-legal, processes and phenomena that shape the essential functions of labour law. The collection develops four themes, and aspects of each will be explored in this article.

First, the collection considers the relationship between labour law, the labour market and social competition. Here, we will focus on the limits of labour law as a corrective mechanism to what the authors see as its clear existential threat: the liberalisation of markets at the European and global levels. Secondly, the contributions look at the tie between labour law and human dignity and the conceptual shift from viewing labour as a commodity to allowing the worker to obtain the status of citizen within the enterprise. The role of human rights in the development of labour law will be considered in relation to this theme. Thirdly, the relationship between labour law, market law and ‘(social) competition law’² is examined; here, we will focus on issues concerned with the spread

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¹ Marc Rigaux, Jan Buelens and Amanda Latinne (eds), *From Labour Law to Social Competition Law?* (Intersentia, 2014).

² Marc Rigaux, ‘Labour Law or Social Competition Law? The Right to Dignity of Working People Questioned (Once Again)’ in Rigaux *et al*, *ibid*, 1.

of market (and contract) law and the dominant philosophy of entrepreneurial freedom. Finally, the collection considers the risk of a renewed contestation of the dignity of working people. In relation to this theme, we will reflect on the view that nation states have lost control over markets and that national systems of social adjustment now compete amongst themselves.

TINKERING AROUND THE EDGES

Labour lawyers and labour relations practitioners (such as trade unionists and human resource management professionals) often feel quite protective of the 'autonomous' nature of labour law. Much regulation of the labour market is generated by the social partners, for example either through collective bargaining between unions and employers at national, sectoral or company level or, more remarkably, by dint of the privileged status accorded to the social partners and to social dialogue by EU law.³ Most EU Member States have established unique systems by which employment disputes are adjudicated upon in employment tribunals (rather than 'regular courts'), which are frequently staffed by employment relations professionals (rather than 'regular judges').⁴ However, the contributions in this collection point over and over again to the dangers, indeed *naïveté*, of searching for labour law instruments only in labour law.⁵ The limited competence in the sphere of labour law afforded to the EU legislator in the Treaties (see Articles 151 and 153 TFEU) has not prevented decisions of the Court from radically impacting national labour law. Such interventions, however, have not been 'full frontal'; rather, momentous decisions in the field have arisen from disputes in relation to company law,⁶ public procurement law,⁷ and the law on transfer of undertakings.⁸

Moreover, in the context of measures taken to address the ongoing economic crisis in the EU, wide-ranging labour law instruments have been found in the Memorandums of Understanding agreed between the 'Troika' of the European Commission, the European Central Bank (ECB) and the International Monetary Fund (IMF) and the 'programme

³ Art 152 of the Treaty on the Functioning of the European Union (TFEU) states: 'The Union recognises and promotes the role of the social partners at its level, taking into account the diversity of national systems. It shall facilitate dialogue between the social partners, respecting their autonomy.' Arts 154 and 155 TFEU provide a procedure that combines the consultation of the social partners by the Commission with the option to leave social regulation to bipartite agreement between management and labour organised at European level: www.eurofound.europa.eu/areas/industrialrelations/dictionary/definitions/europeansocialdialogue.htm (all websites accessed 9 October 2014).

⁴ Susan Corby and Pete Burgess, *Adjudicating Employment Rights: A Cross-National Approach* (Palgrave, 2014).

⁵ Jens Schubert, 'Instruments of Labour Law' in Rigaux, Buelens and Latinne (n 1) 21.

⁶ Most particularly, in relation to what Schubert (*ibid*, 24) refers to as the Court's 'generous' interpretation of the freedom of establishment provisions in cases like Case C-208/00 *Überseering BV v Nordic Construction Company Baumanagement GmbH* [2002] ECR I-9919.

⁷ Case C-346/06 *Rüffert v Land Niedersachsen* [2008] ECR I-1989.

