Manfred Weiss is one of the most prominent figures in the fields of labour law and industrial relations. During his career, he held visiting professorships at prestigious universities and participated in different missions as a consultant for the International Labour Organisation and the European Commission. He has been a member of the scientific committee of many leading labour law and industrial relations journals, writing extensively on these topics. In 2015, he received the Labour Law Research Network (LLRN) Award for his outstanding contribution to labour law.

Materiali di diritto del mercato del lavoro
e relazioni industriali ordinati da
Maurizio Del Conte e Michele Tiraboschi

Collana della Fondazione ADAPT

Scuola di alta formazione in
Transizioni occupazionali e relazioni di lavoro

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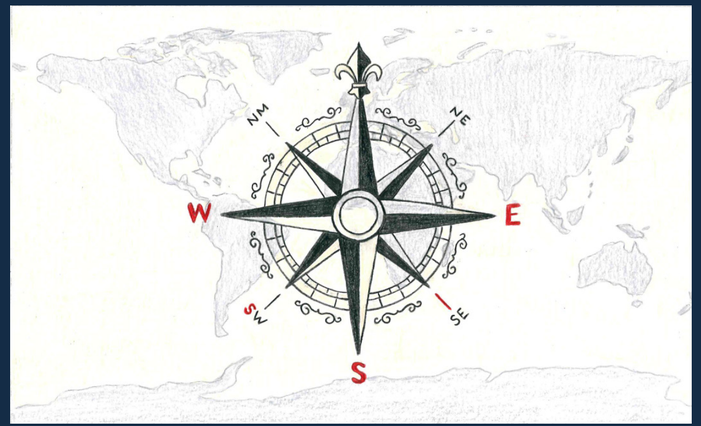
Manfred Weiss A Legal Scholar without Borders

ADAPT UNIVERSITY PRESS

Manfred Weiss

A Legal Scholar without Borders

Selected Writings and Some Reflections on the Future of Labour Law



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This volume collects some of the most significant works by Manfred Weiss. They are preceded by an interview made by Michele Tiraboschi to Prof. Weiss about the origins of the German and European culture of work. It is argued that, in considering the uncertain scenario resulting from globalisation and the economic crisis, it is necessary to review labour protection, without moving away from the fundamental principles of labour law.

Manfred Weiss has been a pioneer of comparative labour law and a role model for labour law scholars who met him in the early stages of their academic career. With his work, he paved the way for a new approach to legal research, standing up for the weakest and those who struggle to have their voices heard.

Manfred Weiss has showed us that we can engage in research and share the results of our work, promoting academia not only in terms of individual careers but as an area contributing to the future of work and benefitting institutions and people. In order to conduct academic research in a way that genuinely serves the community, we need inspirational figures. Manfred Weiss stands out as a role model for all of us, and for this he is deserving of our admiration and gratitude.

This book cover was hand-drawn by Lavinia Serrani and depicts an old geographical map with a compass placed at its centre. The aim is to represent in simple terms the extraordinary effort made by early labour law scholars who ventured into legal comparison, a fascinating approach that was largely unknown at the time. This research methodology is widely implemented today, although it has often turned into mere descriptivism, partly because there is little awareness about its scope.
Manfred Weiss embodies the pioneers of legal studies, serving as a role model for the new generation of labour law scholars. He represents a source of inspiration for those who want to engage in legal comparison, guiding them through work-related changes and new developments in labour law. Manfred Weiss' mastery of comparative analysis and authoritative call to respect human values should be the lodestars of legal studies, especially when dealing with sensitive and constantly evolving labour-related issues.

Materiali di diritto del mercato del lavoro e relazioni industriali ordinati da MAURIZIO DEL CONTE e MICHELE TIRABOSCHI

Collana della FONDAZIONE ADAPT – Scuola di alta formazione in *Transizioni occupazionali e relazioni di lavoro*

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Manfred Weiss
A Legal Scholar without Borders

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Foreword

by Michele Tiraboschi

This volume collects some of the most significant works by Manfred Weiss. The idea behind this book is that an international community as diverse as that of labour law scholars needs to nurture the memory of the past in order to envision the future.

Manfred Weiss has been a pioneer of comparative labour law and a role model for labour law scholars like me, who met him in the early stages of their academic careers. He has always been a thoughtful person, offering advice and encouragement. With his work, Manfred Weiss paved the way for a new approach to legal research, standing up for the weakest and those who struggle to have their voices heard.

As we tried to represent in the book cover illustration, Manfred Weiss has showed us that we can engage in research and share the results of our work, promoting academia not only in terms of individual careers but as an area contributing to the future of work and benefitting institutions and people.

The papers collected in this book are preceded by an interview with Manfred Weiss about the origins of the German and European cultures of work. It is argued that, in considering the uncertain scenario resulting from globalisation and the economic crisis, it is necessary to review labour protection, without moving away from the fundamental principles of labour law.

Delving into the life and legacy of Manfred Weiss revived the *raison d'être* of labour law and the sense of belonging in the labour law community. He taught us to work with loyalty and a collaborative spirit to help others, championing a cause that is more important than our ambitions and individual careers.

This volume is not a mere tribute to Manfred Weiss – which is not up to me and the ADAPT research group I proudly coordinate. Rather, this book

should help reassert the function of labour law as a tool promoting values and safeguarding people, therefore establishing a forward-looking approach that goes beyond the satisfaction derived from publishing papers or participating in academic events.

To conduct academic research in a way that genuinely serves the community, we need inspirational figures. Manfred Weiss stands out as a role model for all of us, and for this, he is deserving of our admiration and gratitude.

* * * * *

In presenting the readers with this book, I feel the urge to thank those who contributed to its making. I am grateful to Pietro Manzella, for accurately proofreading the text, and to Silvia Spattini who, in her capacity as ADAPT's General Director, enabled this publishing venture. I am also indebted to Laura Magni for her invaluable editorial work and to all the ADAPT researchers and doctoral students who read the drafts of this manuscript and improved it significantly with their useful comments.

About Manfred Weiss

by Pietro Manzella and Silvia Spattini

Born in 1940 in Möhringen (a town which is now part of Tuttlingen) in the Baden-Württemberg region, Manfred Weiss has come to be one of the most prominent figures in the fields of labour law and industrial relations.

After graduating in law in 1964 from the University of Freiburg, Prof. Weiss moved to Giessen, near Frankfurt, to begin his doctoral studies.

From 1965 to 1966, he spent a research stay at the Center of Law and Society at Berkeley University, where he was awarded a scholarship to study judicial decision-making in the US. This would be the topic of his doctoral thesis, which he defended in 1971, and also of his first monograph.

He worked first as a research assistant (from 1970 to 1972) and then as an associate professor (from 1972 to 1974) at the Faculty of Law of Goethe University in Frankfurt.

After serving three years as a full professor of civil and labour law at the Law School of the University of Hamburg, in 1977 he moved back to Goethe University, where he is still working as a professor emeritus.

During his career, Manfred Weiss held visiting professorships at many prestigious universities worldwide: at the University of Leuven (1984) and Ghent University (2008) in Belgium; at the University of Paris-Nanterre

(1985, 1992, 1994, 2003, 2004, 2005), the University of Strasbourg (1987), Sorbonne University (1993, 1994, 1996), and the University of Bordeaux (1996, 1999, 2004 and 2005) in France; at the University of Pennsylvania (1987, 1988 e 1991), the University of Gainesville (1989); the University of New York (1997 and 2001), and the University of Illinois Urbana-Champaign (2011) in the USA; at Western Cape University (from 2009 to 2018), and the University of Pretoria (2012, 2014, 2015, 2016, 2018) in South Africa; at Ca' Foscari University in Italy (from 2013 to 2019).

Prof. Weiss was also awarded many honorary doctorates, from the University of Budapest in 2005; from the University of Bordeaux in 2011; and from North-West University (South Africa) in 2015.

Manfred Weiss also chaired many national and international associations: from 2000 to 2003, he served as the president of the International Industrial Relations Association (IIRA, now ILERA – the International Labour and Employment Relations Association); from 1989 to 1995, and from 2000 to 2006, he was a member of the executive committee of IIRA; from 1990 to 1995, he was appointed president of the German Association of Industrial Relations (GIRA); from 1998 to 2002 he became deputy president of German Lawyers' Association (DJT).

Starting from 1980, Manfred Weiss participated in different missions as a consultant for the International Labour Organisation (ILO). He worked in Zambia (in 1983 and 1985); Sri Lanka (1984); Sudan (1987); Trinidad & Tobago (1988); Hungary (1991); South Korea (1991); Poland (1991); Bulgaria (1992 and 2006); South Africa (1994); and Romania (2004). Since 1986, he has also been a consultant for the European Commission.

In 2015, Manfred Weiss received the Labour Law Research Network (LLRN) Award for his outstanding contribution to labour law. He has been a member of the scientific committee of many leading labour law and industrial relations journals, writing extensively on these topics.

Part I
BETWEEN PAST AND FUTURE: AN INTERVIEW WITH MANFRED WEISS

by Michele Tiraboschi

The End and the Revival of the European Integration Project

TIRABOSCHI – If an early-career researcher wanted to know more about your life and academic career, she would find little information on the Internet.

WEISS – Does anyone care, anyway?

TIRABOSCHI – I guess so, Manfred. The large and diverse international community of labour law scholars needs prominent figures like you that can play an inspirational role. This holds particularly true for the new generation of academics, who might not be used to relations and international meetings which are increasingly frenetic and, I would add, career-oriented. Furthermore, many colleagues are pretty active on the Internet today, running their blogs and disseminating research and projects through the Web. Despite existing copyright rules, publications and detailed bibliographical information can therefore be accessed free of charge with a few clicks of the mouse. In addition to the way academics used to be portrayed – i.e., brilliant minds working in their ivory towers – what is changing is perhaps research itself. Nowadays, engaging in research without sharing its findings is the same as not doing it at all. Besides self-promotion to attract attention and funding, what is relevant is the scholar's need to change society through her work.

WEISS – The practical implications of research and the focus on actual issues have always been central aspects of my career. That is why I have never thought that labour law could be understood only by reading books, important as they are. Law has its logic but, first and foremost, it must serve society, individuals, and interests – including economic ones – by promoting certain values.

TIRABOSCHI – Right, Manfred. I would like to know your opinions on legal scholars' more innovative role, on the growing relevance of social networks, and on how academics and social scientists can engage in discussions in new virtual spaces, which bring together politicians, journalists, trade unionists, and business representatives. We should also look at the other side of the coin, i.e., academics' growing narcissism, the fact that research is often pursued only for the sake of their career, equivocal forms of self-promotion, and the risk to play down the complexity of the issues examined.

WEISS – The idea that academics sit in their ivory towers – aloof and disengaged from reality – persists. Yet I can assure you that the generation of labour law scholars I belong to is fully aware of societal issues and prompted by a genuine desire to change the world. For this reason, I do not think that the Internet and social networks are the space where serious and rigorous academic research can be conducted, all the more so if one considers the concentration and the intensity needed in our work. The depth of analysis contained in a book or an academic paper cannot be summarised in a tweet. This is why I have always refused to give summaries or slides when teaching. In short, we cannot ignore the idea that conducting research requires time, effort, and rigour. The same holds when we present our work at public events, where the evocative power of words and the intensity of deep thought will always be more engaging than a mere Power Point presentation. Finally, we shall not underestimate the fact that – while valuable academic research impacts reality – this depends on the links between generations of scholars belonging to a community that speaks the same language and is not wary of innovation, as long as it is respectful of tradition.

TIRABOSCHI – Your words are a further confirmation of the real purpose of our talk. The aim here is not to praise or reminisce about the old days, but to look at the future without forgetting our past. In this respect, your story as a man and as an academic speaks for itself. Born in Tuttlingen (Germany) – once an unknown town in Baden-Württemberg and today regarded as the capital of medical technology – you became one of the leading labour law scholars at the international level.

WEISS – To be precise, I was born on 1 June 1940 in Möhringen, a small town of only 3,000 inhabitants between the Black Forest and Lake

Constance. Around the 1960s – I had already left by then – this village was annexed to Tuttlingen, which counted about 30,000 people.

TIRABOSCHI – Can you tell us something about your childhood? You were born in Germany, in the midst of World War II. A proponent of the European social model, you grew up in a dramatic era when the hopes of European integration were dashed by the wounds and rubbles caused by this conflict.

WEISS – Originally, Möhringen was deeply Catholic. The Church played a central role in the life and economy of our small community. Yet its influence shrank over time, due to the immigration flows from Eastern Europe. Many refugees settled in our town, coming from areas that once belonged to Germany, and after the war they were annexed to Poland and the Czech Republic. They were mostly Protestant, so ever since I was a young boy I had to deal with diversity and the complex problems of integration. I learnt a lot from those years.

TIRABOSCHI – Raised in a small and remote village in the heart of Europe, you became a globetrotter with a German approach but a cosmopolitan attitude. How was it possible? Do you come from a family of academics?

WEISS – No. My father – who grew up in a foster family – was a workman who also faced unemployment in his life. For a long time, he was a sales representative in a local brewery, while my mother was a housewife. We had a modest standard of living and I remember that during my childhood we could never afford to go on holiday. My only trip abroad was arranged during my French course at school. Thanks to this, I had the opportunity to spend a few weeks in Paris in the 1950s.

