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Section I

Labour law and Europe

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Part I

European labour law

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Chapter 1

European labour law and the social dimension of the European Union

Introduction: European labour law challenges the dominance of EU economic law

The European Economic Community (EEC) created by the Treaty of Rome of 1957 had as its central core the economic law of the EEC. Despite its transformation into the European Union (EU), European law remains dominated by the economic law perspective of establishment of a common market. But European integration is no longer a purely economic project. European labour law is a central part of the political and social dimension of the EU.

European labour law as a central component of the European Union poses a fundamental challenge to the economic law profile of the EC. Labour was posited in the Treaty of Rome as one of the factors guaranteed free movement, along with capital, goods and services. As such, labour was equated to a commodity. By so doing, the EEC challenged a fundamental premise of international labour law, embodied in the constitution of the ILO: that labour is not a commodity.[1]

Labour is not the same as goods, services or capital. Labour engages human beings. Living in the EU means for most people spending the greater part of their adult waking life working. The EU law which addresses that part of people's lives, EC labour law, is much more directly central to the peoples of Europe than the regulation of capital movements, financial services, take-overs and mergers, international trade or customs duties or other barriers to free movement of goods and services, which absorbs most of the attention of EC lawyers.[2]

European labour law is the core of the social conception of European integration and the social dimension of EU law. The European Court of Justice recognised the changing profile of the EU in cases concerned with the

[1] See P. O'Higgins, '"Labour is not a Commodity" – an Irish Contribution to International Labour Law', (1997) 26 *Industrial Law Journal* 225.

[2] The European Commission's Directorate-General V retains this early addiction to the theme of free movement. It continues to devote a disproportionate effort to promoting free movement of workers among Member States, ignoring the unchanging reality that the vast majority of people do not wish, unsurprisingly, to leave their own homeland to serve the labour market needs of other countries.

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equal pay provision in the original EEC Treaty (Article 119, now Article 141). Initially, in the famous *Defrenne* decision, Article 119 was characterised as having not only an economic but also a social objective.[3] More recently the Court has declared that the equal pay provision is to be interpreted as no longer primarily concerned with the economic objective of securing fair competition in a common market between the employers of women workers, so that all would be required to observe the equal pay principle. Instead, the objective of the equal pay provision is primarily social.[4]

EC labour law is part of the substantive law of the EC. However, unlike, for example, the EC economic law governing free movement of goods or competition, an awareness of EC labour law is absent from most of the general literature on EC law. EC labour law simply fails to register on the radar screen of most EC lawyers, or, when it does, focuses almost exclusively on discrimination law. To some extent, this is the understandable legacy of the origins of the EU in the European Economic Community's Treaty of Rome which had as its primary objective the establishment of the common market. But that was half a century ago. The literature and teaching on EU law now focus more on the public/constitutional law and institutional dimensions of the EU. However, the prism through which the public law and institutions of the EU are seen is focused on these economic origins.[5]

To comprehend the significance of this bias in EC law studies, try to imagine the concept of EC law in the literature without the EC economic law on free movement (of goods, services, capital and labour in the single market) and competition. The literature on the public law of the EC, the institutions, their competences and interactions, is permeated by the assumptions that they function so as to secure these economic objectives, which are perceived as fundamental to the whole enterprise of European integration.[6]

[3] Case 43/75, *Defrenne* v. *SABENA (No. 2)*, [1976] ECR 455, paras. 10, 12.

[4] Case C-50/96, *Deutsche Telekom AG* v. *Schroder*, [2000] ECR I-743, para. 57.

[5] Marginalisation of EC labour law in general EC law texts may, arguably, be justified where these texts remain within a framework limited to the public law of the EU. If such texts claim to be books on EU law in general, however, and additionally include treatment of the European single market, free movement or other substantive areas, social policy can no longer be reduced to discrimination law without gross distortion of the profile of the EU. If EC lawyers do not attend more closely to EC labour law, the question may well be put not only of whether there can be Europe without 'Social Europe', but whether there can be an understanding of EU law without the social dimension of EU social and labour law. See B. Bercusson, S. Deakin, P. Koistinen, Y. Kravaritou, U. Mückenberger, A. Supiot and B. Veneziani, *A Manifesto for Social Europe*, European Trade Union Institute (ETUI), Brussels, 1996; also in (1997) 3 *European Law Journal* 189–205.

