

## FROM LABOUR LAW TO SOCIAL COMPETITION LAW?



# FROM LABOUR LAW TO SOCIAL COMPETITION LAW?

## Editors

Marc RIGAUX  
Jan BUELENS  
Amanda LATINNE

## Authors

Jan BUELENS  
Wolfgang DÄUBLER  
René DE QUENAUDON  
Filip DORSSEMONT  
Teun JASPERS  
Barbara KRESAL  
Fleur LARONZE  
Amanda LATINNE  
Esteban MARTINEZ  
Giovanni ORLANDINI  
Kelly REYNIERS  
Marc RIGAUX  
Willemijn ROOZENDAAL  
Jens M. SCHUBERT



intersentia

Cambridge – Antwerp – Portland

Intersentia Publishing Ltd.  
Trinity House | Cambridge Business Park | Cowley Road  
Cambridge | CB4 0WZ | United Kingdom  
tel.: +44 1223 393 753 | email: mail@intersentia.co.uk

*Distribution for the UK:*

NBN International  
Airport Business Centre, 10 Thornbury Road  
Plymouth, PL6 7PP  
United Kingdom  
Tel.: +44 1752 202 301 | Fax: +44 1752 202 331  
Email: orders@nbninternational.com

*Distribution for the USA and Canada:*

International Specialized Book Services  
920 NE 58<sup>th</sup> Ave Suite 300  
Portland, OR 97213  
USA  
Tel.: +1 800 944 6190 (toll free)  
Email: info@isbs.com

*Distribution for Austria:*

Neuer Wissenschaftlicher Verlag  
Argentinierstraße 42/6  
1040 Wien  
Austria  
Tel.: +43 1 535 61 03 24  
Email: office@nwv.at

*Distribution for other countries:*

Intersentia Publishing nv  
Groenstraat 31  
2640 Mortsel  
Belgium  
Tel.: +32 3 680 15 50  
Email: mail@intersentia.be

PUBLICATIONS ON LABOUR LAW

From Labour to from Social Competition Law?  
Marc Rigaux, Jan Buelens and Amanda Latinne (eds.)

© 2014 Intersentia  
Cambridge – Antwerp – Portland  
www.intersentia.com | www.intersentia.co.uk

ISBN 978-1-78068-221-1  
D/2014/7849/57  
NUR 825



British Library Cataloguing in Publication Data. A catalogue record for this book is available from the British Library.

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.

# CONTENTS

<b>Labour law or social competition law? The right to dignity of working people questioned (once again). Observations on the future of labour law</b>	
Marc RIGAUX .....	1
Prologue .....	1
I. Labour law, labour market and social competition .....	2
A. A different approach of labour law .....	2
B. Marginal correction of the labour market .....	3
C. Preliminary conditions for correction .....	3
D. The liberalisation of the (labour) market and the lack of adequate social correction at the transnational level .....	4
II. The historical link between labour law and human dignity .....	4
A. The primary function of labour law .....	4
B. The principal fundamental right of human dignity .....	5
C. The (wage earning) worker: from commodity to citizen .....	5
III. Labour law, market law and social competition law .....	6
A. The foundation of liberal society .....	6
1. The concept of liberal society .....	6
2. The market as a regulatory mechanism for the satisfaction of social needs .....	7
3. Arrangements to manage and control systems aimed at the satisfaction of needs .....	7
4. Freedom and equality in law or freedom and equality in name only? .....	8
B. Work as an object of market law and competition law .....	8
1. The foundations .....	8
2. Labour law and the limitations of the freedom of the market and competition .....	9
3. The liberalisation of the labour market: an existential threat ...	10
4. The liberalisation of the labour market: an existential threat to labour law .....	11
IV. The right to dignity of working people questioned (once again) .....	11
A. Social correction jeopardised at the international level .....	11
B. Competition between the national systems of social adjustment ...	12
C. In search of an adequate transnational social counterforce .....	12

<b>Droit du travail ou droit de la concurrence sociale ? De droit à la dignité du travailleur est-il (à nouveau) remis en question ?</b>	
René DE QUENAUDON.....	15
<b>Instruments of labour law. It is high time to start wondering whether labour law has not changed into social competition law, meaning that the right to dignity of working people is questioned (once again)</b>	
Jens M. SCHUBERT.....	21
I. Introduction.....	21
II. Instrument – an ambivalent term.....	22
III. Perspectives.....	23
IV. The cloud.....	23
V. Individual labour law instruments.....	25
VI. Collective labour law instruments.....	26
VII. Other instruments.....	28
A. Instruments in procedural law.....	28
B. Economic instruments.....	28
C. Tort law.....	28
VIII. Classification.....	29
IX. Evaluation and final thoughts.....	29
Bibliography.....	30
<b>Les changements juridiques sur le marché du travail externe et interne</b>	
Jan BUELENS.....	33
I. Le changement du mode de production.....	33
II. Quelques exemples des changements de flexibilité interne.....	34
III. Flexibilité externe: l'exemple de la sous-traitance.....	36
<b>Le droit du travail et les modifications apportées au marché du travail</b>	
Esteban MARTINEZ.....	45
I. Les changements de la norme sociale de l'emploi.....	45
II. La mobilisation flexible des travailleurs.....	46
III. L'affaiblissement des protections liées au contrat de travail salarié.....	49
A. L'enjeu de la relation d'emploi.....	50
B. Travailler sans limites.....	51
C. Une pluralité d'employeurs.....	53
IV. Conclusions.....	54
Bibliographie.....	55