TIRABOSCHI – While my curiosity about your childhood does not concern private matters, your memories help us understand how your personality developed in the context of a global tragedy. I do not want to talk about winners and losers in those years. Rather, I am interested in your upbringing under these exceptional circumstances, which marked Europe's destiny forever. Perhaps, it is the tragedy of war that might explain your human and professional commitment towards European integration, which is far from complete and has often been questioned.

WEISS – I have no memories of the war because we lived in an area that was not directly involved. But I remember the French occupation which took place afterwards. We children soon made friends with the French soldiers. They would take us in their jeeps, sometimes giving us chocolate, etc.

TIRABOSCHI – Was your family involved in the war?

WEISS – My father was not in the army, but during the war, he had to work in a factory that produced military equipment for our country. The plant was located in Bühlertal (a small town near Baden-Baden) where the social conditions were the same as those in Möhringen. We lived there from 1941 to 1947.

TIRABOSCHI – Tell us something about your schooling. I don't know about Germany, but in Italy living outside large cities and with limited financial means made it difficult to access university education, even well after the war.

WEISS – When I started school in 1946, the school building was still occupied by the French army. Therefore, we used to have class in a restaurant, where all pupils were taught together in one room, regardless of their grade level. It was not the ideal situation to ensure effective teaching, but it only lasted one year. The following year we moved back to Möhringen, where school facilities were available and where my father found work at a brewery. My parents wanted me to finish primary school and start working immediately. They were concerned about the financial consequences of continuing my studies. Thanks to one of my teachers and the support of my father's employer, I could access secondary school, where I was quite successful. For the last three years and until graduation, I was also appointed as speaker of the student representatives.

TIRABOSCHI – Do you have memories of the teacher you have just mentioned? And what about your father's employer?

WEISS – I can't recall too much of my teacher, but I remember that he was young and passionate about his job. He went to the factory where my father worked and urged his employer to allow me to continue studying. My father's employer agreed to do so and my father followed suit, otherwise,

he would have been accused of disobeying an order. Now we can say that my life changed radically because an employer exercised his power and an employee – my father in this case – accepted his decision!

TIRABOSCHI – You said you were too young and that you have vague memories of the war because you lived in a remote area. Yet, at some point in your education, you too had to deal with the war, with Nazism and its consequences for the Germans. Was this the case? Or, were the events taking place in those years intentionally ignored in educational settings?

WEISS – In fact, a major issue in my childhood was that neither parents nor teachers were willing to discuss the events of the Nazi period and the consequences of the war. Nazism then was taboo in our society, because of fear, shame, and reticence. I found out about the atrocities of that period by myself, and it was a traumatic experience for me and many people of my age. Fortunately, the efforts to inform about the events taking place during the Nazi period multiplied afterwards, and I could see this when my children went to school.

TIRABOSCHI – 'The past that does not pass' has been one of the most relevant issues in the evolution of law – especially labour law – in post-war Germany. As you said, war-related discussions were taboo, also in the academic community. We will talk about this later. For the time being, can you tell me why you chose law at university? Did you want to become a lawyer or a magistrate? No one in your family was an academic, so how did you develop a passion for this technical subject?

WEISS – In 1960, I enrolled at the law school of the university in Freiburg, because I wanted to understand the role of law in society – specifically its abuse, as was the case in the Nazi period. How was it possible to apply an unjust law? How could the law legitimise the most heinous crimes against humanity? In short, I was interested in societal principles and values, but also in the techniques and the legal safeguards which were necessary to avoid past mistakes.

TIRABOSCHI – What subjects did you enjoy most at university?

WEISS – I liked the philosophy of law, i.e., what we now call 'general theory of law'. However, I soon learned that the answers to my questions

could only be found through an interdisciplinary approach. Therefore, I also engaged in social science studies, though this dimension of analysis was offered neither in Freiburg nor in Berlin, where I studied for two semesters. Unfortunately, in German universities there was and still is a rigid separation between disciplines and interdisciplinarity is not widespread, though it is fundamental when dealing with societal issues.

TIRABOSCHI – Can you name the professor who had the greatest impact on your education?

WEISS – As a university student, meeting Thilo Ramm was an extraordinary experience because he supported my interest in the theory and sociology of law. His teachings prompted me to study labour law, which then became my main field of research. Regrettably, later our views diverged to such an extent that our academic collaboration came to end.

TIRABOSCHI – Who was then your mentor in your education and your brilliant career as a labour law scholar?

WEISS – The most important person in my academic career was Spiros Simitis, who later on became a colleague and a friend of mine at the University of Frankfurt. He guided and also introduced me to the international community of labour law scholars. It was also Simitis who vouched for me with the International Labour Organisation (ILO) and the European Commission, with which I collaborated closely and fruitfully for many years.

TIRABOSCHI – Being a good mentor also means opening opportunities for deserving, early-career researchers, asking nothing in return. Showing appreciation for those opportunities is also important, but this is a controversial issue that needs careful consideration. As a general rule, would you advise a student to choose law at university? Don't you think that the role of legal scholars has changed recently? Do this reluctance towards interdisciplinary studies and considerable formalism affect innovation in this discipline?

WEISS – Yes, I would encourage someone to enrol in a law programme without the slightest hesitation, because nowadays compliance with the rule of law is at risk in many areas of the world. I have already mentioned

the importance of studying law through an interdisciplinary approach to reflect on the social, economic, and even ethical implications of the legal dimension. This approach is not provided by law faculties everywhere, so law students should be proactive to deal with the rigid structure of university curricula.

TIRABOSCHI – Do you have other memories of your university years? As said, finding information about your life is not easy and I do not want to invade your privacy. Interestingly, Esther van Kerken's insightful paper on your contribution to the evolution of labour law and democracy in South Africa ([1]) says that you met your wife Monique at university. You have been together your entire life, nurturing feelings of respect, esteem, and trust.

WEISS – Monique and I met in Freiburg at the start of the university year, on 2 May 1960. She was looking for the law school library and I showed her the way. Then we went together to Berlin for two semesters, and Monique followed me also when I moved to Berkeley for a research stay. We got married in 1967. There is not much to add about my first years as a law student. Legal studies in the 1960s were far from interesting, especially for people like me who were driven by a desire to deal with social issues in more practical terms. Human rights were not discussed in class and the degeneration of law that occurred in the Nazi period had yet to be addressed.

TIRABOSCHI – When did you first approach labour law? And what about your first research topic? Did you choose it yourself? Or, was it recommended by others?

WEISS – After finishing university, I moved to Giessen, a city near Frankfurt, to begin my Doctoral thesis, which was about the general theory of law, particularly judicial decision-making in the United States. At this stage, I was fascinated by Ludwig Bendix, a Jewish lawyer who worked in Berlin during the Weimar Republic. Bendix challenged the idea that judges applied the law in a purely mechanical way, arguing that other factors – e.g., personality, culture, preferences, and opinions – played a decisive role in the implementation of rules. While studying Ludwig Bendix's biography, I learned that his son, Reinhard Bendix, was a world-renowned scholar who taught sociology at the University of California. I, therefore,

made contact with him and I was surprised to know that there were many unpublished manuscripts by his father that could be read.

TIRABOSCHI – So you decided to go to Berkeley.

WEISS – Exactly. I applied for a fellowship as a research fellow at the Center for the Study of Law and Society at UC Berkeley. The centre was not part of the Law School at the time, though it was later integrated into it. In the United States, I understood that the factors affecting judges' decision-making had been discussed at length, giving rise to significant controversy. This aroused my interest in this subject, which became the topic of my Doctoral thesis. I took advantage of my stay in the United States to study the unpublished manuscripts of Ludwig Bendix, editing a collection of his writings upon my return to Germany ([2]).

TIRABOSCHI – In the paper by Van Kerken ([3]) I have already referred to, they say that you took part in the protests against the US policy for the war in Vietnam, and also in demonstrations in favour of minorities and the poor. By then, you had already decided whose side to take: that of the weakest who cannot express their thought freely.

WEISS – My stay at Berkeley was important for me as a person and as a researcher. I was used to German universities, their hushed atmosphere and their disengagement with politics prior to the protests of 1968. Living in Berkeley was a wake-up call and helped me to learn to take sides. Almost immediately, I joined the Vietnam Day Committee to demonstrate against the US involvement in Vietnam, the Free Speech Movement against the repression of non-conformist opinions, and the Civil Rights and War on Poverty Movement to try to improve the conditions of minorities. I took part in the first march from Berkeley to Oakland to rally against the US involvement in Vietnam and actively campaigned for the election of a Democratic candidate, Bob Sheer, who was the editor of *The Minority of One*. I developed my political sensibility at Berkeley and I decided that I would fight for human rights wherever they were at risk. Every day, around noon, we would meet on the famous steps of Sproul Hall and eat packed lunches while listening to activists. At that time, my research was on the theory and sociology of law, not yet on labour law.

TIRABOSCHI – This story surprises me a bit considering your mild-mannered, albeit determined, character. I can't imagine you in the middle of a student protest!

WEISS – I was young and you did not know me yet. I have become calmer over time.

TIRABOSCHI – Thanks to the Internet, it is now easy to access the libraries of the world's most prestigious universities and make contact with internationally-renowned academics. Open-access policies have made research and publications freely available. As this was not the case in the post-war period, how did you get to Berkeley?

WEISS – At that time, accessing publications and adopting an international and comparative approach when studying law was undoubtedly more difficult than today. In Germany, we were not even given direct access to libraries. You had to make a formal request and wait for the books to be given to you. While different, the system at Berkeley was equally complex. Libraries could be entered freely, but sometimes leading legal scholars such as Hans Kelsen placed books on the wrong shelf, causing a lot of confusion. As for your question, there are pros and cons to everything. In the old days, academic research followed a more linear path: we used to approach professors and then read books with attention, because we knew we had the privilege to further our knowledge. Today's significant amount of information available on the Internet might negatively affect research because scholars do not have enough time and concentration to go through the relevant literature.

TIRABOSCHI – Was there anything in US universities that caught your attention?

WEISS – The way lectures were held surprised me, as they were open exchanges of ideas between students and professors. At that time, the teaching approaches used in US and Germany were two worlds apart. In Germany, the students listened to the professors' monologues. At Berkeley, the discussions were based on the materials distributed to the students beforehand, so there was no improvisation. I enjoyed this approach and I have used it in my career.

TIRABOSCHI – We were approaching 1968 and student protests mounted all over the world against authority, also at universities. What were your feelings back then? And what do you think of that period now?

WEISS – In principle I supported – and still do – the 1968 movement, though I did not agree with the violence that followed. In Germany, 1968 was important because it freed society from authorities whose approach was based neither on solid arguments nor on transparent procedures. The 1968 protests changed the climate at universities and in society, more generally, fuelling a debate as to how to deal with the country's past tragedy, i.e., Nazism. Therefore, many views which had been taken for granted were challenged through pluralistic and democratic processes. I must confess that I was never particularly active in relation to national issues, except when we had to demonstrate against the government's introduction of emergency legislation, which could undermine the legitimacy of the parliamentary system.

TIRABOSCHI – Your doctoral thesis – which was defended in 1971 – became your first monograph ([4]). What is your opinion about that book today?

WEISS – I can't answer this question. What I can say is that in Germany my first book had a major impact on the debate on judges' decision-making and on how other factors – e.g., personality – play a role when delivering a sentence. After publishing the monograph, I was invited to lecture on this topic at the congress of the prestigious German Law Association, of which later on I became a member of the board and, at some point, also the vice-president.

TIRABOSCHI – Who was the supervisor of your Doctoral thesis?

WEISS – Initially, it was Thilo Ramm, who at the time was a well-known scholar of legal theory. I knew him because we worked together in Giessen. Thanks to him, I developed an interest in labour law, because this discipline illustrates how to implement laws that respect people's fundamental rights. As said, Thilo and I had many discussions and, at some point, working together was no longer possible. Therefore, I changed my supervisor and I defended my thesis with Friedrich Kuebler, a scholar of legal theory and civil law.

Manfred Weiss and Germany's Legal Culture of Work

TIRABOSCHI – You talked about Thilo Ramm's influence on your education and on the decision to specialise in labour law. This brings to mind some of the reasons behind our conversation and this volume. Prof. Irti – one of Italy's most authoritative legal scholars – defines university in terms of 'chains of generations'. In other words, academic success depends on the ability to stand on the shoulders of giants. The mentor-student relationship safeguards tradition while promoting innovation. We are not interested in speculating on your relationship with Thilo Ramm, also because you told us about the arguments you had with him. Yet I am curious about your thoughts on German legal culture back then because it seems to me that your stay in the USA helped you to discover a 'new world' and a new way of carrying out research and studying law. Thilo Ramm himself was known in Italy ([5]) for criticising his country's legal tradition, which brings us back to the relevance of the past and the way it influenced the evolution of labour law in Germany during the reconstruction phase.

