

§ Law in Context

BRIAN BERCUSSON

European Labour Law

Second Edition

CAMBRIDGE

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2nd edition

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European Labour Law

European Labour Law explores how individual European national legal systems, in symbiosis with the European Union, produce a transnational labour law system that is distinct and genuinely European in character.

Professor Brian Bercusson describes the evolution of this system, its national, transnational and global contexts and its institutional and substantive structures. The collective industrial-relations dimension of employment is examined, and the labour law of the EU as manifested in, for example, European works councils is analysed. Important subjects which have traditionally received little attention in some European labour law systems are covered, for example the fragmentation of the workforce into atypical forms of employment. Attention is also given to the enforcement of European labour law through administrative or judicial mechanisms and the European social dialogue at intersectoral and sectoral levels.

This new edition has been extensively updated, as the EU's influence on this area of social policy continues to grow.

Professor Brian Bercusson was Professor of European Social and Labour Law at King's College London. Immediately before taking up his position at King's, he held the Chair in European Law at the University of Manchester. Previously, Professor Bercusson served as Jean Monnet Fellow and Professor of Law at the European University Institute, and was a visiting professor at the University of Siena.

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Editors: William Twining (University College London)
Christopher McCrudden (Lincoln College, Oxford)
Bronwen Morgan (University of Bristol).

Since 1970 the Law in Context series has been in the forefront of the movement to broaden the study of law. It has been a vehicle for the publication of innovative scholarly books that treat law and legal phenomena critically in their social, political and economic contexts from a variety of perspectives. The series particularly aims to publish scholarly legal writing that brings fresh perspectives to bear on new and existing areas of law taught in universities. A contextual approach involves treating legal subjects broadly, using materials from other social sciences, and from any other discipline that helps to explain the operation in practice of the subject under discussion. It is hoped that this orientation is at once more stimulating and more realistic than the bare exposition of legal rules. The series includes original books that have a different emphasis from traditional legal textbooks, while maintaining the same high standards of scholarship. They are written primarily for undergraduate and graduate students of law and of other disciplines, but most also appeal to a wider readership. In the past, most books in the series have focused on English law, but recent publications include books on European law, globalisation, transnational legal processes and comparative law.

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Preface

The first edition of this book was published in 1996, and although it was by no means the first book on the subject, it was in some way the most original, stimulating and rigorous. As well as being also the most comprehensive in terms of the issues covered, it was the first convincingly to make the case for European Labour Law as a wide-ranging discipline in its own right, with a distinct identity separate from national labour law systems, but influenced by them. Such visionary thinking was to elevate the debate about European Labour Law at a time when, imperfectly schooled in EC law, many British labour lawyers in particular encountered EC Labour Law only collaterally through matters like equal pay or the transfer of undertakings, and then sometimes only cautiously, nervously and reluctantly.

There are now many more books on European Labour Law which have been published since 1996. But few show the same learning, the same experience, or the same understanding of the subject as are revealed in the pages that follow. Indeed, this volume is only Part One (the General Part) of what had been intended as a two volume enterprise (with Part Two (the Special Part) being an examination of the substance of the law). As such, the present volume is concerned principally with the evolution, development and identity of European Labour Law; the process by which European Labour Law is made (notably by Social Dialogue as a means of setting and implementing labour standards), and the emerging constitutionalisation of labour rights, notably in the EU Charter of Fundamental Rights of 2000.

Doubtless, Brian would not have allowed the opportunity to pass without updating the text at various points, and I should take this opportunity here to indicate three developments in descending level of importance. The first is the decision of the European Court of Human Rights in *Demir and Baykara v Turkey* (12 November 2008) which succeeded in putting a smile back on the faces of labour lawyers everywhere. Decided within 12 months of the ECJ's decisions in *Viking* and *Laval* (considered in some detail on chapter 21 below), the Grand Chamber of the European Court of Human Rights consciously and deliberately overruled its earlier decisions on the matter to hold that the right to freedom of association in article 11 of the European Convention on Human Rights (ECHR) now includes the right to collective bargaining.

Moreover, according to the Court, not only does the right to freedom of association include a right to bargain collectively, but there may be a duty to have in place 'legislation to give effect to the provisions of international labour conventions' (para 157), the latter being the yardstick against which the substance of the right to collective bargaining for the purposes of article 11 is to be assessed. This recognition of the right to collective bargaining on the basis of ILO Convention 98 is not only an astonishing development, but at a time when trade unions are looking for ways to challenge the decisions of the ECJ in *Viking* and *Laval*, it is an extremely timely one, given the commitment of the ECJ to take full account of the Strasbourg jurisprudence. The decision in *Demir* thus creates the alluring possibility of complaints being made in the Strasbourg Court against an EU Member State about the latter's failure to comply with the ECHR because of obligations arising under EU law.

The second issue to which attention might be directed is the Temporary Agency Workers Directive (2008/104/EC), which came too late for inclusion in the text, and represents one of the few social rights' achievements of the Barroso Commission, of which there is a great deal of well-placed criticism in the pages that follow. The importance of the Directive – to some extent inspired by, but not a product of, the Social Dialogue process – relates to its introduction of the principle of equal treatment for temporary agency workers, in the sense that the 'basic working and employment conditions of temporary agency workers shall be, for the duration of their assignment at a user undertaking, at least those that would apply if they had been recruited directly by that undertaking to occupy the same job' (Article 5(1)). This principle is, however, subject to a number of important exceptions, including the following in Article 5(4):

Provided that an adequate level of protection is provided for temporary agency workers, Member States in which there is either no system in law for declaring collective agreements universally applicable or no such system in law or practice for extending their provisions to all similar undertakings in a certain sector or geographical area, may, after consulting the social partners at national level and on the basis of an agreement concluded by them, establish arrangements concerning the basic working and employment conditions which derogate from the principle established in paragraph 1. Such arrangements may include a qualifying period for equal treatment.

