## LABOUR LAW OR SOCIAL COMPETITION LAW? On labour in its relation with capital through law

Francqui Chair Lectures

Marc RIGAUX Social Law Unit University of Antwerp



Distribution for the UK: Hart Publishing Ltd. 16C Worcester Place Oxford OX1 2JW UK Tel: +44 1865 51 75 30 Fax: +44 1865 51 07 10 Distribution for the USA and Canada: International Specialized Book Services 920 NE 85<sup>th</sup> Ave Suite 300 Portland, OR 97213 USA Tel: +1 800 944 6190 (toll free) Tel: +1 503 287 3093 Fax: +1 503 280 8832 Email: info@isbs.com

Distribution for Switzerland andGermany:DistributionSchulthess VerlagInterseZwingliplatz 2GroenCH-8022 ZürichBE-26SwitzerlandBelgiuTel: +41 1 251 93 36Tel: +3Fax: +41 1 261 63 94Fax: +5

Distribution for other countries: Intersentia Publishers Groenstraat 31 BE-2640 Mortsel Belgium Tel: +32 3 680 15 50 Fax: +32 3 658 71 21

Labour Law or Social Competition Law? On Labour in Its Relation with Capital Through Law Marc Rigaux

www.ua.ac.be/sociaalrecht Translated by Erika Peeters Lay-out by Els Peeters

© 2009 Intersentia Antwerp – Oxford – Portland www.intersentia.be

ISBN 978-90-5095-942-1 D/2009/7849/52 NUR 825

No part of this book may be reproduced in any form, by print, photoprint, microfilm or any other means, without written permission from the publisher.

## TABLE OF CONTENTS

LABOUR LAW OR SOCIAL COMPETITION LAW? A JUSTIFICATION
OF CONTENT AND STRUCTURE
LECTURE 1. LABOUR LAW AS A CORRECTION OF THE FREE
LABOUR MARKET AND SOCIAL COMPETITION
Introduction
Outline 1. Labour as a commodity of which the price is set by a market
mechanism5
I. Production within a capitalist system or the dominance of the
owners of the means of production5
II. Labour as a commodity dissociated from the person who produces it6
III. The (internal and external) labour market generates social
competition6
1. The external labour market7
2. The internal market (within the enterprise or group of enterprises)8
3. Degree of employability8
4. Social competition in the internal labour market8
IV. Social competition as the principal cause of social exploitation and
social exclusion9
1. Exploitation9
2. Social exclusion9
Outline 2. The law as an instrument for the institutionalization of the
dominance of capital over labour10
I. Individual right of ownership, freedom of enterprise and labour,
contractual freedom based on and legitimized by the individual
freedom and equality in law of citizens10
II. The predominance of the fundamental economic rights over the
(fundamental) social rights11

Intersentia

v

Labour law or social competition law?

Outline 3. Labour law and the protection against social competition	13
I. The correction mechanisms of labour law in general	13
II. Interventions in the functioning of the external and internal labour	
markets	13
1. The external market	13
2. The internal labour market within the enterprise or group of	
enterprises	14
III. The standardization of pay and working conditions by means of	
mandatory legal regulations	15
1. The restriction of contractual freedom – The "incorporatieleer"	
(theory of incorporation)	15
2. The regulation of the terms of employment by mandatory	
provisions of law	16
IV. Standardization by means of collective bargaining (or right of co-	
decision)	17
1. The fundamental social right of collective bargaining	17
2. The supremacy of collective contractual freedom over the	
individual one	18
3. The collective agreement and the power of co-determination and	
co-decision as important instruments of standardization	19
V. The introduction of a representative system borrowed from politics	20
VI. The preliminary and necessary conditions for social intervention in	
the free labour market and social competition	21
1. A political (state controlled) structure capable of restraining the	
economic power and imposing social corrections	21
2. Citizenship as an indispensable instrument for the	
individualization of protection for employees	
3. A social counterforce	23
Outline 4. Labour law does not change the economic order, it only	
corrects it very marginally	24
I. Society's undervaluation of the contribution of labour in the process	
of production	24
II. Labour as a negligible factor in the legal specification of the	
enterprise	24
1. The contribution of labour does not usually lead to the right to	
acquire shares in a trading company	24
2. The consultative bodies and representative bodies are not part of	
the company's managerial and administrative structures	
III. The employment contract was defined in terms of authority	25