WEISS – As a young university student, I was fascinated by Thilo Ramm. Like me, he also had an interest in history, general theory, and the sociology of law. In addition, he firmly rejected Nazism and can be praised for reviving academic interest in the founding fathers of German labour law, i.e., Hugo Sinzheimer, Otto Kahn-Freund, Ernst Fraenkel, and Franz Neumann. The work of these leading figures embodying Germany's legal culture was neglected after World War II, but it was given fresh momentum thanks to Thilo Ramm. We should not forget that the labour law community of the 1960s and the 1970s treated Thilo Ramm as an outcast. The reason for this was that the most authoritative scholars at the time – who were mostly conservative – regarded him as a left-wing extremist. This academic and cultural isolation contributed to his cantankerous personality. He started to become paranoid and developed a theory known as 'constitutional positivism', which opposed prevailing

scholarly work. According to this theory, all the answers to current legal problems could be unambiguously found in the German Constitution, failing to consider that this piece of legislation only laid down general principles that are open to interpretation, to keep up with the evolution of societal and economic processes. The rigid approach characterizing constitutional positivism made it particularly problematic from a methodological point of view and gave rise to heated discussions with other academics, me included. Due to his isolation, Thilo Ramm became intolerant, so at some point, our academic paths took different directions. Yet I am grateful to Thilo Ramm, despite our controversies over methodological issues. He helped me develop an interest in labour law and research from the Weimar period, which formed the basis for my career. The controversy over constitutional positivism only concerned the national legal debate. Thilo Ramm was an internationally-renowned scholar because of his knowledge of the history of German labour law. He then became a member of the international group that authored *The Making of Labour Law in Europe* ([6]), a highly-influential study that investigated labour law as a historical and social process rather than in terms of formal and positive law.

TIRABOSCHI – You met Thilo Ramm during your stay in Giessen, where he had also recently arrived with an ambitious project. I am referring to his attempt to reform legal studies by establishing a law faculty. This idea did not come to fruition because of the protests of 1968. Do you have any memories of that period? Was it the right time to reform legal education in Germany?

WEISS – I met Thilo Ramm in Freiburg as he was one of my professors. I attended his seminars on the sociology of law also to get to know each other better. Ramm then moved to the University of Giessen, where the focus was not on legal studies. Once there, he became a professor in the faculty of political science, and was also in charge of establishing the law department. After I graduated from law school in Freiburg in 1964, Thilo Ramm invited me to join him as his assistant. I accepted, but I did not work with him full-time because at the same time I had to undergo my training as a lawyer – which lasted three years and a half – to catch up on the time I spent in Berkeley. He wanted to create an innovative law school in which he could attract professors who shared his methodological approach and cultural views. The project failed because Thilo Ramm remained isolated,

though his academic work had nothing to do with student protests. He was not involved in the country-wide debate about the reform of legal studies and how to structure law schools. As a consequence of this debate, new faculties were established attempting to ensure greater integration between theory and practice while also promoting interdisciplinarity. These faculties hosted not only legal scholars but also philosophers, sociologists, economists, and historians. The faculty where I became a professor in 1974 was one of them, which however was shut down after a few years, due to the resistance of conservative legal academics.

TIRABOSCHI – It seems to me that Thilo Ramm was one of the first labour law scholars to raise the question of the past and the ever-lasting influence of national socialism on the development of German labour law, even after the war. Is that correct?

WEISS – Yes, and this is one of the reasons he was isolated, but I admired him greatly.

TIRABOSCHI – It is also my understanding that Thilo Ramm questioned the role of labour law scholars. His goal was to harmonise fragmented legislation, point out differences between well-rooted concepts, emphasise social changes, and lay the foundations for a new conception of society. Was it true?

WEISS – When the German civil code was enacted at the end of the 19th century, the regulation of labour law was postponed until a later date. The attempts to codify labour law, which took place during the Weimar Republic and after World War II, were not successful. The last effort – in which Thilo Ramm also participated – took place following the unification of the Federal Republic of Germany and the German Democratic Republic in the 1990s. A major debate on this topic was held at the Conference of the German Law Association in Hannover in 1992. I too gave a speech during this conference in which I strongly criticised this project. Among other things, I stressed the need to amend national labour law taking into account the changes brought about by European labour law. Codification tends to be a systematic process whose aesthetics could be affected if a section of a provision is modified. This could have led German legal culture to resist the European reform process. To me, it was easier to amend labour laws on specific topics than to question a potential Labour

Code on a case-by-case basis. That is why I opposed the codification project, though only a few colleagues shared this view at the time. But I won the battle eventually. No one today would think of drawing up a labour code in consideration of the current social and economic changes and the multilevel regulations resulting from the EU and from globalization ([7]).

TIRABOSCHI – Outside Germany, there was a well-known controversy between Thilo Ramm and Hans Carl Nipperdey – who was regarded as the father of German labour law and an authority in this field. The issue concerned a dispute brought before Germany's Constitutional Court related to a strike organised by metalworkers in Schleswig-Holstein. It was a pioneering case concerning the violation of a peace clause and also a political attempt to tame IG Metall, the most powerful union in Germany. The main problem was the relationship between individuals, an independent association, and the community, which also questioned Nipperdey's authority.

WEISS – Nipperdey played an ambiguous role during the Nazi period. Yet he managed to become a leading figure in post-war Germany's labour law. In addition to being a brilliant scholar, he had been the president of the Federal Labour Court for a long time. He provided a significant contribution to law-making, shaping German labour law in important respects. He was highly regarded at the time, though Thilo Ramm considered him to be a representative of the Nazi period and criticised him strongly. It was therefore not surprising that IG Metall, the German metalworkers' union, had asked for Ramm's opinion on the possible legal issues resulting from that strike. At the time, Thilo Ramm opposed the views of the Federal Labour Court on the matter, while today their positions are quite aligned.

TIRABOSCHI – Following these events, Thilo Ramm was branded as a dangerous extremist.

WEISS – Actually, this had happened before.

TIRABOSCHI – Thilo Ramm's academic and cultural isolation in post-war Germany led him to look at the past in search of scholars sharing his views.

That is why he studied the work of left-wing scholars from the Weimar Republic, among others Hugo Sinzheimer, Kahn-Freund, Fraenkel and Neumann. Can you tell us more about this fascinating and controversial cultural path?

WEISS – I have already said enough about Thilo Ramm's human and professional story. I can add that the founding fathers of German labour law somehow prioritised collective over individual law, though the latter was more relevant in post-war debates. This approach was based on Sinzheimer's arguments that employment relationships should be considered first and foremost as power relationships and then as contractual bonds.

TIRABOSCHI – One of the themes discussed by scholars during the Weimar Republic was the 'labour constitution'. Can you tell us what Thilo Ramm and Hugo Sinzheimer meant by that?

WEISS – Basically, 'labour constitution' means that collective and individual labour law is a single entity and should be considered neither separately nor as a subcategory of civil or public law. This entity has its own principles and the collective dimension integrates into the individual one. Unlike many German colleagues, I fully agree with this approach.

TIRABOSCHI – In his 1978 study ([8]), Thilo Ramm argued that the concept of 'labour constitution' – i.e., the factors that determine labour relations – prompts us to set aside the positivistic approach whereby conflict is settled through mechanisms similar to those implemented in private law. What is your view as a legal scholar moving between empiricism and conceptualism?

WEISS – I agree with Thilo Ramm's approach, but not with the way he drew unambiguous answers to all questions from the Constitution. In his views, the Constitution represents not only the basis for the entire legal system, but it also contains already all the answers. While he was right to oppose the theories based on natural law, he was merely replacing natural law with the Constitution, the content of which could neither be challenged nor changed. This approach appears problematic, to say the least.

TIRABOSCHI – You told us about your interest in social sciences. You are a pragmatic academic and a role model for scholars who are interested in international and comparative labour law. In this respect, who was your source of inspiration in academic and cultural terms?

WEISS – While my main source of inspiration was Otto Kahn-Freund – a person who taught me a lot – Spiros Simitis made me aware of the importance of comparison. It was thanks to him that I started collaborating with the ILO and the European Commission. Concerning comparative analysis, Clyde Summers also played a major role. I worked with him for many years and he allowed me to teach comparative labour law at Philadelphia University for a long time. Finally, I owe my interest in the sociology of law and industrial relations to Hugo Sinzheimer, Otto Kahn-Freund's mentor and the founder of European and German labour law.

TIRABOSCHI – Gino Giugni – one of Italy's most influential labour law scholars – has always encouraged early-career researchers to familiarise themselves with the events taking place during the Weimar Republic and the authors from that period, reading their works in German, when possible ([9]). Hugo Sinzheimer was one of your inspirational models, and you also refer to him in your writings ([10]). Could you tell us more about him?

WEISS – As you know, Hugo Sinzheimer was a professor of labour law and sociology of law at the Goethe University in Frankfurt, which was the same university where I taught labour law until retirement. The Nazis did not allow Sinzheimer to teach and he had to move to the Netherlands, where he died in 1945. The book you referred to was written in his honour and published by our law school. In that volume, I remember Sinzheimer, stressing the importance of his legacy for legal research and teaching. Twelve years ago in Frankfurt we also founded the Hugo Sinzheimer Institute, which is now part of the Hans-Böckler Foundation, of which I still chair the advisory board. We do our best to keep Hugo Sinzheimer's legacy alive. His work is more relevant today in the community of German labour lawyers than it was in the 1960s or 1970s. His approach to collective bargaining and employee participation is currently discussed, though the idea of a 'labour constitution', taken up by Thilo Ramm, is opposed by many colleagues in Germany.

TIRABOSCHI – How did the new generation of labour lawyers in the post-war period distance itself from the dominant group of legal scholars – e.g., Nipperdey – who were educated under the Nazi regime through an approach based on legal precedents, loosely implemented?

WEISS – This was possible only after the events of 1968. It was anti-establishment, student movements that created the conditions to engage in debates free from traditional dogmas, also in the labour law community. Consequently, questions arose about some aspects of the Nazi regime that were later on rejected, while new approaches were implemented to deal with labour issues.

TIRABOSCHI – Also, what can you tell me about the influence of Otto von Gierke's organicism?

WEISS – It is no longer relevant today. It would play a major role in debates about the legal nature of the employment relationship, loyalty duties, and the nature of works councils. His theories gained momentum during the Weimar period, during Nazism and shortly afterwards, but now they have been set aside.

TIRABOSCHI – What about Otto Kahn-Freund? You and he were on very good terms.

WEISS – My wife Monique and I had the privilege to become good friends with Liesel and Otto, and we used to meet regularly. My conversations with him were particularly inspirational. Otto was a wonderful person and an outstanding scholar. Yet he was not particularly good at daily routine activities, e.g. he never went shopping for clothes, food, or things like that. Liesel – who formerly was a student of the Labour Academy (the German trade union school founded by Sinzheimer) – had and wanted to do all these things for him. I remember having lively conversations about certain legal problems while driving in Frankfurt and the difficulty I had staying focused. He would not have survived the Nazi's hatred without Liesel. As a labour court judge, he reinstated people considered opponents of the Nazi regime who had been terminated for retaliation. Being Jewish, his attitude soon would have turned into a death sentence, yet Otto failed to understand that he had to flee Germany to survive. It was Liesel who eventually convinced him to move to the United Kingdom. On these matters, Otto was naïve, or perhaps rather idealistic. Upon his arrival in the UK, he had

to study law to practise his profession. This enabled him to further his education in the field of labour law, superbly mastering two different legal systems and cultures and paving the way for genuine legal comparison. I admired him as a scholar and a friend. It was difficult for him to return to Germany only as a visitor and, when he was around, he never permitted me to drive near his childhood house. The memories of the past were too difficult for him to bear.

TIRABOSCHI – Do you have other memories of him?

WEISS – Otto Kahn-Freund reached his popularity during his English period, though before leaving Germany he had already become a famous and respected scholar. A student of Hugo Sinzheimer, Otto engaged in a fruitful discussion with his mentor. He had already written extensively before becoming a judge. I clearly remember an episode which demonstrates his extraordinary recognition in the UK. I was at Otto's funeral at the London School of Economics and you could sense the rivalry between Bob Hepple and Bill Wedderburn as to who had to be considered Otto's successor. He had never chosen in this respect, although in fact it was Marc Freeland who was his best student and friend.

TIRABOSCHI – What is Otto Kahn-Freund's legacy today?

WEISS – Undoubtedly his method. Otto's study on the use and abuse of legal comparison ([11]) is a masterpiece and his lesson on the evolution of industrial relations in the search for a balance between tradition and innovation ([12]) is still relevant. Furthermore, the functional approach used by Otto in comparison is implemented extensively today. When a legal scholar contrasts two or more legal systems, he or she cannot simply look at rules and laws. It is necessary to study the law when implemented, its historical context, and its evolution. This method also helped me when I worked in other countries, for example in South Africa and Zambia.

TIRABOSCHI – Through your memories and the people who influenced you as a person and a scholar, we talked a lot about Germany's legal culture of work. Culturally speaking, what was your position in the community of German labour lawyers?

WEISS – This is a difficult question. Drawing on Sinzheimer's teachings, I always tried to defend the autonomy of labour law, resisting the temptation to understand labour law as a branch of civil law. Yet I have never been interested in the specific details of German labour law. I have always been concerned with our legal system in broad terms and labour law's historical, social and economic features. Of course, my view has been influenced by my passion for comparison, an approach that was poorly implemented at the time. I have repeatedly stressed the need to study carefully international labour law and European labour law. Many of my colleagues in Germany have underplayed comparative analysis, based on the assumption that not much can be learned by this approach. Fortunately, this somewhat arrogant attitude is no longer widespread.