⁸ Case C-426/11 *Alemo-Herron v Parkwood Leisure Ltd* (judgment of 18 July 2013).

countries', which received 'bail-out' packages.⁹ Even for those countries not bound by such agreements, the putting in place of a strict economic governance package for Eurozone countries means that the Country-Specific Recommendations (CSRs), issued to Member States, have become ever more intrusive in the area of labour law, focusing increasingly on wage-setting mechanisms.¹⁰ Bekker and Klosse note that at least five coordination mechanisms now support CSRs, ranging from soft law policy coordination (the Euro Plus Pact and Europe 2020) to measures which combine soft law and hard law mechanisms (the Stability and Growth Pact and the Macro-Economic Imbalances Procedure).¹¹

Thus, defending or reinforcing labour rights will involve much more than simply reforming or reshaping labour laws (not that there is anything simple about that!) or reconfiguring judicial institutions;¹² it will require a radical rethinking of social and economic orthodoxy within the European Union. This conclusion chimes, in any case, with a number of contributions to the collection which take the view that labour law can only provide a marginal correction to the worst excesses of (labour) market liberalisation; it cannot, without more, modify the 'bases and principles of the market's existence and functioning'.¹³

FUNDAMENTAL RIGHTS AND LABOUR LAW

At several points in the collection, it is emphasised that labour is not a commodity. The primary function of labour law, therefore, is to guarantee and preserve the *human* dignity of the worker. This role is fulfilled, albeit to varying degrees in different countries, by labour laws underpinning basic rights of citizenship within the enterprise, including, for example, the political right to elect representatives. Increasingly, though, the issue has arisen as to whether labour rights are, or should be conceived of as, fundamental human rights.

To some extent, the invocation of human rights standards in the context of labour rights is born of desperation. As national labour law systems, and particularly national

⁹ In the case of Greece and Ireland, for example, see Eftychia Achtsioglou and Michael Doherty, 'There Must Be Some Way Out of Here ... The Crisis, Labour Rights and Member States in the Eye of the Storm' (2014) 20 *European Law Journal* 219.

¹⁰ For 2014–15, see http://ec.europa.eu/europe2020/pdf/csr2014/overview_recommendations_2014_by_member_state_en.pdf.

¹¹ Sonja Bekker and Saskia Klosse, 'EU Governance of Economic and Social Policies: Chances and Challenges for Social Europe' [2013] *European Journal of Social Law* 103. CSRs were originally formulated in the context of the (soft law) Open Method of Coordination (OMC).

¹² Schubert, for example, proposes setting up specific 'labour law chambers' at the Court of Justice ((n 5) 28). The idea has merit, but runs the risk of creating a 'hierarchy' of chambers at the Court (it would not be too difficult to imagine where labour law might place in such a pecking order) and considerable scope for procedural wrangling before a claim could be heard at all.

¹³ See Rigaux (n 2) 3.

organised labour movements, struggle to regulate globalised (labour) markets, the attempts to lay claim to 'fundamental rights' status intensify. Jaspers and Roozendaal consider the extent to which conceptualising labour rights as fundamental social rights adds value, in terms of achieving adequate protection for workers compared to the protection provided by 'traditional' national or international labour laws.¹⁴ Drawing on the work of Mantouvalou, they outline three different approaches to examining labour rights as human rights.¹⁵ The positivistic approach sees a fundamental right as being recognised as such when it has been adopted in international treaties or other sources of international law. The instrumental approach looks at the consequences of using strategies, primarily litigation, which promote labour rights as human rights. The third approach is a normative one; the rights in question are seen to have a compelling moral weight and are universal and imperative (implying that such rights are not subordinate to other interests).

In terms of the positivistic view, there are long-standing declarations on the fundamental status of labour rights, from the International Labour Organisation (ILO) and in the European Convention on Human Rights (ECHR). The EU, following the Treaty of Lisbon, is to accede to the ECHR, where recent jurisprudence of the European Court of Human Rights has been much more sympathetic to labour rights than that of the Luxembourg Court.¹⁶ The entry into force of the Treaty of Lisbon also, of course, gave the EU Charter of Fundamental Rights the same legal status as the Treaties. The Charter explicitly protects the rights of freedom of association (Article 12), the freedom to choose an occupation and the right to engage in work (Article 15) and, in Title IV (Solidarity), the rights to collective bargaining and action and the right to fair and just working conditions. There has been an ongoing debate about the extent to which the Charter's new status, following Lisbon, will impact on the Court's jurisprudence, in particular in the area of labour rights.¹⁷ It is early days, but there is scant evidence to date that the Court will fundamentally rethink its approach; see the decisions in cases like *Commission v Germany*,¹⁸ *Palhota*¹⁹ and *Alemo-Herron*²⁰ (notwithstanding some of the comments of the Advocates General in the cases).²¹ Indeed, the decision in *Alemo-Herron* forcefully reminds us that some fundamental *economic* rights, like the freedom to conduct a busi-

14 Teun Jaspers and Willemijn Roozendaal, 'Fundamental Social Rights: An Added Value to the Protection of Workers' in Rigaux *et al* (n 1) 107.