Intersentia

vi

Table of contents

1. The employment contract, a barrier to the employee's space of action	25
2. The employment contract as concretization of the dominance of the	
economic order over the idea of citizenship	26
Outline 5. Conclusion: from labour law to social competition law	
_	

## LECTURE 2. THE EMPLOYMENT CONTRACT AS A BARRIER TO THE EMPLOYEE'S LEGAL INVOLVEMENT IN THE POLICY OF THE

ENTERPRISE	31
Introduction	31
Outline 1. The employment contract or the instrument of access to and	
ties with the internal labour market	32
I. Preliminary reflections	32
II. The individual employment contract as an instrument for access to	
and ties with the internal labour market	34
The contract of employment withdraws the worker from the	
external labour market – The prospective worker becomes an	
employee	34
III. The contract of employment creates a legal tie with the employer	
and not with the other employees – The contract of employment	
institutionalizes the alienation of work	35
IV. The internal labour market is a semi-planned market	36
V. The model of the internal labour market sometimes gets transposed	
to a section of the external labour market or to a group of enterprises	36
Outline 2. The contract of employment concretizes the position of labour	
within the economic order and specifies its objectives	37
I. The acceptance of the dominance of capital over labour	37
II. The contract of employment concretizes the objectives of the	
contribution of labour in the process of production	38
III. The contract of employment as a barrier to the employee's legal	
involvement in the enterprise's activities and policy	39
Outline 3. Lifting the structural limitation on the employee's	
involvement, resulting from the employment contract – The means on	
the individual level	39
I. Lifting the restrictions on the employee's legal involvement in the	
social correction of the labour market	39
II. The subject of the employment contract	40
III. The concept of "agreed labour" and the changing and	
complementary function of good faith	41
IV. The broadening effect of the "institutional theory" of the enterprise	42

Intersentia

vii

V. The intrinsic limitations of the means mentioned supra I to IV	44
VI. Categories of legal origin or of collective conventional origin to	
broaden legal involvement	46
Outline 4. Removing the barrier to legal involvement – The collective	
dimension – The right to develop a social counterforce – The collective	
claim to legal involvement	47
I. The right to develop a social counterforce: an element of citizenship	47
II. A social counterforce in the enterprise: not only a matter of union	
representation	
1. The various elements of social counterforce	48
2. Union representation as the core of a social counterforce	49
A. Interpretation of the phenomenon	49
B. The union representation or the coexistence of the contract of	
employment with the contract of association	50
C. The trade union representative's immunity	51
D. The right to co-negotiate	52
E. The residuary competence of the trade union representation:	
the competence with regard to labour relations	53
III. Social counterforce and the right to collective action	54
1. The right to collective action within the framework of the	
(Revised) European Social Charter	54
2. The right to collective action in the sense of Article 6.4 (R)ESC	55
3. The limits to the right of collective action	55
IV. Social counterforce and collective bargaining	57
1. The right of collective bargaining and the collective agreements	57
2. The collective labour agreements are concluded at various levels	57
3. Sanctions in the event of non-observance	58
Conclusion: various legal techniques lead to a partial removal of the	
barrier to legal involvement	58

