
In the aftermath of the trilogy of cases from the European Court of Justice (ECJ), Viking Line (C-438/05), Laval (C-341/05) and Rüffert (C-346/06) the map for labour and employment law has been redrawn. This redrafting is the focus of this highly relevant book, edited by Professors Edoardo Ales and Tonia Novitz. The study is comparative and includes the following member states: Belgium, France, Germany, Italy, Spain, The Netherlands and the United Kingdom. Highly distinguished professors have submitted national accounts. The book comprises a preface and four chapters. Chapter 2 – the most comprehensive – contains a detailed description of the law in the various member states with respect to industrial action. The analysis of the seven national legal orders follows in the main the same format, id est (i.e.) what collective action is, the juridical status of collective action, limitations of collective action, judiciary or administrative control of collective action, procedural requirements, balancing collective action with other rights and freedoms on the national level and – ultimately – the potential impact of the ECJ case law on the national regulations concerning collective action. Chapter 3 is an account of the international private law aspects with respect to industrial action. Chapters 4 and 5 are a learned summary and evaluation of the law as submitted by the contributors in chapter 2.
It is obvious even from a cursory reading of the book that the seven national legal orders are very different. To be sure, there are some similarities, but the differences are more striking. It is found that international sources usually play a very little role in the countries under scrutiny. On the other hand, is it possible to bridge the gap between the ECJ law in this triad of cases as referenced above and the individual right of workers to take industrial action, such as in France, Italy and Spain, where this constitutional right is adopted in its broadest sense? A proportionality test with respect to industrial action is adopted exclusively in Germany. The approach to lockouts is very different in the studied countries. An immunity test is applied in the United Kingdom, which is hardly the case in any other member state. Essential public services are treated in a very detailed manner in some of the countries, such as France. The approach to political strikes is highly varied, at times even prohibited.

It is evident that diversity is the rule in the seven social models that are the subject of the book. Other social models exist as well, such as in Sweden and the other Nordic states. If the ECJ in the triad of cases had taken the diversity principle seriously in the Treaty, i.e. the principle laid down in Art. 151 of the Treaty on the functioning of the European Union (TFEU) wherein it is stated that the Union „shall implement measures /within the area of social policy/ which take account of the diverse forms of national practices, in particular in the field of contractual relations, and the need to maintain the competitiveness of the Union economy“, the outcome might have as well have been the opposite in those cases.

Prof. Novitz makes a highly relevant comment (p. 209) that the ECJ case law must be „revisited and substantially altered“, and furthermore (p. 252) that „the approach of the ECJ to legal regulation of industrial action does not reflect the diversity of Western European industrial relations systems“. Prof. Novitz said already in her major treatise on international labour law and industrial action (see her book, International and European protection of the right to strike, 2003, p. 259) that „the danger is that the ECJ will decide independently of the findings of other international supervisory bodies on the scope and content of the right to strike, as it has been shown to do in the past in relation to other rights set out in the ECHR /European Convention of Human Rights/. Given the Court’s limited experience in the labour law field, due to the restrictions on EU competence to date, this may be a cause for concern."

At that time, 2003, Prof. Novitz could not know how right she was. It took only five years for this very danger to materialize. The references in Viking Line and Laval to the international instruments, such as the Conventions of the International Labour Organization (ILO), and in the light of the later case law of the European Court of Human Rights in the two Turkish cases (Demir, 12.11. 2008 and Enerji, 21.4. 2009), can be seen as simply lip service to these fundamental rights (see further my comment in „A Swedish Perspective on Laval“, in Comparative Labor Law & Policy Journal, Vol. 29, No. 4, Summer 2008). To be sure, the ECJ did recognize the right to take collective action as a fundamental right, since it forms part of the general principles of European Union (EU) law. Having said that, however, the same right is siphoned through the lens of the four economic freedoms of the Treaty, as if economic law is paramount to social policy law.

The Rüffert case is even more striking wherein the ECJ struck down the delicately built up federal minimum wage system in Germany by giving priority to the competitive advantages – only – which the Polish provider of services could avail itself of by offering far lower wages than was provided for in Germany, discarding any balance
in between „fair competition“ and „respect for rights of workers“, which are the basis of the Posting of Workers Directive (Directive 96/71/EC).

The very libertarian approach adopted by the ECJ in the trilogy of cases of Viking Line, Laval and Rüffert does not square very well with the adopted social policy ambitions of the EU. In the preface of the book (chapter 1, p. 2) Prof. Silvana Sciarra also proffers the view that after having read this book the conclusion „is that caution and respect must be paid, when entering the field of autonomous national systems of industrial relations“. I fully agree with that statement.

I can strongly recommend that any interested scholar read this book very carefully. It is not possible in such a short space – as a review – to give justice to the richness of details and wisdom from all contributors and also national social features which are depicted in the book. However, the book sheds more light on the issues than have been discussed in scholarly circles since the infamous trilogy of cases was handed down by the ECJ in 2007 and 2008.

The lesson of the book is that when we approach labour and employment issues, there is less scope for a command from above. The diversity principle in the TFEU must be sustained with more vigour. The rhetorical question is why the ECJ did make the diversity principle a dead letter in the trilogy of cases of Viking Line, Laval and Rüffert?

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