15 Virginia Mantouvalou, 'Are Labour Rights Human Rights?' (2012) 18 *European Law Journal* 151.

16 Keith Ewing and John Hendy, 'The Dramatic Implications of *Demir and Baykara*' (2010) 39 *Industrial Law Journal* 30. Although see Application No 4241/03 *Trofimchuk v Ukraine* (28 October 2010) and Application No 31045/10 *RMT v UK* (8 April 2014).

17 See eg Sybe de Vries, 'Balancing Fundamental Rights with Economic Freedoms According to the European Court of Justice' (2013) 9 *Utrecht Law Review* 169.

18 Case C-271/08 *Commission v Germany* [2010] ECR I-7091.

19 Case C-515/08 *dos Santos Palhota and Others* [2010] ECR I-9133.

20 Case C-426/11 *Alemo-Herron v Parkwood Leisure Ltd* (judgment of 18 July 2013).

21 Phil Syrpis, 'Reconciling Economic Freedoms and Social Rights: The Potential of *Commission v Germany* (Case C-271/08, Judgment of 15 July 2010)' (2011) 40 *Industrial Law Journal* 222.

ness in Article 16 of the Charter, also gained an ‘upgrade’ post-Lisbon. Following the decisions in the ‘Laval Quartet’, the European Trade Union Congress (ETUC) has pushed hard, albeit to date without success, for a ‘Social Progress Protocol’, which includes a declaration (in Article 3) that ‘nothing in the Treaties, and in particular neither economic freedoms nor competition rules, shall have priority over fundamental social rights’.

However, it seems that the instrumental appeal to fundamental rights as a defence to attacks on labour standards has failed spectacularly in recent years. This is most evident in relation to responses to the crisis. Particularly, but not exclusively, in the ‘programme countries’, the requirements of the Troika have meant that international law obligations have been ignored and national constitutional principles set aside.²² The ease with which ‘fundamental’ rights have been dispensed, in order to implement austerity policies, has been instructive.

Nonetheless, Jaspers and Roozendaal, whilst concluding that fundamental social rights add value, at best, in a very modest way to worker protection in the EU, note that ‘their moral weight should not be underestimated.’²³ This is undoubtedly true, but we cannot leave matters there. The idea of fundamental human rights protection is often discussed at too abstract a level, or in merely symbolic terms. More worryingly, it can become the focus of popular cynicism and discontent; witness recent debates in the United Kingdom in relation to the application of the Human Rights Acts 1998.²⁴ Labour law and policy could (should) be a means of concretising human rights; ‘labour law has the potential to bring human rights (declared in a very abstract and general manner and acknowledged by constitutions and many international treaties) into people’s everyday lives.’²⁵ Achieving this would make it much more difficult for such rights to be set aside, in the manner described above, whenever it is deemed that they cannot be afforded.

It is here that those seeking to reinforce and defend labour standards—notably, but by no means exclusively, trade union movements—have failed. Labour rights in general, and collective labour rights in particular, simply do not register (certainly in the ‘Anglo’ world) as ‘fundamental’. They are not seen as ‘universal and imperative, with a special moral weight that normally overrides other considerations’;²⁶ and, as such, this weakens their instrumental value. However, even if one does not wish to invoke fundamental

22 In terms of ILO obligations, see eg Case 2820 in the 365th Report of the Committee on Freedom of Association (November 2012), 784-2003, www.ilo.org/gb/GBSessions/GB316/ins/WCMS_193260/lang-en/index.htm. The European Committee for Social Rights (ECSR), the main supervisory body for the Council of Europe’s Social Charter, in its Conclusions for 2013, found 180 cases of violations of the Charter concerning health, social security and social protection. Programme countries Greece and Romania received a particularly high number of negative conclusions; see www.coe.int/T/DGHL/Monitoring/SocialCharter/NewsCOEPortal/Conclusions2013Publication_en.asp.