The enigmatic Article 5(4) is another concession to the United Kingdom, with the website of the Department for Business, Enterprise and Regulatory Reform (incongruously the government department responsible for workers' rights) already containing the text of an agreement between the government, TUC and CBI (negotiated some time before the Directive was even finally approved). This is an agreement on 'how fairer treatment for agency workers in the United Kingdom should be promoted, while not removing the important flexibility that agency work can offer both employers and workers'. Tilting the balance more clearly in favour of 'flexibility' rather than 'fairness' (at least for

some), the parties have undertaken that the principle of equal treatment for temporary agency workers may be postponed for the first 12 weeks of the employment, which means that it will not apply to agency workers on short term placements. See www.berr.gov.uk.

The other major development which addresses issues dealt with in the text at various points is the John Major Maastricht-style opt out from the Solidarity provisions of the EU Charter of Fundamental Rights negotiated by Tony Blair and Gordon Brown as a condition of accepting the Treaty of Lisbon. That opt-out is now enshrined in domestic law – as a result of the European Union (Amendment) Act 2008 – and provides that

1. The Charter does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms.
2. In particular, and for the avoidance of doubt, nothing in Title IV of the Charter creates justiciable rights applicable to Poland or the United Kingdom except in so far as Poland or the United Kingdom has provided for such rights in its national law.

The provisions of the Charter in question are those dealing with rights to information and consultation, the right to collective bargaining, and the right to strike. Quite what significance this will have is unclear, not just because the future of the Lisbon Treaty remains uncertain (though probably now more secure in a climate of global financial crisis), but also because developments in the Strasbourg Court may mean that fundamental human rights will find themselves adopted as universal principles of EU Law (with no British or Polish opt – outs) by routes other than the EU Charter of Fundamental Rights. If this is correct, it will reinforce the predictions in the text below, that the United Kingdom will be unable to build high enough barriers to keep back the rising tide of European Labour Law, even on the right to strike.

As many readers of this book will know (and as will by now be clear), this edition is being published posthumously. The book was completed and submitted to Cambridge University Press shortly before Brian's sudden death on 17 August 2008. The manuscript is published as submitted, and no liberties have been taken with the text, by either the copy-editor, or by myself as proof-reader. In other words, nothing has been done to detract from a book that reflects Brian's great ambition for European Labour Law (a theme that shines through the first parts of the book), his great optimism about the new institutions that are distinguishing features of European Labour Law (a theme that stands out in the middle sections of the book), or his growing disappointment (not to be confused with pessimism) with some national governments and the European Commission, as well as the European Court of Justice (a theme that emerges in the final sections of the book).

That disappointment would, however, have been lifted by the *Demir* case, and by the even more recent decision of the European Court of Human Rights in *Enerji Yapi-Yol Sen v Turkey*, 21 April 2009, where it appears to have been held that article 11 of the ECHR now also protects the right to strike. For Brian was never in any doubt about the purpose of Labour Law generally, or European Labour Law in particular, at a time when much of the vigour and colour have been drained from both disciplines. Nor was he ever in any doubt about the responsibility of the labour lawyer to be steadfast and imaginative in the defence of workers' rights. As will again be clear from the pages that follow, Brian combined profound scholarship with an unyielding commitment to the trade union movement, by which he was held in the highest regard. This book is an extraordinary legacy to labour lawyers everywhere, and a brilliant synthesis of scholarship and commitment by a man who stood at the forefront of his discipline.

KD Ewing

Contents

<i>Preface</i>	<i>page ix</i>
Section I Labour law and Europe	1
Part I European labour law	3
1. European labour law and the social dimension of the European Union	5
2. EU labour law and the UK	42
3. The conceptualisation of European labour law	78
Part II History and strategies of European labour law	99
4. Shifting strategies 1951–1986: ECSC, EEC, harmonisation, financial instruments, qualified majority voting	101
5. The strategy of European social dialogue	126
6. The European Employment Strategy, the open method of coordination and the ‘Lisbon Strategy’	168
7. The strategy of fundamental rights: the EU Charter of Nice 2000 and a ‘constitutional’ strategy	198
Section II The structure of European labour law	257
Part III Labour law and the European social model	259
8. The institutional architecture of the European social model	261
9. A framework of principles and fundamental rights for European collective labour law	288
10. A framework of principles and fundamental rights for European individual employment law	331
11. The European Court of Justice, the EU Charter of Fundamental Rights and the European social model	384

Part IV Enforcement of European labour law	401
12. General principles of enforcement of European labour law	403
13. Administrative enforcement of European labour law	417
14. Implementation and enforcement of European labour law and employment policy through the social partners at national and EU levels	450
15. Individual judicial enforcement of European labour law	467
16. Euro-litigation: collective judicial enforcement of European labour law	496
Part V The European social dialogue	519
17. The European social dialogue: from dynamism to benign neglect 1993–2008	521
18. External and internal scrutiny of the democratic legitimacy of the European social dialogue	563
19. Threats and challenges to and the future of the European social dialogue	607
Section III The futures of European labour law	637
Part VI Agendas and visions of European labour law	639
20. The futures of European labour law: (1) the Commission's agenda – 'modernisation'	641
21. The futures of European labour law: (2) the European Court's agenda and <i>ordre communautaire social</i>	655
22. The futures of European labour law: (3) the agenda of the Member States and of the European Parliament – the Lisbon Treaty and after	715
<i>Index</i>	738

Section I

Labour law and Europe

Part I

European labour law

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.