TIRABOSCHI – You have taught in Frankfurt. What can you tell us more about your university and the other labour law scholars there? In 2004 in Florence ([13]) you paid a wonderful tribute to Spiros Simitis and his modern way of working as a labour law scholar.

WEISS – Frankfurt's Goethe University is a relatively recent institution. It was founded in 1914 by wealthy liberal Jews and subsequently taken over by the regional government. After playing a problematic role during the Nazi period – that of Sinzheimer is a case in point – following World War II it became a respectable and international university with over 50,000 students. When I taught there, the law school had an excellent reputation. We were known to be the most progressive faculty in Germany due to our interdisciplinary approach, which drew on research from social sciences, philosophy of law, history of law, and economics. We all had the same objectives, which we tried to reach through close collaboration. The difference from the faculty in Hamburg – where I was before – was that there we had colleagues from other disciplines who worked at the faculty. In Frankfurt, we were only legal scholars who were also interested in findings from other disciplines.

TIRABOSCHI – Can you describe the recent developments in Germany's legal culture of work?

WEISS – To answer your question, it is important to understand the dominant role of the Federal Constitutional Court ([14]). According to all the surveys carried out in recent decades, the Constitutional Court was and

still is Germany's most influential institution. It was the Constitutional Court that implemented the vague principles laid down in the Constitution, filling legal vacuums and amending its ambiguous rules (rather different from Thilo Ramm's approach). The Constitutional Court always has the final say, even about the legislative texts approved by the parliament. Controversial issues are discussed before the Constitutional Court, so all German law, including labour law, is nothing but somehow applied constitutional law. Now the discussions between our Constitutional Court, the European Court of Justice and the European Court of Human Rights ([15]) have become key issues.

TIRABOSCHI – How did Germany's unification following the fall of the Berlin Wall affect the evolution of German labour law? Was it colonization, homogenization, or a more complex process?

WEISS – Initially, i.e., when the delegations from the German Democratic Republic and the Federal Republic of Germany negotiated the Unification Treaty, representatives from the former requested an evaluation of the best sections of both legal systems, an approach which was rejected by the latter. Therefore, the legislation of the Federal Republic of Germany was extended to the German Democratic Republic, meaning that it had similarities to colonization rather than to a pure homologation process. Discussions also took place about drawing up a new Constitution, but this idea did not take off. Initially, those in charge of managing the unification process – i.e., judges, civil servants, lawyers – came almost exclusively from the Federal Republic of Germany. People from East Germany had nothing to identify with and this is one of the reasons for the emergence of the right-wing movement in that area of Germany ([16]).

TIRABOSCHI – Following this process, what is the essence of German labour law today? Some of its traditional institutions date back to the beginning of the last century, and so do some important pieces of legislation, e.g., the Works Council Act of 1912 and the Collective Bargaining Decree of 1918.

WEISS – The works councils and the presence of workers in companies' supervisory boards are peculiar to German labour law ([17]). After all, the works council system was initially created by some paternalistic employers who wanted to draw a separation line between the employees

in the workplace and actual union representatives. Not surprisingly, it was the unions that initially opposed this proposal. Later on, this turned into a close alliance. The Collective Bargaining Decree of 1918 is also relevant because it ensured the effectiveness of collective agreements. This provision was only possible thanks to an agreement between the Confederation of Employers' Associations and German trade unions. In other words, trade unions were recognised as workers' representatives, while collective agreements were identified as the most important instrument for laying down proper working conditions. It is also essential to make mention of labour courts, which were regulated for the first time in 1926. Labour courts deal with individual and collective disputes, ensuring the autonomy of labour law ([18]).

TIRABOSCHI – What about the co-determination model? That was probably your real passion, not only in academic terms but also as a tool for disseminating the German model around the world.

WEISS – Absolutely! Co-determination is an instrument ensuring worker participation in the workplace – through works councils – and in company decision-making. I have tried to disseminate this concept around the world, for example in my missions in Zambia, Sudan, Trinidad, and South Africa under the auspices of the ILO. Together with Gino Giugni, Bill Wedderburn, and other colleagues, I was also a member of the EC's High-Level Group, which was in charge of drafting the European Works Council Directive. Our great achievement was to move away from the approach elaborated in the Vredeling Proposal to adopt a procedural perspective instead of substantial regulation. This move made the draft politically acceptable, turning it into a model for the European Company Law Directive.

TIRABOSCHI – Another main feature of Germany's labour market is dual training. In one of your papers – which is frequently referred to by Italian labour law scholars as it was published in *Diritto delle Relazioni Industriali* ([19]) – you warned the international academic community against the increasing attempts to emulate Germany's apprenticeship system in Europe. You had – and probably still have – serious doubts about transposing the German apprenticeship model to other countries. Why?

WEISS – My answer is simple: first, merely transposing the apprenticeship system to other legal systems is impossible, because we need to consider other historical, political, and sociological factors. In this case, we should be aware of Germany's guilds, our vocational schools, the links between schools and companies, and the characteristics of the teaching faculty. They form part of the German historical background. In addition, I am not sure whether the German apprenticeship system will survive in the years to come. The reason is simple: apprenticeships are intended to train people at the early stages of their careers and to provide specific skills throughout their professional life. However, changes today take place by the day because of technology, and there are no longer clearly defined professions. We need to 'learn how to learn' to live up to these changes. So, no matter how widespread it is, I am not sure the German apprenticeship system will stand the test of time.

TIRABOSCHI – Listening to you a question arises as to why the German apprenticeship system receives so much attention abroad and why there are so many attempts to implement it outside Germany. This happens despite its peculiarities, which as you said are related to cultural and historical factors.

WEISS – It is a knowledge transfer system that keeps up with technological innovation and is formalised in terms of requirements, curricula, timelines, and assessment of outcomes. At the end of the training, the apprentices are awarded a certificate attesting to their professional qualifications. This is what makes apprenticeships attractive. It is a well-designed institution, which links employability and productivity, school and companies, bureaucracy, and industrial relations entities. Moreover, international scholars who want to understand the reasons for Germany's economic success have consistently referred to apprenticeships and co-determination.

TIRABOSCHI – Another aspect that makes apprenticeships interesting is their contractual basis and legal conformation, according to which the employment relationship goes beyond an exchange between work and remuneration. It is based on a modern approach, so it is more than a simple contract, isn't it?

WEISS – Yes, I agree. It is the reasoning behind the right to lifelong learning, which lies at the foundation of the Fourth Industrial Revolution. In other words, people receive training – and not only remuneration – while working.

TIRABOSCHI – More generally, don't you think that the distinction between salaried and self-employed work is increasingly blurred? And what about the labour market, where the focus is increasingly on skills rather than on working time, an approach that is typical of self-employment? My view is that labour law scholars need to contribute to innovating our discipline on this point, taking into account its historical function and value.

WEISS – Yes, I agree. We need new structures and rules to govern current changes while ensuring worker protection and social justice. The traditional legal classification of employment status is passé, and as you said the separation line between salaried workers and self-employed workers is increasingly blurred.

The Origins of a New European and International Legal Culture

TIRABOSCHI – If I were to provide a sketchy description of Manfred Weiss – both in professional and academic terms – I would say without hesitation that you are one of the few legal scholars 'without borders'. You are a genuine European legal academic if one considers your cultural and methodological approach. In this respect, how did European and transnational labour law develop? Were they created in the aftermath of World War II?

WEISS – This is a long and complex process that started with the end of World War I, the conclusion of the Treaty of Versailles, and the establishment of the ILO. The end of World War II certainly speeded up things, even though initially governments were not willing to give up their sovereignty, especially on work-related issues that were linked to national dynamics, i.e., economic competition. If we look at the Treaty of Rome, through which the European Economic Community was established, it only refers to the creation of a common market for which we need a common trade policy, market freedoms, and the regulation of competition that promotes national labour rights. Social progress is left to individual member states. When the six founding states of the European Economic Community were negotiating the treaties, criticisms were levelled at Germany and Italy for the unequal treatment of men and women in the labour market. However, this problem was not considered in terms of social justice and gender equality. Rather, they related it to possible social dumping, which could not take place in the other member states with legislation ensuring equality between men and women and women's rights. That is why in the 1957 Treaty of Rome we have an article on equal pay for men and women. In other words, in the original text of the Treaty, labour law was not mentioned, but the turning point came during the 1972 Paris Summit, where the member states understood the links between a properly structured common market and social progress. First labour law

Directives only could be passed by unanimous voting, then the legislative powers in this field were gradually enlarged by amendments to the Treaties.

TIRABOSCHI – Was providing European institutions with more social powers the proper way to promote rights among all countries? While it is true that the economic dimension needed to be considered, ensuring the social dimension without actual political integration still proves to be an ineffective strategy.

WEISS – Broadening the competence of the European institutions was a positive move that strengthened the social dimension of the European unification process ([20]). However, some fundamental aspects of labour law such as pay, freedom of association and engaging in collective bargaining, and the right to strike were still disregarded, due to the scepticism of the social partners at the national level. While working on the Maastricht Social Protocol ([21]), the European Commission produced several drafts focusing on social issues, which were rejected by the social partners, who are responsible for the still existing exclusion of the mentioned areas. The European legislator should be given more power in my opinion. While differences exist in the field of social and employment protection – for example the system of collective bargaining – many topics can be dealt with. Just think of the recent European directive on adequate minimum wages, which is prevented from introducing an obligation to a statutory minimum wage and the amount of a minimum wage. The different costs of living in each country should be taken into account, which can be calculated using a standard percentage based on the average of the remuneration paid in each member state. This, however, is not possible because of the exclusion of legislative powers. It has to be changed.

TIRABOSCHI – In the areas where European institutions have more powers – e.g., collective dismissals and Occupational Health and Safety (OHS) – relevant legislation in member states is not yet harmonised.

WEISS – I think that the promotion of the social dimension does not take place only through harmonization. It is more about bringing rules closer together by defining common minimum standards, as is the case with direct and indirect discrimination legislation.

TIRABOSCHI – I can see your point, Manfred, but there are still significant differences between member states in terms of regulatory frameworks, welfare, and protection of labour rights. In this respect, what is your opinion about the integration process after so many years of its implementation? This is particularly interesting in the aftermath of Brexit and in consideration of the nationalist and populist thrusts challenging the founding principles of the European Union itself.

WEISS – It has become clear to me that the monetary union needs a common economic and financial policy to be effective. We did not mention the Charter of Fundamental Rights, which is another tool for developing the social dimension. During the drafting stage, there was significant resistance to including fundamental social rights, but then the final document incorporated both individual and collective rights. This example shows that, at least in principle, economic and social rights are now on an equal footing.

TIRABOSCHI – If we want to integrate the economic dimension with the social one, we must also consider extra-European countries. The establishment and development of the ILO are particularly interesting in this connection.

WEISS – As early as the 19th century, there were attempts by both unions and employers to create international institutions to ensure minimum working conditions. It was clear that promoting international economic exchanges was possible only by laying down minimum labour standards. Therefore, the ILO was created, which is important because it is a tripartite body, so it is recognised both institutionally and in terms of social legitimacy. In 1944, the ILO members reasserted their goals by adopting the Declaration of Philadelphia, which unconditionally stated that labour is not a commodity and defined basic human and economic rights according to the principle that poverty is dangerous to the prosperity of all. The main deficiency for the ILO is promoting effectiveness, as currently there is no real mechanism to ensure the implementation of conventions. ([22])

TIRABOSCHI – Tripartism is therefore another issue to deal with.

WEISS – On this point, I can give you the example of environmental changes, which today are urgent issues, though I am not sure that the social

partners are the right actors to deal with them. The question is whether to include non-governmental organizations (NGOs). Trade unions might be reluctant in a short-term perspective to save jobs, but those involved might change their mind in the long run. Then there is a further problem, i.e., the original version of the ILO's Constitution referred to the principle of universality, so global standards were established. Yet geographical areas have different initial conditions and problems, so it is not possible to apply the same standards everywhere. Therefore, the ILO has established regional offices to attend to local problems. Nevertheless, a strong tension exists between global standards and local dynamics. Sometimes gradual pathways are designed to adapt to global standards, but perhaps it is still not enough ([23]).

TIRABOSCHI – Therefore, who benefits from these standards? Developing or developed economies? In my view, strict enforcement might affect actual implementation, penalizing developing countries in global competition.

WEISS – In global value chains, developed countries often face this issue, though at times this situation leads to workers' exploitation in developing countries. I would nevertheless insist that basic human and social rights are to be enforced by developing countries to benefit all parties. Empirical research has shown that compliance with fundamental rights creates a win-win situation.