## 

Intersentia

viii

III. The employer or the power of decision with regard to the employment contract: the right to decide unlawfully on the contract of	
employment	61
IV. The employer, the power of decision (and the right of decision) in	01
the enterprise and the collective labour relations within the same	(1)
enterprise	62
V. The employer, the benchmark for the law of collective labour	(1)
relations within the enterprise VI. The effectiveness of labour law: the use of the power of decision in	63
accordance with labour law	61
Outline 2. Labour relations: the relation between economically unequal	04
employees and employers, including at the collective level	61
I. The primacy of the employer's power of decision	
II. The individual labour relation, the relation between economically	04
unequal parties and the limits of labour law protection	65
1. The constitutive elements of labour law protection	
A. The curtailment of contractual freedom	
B. The primacy of the collective contractual freedom over the	05
individual one	66
C. Formalism	
D. Argumentation	
2. The limits of correction	
III. The economic inequality between employees and employers at the	
collective level	69
1. The theory of the same weapons	
2. The right to form a social counterforce: a direct correction of the	
inequality	70
3. Other corrections	70
Outline 3. The collective labour relations and their anchoring in the law:	
the quadrangle of the fundamental rights to information, concertation,	
collective bargaining and collective action	71
I. The fundamental right to information: foundation of the law on	
collective labour relations	71
1. The absence of employee participation	71
2. The fundamental right to information: a collective fundamental	
right with an individual dimension	72
II. The relation of the fundamental right to information with the	
fundamental rights of concertation and collective bargaining	
III. The institutionalized function of the right of collective action	73

Intersentia

 $\mathbf{i}\mathbf{x}$ 

I

1. The triad of the European Social Charter (ESC)	73
2. The institutionalized function	74
IV. The relation between collective labour relations and the power of	
decision in the enterprise: a matter of claiming involvement in the	
application of the power of decision	74
1. Stake and purpose	74
A. The first issue: preservation of employment	74
B. The second issue: standardization and optimization of pay and	
working conditions	75
2. The shape of the involvement	75
A. The institutionalized form	75
B. The non-institutionalized claim to involvement	76
V. Effectiveness of the call for involvement: factual and legal power of	
decision in the enterprise have to coincide	76
Outline 4. Increasing formalism of the concept of employer and	
enterprise or the disconnection between the right of decision and the	
power of decision in the enterprise	77
I. Mechanisms of formalism	77
II. The network company	79
1. Definition	79
2. The collective rights of employees at stake	79
A. Direct and indirect dismantlement	79
B. Right to information and concertation	80
C. The right of collective bargaining at enterprise level	80
D. The right of representation	81
E. The right of collective action	81
III. Corporate governance	81
Outline 5. Broadening the concept of employer (enterprise) or beyond	
formalism	82
I. Searching for techniques that will connect the collective rights of the	
employees with the power of decision	82
II. Overview of the techniques and legal concepts which de lege lata	
allow a broadening of the concept of employer	83
III. The technical business unit	83
1. The notion	83
2. Presumption of technical business unit	84
3. Limits to the broadening	84
IV. The consolidated annual accounts	
V. The enterprises and groups with a community dimension	85

Intersentia

х

Table of contents

VI. The European company	.85
Outline 6. Towards a closer connection between the (collective) notion of	
entrepreneurship as laid down in labour law and economic reality and	
the reality of corporate law	.86
2 1	
LECTURE 4. TOWARDS AN INTEGRATED APPROACH IN	
COMMUNITY LAW OF THE PROCEDURE OF INFORMATION AND	
CONCERTATION IN THE EVENT OF RESTRUCTURING	.87
Outline 1. Restructuring or the redrafting and reconstruction of the	
internal labour market	.87
I. Restructurings, a logical consequence of the merger oriented	
European economic integration policy	.87
II. Restructuring or the change in the structures and organization of	
the production and therefore also of labour	.88
III. Preliminary: the internal labour market and its corrections	.88
1. Tied to the internal labour market	.88
2. The social correction of the internal labour market under pressure	.89
A. The elements of social correction	.89
B. The corrections under pressure	.89
C. Social correction linked to a static conception of the internal	
labour market	.90
IV. New contours of social competition as a consequence of redrawing	
the internal labour market	.90
1. Redrawing the internal labour market	.90
A. The components	.90
B. Rearranging the organization of labour	.91
C. The precariousness of restructuring	.91
2. Restructuring and social competition	.92
3. Social competition and right to information	.92
Outline 2. Restructuring: an economic concept, but not a labour law	
category	.93
I. The marginal use of the term in European and Belgian labour law	.93
II. Restructuring in labour law, a combination of different legal	
concepts	.93
III. Restructuring in labour law, a combined application of rules of law	
with a different content, purpose and legal nature	.94
Outline 3. The Community regulations with regard to information and	
consultation in the event of restructuring: a mosaic with badly fitting	
pieces	.95