[6] The European Commission's Directorates are informally ranked in terms of their economic status: the internal market directorate, the competition directorate and the external trade directorate are the most important. The Commission's actions in regulating economic competition attract the most attention, just as its support for agriculture takes up the largest portion of the EC's budget. The critical judgments of the European Court involve breaking down barriers to free movement. The Court's teleological interpretation of the Treaties and of EC legal measures are in terms of European integration, but this implies a specific vision of the kind of integration sought: economic, social and/or political integration.

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The dominant economic profile of the EC has always been subject to challenge from other visions, both of political economy[7] and of political integration. The theoretical frameworks constructed to comprehend the EU embodied both economic and political dimensions.[8] And, thirty-five years after the founding of the EEC, the transformation of the European Community into the European Union in 1992 led to major changes.[9] But the outcome, rather than a comprehensive transformation, left EC law with its dominant traditional economic profile, the new non-economic competences in justice and home affairs and foreign and security policy being hived off into separate pillars, part supranational and part intergovernmental.

Nevertheless, despite their relative obscurity, radical institutional and constitutional changes were to be found in the new social chapter introduced by the Maastricht Treaty (the constitutionalisation of the EU social dialogue) and in the new Employment Title introduced by the Treaty of Amsterdam (the 'open method of coordination').[10]

Yet many texts on EC labour or employment law[11] begin with or include a section, often detailed and substantial, introducing general EC law concepts, presumably justified by the assumption of the relative ignorance of the labour law reader of the basic elements of Community law.[12] A comparable introduction to a text on *national* labour law would be highly unlikely, in part because

[7] F. Snyder, 'Ideologies of Competition in European Community Law', (1989) 52 *Modern Law Review* 149; reprinted in 'Ideologies of Competition: Two Perspectives on the Completion of the Internal Market', Chapter 3 in F. Snyder, *New Directions in European Community Law*, London: Weidenfeld & Nicolson, 1990, pp. 63–99.

[8] P. Craig and G. de Búrca, *EU Law*, 3rd edn, Oxford: Oxford University Press, 2003, Chapter 1, 'The Development of European Integration', pp. 1–48. J. Weiler, 'The Transformation of Europe', (1991) 100 *Yale Law Journal* 2403; published with a new afterword as Chapter 2 in J. Weiler, *The Constitution of Europe*, Cambridge: Cambridge University Press, 1999, pp. 10–101.

[9] In the Treaties of Maastricht (1991), Amsterdam (1997) and Nice (2000).

[10] These have attracted some attention in the general EC law literature. Their interest for EC lawyers, however, appears to lie more in their institutional innovation than in their substantive policy content. Hence, it is the engagement of private actors in the form of the social partners in EC law-making through the social dialogue which is perceived as the primary feature of the EU social dialogue. It is the institutional engagement of Commission, Council and Member States in formulation of the 'soft law' of Guidelines, National Action Plans, Reviews and Recommendations which attracts attention to the Employment Title's new processes and measures. The relation between these and their substantive policy content – social policy, working conditions, labour standards, employment and labour market measures – is neglected. It is reminiscent of the view that the substantive labour law content of many of the leading constitutional decisions of the European Court of Justice (*Defrenne* v. *Société Anonyme Belge de Navigation Aerienne (Sabena)*, Case 43/75, [1976] ECR 455; *Marshall* v. *Southampton and South-West Hampshire Area Health Authority (Teaching)*, Case 152/84, [1986] ECR 723; *Von Colson and Kamann* v. *Land Nordrhein-Westfalen*, Case 14/83, [1984] ECR 1891; *Francovich and Bonfaci* v. *Italy*, Cases C-6/90 and C-9/90, [1991] ECR I-5357) is of secondary interest or value. The argument of this book is that the character of the European Union, and of EU law, cannot be divorced from this substantive content.

[11] See Chapter 4 below.

[12] Such an account of the law and institutions of the EC is obviously otiose for those readers coming from an EC law background – an interesting assumption that EC law specialists will be less interested in the subject of EC labour law than labour law specialists.

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knowledge of the basic elements of national law and institutions may be presumed. More importantly, however, the absence of such an introduction is likely to be the consequence of the recognition that labour law in many countries is not perceived as deriving solely, or even mainly, from the normal law-making institutions and procedures of civil law. Specifically, the central role of the social partners, trade unions and employers' organisations, in the formulation and implementation of labour law norms means that an introduction to national labour law by way of 'normal' law-making procedures and institutions would be seriously misleading.[13]

In sum, this book challenges assumptions as to the dominant economic character of the EU and of EU law by putting forward an analytical framework for the social dimension of the EU. The argument is that EC labour law, although only one of the many substantive dimensions of EC law, is central to a definition of the EU in social terms: Social Europe.