TIRABOSCHI – Let us now return to the international legal culture of work and its origins. In the Italian edition of his study on Germany's past and present labour constitution – edited by Gaetano Vardaro and Lorenzo Gaeta – Thilo Ramm recalled that in the early stages of his academic career, research on international and European labour law was practically inexistent ([24]) and the few attempts that were made before had been unsuccessful. I am referring to Benjamin Aaron, who in the late 1960s had tried to bring together an international group of labour law scholars – the 'Comparative Labour Law Group' – made up of Thilo Ramm for Germany, Gino Giugni for Italy, Xavier Blanc-Jouvan for France, Folke Schmidt for Sweden and Bill Wedderburn for the United Kingdom.

WEISS – That was a fantastic group that produced three pioneering comparative studies ([25]). If, as Ramm argued, they were not as successful

as they expected, this was due to two reasons. First, their goals were too ambitious: they intended to create a global-level labour law and social security system. Secondly, Thilo Ramm had a formalistic approach which, as said, was based on the Constitution. Adopting this perspective is already problematic at the national level, let alone in the global context. Ramm wanted to impose his vision, becoming intransigent and even intolerant in the long run. That is why that group eventually fell apart and was dismantled.

TIRABOSCHI – The other international research group that was established later on – in which you played an active role – did not have these kinds of problems. Would you like to talk about this group, which was as outstanding as the previous one?

WEISS – Our research group worked well because we set feasible goals and worked flexibly. We focused on specific themes, without seeking to review labour law globally. The main idea was to identify emerging topics and to understand the situation in each country, providing a comparative analysis afterwards. In addition, we were open and tolerant even when our views diverged. Most importantly, we could count on the research and organizational skills of Roger Blanpain and Marco Biagi, who always managed to raise funds for international events. Just think of the costs and the work needed for a conference with scholars from all over the world.

TIRABOSCHI – Can you tell us how this international group of legal scholars contributed to the European integration process, e.g., by drawing the attention to social and labour aspects?

WEISS – I think we influenced the debate about the integration process indirectly. Many of us – Roger Blanpain, Marco Biagi, and even myself – had worked with the European Commission individually, drawing on the exchanges and meetings that took place regularly at the international level. That could not be compared with today's situation, where the European Commission is supported by labour law scholars – who are coordinated by my successor, Bernd Waas – who are entrusted with advising on labour law issues.

TIRABOSCHI – Lammy Betten was the first person from your international group that I met. It was during the summer schools organised by Marco Biagi in Bologna. I also remember her as the editor of the *International Journal of Comparative Labour Law and Industrial Relations*. Lammy left us prematurely due to an incurable disease. What are your memories of her?

WEISS – I have fond memories of her. Lammy was a cheerful person, very good at teamwork and at developing under-researched topics.

TIRABOSCHI – Who was the most charismatic person in your group?

WEISS – Undoubtedly, Roger Blanpain. He was a real leader with exceptional organizational skills.

TIRABOSCHI – Among his works, we can mention the pioneering *International Encyclopaedia of Laws*, which – before the advent of the Internet – provided significant information on the state of the law in many countries, particularly labour laws.

WEISS – I could only imagine what this project could have become if it had been available for open access.

TIRABOSCHI – Why did this project end, despite the power of the Internet?

WEISS – I think because of the enormous organizational costs, the lack of adequate funding and the disregard for international legal issues. Take Germany's case. Of course, there are now active scholars who are interested in European and international labour law, but they are still a minority. Most scholars focus on national labour law also because of the links between the academic career and the legal profession. The legal issues discussed often have national relevance, so people engage in research to influence court decisions or to criticise them and create guidelines.

TIRABOSCHI – We mentioned the proactive role of Roger Blanpain, which I witnessed during my research stay in Leuven ([26]) after graduating from university. There were other scholars who engaged in pioneering,

comparative labour law research, e.g., Bob Hepple, Tadashi Hanami, Janice Bellace, Tiziano Treu, Matthew Finkin, Kazuo Sugeno, Alan Neal, Csilla Kollonay-Lehoczky, and Jacques Rojot, for whom you wrote a touching memoir which was published in *Diritto delle Relazioni Industriali* ([27]). Finally, we should mention Marco Biagi, because of the personal and working relationship we both had with him and his fantastic organizational skills, as you said.

WEISS – Marco was an extremely productive and innovative scholar, who made extensive use of the interdisciplinary approach. I remember the events he used to organise in Modena and Bologna very fondly. Being an innovator is never easy, especially in our disciplines. Marco showed a willingness to promote change since the beginning of his career, that is when the academic community requires one to align with traditional views rather than challenge them.

TIRABOSCHI – About the promotion of an international culture of work and its underlying legal rules, another important aspect concerns the role of scholarly associations, both locally and globally. Can you tell us what you think about these associations with your usual frankness?

WEISS – In our disciplines, the two most important international associations are the International Society for Labour and Social Security Law (ISLSSL) and the International Labour and Employment Relations Association (ILERA). The former is perhaps more traditional and, for a long time, it had a rather formalistic approach. It consists of national umbrella associations that choose topics and speakers. The themes used for international comparisons were extremely theoretical and technical, so disregarding the practical dimension of the problems analysed. Only recently have they started to focus on more practical issues – particularly after the fall of the Iron Curtain and the emergence of new industrial relations systems. On the contrary, the legal scholars involved in the Labour Law Research Network (LLRN) have discussed from the very beginning interesting topics, which are of practical as well as theoretical relevance. ILERA deserves specific mention, as its multidisciplinary approach makes it more proactive. It was formerly known as the International Industrial Relations Association (IIRA). However, some of its members from the Anglo-American countries felt that this terminology and the reasons behind it were influenced by the collective dimension of labour relations. Therefore, they asked to review the name of the

association, which also represented an innovation in cultural terms, i.e., examining labour relations moving beyond the collective dimension, which until then had been the dominant approach. The intention was to consider the evolution of employment relations in those contexts where union membership was declining. Yet this also involved a disregard for the social and collective dimension which exists in power relations, i.e., labour relations. Changing the name of the association was a difficult process. I was against it, but only I and a few other members seemed to be aware of the relevance of the collective dimension. In any case, I think ILERA provides a more open and dynamic environment than the International Society for Labour and Social Security Law.

TIRABOSCHI – I am not surprised at this resistance to change and the difficulty to establish friendly relationships in the context of international associations. However, I would like to know your opinion on another aspect that affected the work of these associations in important respects, as was the case with IIRA. Don't you think that the Anglo-American cultural and legal perspective is so predominant that it might as well 'colonise' the others? I am referring to the way they understand the law and the relationship between society, individuals, and legal rules. Does this dominance risk limiting the evolution of our disciplines globally, affecting integration with other legal and labour law cultures?

WEISS – In formal terms, I think we overestimate the differences between the Anglo-American world and continental Europe. It is commonplace to argue that in continental Europe we have mandatory laws and norms, while in the Anglo-American context everything is governed by case law. There is a significant amount of research indicating that the two systems share many similarities – also because of a hybridization process – so they can be compared if we take a functional approach. Perhaps the greatest differences concern their industrial relations systems, their trade union, and labour dimensions. In continental Europe, industrial relations as an academic discipline is not deeply rooted. Scholars of industrial relations in continental Europe are 'outsiders', as the academic community does not fully recognise industrial relations as a specific discipline. In our countries, disciplines are quite distinct – e.g., law, sociology, economics, labour psychology – and academic and cultural approaches based on interdisciplinarity are poorly implemented. However, industrial relations

as a discipline is declining also in the Anglo-American context, as priority is given to individual labour relations. At the same time, human resource management as a discipline is becoming increasingly important.

Legal Comparison: Myth and Reality

TIRABOSCHI – 15 years ago, on the occasion of the 25th anniversary of the *Comparative Labor Law & Policy Journal*, founded in 1976 at the Law School of the University of Pennsylvania and edited by Matthew Finkin, you wrote: "The environment for comparative labour law as an academic discipline and as a practical tool has become more favourable than ever: a promising perspective for its future" ([28]). Considering the recent events – i.e., the war in Europe and the slowdown in globalization due to the pandemic – do these words still hold true today? Perhaps legal scholars should also contribute to the globalization process in the years to come. Just think of the many international events in our field, which are frequently characterised by low levels of participation and interaction.

WEISS – I can only confirm what I wrote back in 2005. Now more than in the past we can establish long-standing relationships with overseas colleagues. Technology helps us to easily access international research, which is often produced in English. The situation is not so different from the one back then. However, despite the global issues that have occurred in the last ten years and the risk of a climate crisis, globalization will go on. There may be attempts to promote autarky because the pandemic has unearthed the delicate internal balances of global value chains. Yet in considering globalisation, respecting human rights is the most important aspect and the UN Human Rights Council is particularly active in this connection.

TIRABOSCHI – Don't you think that this international turmoil might contribute to the creation of new blocs, like those existing during the Cold War?

WEISS – I agree with you, particularly if we look at the alliances established during the war between Russia and Ukraine. However, these blocs will find ways to cooperate, and Putin's reign will soon come to an

end. The world is already interconnected and completely isolated blocs are a thing of the past.

TIRABOSCHI – There is another aspect that should be pointed out. In the past, comparatists were few and far between and their events used to take place mostly in Europe, so Africa and Asia were poorly considered in the academic debate. Today, things seem to be changing, for example, the ILO's Director-General – Gilbert F. Houngbo – is from Africa. Is this the beginning of a new era in comparative studies, also in consideration of what is happening globally? Eurocentrism is long over, and the US hegemony is also declining. What impact might this state of affairs have on academic research and international cooperation?

WEISS – I agree. The Eurocentric culture of law and economics is disappearing, and I am pleased that the ILO's Director-General is from Africa. This situation will only benefit legal comparison. New schools of thought will establish and diversity will facilitate comparison and the evolution of law at the national level, through new models and practices. Excellent universities and innovative approaches are developing in our subjects, too. I am thinking of the University of Cape Town – which has a major impact on the rest of the continent – and other institutions in Morocco and Algeria. This flurry of activity makes me optimistic about the future.

TIRABOSCHI – After discussing the current state of comparative research globally, I would like to focus on the application of the comparative method. In the past, there was little information about national systems, and the few publications available could not be accessed easily. Accessibility rested on academic networks – which were fewer than today but highly reliable in terms of reputation and credibility – to such an extent that relationships went beyond the professional sphere. While in the past it was not easy to travel and exchange information, today there seems to be a sort of information overload, i.e., there are thousands of events and publications, the reliability of which is often difficult to assess. Many scholars define themselves as 'comparatists' and discuss other legal frameworks without having ever been to the countries examined and failing to engage in serious analysis, which takes a lot of time. They do so virtually from their home, resorting to the Internet, blogs, and social

networks. Does this approach affect the reliability of comparative research?

WEISS – Yes, it does. When we engage in comparative work, we have to do it through a 'functional perspective', as pointed out by Otto Kahn-Freund ([29]). In other words, we have to examine both the legislative and the empirical dimensions, i.e., how legal institutions and laws work in practical terms. That is why comparative research requires knowledge of the countries under evaluation. Therefore, it is essential to live in the country being compared and to exchange views with colleagues there. This is also why I believe that genuine legal comparison cannot involve many legal systems. The quest for completeness and horizontal extension is pure nonsense and has nothing to do with comparison. We need to understand legal systems in all their complexity, pointing out commonalities and differences if any. Comparing two countries is enough and we should focus on how the law applies in both systems. Otherwise, the comparative perspective cannot be adopted.

TIRABOSCHI – Another issue that might affect comparative research is the significant amount of labour laws that are issued every year around the world. These new regulations are often short-lived or are radically amended over time, giving rise to extensive and contradictory case law. Labour laws frequently need collective agreements to adapt and be implemented, yet collective bargaining fails to keep up with legislative changes and at times opposes them. There are too many documents that are difficult to go through even for national lawmakers. Furthermore, the large body of international labour law research affects the selection and evaluation of sources. In this regard, I am sure that if three Italian labour law experts were asked to give their opinion on a particular law, they would provide three different answers.

WEISS – The first question we should ask ourselves is: What is the purpose of comparative research? In my opinion, comparison helps fulfil two objectives. First, by proposing different models and solutions for similar problems, legal comparison serves to better understand our system. I understood German labour law better during my stay abroad than when I was a student in Germany. Becoming aware that a problem can have different solutions led me to question the reasons for these differences. Secondly, the legal comparison is useful for the evolution of the other national systems being contrasted. By looking at the situation in other

countries, it is possible to understand the reasons for existing differences and draw insights to improve one's legal framework, assessing how certain practices work in their original context. It bears repeating that mere transposition is not possible because laws function within a specific political, economic and social system. Yet comparison can help develop ideas and principles and explain the effectiveness or the shortcomings of certain provisions. Law is not a natural science, but it features a scientific dimension that can be assessed. Diversity helps think outside the box to better integrate laws, society and economic processes and properly serve individuals.

TIRABOSCHI – However, the legal comparison seems to be used differently in reality. A 'cherry picking' approach is frequently employed, whereby reference is made only to the arguments of colleagues which substantiate our pre-determined theories. As for the Italian context, Lorenzo Gaeta ([30]) raised doubts about the quality of many papers which are described as using comparison without however engaging in a detailed analysis of national dynamics and developing models.

WEISS – I agree. Legal comparison is a rigorous method that is not easy to apply and requires time and intellectual honesty. Findings need to be corroborated, through field research and scholarly collaboration. Sometimes this rigour is not possible, due to time constraints and individual interests. Serious research is rare, and we only need to learn to recognise it. For example, another way of applying the comparative method is by collecting data and information to help implement models and reform processes at the international level. It is about establishing a normative framework that can work in transnational or regional contexts.