**Labour law and competition**

Wolfgang DÄUBLER..... 57

I. Introduction ..... 57

II. Competition ..... 57

III. Labour law..... 58

IV. Conflict or coexistence?..... 59

    A. The U.S. experience ..... 59

    B. The German experience ..... 60

    C. Coexistence after the Second World War in Western Europe..... 60

V. The growing importance of the principle of competition ..... 62

VI. Attacks on labour law..... 63

VII. Counterattacks?..... 65

**Market rules and the right to strike: a different approach**

Giovanni ORLANDINI and Filip DORSEMONT ..... 67

Introduction ..... 67

I. A judicial reappraisal of market rules and the right to strike ..... 70

    A. Reformulating the issue of horizontal effect..... 70

    B. Private sources versus private actions ..... 71

    C. Employers' behaviour versus trade unions' activities ..... 74

    D. Collective agreement, collective bargaining and collective actions. 78

    E. Restrictions on collective actions: non-discrimination and protection of third parties ..... 80

    F. Horizontal direct effect or indirect state liability? ..... 84

II. A failed legislative road *de iure condendo*: The Monti II proposal..... 86

    A. Legal basis ..... 86

    B. The balance of Monti II ..... 88

    C. Problems of the dispute resolution mechanism..... 89

    D. Critique on the alert mechanism..... 96

III. A constitutional pathway ..... 99

    A. The accession to the European Convention for the Protection of Human Rights and Fundamental Freedoms ..... 99

    B. Prospects of the accession ..... 101

    C. A social progress clause ..... 103

Conclusions..... 103

**Fundamental social rights: An added value to the protection of workers?  
The increasing importance of fundamental (social) rights to the  
development of labour law?**

Teun JASPERS and Willemijn ROOZENDAAL .....	107
I. Introduction .....	107
II. Controversial aspects .....	109
III. The meaning of ‘fundamental’ social rights .....	112
IV. EU law and respect for fundamental rights .....	116
A. Introduction .....	116
B. The EU legislator and fundamental social rights .....	116
C. The CJEU and fundamental social rights .....	118
V. Competition between individuals and equality rights .....	122
A. Introduction .....	122
B. Protection against discrimination on the grounds of sex .....	123
C. Protection against age and disability discrimination: reconsidering the proportionality test .....	128
VI. Concluding remarks .....	132

**Le droit du travail, la restauration de l’autonomie de la volonté  
individuelle et la montée de la soft law**

Fleur LARONZE .....	135
I. La réalisation du conflit entre l’autonomie de la volonté individuelle et la soft law .....	139
A. Les conditions d’émergence du conflit .....	139
1. L’existence du conflit conditionnée à l’articulation entre l’autonomie de la volonté collective et l’autonomie de la volonté individuelle .....	139
2. L’existence du conflit conditionnée à l’articulation entre la dimension individuelle et la dimension internationale .....	140
B. Les effets de la reconnaissance du conflit .....	142
1. Un effet pavlovien .....	142
2. Un effet secondaire .....	143
II. La résolution du conflit entre l’autonomie de la volonté individuelle et la soft law .....	143
A. La régulation du conflit .....	144
1. La régulation du conflit par l’application de règles de conflit ..	144
2. La requalification des normes en conflit par le juge .....	145
B. L’anticipation du conflit .....	146
1. L’anticipation du conflit par la « fusion-absorption » des normes individuelles .....	146



2. L'anticipation du conflit par la « fusion-intégration » des normes individuelles .....	147
<b>Mutating or dissolving labour law? The fundamental right to dignity of working people questioned (once again)</b>	
Barbara KRESAL .....	149
I. The right to dignity and human rights – why is it so difficult to take them seriously in labour relations? .....	149
II. Current challenges of labour law in the light of the right to human dignity .....	153
III. Conclusion: The way forward – mutating or dissolving labour law? .....	157
References .....	158
<b>Human dignity and decent work as ultimate objectives of labour law. Towards ‘basic social law’ with a labour law component?</b>	
Kelly REYNIERS .....	161
I. Human dignity .....	161
A. A dynamic concept with ethical and philosophical roots .....	161
B. ... but also a legal concept .....	162
II. Decent work: a factor of human dignity .....	165
A. An obvious nexus between decent work and human dignity .....	165
B. Decent work: concept .....	165
1. In general: ensuring the employee’s fundamental rights in the best possible way .....	165
2. Specifically: a means of identifying the ILO’s major priorities .....	166
C. Some remarks from a (Belgian) legal point of view .....	168
III. Labour law as (necessary) instrument to enforce and achieve decent work .....	169
IV. Towards basic social law with a labour law component? .....	170
A. The issue .....	170
B. Labour law... “for everyone who performs labour” .....	171
C. Fundamental rights and international labour standards as incentives to change or extend the personnel scope of labour law .....	173
D. “Labour” as the first application criterion for labour law .....	173
V. Conclusion .....	174
<b>Labour law or social competition law: some concluding critical remarks</b>	
Amanda LATINNE .....	175
Exit solidarity, enter labour as a commodity .....	176
Under pressure .....	178

Me and my car ..... 180  
Sympathy for the corporations..... 182  
Come together ..... 184  
Now that we have found out, what are we going to do?..... 186