EC labour law and the EU's social constitution

The early history of the EC, reflecting its origins in a project to construct a European common market, is marked by a constitutional debate concentrated on the economic dimension.[14] Developments moving away from the economic focus in the direction of a political construct for European integration, from Maastricht to the Convention on the Future of Europe, have looked to other constitutional models. These hesitate before the juridical and political choices involved in adopting the traditional state constitutional model for an evolving European polity which is not always agreed to possess the attributes of a state.[15] Debates on EU citizenship in particular have highlighted the contrast between EU citizenship and state citizenship.[16]

[13] The inclusion of the equivalent information on 'normal' EC law in EC labour law texts implies the assumption that EC labour law, unlike national labour law, *does* derive from the same institutional sources as other EC law, and that its nature and origins are not autonomous and different. This assumption is questionable at least. To start a text with such an account, without questioning this assumption, may be to lay the foundations for a misapprehension of EC labour law.

[14] This debate gave rise to theories about an economic constitution of the EC. M. Streit, 'The Economic Constitution of the EC', (1995) 1 *European Law Journal* 1. M. Poiares Maduro, *We, the Court: The European Court of Justice and the European Economic Constitution*, Oxford: Hart, 1998.

[15] J. Weiler, 'Does European Need a Constitution? Demos, Telos and the German Maastricht Decision', (1995) 1 *European Law Journal* 219. D. Grimm, 'Does Europe Need a Constitution?' (1995) 1 *European Law Journal* 282–302. J. Habermas, 'Remarks on Dieter Grimm's "Does Europe Need a Constitution?"' (1995) 1 *European Law Journal* 303–7. M. Jachtenfuchs, 'Theoretical Perspectives on European Governance', (1995) 1 *European Law Journal* 115–33. J. Weiler, 'Introduction: The Reformation of European Constitutionalism', Chapter 6 in *The Constitution of Europe*, pp. 221–37. P. Craig, 'Constitutions, Constitutionalism and the European Union', (2001) 7 *European Law Journal* 125–50.

[16] U. Mückenberger, 'Social Citizenship in the European Union', Chapter 6 in Bercusson *et al.*, *A Manifesto for Social Europe*, pp. 91–104; and U. Mückenberger, 'Introduction', Chapter 1 in U. Mückenberger (ed.), *Manifesto Social Europe*, ETUI, Brussels, 2001, pp. 1–16. J. Weiler,

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These debates were sharpened by the adoption in December 2000 in Nice of the EU Charter of Fundamental Rights.[17] The most significant feature of the EU Charter is the inclusion of social and economic rights as fundamental rights alongside the more traditional civil and political rights. In particular, Chapter IV, entitled 'Solidarity', includes the key dimensions of the post-1945 settlements in Europe: protection of the welfare state, of individual employment and of collective labour. The EU Charter includes provisions which are at the heart of labour law and industrial relations in Europe: freedom of association (Article 12), right of collective bargaining and collective action (Article 28), workers' right to information and consultation within the undertaking (Article 27), freedom to choose an occupation and right to engage in work (Article 15), prohibition of child labour and protection of young people at work (Article 32), fair and just working conditions (Article 31), protection of personal data (Article 8), non-discrimination (Article 21), equality between men and women (Article 23) and protection in the event of unjustified dismissal (Article 30).

The inclusion in the EU Charter of such fundamental rights of labour raises a central question: is EC labour law to be considered only as part of the substantive private law of the EC, or is it now also to be conceived in public law terms? In other words, among the various constitutional frameworks being considered for the European Union, alongside the political and/or economic constitution, is there an EU social constitution protecting a European welfare state? Is there emerging a European constitutional principle analogous to the German *sozialstaat* or the French *ordre public social*? And what is the place of EC labour law within a European social constitution?