TIRABOSCHI – The number of international events where comparative analysis is discussed has also increased recently, so the time for examining the papers presented has drastically reduced. Significantly, the difficulties faced by international and national labour law associations often lead them to accept all the papers submitted to cover organizational costs, to the detriment of high-quality research. Furthermore, the interest in the international and comparative dimension has prompted many scholars to get to know each other but also to focus on fashionable topics, somewhat disregarding the main elements making up a legal system. A recent

example is the priority given to delivery drivers (or 'riders') over domestic workers, though the latter group involves a larger number of people.

WEISS – It all comes to striking a balance between topical issues and medium- and long-term trends. However, the increase in the number of scholars engaging in comparison is a positive aspect, even though this complicates mutual recognition and accreditation, which are the pillars of any academic community.

TIRABOSCHI – Let's return to the international associations, which should help prioritise some topics over others and acknowledge the work of deserving research groups.

WEISS – We have already talked about the shortcomings of the International Society for Labour and Social Security Law, which arise from its formal approach. It seems to me that what you suggested about rigour and selection can be carried forward by ILERA and the Labour Law Research Network, where high-quality debates take place that are not career-driven. At any rate, it is publications more than participation in events that count in the end, and peer review is always an effective selection criterion.

TIRABOSCHI – This is an important point because peer review as a tool to build a scholarly reputation works well for small academic communities. However, the massification of higher education affects the effectiveness of the peer-review process, so other interests might come into play to the detriment of academic merit.

WEISS – I agree, some critical issues need to be solved. In the past, academic quality was the most important aspect. Now universities are like companies and other criteria are taken into account, i.e., the ability to attract funds. Furthermore, a lot of staff is needed for research, and sometimes unstable working conditions are offered which are almost exploitative. The world has certainly changed.

TIRABOSCHI – Today's early-career researchers speak foreign languages better than in the past. However, there exist some barriers related to the specific meaning of certain technical words. The language challenges in comparison are well known, but the idea of creating a dictionary that could

be useful for scholars engaged in the comparative analysis did not come to fruition. The European Foundation for the Improvement of Living and Working Conditions (Eurofound) started an ambitious project years ago, but it has not been carried forward ever since, although some material is still available on its website ([31]). Do you think halting this project was due to a lack of funding or other issues? Furthermore, these dictionaries used English as a working language. Yet English is not only a language, as it relates to a cultural approach and to a way of conceiving law and work. Is this the right perspective to be used? Or, shall we also give voice to other relevant cultures?

WEISS – I remember I was involved in that project, yet the basic idea was not to translate the main terms into different languages (e.g., 'collective agreement' has a different meaning and legal function in Italy and the UK). The purpose of the dictionary was to select the most important concepts in each country, try to explain their meaning and understand how they could be compared. We, therefore, compiled these dictionaries in our native languages. Subsequently, they were translated, and we met with brilliant translators to discuss their possible interpretations. Finally, we published the volumes. It was an extremely expensive and time-consuming process. That is why the project came to an end, even though this idea had merit. Of course, the project was only intended to those who mastered English. Some concepts and legal references are now outdated, but these tools are still useful. After all, even though the political and economic geography is changing rapidly, English is and will be the lingua franca in academic discourse.

TIRABOSCHI – Let's talk about the practical implications of legal comparison. I have already said that I and many other colleagues regard you as a legal scholar without borders, something of a romantic figure ([32]). You lived in Zambia from 1983 to 1985, in Sudan in 1987, in Trinidad in 1988, in South Africa in 1994 as well as in Bulgaria in 1992 and 2006, and in Romania in 2004. Have I forgotten anything?

WEISS – The list you made is long enough. I would add that between 1992 and 1995 I was involved in the drafting of Croatia's labour code.

TIRABOSCHI – I consider you to be a romantic figure because you lived in a time that will probably never return, with emerging democracies in

Eastern Europe and Africa and the end of apartheid in South Africa. In addition to the difficulties to reach those areas through means of transportation which were not as safe as today, you also had to face other risks, i.e., instability, internal conflicts, and poor hygienic conditions. Were you ever afraid?

WEISS – The desire to improve the lives and working conditions of millions of people has always prevailed over fear. Moreover, during the ILO missions we were ensured high levels of security and we were also provided with diplomatic passports which enabled us to leave the country quickly in the event of imminent danger. The briefings we used to arrange in Geneva before departure were also important, because we were given detailed information about the mission and the logistics.

TIRABOSCHI – Your first mission was in Zambia.

WEISS – In the past, it was known as Northern Rhodesia, a protectorate of the British Empire that dissolved in 1964. After the liberation and the establishment of present-day Zambia industrial relations changed. The aim was to introduce a system of works councils similar to the one in Germany, although the industrial relations tradition was still influenced by the past British regime. I had to investigate how the industrial relations system worked in different companies, pointing out critical issues to promote participation and reduce conflict. I was joined by a colleague from the former Yugoslavia who had to assess whether the Yugoslav system could have been a more suitable alternative. The local context was not easy for both political and cultural reasons, and that was another reason why the mission was not successful. A few proposals of mine were implemented because they affected the status quo and personal interests of those concerned. During this mission, I also understood how education affects industrial relations, especially in a country where most workers were illiterate. The mission in Sudan was not particularly remarkable, either. Besides local and cultural factors, it was deep-rooted ethnic and religious conflicts that affected my work.

TIRABOSCHI – The 1994 mission to South Africa went well, instead. At IIRA's Fifth African Regional Congress – which was held in Cape Town in March 2008 – I could see first-hand the deep respect the local colleagues

had for you. This gratitude lives on today, as shown by the recent volume published in your honour ([33]).

WEISS – We are talking about an unrepeatable historical period where I could draw on the knowledge gained in my previous experiences and through legal comparison. With the end of apartheid, we had to rewrite South African Labour Law. Bob Hepple and Anthony Adeogun from Nigeria also participated in the mission, which featured quite a diverse group: government representatives, members of employers' associations and trade unions, and local scholars, including Raymond Zondo, who is now the Judge President of the Constitutional Court of South Africa and who chaired the commission that investigated the crimes committed by Jacob Zuma, South Africa's former president. For several months, we met in Geneva, where we had discussions with ILO experts. We then had several meetings in Pretoria and Johannesburg, where we examined our proposals with local representatives. Our goal was to modernise South Africa's labour law, not only by working on the inequalities generated by the previous racist regime but also by introducing fundamental rights in labour law, in keeping with the best international standards. It was not just about providing a list of rights but making sure they were implemented. To this end, we established the Commission for Conciliation, Mediation, and Arbitration (CCMA) in Labour Disputes, which has worked well over time, thanks to the training provided to its members. The attempt to introduce worker participation in company decision-making was a more complex task, also due to the reluctance from the unions, because company-level bargaining conducted exclusively by them was preferred. We then agreed to establish participation bodies only if requested by the most representative trade union in the company. However, the attempt to replicate something similar to German works councils did not take off. Only recently has the economic crisis in South Africa prompted efforts to experiment with the opportunities provided by law. The South African mission taught us that it is always difficult to predict the outcomes of implementing a certain provision, no matter how effective it may appear. Again, experimentation and the willingness to adapt are required, as merely transplanting laws is doomed to failure.

TIRABOSCHI – To conclude this discussion on legal comparison, what advice would you give to an early-stage researcher approaching this

methodology? Also, which are the research centres that promote comparison in labour law and industrial relations most effectively?

WEISS – The two questions are closely related. The most important aspect is to encourage people to engage in comparison by going abroad as soon as possible. Unlike the past, many programmes and funds can be accessed for this purpose. Studying in another country for a significant time contributes to perfecting the comparative method. If you ask about which country students should go to, I would say it does not matter. When you go to Harvard, it is better for your career. The most prestigious universities are still based in the United States and the United Kingdom. But as a general rule, it is important to go to a country where you already know the language or at least where you can communicate easily in English. It is also important to find academics who have the time and willingness to supervise your work, either directly or indirectly.

TIRABOSCHI – Does the letter of recommendation still count when making contact with professors and research centres in other countries?

WEISS – Establishing contacts before the stay abroad is crucial, but it is up to the supervisors to pull the right strings with their peers abroad. Senior professors can make sure these are useful learning experiences for their students.

A Legacy that Lives on and a Look into the Future

TIRABOSCHI – In Part II of this volume, the reader can find a selection of your most important works written in English and published in international journals. Finding a common thread among them would be complicated, because they cover the most relevant labour law issues discussed in the last fifty years. However, we can examine the most important aspects related to the 'modernity of work' – i.e., a collection of the most recurrent themes in your writings – to establish a link between the past and the future of our discipline ([34]). What do you think?

WEISS – Let's give it a try!

TIRABOSCHI – Worker participation is certainly a major topic in your research ([35]). Among others, Alan Neal referred to this aspect in the volume written for your 65th birthday ([36]). Looking at the last decades, it seems that this is the way forward to modernity, where social goals are given priority over economic ones. Is there a definition of 'worker participation' that can be applied cross-nationally? And what can you tell us about the German *Betriebsrat* (or 'works council' in English)?

WEISS – It is not possible to come up with definitions that apply to all national systems, and the ILO missions we discussed earlier ([37]) confirmed this point also in practical terms. As for my country ([38]), I should say at the outset that worker participation through works councils is quite established in Germany, as this model dates back to the 19th century. The first law regulating this practice was passed in 1920 and served as a reference for the other provisions put in place after World War II. Works councils must be elected in companies with at least five employees, though this rule is ignored in many small-sized businesses. Only larger companies fully comply with this provision, and it is up to employees to establish a works council (but there are no legal consequences if they don't). The size of the works council depends on the number of employees working at the

company. Members are elected for a renewable period of four years. If a company has different establishments, a 'general' works council must be designated, while for a group of companies a 'group' works council is needed. By law, works councils are not linked with trade unions, and they represent employees at the company level. However, close ties exist between unions and works councils in practice, as most members of the works councils are also union affiliates. The law provides works councils with specific rights in terms of participation, i.e., access to strategic information, the right to consultation, and, most importantly, the right of co-determination, meaning that decision-making is no longer the preserve of management. Co-determination means that management needs the consent of the works council to make decisions, so unilateral actions by the employer are regarded as illegal. This system places both parties on an equal footing. If a disagreement arises over a matter dealt with through co-determination, an arbitration panel will settle the issue by delivering a binding decision. This panel is made up of the same number of representatives from management and the works council. If the employer violates legal requirements, the works council can turn to labour courts, to ensure compliance.

TIRABOSCHI – Why are works councils so successful in Germany? Do you think that, under certain conditions, this system can be transposed to other countries?

WEISS – There are many reasons for the success of works councils, which also contributed to Germany's economic wealth. The most important one is concerned with social partnership, which is still prevalent in Germany. Furthermore, employers have realised that works councils are good for business, while members of these bodies set aside their confrontational attitude once they understand the complexity of management. It is a win-win situation, and in large-sized companies, their effectiveness is also based on cooperation with employee representatives in supervisory boards. However, the system of works councils is not always successful, just think of their little presence in small-sized companies we mentioned before. In terms of transposition to other industrial relations systems, works councils are essentially the result of Germany's legal history and culture. But the underlying idea of this model – i.e., close and fair cooperation in decision-making – can certainly be transferred to other systems, though some adaptations are necessary. Today and in the future, production models will

be centred on powerful technologies and a highly-skilled workforce, so co-determination will be more important than ever.

TIRABOSCHI – The idea of the 'social economy' is also making inroads in Europe, especially at the institutional level. It seems an attempt to move on from capitalist production to a more cooperative system.

WEISS – We are particularly proud of Germany's social economy, though whether or not it exists is a matter of speculation. However, the idea behind our production model is that capitalism entails social duties and obligations. It is important to develop a form of capitalism that meets the interests of all those concerned, especially society as a whole.

TIRABOSCHI – If you talk about employers' obligations toward society, the environmental question is the first thing that comes to mind as one of the main reasons behind the recent changes to work and businesses. This is a key issue for the new generations of labour law scholars.

WEISS – This is a particularly complex problem that regularly comes up in the academic debate, also because of its impact on workers' health and employment. Decarbonization will radically change the world of work, e.g. the automotive industry, which is relevant in both Germany and Italy. This sector will face major changes both in terms of new jobs and support for those who will be forced out of the labour market. One concerning aspect is whether the current forms of worker representation (trade unions and works councils, among others) will manage to strike a balance between social and environmental needs, although I doubt it.

TIRABOSCHI – Do you think the labour law community can provide a real contribution to addressing environmental changes? Or, will labour law scholars just denounce that institutions and industrial relations actors cannot keep up with these changes, thus failing to take the matter into their own hands?

WEISS – The labour law community has not yet focused on how the economic, social and environmental dimensions can be held together, though it is clear that these complex issues should be dealt with through an interdisciplinary approach, which however takes time to establish.