Intersentia

xi

I. The right to information: a fundamental right, also according to	
community regulations	95
II. Restructuring within community law, also a matter of collective	
bargaining	96
III. Secondary community regulation	96
IV. The comparison between the various directives, an exploratory	
sketch	97
1. An exploratory sketch	97
2. Points of interest	97
3. The actual comparison	98
Outline 4. Restructuring or the discrepancy between an economic, often	
transnational, phenomenon and a chiefly nationally organized	
information and consultation procedure	102
I. An amalgam of norms: information and consultation, mere eyewash	
1. A multitude of legal norms: the fundamental right to information	
and concertation realized in various ways	102
2. Terminological vagueness with regard to concertation and	
consultation	102
3. Restructuring: not a specific legal category	103
4. Lack of rapport between the directives	103
5. Absence of an adequate information and consultation platform	103
6. The lack of a Community definition	103
7. No alignment of the procedures at the various levels	104
8. Community structures without the institution of an adequate	
European legal frame of reference	104
II. De lege ferenda: some proposals to achieve better efficiency and	
effectiveness	104
Outline 5. The information and consultation procedures throughout the	
implementation legislation: suffering from the same?	105
I. An amalgam of badly fitting dissimilar rules	105
II. Information in advance: a persistent obstacle	106
III. The shortcomings at community level also exist at national level	107
IV. Information and consultation at the level of the production plant –	
No information at the level of the group	107
V. Fragmentation as far as sanctions are concerned: the best guarantee	
for inefficiency and ineffectiveness	107
VI. Unclarity about the existence and legal position of the social plan	108
VII. Absence of an informative and consultative structure in small and	
medium sized enterprises	108

Intersentia

xii

VIII. An integrated procedure is possible. Both in Europe community	
and nationally the legal ground is available political will must follow1 $$	08

Outline 1. From labour law to social competition law, a logical   consequence of the dominance of market ideology 10   I. Social relations, a principle of communicating vessels 10   II. Economism and the dominance of market ratio 11   The globalization of the economic and financial relations as the 11   cause of a globalized labour market 11	)9 10 10 10
I. Social relations, a principle of communicating vessels	)9 10 10 10
II. Economism and the dominance of market ratio11 The globalization of the economic and financial relations as the	10 10 10
The globalization of the economic and financial relations as the	10 10
-	10
cause of a globalized labour market11	10
	10
III. From labour law to social competition law, the factors external to	10
the law11	
1. The disruption of the (national) labour market and the increase of	
social competition11	1
2. Dismantlement of the national state11	ι Ι.
3. The inadequacy of the nationally organized social counterforce11	1
4. Devaluation of (national) citizenship?11	2
5. Increased autonomy for the individual11	2
IV. From social law to social competition law, the factors internal to	
the law11	13
1. From labour law to labour organization law11	13
2. Contractual labour protection11	4
A. Transition from public order law to imperative law11	4
B. Contractual approach and subsidiarity11	4
3. The growing significance of the anti-discrimination legislation as	
an element of labour protection11	15
4. HRM or the core of social competition law11	6
5. From labour protection law to competition law and citizenship11	6
Outline 2. The pursuit of homogeneity in the law: contributory cause of	
the juridification of social relations and labour relations?11	17
I. Juridification of social relations as a peripheral phenomenon of	
economism and market ideology11	17
II. The law and the social relations: the ultimate formalized way of	
conflict settlement11	17
III. Furthering the juridical homogeneity and an umbrella covering	
private relations11	8
1. Homogeneity in the law11	8
A. Open or undetermined norms11	8