23 Jaspers and Roozendaal (n 14) 122.

24 See www.liberty-human-rights.org.uk/human-rights/what-are-human-rights/human-rights-act/human-rights-act-myths.

25 Barbara Kresal, ‘Mutating or Dissolving Labour Law?’ in Rigaux *et al* (n 1) 141, 151.

26 Hugh Collins, ‘Theories of Rights as Justifications for Labour Law’ in Guy Davidov and Brian Langille (eds), *The Idea of Labour Law* (Oxford University Press, 2011) 137.

rights arguments, the 'public relations' battle must be fought and fought harder. A good crisis should never be wasted; the value of labour standards, and how these should be promoted and defended, should be at the centre of debates about the future of the EU project and of the type of social and economic model desired by European workers and citizens. In this, the ETUC's push for a Social Progress Protocol could be an extremely useful rallying point.

COMPETING VISIONS

A core theme running through the collection is that (EU) market law has intruded into all areas of socio-economic regulation, with market liberalisation and the associated focus on freedom of contract and individual autonomy posing an existential threat to labour law. Däubler specifically addresses how social values and competition co-exist.²⁷ Here,²⁸ he draws striking parallels between contemporary 'neo-liberal' attacks on labour law in the EU and the famous *Lochner*²⁹ decision of the US Supreme Court in 1905, which declared a law limiting the hours bakers could work to be an 'unreasonable, unnecessary and arbitrary interference with the right of the individual to enter into a contract related to his business'.

Däubler is concerned with the growing importance of the principle of competition, in law but also in other social processes. Achtsioglou and Doherty have similarly argued that 'competition' has been rendered a general norm in EU policymaking, by which 'any regulatory policy choice is assessed in terms of its ability to favour this specific model of market governance'.³⁰ The shift from the decision in *Albany*,³¹ where the Court refused to apply competition law rules to collective agreements aimed at improving working conditions, to the approach taken in *Viking*³² and *Laval*³³ has been well documented.³⁴ The freedom of movement provisions in the treaties, which originally focused on the prohibition of discrimination, have been developed by the Court, over time, to amount to entrepreneurial freedoms, restrictions on which must be justified. In *Alemo-Herron*, the Court found, in the context of a transfer of undertaking, that to enforce 'dynamic clauses'—by virtue of which the transferee could be bound not only by collective agreements in force at the time of the transfer at issue but also agreements subsequent to that

²⁷ Wolfgang Däubler, 'Labour Law and Competition' in Rigaux *et al* (n 1) 57.

²⁸ *Ibid.*, 63.

²⁹ *Lochner v New York*, 198 US 45 (1905).

³⁰ Achtsioglou and Doherty (n 9) 233.

³¹ Case C-67/96 *Albany International v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.

³² Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union v Viking Line* [2007] ECR I-10779.

³³ Case C-341/05 *Laval v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

³⁴ In this collection, see Giovanni Orlandini and Filip Dorssemont, 'Market Rules and the Right to Strike: A Different Approach', 67.

transfer—would mean that the transferee's 'contractual freedom is seriously reduced to the point that such a limitation is liable to adversely affect the very essence of its freedom to conduct a business';³⁵ as noted above, a freedom protected by Article 16 of the Charter of Fundamental Rights.

Däubler sees the current crisis as an opportunity to mount a counter-attack, a time to develop new forms of social solidarity and to revitalise collective bargaining: 'The neo-liberal idea has suffered a big defeat. This fact should be mentioned more and more and it should be treated as self-evident by the public opinion.'³⁶ It is submitted, however, that this is another 'public relations' battle that is being lost. Far from an intensified *European* debate on the appropriate responses to the crisis and future directions, we have seen fragmentation and a retreat to insularity, characterised by national navel-gazing (witness all the policy statements, conferences and symposia that 'compare' whether Greece or Ireland or Romania or Germany or Denmark have fared better or worse) and wide-scale abandonment of social dialogue. Policy responses have been driven by inter-governmentalism; we have seen, for example, no fundamental attempts to reform EU social legislation and no intervention from the Court of Justice on the impact of the economic measures demanded by the Troika (unlike the clear interventions from the ILO and the Council of Europe). Instead, in the Eurozone, where currency devaluation is not an option, we see the 'burden of adjustment' falling on national labour law systems (with the aim always to reduce their 'distorting effects'), which now increasingly compete with one another.