TIRABOSCHI – In this respect, what is the role of supranational institutions on aspects that fall outside the remit of industrial relations actors, e.g., the environmental issue? I am thinking of tripartism, one of the ILO's founding principles. How can we provide a more modern interpretation of this concept? Tripartism requires full agreement among the parties, and this approach might be understood as giving them a veto right which slows down decision-making and affects problem-solving.

WEISS – Historically, tripartism has been a successful tool that helped those concerned to reach an agreement on controversial questions, including work-related issues. It remains to be seen whether the concept of tripartism should be reviewed in light of current societal changes. As said, achieving environmental sustainability is high on decision-makers' agenda, also because of its consequences on the world of work. This is not an easy task, and doubts can be raised about the ability of employers' associations and trade unions to promote environmental sustainability. Perhaps NGOs dealing with ecological issues could have a say in this. While industrial relations actors might see their involvement as a provocative act, I think that engaging other entities is the way forward to tackle the environmental issue.

TIRABOSCHI – So, should we rethink industrial relations? ([39]) Are they an old-fashioned way of solving work-related issues? This seems to be the case, also in consideration of the low number of industrial relations programmes available today.

WEISS – Regardless of the way this subject is labelled – which someone regards as passé – industrial relations as a discipline examines work-related issues through an interdisciplinary approach. Unfortunately, interdisciplinarity is being disregarded in highly-segmented university courses (law, economics, sociology, etc.). However, methodologically speaking, industrial relations as a subject remains as important as ever. The renaming of IIRA to ILERA was highly misleading and it was based on the misconception that industrial relations are only concerned with the collective dimension of work relations (i.e., trade unions). This misunderstanding originates from a human resource management (HRM) approach, which tends to emphasise individual relationships at the micro level. However, in current research, industrial relations are still relevant despite segmentation. Therefore, I remain optimistic. In my opinion, the

main question is how to involve new actors and employ novel, non-capitalist economic models – e.g., the social economy.

TIRABOSCHI – Let's consider another concept: trade unions. As we know, this word – which translates as *gewerkschaft* in German and as *syndicat* in French – comes from *sýndikos*, a Greek word that combines the terms *syn* (together) and *dike* (justice). There are fascinating expressions as they account for the social and human dimensions in economic and production relations. Today, many people disagree with this view, arguing that trade unions have become self-referential entities that only defend their interests, disregarding the needs of their members. What is your opinion about this issue, also in consideration of your international experience?

WEISS – Trade unions are different in each country and might adopt a bottom-up or a top-down approach to work effectively. In some cases, they are antagonist trade unions, while in other cases they cooperate to seek their interests. Finally, there are generalist trade unions or unions representing specific categories of workers. Due to these differences, transnational unions are difficult to conceive and supranational unions have little say in work-related issues. Therefore, it is not possible to provide an overall assessment of the role of trade unions. However, both salaried employees and self-employed workers need organizations that safeguard their interests, irrespective of their name and the model adopted. What is important is that these organisations must have a democratic structure to make sure their members are given a voice.

TIRABOSCHI – The concept of a 'trade union' is closely related to that of 'collective bargaining'. In the twentieth century – and in addition to playing a normative function – collective bargaining has been a key factor in the social and sustainable construction of the labour market and in balancing powers. This is how the founders of industrial relations in Anglo-Saxon countries looked at it, a view that is also shared by other experts worldwide. In your opinion, what is the future of collective bargaining?

WEISS – It is impossible to provide a clear-cut answer because much depends on national, cultural, and historical factors. For example, France, Italy and the Scandinavian countries are highly centralised, so it might be difficult to move away from collective bargaining at a national level.

Conversely, in Germany, we do not conclude national collective agreements as they are not suitable for our federal structure. Finally, in Poland and the UK, emphasis is placed on company-level collective agreements, so everything rests on the characteristics of national systems. This is one of the reasons why promoting social dialogue at the EU level is complicated. Collective bargaining will also be affected by the transformations taking place in the world of work, which make it difficult to seek collective interests. Think of platform workers. Do their interests match those of standard workers? Do they need different forms of protection? One problem is that law-making fails to keep up with the rapidly-changing labour market, sometimes providing ill-founded solutions. On the contrary, collective bargaining is faster and can also experiment with certain tools, which can then be enforced through legislation, ensuring effective problem-solving.

TIRABOSCHI – Together with an economic function, the collective agreement has traditionally performed a fundamental political dimension, settling social conflicts which pitted clearly-identified classes against each other.

WEISS – As employment relations are not only contractual relations but also relations of power, promoting workers' collective interests inevitably takes on a political dimension. Discussing social classes is a different, though equally complicated, matter. Yet an individualistic approach is indeed emerging that might undermine the spirit of solidarity characterizing collective interests.

TIRABOSCHI – We said that collective bargaining has historically served a 'standardizing' function, which however has been weakened by globalization. Do you think that one solution for this state of affairs is supranational collective bargaining, e.g., European collective bargaining?

WEISS – The idea of promoting European collective bargaining dates back at least to the 1960s, but it is impracticable due to significant cultural differences at the national level.

TIRABOSCHI – If we jettison this idea, don't you think we miss the opportunity to govern the economic processes that mostly take place on a

global scale? Isn't it perhaps better to focus on decentralised bargaining (e.g., company-level bargaining)? Many national systems are moving in this direction.

WEISS – The picture is quite complicated. I think that solidarity cannot only consider business dynamics, disregarding the issues of the entire labour market, which for example include the unemployed. However, we need new forms of protection and look for them through a realistic approach. Regrettably, transnational collective bargaining has proved unsuccessful in this respect. Much will also depend on the evolution of the European political project and future geopolitical changes.

TIRABOSCHI – In the meantime, promoting worker participation is high on the political agenda. Do you think union-mediated collective involvement will still exist in the future? Alternatively, will the individual dimension be given priority in the management of employment relations?

WEISS – Employee involvement in management's decision-making is more important than ever, due to the increasing isolation of both workers and companies. We need to draw on the work of the most authoritative labour law scholars, who argue that a democratic work environment ensures higher productivity and competitiveness. In the words of Hugo Sinzheimer, political democracy is fragile unless there is also democracy at work. Technological advances, drastic organizational changes, and the threat of job losses make participation a fundamental aspect. Without it, innovation is not accepted and concerns for the future might slow down transitions. Employee participation is built on mutual trust, but how can solid relationships be established remotely? I do not have an answer to this question, but we need to address it. Trade unions are looking for new forms of aggregation and communication, but they are working in an increasingly difficult context.

TIRABOSCHI – Arguably, working away from the office to achieve well-defined objectives without time constraints negatively affects solidarity. Is it time, in production and society as a whole, to provide individuals with more autonomy in work regulation?

WEISS – While it is difficult to give a clear-cut answer, we can say that there is a risk that new forms of exploitation will emerge. The pandemic showed us that more autonomy might also lead to exploitative practices

and infringements of labour laws. Let's just think of workers' health and safety and the protection of the most vulnerable groups. And what about the wage issue and the new forms of in-work poverty that are emerging in advanced economies? ([40]). Promoting autonomy in employment relations is an ambiguous goal. It stimulates creativity, but it could also give rise to self-exploitation. As is frequently the case in our disciplines, the crux of the problem is to strike the right balance between competing interests.

TIRABOSCHI – The notion of 'working time' developed during capitalism. It was the precondition for a market based on the hours worked, which replaced the idea of work conceived as a mere commodity. Do you think working time is still a central aspect in the regulation of the employment relationship, and economies, more generally? Or, will the future labour market prioritise skills, as in the case of self-employed workers?

WEISS – Working hours will be organised differently, but we need limits, particularly to protect workers' health and safety and work-life balance. If we don't have rules about breaks, minimum rest periods, and maximum working hours, we will not have a healthy workforce. It remains to be seen how the hours worked will be calculated, in consideration of the ongoing changes and the massive use of remote work ([41]). Significantly, these changes also give rise to new generation rights, e.g., the right to disconnect.

TIRABOSCHI – The digitalisation of work is closely related to working time. In this respect, are we facing a paradigm shift in production processes that will also produce changes to labour law?

WEISS – Undoubtedly, labour law needs to adapt to the digital age ([42]). For example, the concept of 'subordination' today might be misleading. In many countries, attempts have been made to expand the notion of an 'employment relationship' to include and safeguard other categories of workers, but this move does not solve the problem, especially when traditional employee protections are questioned.

TIRABOSCHI – Will this paradigm shift challenge the relevance of mandatory labour laws? Will the focus be more on remedial measures?

WEISS – Some may say I am an old-fashioned, labour law scholar, but I believe we need mandatory norms. Soft laws are far from effective, so mandatory legislation is necessary to protect workers. In this sense, the EU proposal on due diligence concerning corporate sustainability – which establishes minimum obligations for the global supply chain – is an excellent starting point. All corporate social responsibility (CSR) initiatives in the past were carried out voluntarily, but research has showed that this approach was not effective. Therefore, binding rules and enforcement mechanisms are necessary.

TIRABOSCHI – I agree, Manfred. If we consider the most vulnerable groups in the labour market, we can see that the labour laws enforced to protect them have been ineffective. Accordingly, which strategies do we need to ensure rights and protection through labour legislation?

WEISS – I think governments, employers, and workers need to agree on a new 'social pact', similar to the one enabling the Fordist model to last for decades. The underlying reasoning of the social pact lies behind the success and resilience of the German model. In Germany and other German-speaking countries, cooperation is preferred to conflict.

TIRABOSCHI – Yet most of your research has focused on conflict, particularly strikes.

WEISS – We talked about worker participation, the social pact, mutual recognition, and trust between workers and businesses. These are key factors in developing an economic system and making it socially acceptable. However, employment relations remain power relations, so trade unions and workers need tools such as a strike to put pressure on employers to safeguard their interests. In many cases, workers are left with no other option but to engage in industrial action to make their voices heard. Clearly, with the tertiarization of conflict, these actions mostly affect service users, but lawmakers should be cautious about limiting the right to strike. In my opinion, the ILO's Committee of Experts and that on Freedom of Association, as well as the European Court of Human Rights have done a good job in this regard.

TIRABOSCHI – We also have out-of-court dispute resolution mechanisms, which you investigated at length ([43]).

WEISS – The space for state jurisdiction or the implementation of other instruments – i.e., conciliation and arbitration – depends on national legal systems. For example, unlike what happens in the United States, court decisions in Germany are traditionally given priority over alternative dispute resolution mechanisms. Lay judges represent companies and workers on work-related issues, so these courts enjoy significant legitimacy. An efficient industrial relations system must provide proper tools to settle and prevent conflict. Once again, worker participation and involvement can represent a solution.

TIRABOSCHI – We were talking about work-related changes and the rules to govern them. At the international level, some scholars have emphasised the relevance of capabilities, drawing on the theories put forward by Martha Nussbaum and Amartya Sen. What is your opinion about this aspect?

WEISS – Martha Nussbaum and Amartya Sen have made compelling arguments about capabilities. They focus on the individual, who can raise his or her aspirations when given greater autonomy and responsibility. However, their theories underestimate the imbalance of power and the control mechanisms which still exist in the context of the employment relationship. I think that labour law does not need a major overhaul. The underlying reasoning behind the capabilities approach can be integrated into the labour law principles, without the need for significant changes.

TIRABOSCHI – Is this another reason why the concept of 'flexicurity' lost momentum? In recent decades, flexibility has been given priority over security, as is the case with active labour market policies.

WEISS – I think replacing job security with labour market security is misleading. While I agree that it is important to facilitate mobility and employment transitions, we cannot disregard the relevance of job security, which is an essential condition to help workers plan their life. Job security, broadly understood, has a major psychological impact on employees. The problem is that job security is undermined by recent developments, e.g., digitalisation and decarbonization. The lesson we have learned from the misleading use of the notion of 'flexicurity' in the neoliberal era should

make us wary of its possible negative implications. New generation rights alone cannot provide workers with effective protection.

TIRABOSCHI – The combination of flexibility and job protection is also a characteristic of the apprenticeship contract, which in southern Europe is frequently used to help young people access the labour market without however training them properly. On the contrary, Germany is famous for its dual training model. What can you tell us about that?

WEISS – The basic idea is to combine training and education in the workplace ([44]). I would talk of integration rather than alternation, and this is never easy because harmonization is needed between different aspects. You need qualified instructors to train teachers, specific institutions to govern the process that has to meet certain standards and good tutors in companies. In Germany, we train these people in companies until they are awarded the title of 'Master'. Things are changing now, as we need to teach both young people and adults to promote lifelong learning. However, combining training and education is the central idea and can be implemented in different ways, depending on each national context.

TIRABOSCHI – In Italy, many people raised concerns about the possible commodification of education, namely the risk of the education system moving away from its main function, i.e., preparing people. These arguments are made when attempting to establish a dual training system for minors.

WEISS – I understand what you mean.

TIRABOSCHI – This confirms that the effectiveness of apprenticeship depends on cultural factors, primarily on the fact that employers should consider it to be a valuable tool, a sort of 'common good'.

WEISS – This aspect is also pointed out in our Constitution, as Article 14 implies that the larger the enterprise, the greater its social responsibilities. That is why the Constitutional Court ruled that co-determination does not violate shareholders' rights, in that ownership entails social obligations. This reasoning is also reflected in our dual training system. In other words, vocational training helps people to learn a trade, making them better citizens.