Intersentia

xiii

B. The application of the fundamental rights in private legal	
relationships	119
C. Judicial testing of the law against the fundamental rights listed	
and guaranteed in treaties	119
D. Removing the partitions between public and private law	119
E. Removing the partitions between national and supranational	
law	119
2. Increased appeal to the judge	120
A. Increased appeal to the judge: some of the causes	120
B. "Le gouvernement des juges", back from whence it came?	120
IV and therefore also an umbrella for labour relations	122
The juridification of labour relations	122
A. Judicial intervention in collective labour disputes	122
B. Juridification and increased insecurity	122
V. Legal homogeneity, an element of juridification?	123
Outline 3. The employee's citizenship, conceptually inherent to the	
genesis and existence of labour law	123
I. Citizenship and labour law: the three dimensions	123
1. The technical level, the instrument of individualization of the	
correction of social competition	123
2. The citizen as a legal subject: bearer of fundamental rights	124
3. Citizenship as a reference for the connection of labour protection	
legislation and fundamental rights	124
II. The birth of labour law, a realization of fundamental rights before	
the term even existed	
1. Genesis of labour law	
2. Fundamental social rights, rationalization post factum	
III. The right of union freedom: the employees' most basic fundamental	
right?	
1. The various functions of the right of union freedom	
2. Union freedom: the most basic fundamental social right?	
IV. The connection of labour law and fundamental rights	
1. The relative indivisibility of fundamental rights	
2. The connection	
V. Labour law: the worker manifests himself as a citizen	128
Outline 4. The essential function of the fundamental rights (and	
consequently of citizenship) for the protection of the employees' dignity	129
I. The fundamental rights or the legitimacy of the correction of social	
competition	129

Intersentia

xiv

Table of contents

1. Labour law as a field of tension between social competition and	
citizenship12	29
2. The fundamental (social) rights draw their legal power from the	
political legitimacy	30
3. The essential function of the fundamental rights	
II. Labour law or concretizing the right to lead a decent life at the level	
of labour relations	31
III. The fundamental social rights: the legitimacy of the employees'	
claim to involvement in the use of the power of decision in the	
enterprise	31
Outline 5. The precedence in law of the fundamental rights over the	
employer's right of authority – The field of tension between social	
competition and citizenship – Fundamental rights versus economic power .13	32
I. The application of the fundamental rights in the relation between	
citizen and government13	32
II. The basic application and applicability of the fundamental rights of	
the first generation to the relationship between private persons13	33
1. Gradual fading of the distinction between the first and second	
generations of fundamental rights13	33
A. The relevance of the distinction questioned13	33
B. The issue of direct effects13	34
C. The standstill principle13	34
D. The obligatory protection of the basic core of the fundamental	
right	34
2. The application of the fundamental rights of the first generation in	
the private domain13	35
3. Arguments for application13	35
4. The application of the fundamental social right in private relations13	35
A. Direct enforceability13	35
B. Indirect enforceability13	36
III. Contractual limitations on fundamental rights13	36
1. The basis: the employee as bearer of fundamental rights13	36
2. Fundamental rights higher-ranking than the employer's right of	
authority13	36
3. Freedom of enterprise, a fundamental right?13	36
4. Limits on the contractual restriction of fundamental rights13	37
Outline 6. Towards an application of labour law on the basis of	
fundamental rights	38

Intersentia

XV

Labour law or social competition law?

CONCLUDING OBSERVATIONS	
BIBLIOGRAPHY	

Intersentia

xvi