To elevate EC labour law to the constitutional level has both substantive and procedural consequences. As to procedures, for example, it highlights the constitutional/institutional innovations of the EC Treaty's attribution of law-making power to the EU social partners through the social dialogue. This raises questions, among others, of democratic legitimacy, the hierarchy of norms and judicial review. Is the EU social dialogue better understood in industrial-relations terms of collective bargaining, or as a law-making process?[18] Other procedural developments raise equally difficult questions; for example, the

'To Be a European Citizen: Eros and Civilization', Chapter 10 in *The Constitution of Europe*, pp. 324–57. N. Reich, 'Union Citizenship – Metaphor or Source of Rights?', (2001) 7 *European Law Journal* 4–23. B. Bercusson *et al*., 'A Manifesto for Social Europe', (1997) 3 *European Law Journal* 189–205. Comments by A. Lo Faro, 'The Social Manifesto: Demystifying the Spectre Haunting Europe', and A. Larsson, 'A Comment on the "Manifesto for Social Europe"', (1997) 3 *European Law Journal*, 300–3, 304–7.

[17] Charter of Fundamental Rights of the European Union, proclaimed at the meeting of the European Council held in Nice from 7 to 9 December 2000, and adopted by the Commission, the Council and the Member States, OJ C364/01 of 18 December 2000. The 'adjusted' version of this Charter is proposed to be made legally binding by the Reform Treaty of Lisbon.

[18] Similar questions have been raised in national contexts where the nature of collective bargaining crosses over into public law-making from private bargaining, as when collective agreements are embodied in legislation or extended by ministerial decree. See the discussion in Chapter 18.

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constitutional profile in terms of effective enforcement of the 'soft law' created by the 'open method of coordination' in the Employment Title, increasingly invoked as a model in other policy areas.

As to substantive consequences, the fundamental rights in the EU Charter reflect some, though not all, of the contents of EC labour law in EC legislation, such as labour law directives, and the legal measures transposing them into the laws of the Member States. This EC legislation, by virtue of the doctrine of supremacy of EC law, already possesses a constitutional character insofar as it overrides national legal measures. To this is now added a further EU constitutional dimension in the form of the EU Charter. The EC legislation itself is often open to much interpretation, and also leaves much to the discretion of Member States. The Charter, embodying substantive labour rights, provides another avenue to challenge both EC and national legislation which parallels those rights.

An early indication arrived barely eight weeks after the EU Charter was adopted on 7 December 2000. A British trade union, the Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU), challenged the UK government's implementation of the Working Time Directive. The UK government made the entitlement to four weeks' paid annual leave provided in Article 7 of the Directive conditional on a qualification period of thirteen weeks' employment, though there was no such qualification in the Directive. Since EC law has supremacy over national law, the UK, as a Member State, is obliged to respect the rights guaranteed by EC law. BECTU complained because many of the union's members on short-term contracts were being deprived of their right to paid annual leave under EC law by the UK government's legislation.

On 8 February 2001 Advocate General Tizzano delivered his advisory Opinion upholding BECTU's complaint. What is particularly important about the Advocate General's Opinion is that he looks at the right to paid annual leave 'in the wider context of fundamental social rights'.[19] A worker's right to a period of paid annual leave is to be given the same fundamental status as other human rights and guaranteed absolute protection. Advocate General Tizzano then pointed out that 'Even more significant, it seems to me, is the fact that that right is now solemnly upheld in the Charter of Fundamental Rights of the European Union, published on 7 December 2000 by the European Parliament, the Council and the Commission after approval by the Heads of State and Government of the Member States.'[20] He freely admits that 'formally, [the EU Charter] is not in itself binding'.[21] However, he states unequivocally:[22]

> I think therefore that, in proceedings concerned with the nature and scope of a fundamental right, the relevant statements of the Charter cannot be ignored; in

[19] Case C-173/99, *Broadcasting, Entertainment, Cinematographic and Theatre Union (BECTU)* v. *Secretary of State for Trade and Industry*, [2001] ECR I-4881, para. 22.
[20] *Ibid.*, para. 26. [21] *Ibid.*, para. 27. [22] *Ibid.*, para. 28.

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> particular, we cannot ignore its clear purpose of serving, where its provisions so allow, as a substantive point of reference for all those involved – Member States, institutions, natural and legal persons – in the Community context. Accordingly, I consider that the Charter provides us with the most reliable and definitive confirmation of the fact that the right to paid annual leave constitutes a fundamental right.

This approach highlights the constitutional potential of fundamental social and labour rights, including trade union rights, in the EU Charter. The rights in the EU Charter are 'a substantive point of reference', and not only for the Community institutions, but also for Member States and even for private persons, human and corporate. EC labour law embodied in the EU Charter potentially acquires a constitutional character: it is part of the EU's social constitution.