SOCIAL COMPETITION AND DIGNITY AT WORK

Supiot has commented that even 'national legislative models are today treated as so many products in competition with each other in the world market of norms'.³⁷ Financial soundness ratings, attributed to states by private corporations, determine their value on financial markets. A country's score on the 'Doing Business' index of the World Bank, or the Employment Protection Legislation (EPL) index of the IMF, is worse if its labour law system guarantees more rights or greater protections to workers.³⁸ As noted above, although the Union legislator has limited competence in the sphere of labour law, decisions of the Court of Justice have radically impacted upon national labour law systems. In circumstances where it seems nation states are more and more struggling to regulate global markets, how can labour standards be secured? Throughout the collection, contributors return again and again to the idea of the nexus between decent work and human dignity. As Reyniers argues:

³⁵ Case C-426/11 *Alemo-Herron v Parkwood Leisure Ltd* (judgment of 18 July 2013), para 35.

³⁶ Wolfgang Däubler, 'Labour Law and Competition' in Rigaux *et al* (n 1) 66.

³⁷ Alain Supiot, 'Law and Labour: A World Market of Norms?' (2006) 39 *New Left Review* 109, 112.

³⁸ Kresal (n 25) 152.

The fact that work/labour is considered as a means to achieve human dignity does not only follow from the *economic meaning* of work/labour (i.e. a means to support oneself). Indeed, work is also the fundamental activity that allows people to *develop themselves personally and socially*. In a way, people take their identity from their work, which also gives meaning to life.³⁹

Echoing the point made above about concretising fundamental human rights, the idea of decent work as central to human dignity is one that those concerned with defending labour standards need to strongly reassert. As with the ETUC's Social Progress Clause, the ILO has already provided a platform from which to begin: the Declaration on Social Justice for a Fair Globalization, which formalises the Decent Work Agenda.⁴⁰ However, this must be made meaningful to everyday working life. As such, debates around access to labour rights (procedurally, in terms of dispute resolution systems, but also in terms of extending the coverage of labour law beyond 'employees'), around living (not minimum) wages and around industrial democracy and social dialogue must be brought centre stage at EU level. An appeal to political self-interest might be made here. Monti has noted that the Court of Justice jurisprudence on collectively bargained standards 'has the potential to alienate from the Single Market and the EU a segment of public opinion, workers' movements and trade unions, which has been over time a key supporter of economic integration'.⁴¹ It is submitted that it is not simply workers' movements that are disconcerted by a potential 'race to the bottom' in terms of working terms and conditions, and social protection, but that the current economic climate has engendered a much more widespread public suspicion of greater integration measures at EU level (witness the 2014 European Parliament elections). Ongoing failure to protect the labour standards of ordinary workers is unlikely to contribute to social cohesion and popular support for national or international governing institutions in an era of crisis.⁴²

CONCLUSION

From Labour Law to Social Competition Law? illustrates the central, yet complex, role that labour law plays in contemporary social and economic life and makes the compelling

³⁹ Kelly Reyniers, 'Human Dignity and Decent Work as Ultimate Objectives of Labour Law' in Rigaux *et al* (n 1) 165 (emphasis in the original). It is interesting to note, when discussing the role of labour law, the debate in social theory about the role of work in contemporary life. Whilst some have argued that work is no longer central as a source of personal identity (eg Ulrich Beck, *The Brave New World of Work* (Polity, 2000)), others have asserted the centrality of work in fulfilling vital personal and social needs (eg Michael Doherty, 'When the Working Day is Through: The End of Work as Identity?' (2009) 23 *Work, Employment and Society* 84).

⁴⁰ www.ilo.org/global/about-the-ilo/decent-work-agenda/lang--de/index.htm.

⁴¹ Mario Monti, 'A New Strategy for the Single Market—At the Service of Europe's Economy and Society', http://ec.europa.eu/internal_market/strategy/docs/monti_report_final_10_05_2010_en.pdf, 68.

⁴² Michael Doherty, 'Battered and Fried? Regulation of Working Conditions and Wage-Setting after the *John Grace* Decision' (2012) 35 *Dublin University Law Journal* 97.

case that a reformulation, to better reconcile social rights and economic freedoms, is urgently required. However, it makes clear, too, that any field of law can only be analysed by reference to underlying social reality. Consequently, 'in view of the omnipresence of liberal economic worldviews', any reformulation will demand the emergence and mobilisation of an 'effective social countervailing power'.⁴³ Back to the future indeed.

⁴³ Amanda Latinne, 'Labour Law or Social Competition Law: Some Concluding Critical Remarks', 175, 186; René de Quenaudon, 'Droit du travail ou droit de la concurrence sociale', p 15.