There remains the question of the relation of this social constitution to the 'economic constitution', the economic freedoms guaranteed by the Treaty. The struggle between these two constitutional frameworks reflects the conflict between markets and social protection, between free trade and trade union freedom, which has characterised the evolution of labour law from its beginnings. It remains to be played out in the EU context and will engage all the actors on the European stage: EU institutions, Member States and the social partners, trade unions and employers' associations at EU and national levels.[23]

EC labour law: constitutionalising national labour laws

The elevation of EC labour law to the constitutional level of fundamental rights also has important implications for the labour law of the Member States. The emergence of national labour laws was often the chronicle of slow and painful separation from civil law, in particular, recognition of the employment contract as possessing a nature distinct from commercial contracts. Similarly, the emergence of collective labour regulation by the social partners raised questions of the anti-competitive ('restraint of trade') and public law nature of collective agreements and their authors.

In some Member States, fundamental rights of labour have been included in national constitutions. This has guaranteed some labour rights a degree of constitutional protection and thereby 'constitutionalised' parts of labour law. In other Member States, international labour law has had similar effects, as where a monist theory of international law means that the European Social Charter and ILO Conventions will have effect within a domestic legal system.

[23] Battle has been joined with the decisions of the European Court of Justice in Case C-438/05, *International Transport Workers' Federation, Finnish Seamen's Union* v. *Viking Line ABP, OÜ Viking Line Eesti*, 11 December 2007, Case C-341/05, *Laval un Partneri Ltd* v. *Svenska Byggnadsarbetareförbundet, Svenska Byggnadsarbetareförbundet, avd. 1, Svenska Elektrikerförbundet*, 18 December 2007, Case C-346/06, *Rechtsanwalt Dr. Dirk Rüffert* v. *Land Niedersachsen*, 3 April 2008 and Case C-319/06, *Commission* v. *Luxembourg*, 19 June 2008.

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EC labour law, by virtue of its character as a supranational law with supremacy over national labour laws, already partakes of the character of a higher norm. The EU Charter's labour rights, becoming part of an EU social constitution, would reinforce this status. The EU social constitution may become the vehicle for the constitutionalisation of national labour laws.

Supremacy does not tolerate contradiction, but it does allow for discretion in application, in means, if not ends. National labour law must bend before it or break; but the deep roots of national labour law give it strength to resist, and its suppleness can soften and shape. Both can serve to mould the imperiousness of EU labour law supremacy.

The constitutional nature of some labour law norms is familiar to national legal orders accustomed to general constitutional provisions overriding sectional labour laws, though much less so to those legal orders where constitutional norms impinge less frequently, if at all, as in the UK. The impact of EC norms overriding domestic labour laws in the same way as national constitutional norms attributes to EC norms a constitutional quality. In itself, this creates an uneasy relationship with national constitutional norms, as domestic norms, domestic constitutions and EC law interact. It becomes even more complex if EC law itself is 'constitutionalised', including the EU Charter and its labour law provisions.[24]

The next part of this chapter explores the theme of 'regulatory competition', including between national and transnational norms. This theme can be projected as a major theme of this book: the strategic choice facing the institutional architecture of the European social model. Is EU labour law to be constitutionally embedded as the social partners become institutional actors in the EU's law making and law enforcement processes? Is the social model a central and integral element of European integration? Or is EU labour law a mere adjunct to legal regulation of an internal market in which the social partners are subordinate players in an industrial relations sub-system?[25]

In other words, regulatory competition is not only between levels (national v. transnational/EU), actors (states v. social partners) and instruments (collective agreements v. legislation) but, more fundamentally, it is over substance. Which is to prevail: competitive markets or a social model?[26]

[24] Even without this competing EU constitutional dimension, EU law transforms the legal character of domestic norms transposing EU law through doctrines such as indirect effect: requiring them to be interpreted consistently with EU norms.

[25] The question of legitimacy becomes central in these different visions of the EU constitution.

[26] An archetypal case is exemplified in litigation over the legality of collective industrial action by workers which confronts freedom of establishment or free movement of services where these threaten to undermine labour standards through 'social dumping'. See Case C-341/05, *Laval* and Case C-438/05 *Viking*. B. Bercusson, 'The Trade Union Movement and the European Union: Judgment Day', (2007) 13 *European Law Journal* (No. 3, May) 279–308. B. Bercusson, *Collective Action and Economic Freedoms: Assessment of the Opinions of the Advocates General in Laval and Viking and Six Alternative Solutions*, European Trade Union Institute (ETUI-REHS), Brussels, 2007, available, together with an Executive Summary in French, at www.etui-rehs.org/research/publications. And see Chapter 21 below.

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