TIRABOSCHI – One last question. What is labour law for you today? Is it a discipline doomed to lose relevance?

WEISS – Labour law still has a future ([45]). Work changes and so do the laws that regulate it. But the ideals of justice and equality in society cannot be undermined, and the workplace is the environment. These principles are in danger of being compromised because of profit and economic interests. Effective labour law also depends on the strength of workers' collective voice and the ability to affect company decision-making. These are the issues that the new generations of labour law scholars will have to deal with while pursuing innovation and respecting tradition.

ENDNOTES

([1]) E. VAN KERKEN, *Manfred Weiss, the man, and his contribution to the teaching of law in South African law*, in M. OLIVIER, N. SMIT, E. KALULA (eds.), *Liber Amicorum Manfred Weiss*, Juta, 2021. See also *infra*, M. WEISS, *Realizing Decent Work in Africa*, available in part II, chap. IV of this volume.
([2]) See L. BENDIX, *Zur Psychologie der Urteilstätigkeit des Berufsrichters und andere Schriften*, Luchterhand, 1968.
([3]) E. VAN KERKEN, *Manfred Weiss, the man, and his contribution to the teaching of law in South African law*, cit.
([4]) M. WEISS, *Die Theorie der richterlichen Entscheidungstätigkeit in den Vereinigten Staaten von Amerika*, Athenäum, 1971.
([5]) T. RAMM, *Problemi della costituzione del lavoro*, edited by L. GAETA, G. VARDARO, Giuffrè, 1978.
([6]) B. HEPPLE, *The Making of Labour Law in Europe: A Comparative Study of Nine Countries Up to 1945*, Mansell, 1986.
([7]) See M. WEISS, *The Sources of German Labour Law*, in part II, chapter. VI of this volume.
([8]) T. RAMM, *Problemi della costituzione del lavoro*, cit.
([9]) See the interview made in 1992 by Pietro Ichino to Gino Giugni for *La Rivista Italiana di Diritto del Lavoro*.
([10]) M. WEISS, *Arbeitsrechtswissenschaft auf den Spuren Hugo Sinzheimers*, in FB RECHTSWISSENSCHAFT DER GOETHE UNIVERSITÄT FRANKFURT (Hrsg.), *100 Jahre Rechtswissenschaft in Frankfurt*, Vittorio Klostermann, 2014, p. 577 ff.
([11]) O. KAHN-FREUND, *Labour Relations: Heritage and Adjustement*, Oxford University Press, 1979.
([12]) O. KAHN-FREUND, *Labour Relations: Heritage and Adjustment*, cit.; O. KAHN-FREUND, *On Uses and Misuses of Comparative Law*, in *The Modern Law Review*, 1974, n. 1, p. 1 ff.
([13]) Available in S. SCIARRA, S. SIMITIS, T. TREU, M. WEISS, *Spiros Simitis giurista europeo*, in *Giornale di Diritto del Lavoro e Relazioni Industriali*, 2006, p. 301 ff.
([14]) See *infra*, M. WEISS, *The Interface between Constitution and Labor Law in Germany*, available in part II, chap. VI of this volume.
([15]) See M. WEISS, *Fundamental rights and German labor law*, in J. BELLACE, B. TER HAAR (eds.), *Research Handbook on Labour, Business and Human Rights Law*, Elgar, 2019, p. 17 ff.
([16]) See M. WEISS, *The Transition of Labor Law and Industrial Relations: The Case of German Unification – A Preliminary Perspective*, in *Comparative Labor Law Journal*, 1991, p. 1 ff.
([17]) See M. WEISS, *Workers' Participation in the Enterprise in Germany*, in part II, chap. VI of this volume.
([18]) The fundamentals of Germany labour law are described in detail in M. WEISS, M. SCHMIDT, *Labour Law and Industrial Relations in Germany*, Wolters Kluwer, 2008.

([19]) M. WEISS, *Formazione professionale in Germania: il sistema duale*, in M. TIRABOSCHI (ed.), *Manfred Weiss. Giurista senza frontiere*, ADAPT University Press, 2022, part II.
([20]) See M. WEISS, *The Social Dimension of the EU*, and also M. WEISS, *The Future of Labour Law in Europe: Rise or Fall of the European Social Model?*, in part II, chap. III of this volume.
([21]) See *The Significance of Maastricht for European Community Social Policy*, in *The International Journal of Comparative Labour Law and Industrial Relations*, 1992, No. 3.
([22]) See *infra*, M. WEISS, *Some Reflections on the Future of the ILO*, in part II, chap. IV of this volume.
([23]) See *infra*, M. WEISS, *International Labour Standards: A Complex Public-Private-Policy-Mix*, in part II, chap. IV of this volume.
([24]) T. RAMM, *Per una storia della Costituzione del lavoro tedesca*, Giuffrè, 1989, p. 23, note 3.
([25]) These studies can be found in: B. AARON (ed.), *Labour Courts and Grievance Settlement in Western Europe*, University of California Press, 1971; B. AARON, LORD WEDDERBURN (eds.), *Industrial Conflict. A Comparative Legal Survey*, Longman, 1972; F. SCHMIDT (ed.), *Discrimination in Employment*, Almqvist & Wiksell, 1978.
([26]) I referred to this aspect in M. TIRABOSCHI, *Some personal insights into the International Conference in commemoration of Roger Blanpain: "Game Changers in Labour Law – Shaping the Future of Work" (3-4 November 2017, Leuven, Belgium)*, in *ADAPT International Bulletin*, 2017, n. 21.
([27]) M. WEISS, *Jacques Rojot: un ricordo molto personale*, in *Diritto delle Relazioni Industriali*, 2020, n. 3, pp. 607-610.
([28]) M. WEISS, *The Future of Comparative Labor Law as an Academic Discipline and as a Practical Tool*, in part II, chap. II of this volume.
([29]) O. KAHN-FREUND, *Comparative Law as an Academic Subject*, Oxford University Press, 1965.
([30]) L. GAETA, *La comparazione nel diritto del lavoro italiano*, in A. SOMMA, V. ZENO-ZENCOVICH, *Comparazione e diritto positivo. Un dialogo tra saperi giuridici*, RomaTre-Press, 2021, p. 203. It is stated that "Early-career labour law scholars are particularly interested in comparative analysis. Besides the traditional 'Pontignano seminars', many meetings are arranged that focus on comparison. However, as a member of the selection panel awarding the National Scientific Qualification (ASN), I came to the conclusion that their research fails to meet the main purpose of comparative law, so this attempt is not particularly rewarding in academic terms".
([31]) Here reference is made to the *European Employment and Industrial Relations Glossaries,* which were compiled between 1991 and 2003. They are now available online at the Eurofound website in the form of a database (EMIRE Database).
([32]) Cf. *supra*, *The Origins of a New European and International Legal Culture*.
([33]) M. OLIVIER, N. SMIT, E. KALULA (eds.), *Liber Amicorum Manfred Weiss*, cit.
([34]) Weiss' views can be read in *Challenges for Labour Law and Industrial Relations* e *Re-Inventing Labour Law?*, in part II, chap. I of this volume.
([35]) See M. WEISS, *La partecipazione dei lavoratori in Europa*, in M. TIRABOSCHI (ed.), *Manfred Weiss. Giurista senza frontiere*, cit., part II.
([36]) A. NEAL, *The Very Model of a Modern Labour Lawyer*, in A. HÖLAND, C. HOHMANN-DENNHARDT, M. SCHMIDT, A. SEIFERT (eds), *Arbeitnehmermitwirkung in einer sich*

globalisierenden Arbeitswelt/Employee Involvement in a Globalising World: Liber Amicorum Manfred Weiss, BMV, 2005, p. 3 ff.
([37]) Cfr. *supra*, *Legal Comparison: Myth and Reality*.
([38]) *Infra*, M. WEISS, *Workers' Participation in the Enterprise in Germany*, cit.
([39]) *Infra*, M. WEISS, *Challenges for Labour Law and Industrial Relations*, cit., e *Re-Inventing Labour Law?*, cit.
([40]) See M. WEISS, *Il salario minimo legale in Germania*, in M. TIRABOSCHI (ed.), *Manfred Weiss. Giurista senza frontiere*, cit.
([41]) See M. WEISS, *Digitalizzazione: sfide e prospettive per il diritto del lavoro*, in M. TIRABOSCHI (ed.), *Manfred Weiss. Giurista senza frontiere*, cit.
([42]) See M. WEISS, *Digitalizzazione: sfide e prospettive per il diritto del lavoro*, cit., and also M. WEISS, *La sfida regolatoria per i nuovi mercati del lavoro: verso un nuovo diritto del lavoro?*, in M. TIRABOSCHI (ed.), *Manfred Weiss. Giurista senza frontiere*, cit., part II § 3.
([43]) See, M. WEISS, *Dispute Resolution in German Employment and Labor Law*, in part II, chap. VI of this volume.
([44]) See M. WEISS, *Formazione professionale in Germania: il sistema duale*, cit., and also M. WEISS, *La sfida regolatoria per i nuovi mercati del lavoro: verso un nuovo diritto del lavoro?*, cit., § 2.
([45]) See M. WEISS, *La sfida regolatoria per i nuovi mercati del lavoro: verso un nuovo diritto del lavoro?*, cit.

Part II
SELECTED WRITINGS

CHAPTER I
LABOUR LAW AND INDUSTRIAL RELATIONS BETWEEN PAST AND FUTURE: SOME MAIN CHALLENGES

Challenges for Labour Law and Industrial Relations*

I. Introduction

Beyond Traditional Employment. Industrial Relations in the Network Economy was the general topic of the 13th World Congress of ILERA (then still IIRA), organised in Berlin 2003 in the period of my presidency. The issues discussed there are as important today as they were then. This applies to the track *Enterprise Reorganisation: Negotiated, Consultative or Unilateral* as well as to the track *Changing Contours of the Employment Relationship as well as to the Employment Relationship*, *Industrial Relations and Global Labour Standards*, *Collective Actors in Industrial Relations: What Future?*

The problems implied by the fragmentation and segmentation of the workforce were discussed as well as the ongoing erosion of the traditional enterprise by outsourcing, networking and similar strategies in the context

* In M. RÖNNMAR, D.-O. KIM (eds.), *Global Labour and Employment Relations. Experiences and Challenges*, Seoul, 2020, p. 133.

of a globalized economy. The decline of standard employment in favour of new forms of work was analysed as well as the increasing difficulty of identifying the employer in scattered enterprise structures. The limits and weaknesses of international labour regimes were subject to debate as well as the increasing difficulties for the trade unions to organize collective power, particularly in the international arena ([1]).

The topics to be discussed and the problems to be resolved have remained to be the same up to now. But they have become more complex and more dramatic today than at the turn of the century. The promotion and enforcement of global labour standards has remained to be an unresolved problem which particularly becomes evident in view of the increasing phenomenon of global supply chains. And the technological development has changed the world of work in a way that urgently new answers on how to cope with this challenge are to be found.

It, of course, will not be possible in this contribution to present a comprehensive overview on all the challenges labour law and industrial relations are facing in this globalized economy and in view of the latest technological developments. Therefore, I will limit myself to indicate just some unresolved problems in reference to international labour standards (II) and in reference to digitalization of work (III) My intention is not to present possible solutions but rather to identify the challenges, the obstacles for solutions and the uncertainties on how to cope with these challenges. Or to put it differently: I would like to sketch some problems for future activities of ILERA.

II. The Deficiencies of International Regulation

1. The Enforcement Problem

In a globalized economy it is possible for the trans-nationally operating companies to shift production and services to countries with lowest labour standards and, thereby, lowest labour costs. This leads to social dumping between countries. In order to turn around this run to the bottom it is necessary to establish a worldwide minimum floor of protection. This task evidently cannot be achieved by national law. It needs international norm setting. The International Labour Organization (ILO) and to a certain extent also the United Nations (UN) have been involved in developing international labour standards in order to achieve this ambitious goal.

Above all the UN and the ILO have developed social human rights which are supposed to be the point of reference for labour law worldwide. They are embedded in the UN Universal Declaration on Human Rights of 1948 (Art. 23 and 24), in the UN International Covenant on Economic, Social and Cultural Rights of 1966 (Art. 6- 8) and in the ILO Declaration of 1998 on Core Labour Rights. In addition the ILO has passed almost two hundred Conventions on all aspects of Labour Law and Social Security. In short: There is already an impressive set of universal minimum labour standards. The problem is less the production of norms ([2]) but the lack of implementation in practice and in particular the lack of enforcement mechanisms. This applies to all the UN instruments. The ILO conventions suffer not only of an often low level of ratification ([3]) but in particular of a rather toothless monitoring system. Even if the influence of the case law of the different monitoring bodies of the ILO on the judicial debates in member countries cannot be denied, this is by far not enough. The ILO standard setting machinery needs significant strengthening. As far as monitoring and sanctioning are concerned, the system of the European Convention on Human Rights where conflicts are adjudicated by the powerful European Court of Human Rights might serve as a model for more efficient enforcement of conventions. However, a consensus for such a structure on global scale is not easily to be achieved. Many obstacles would have to be surmounted. Attempts to establish the Tribunal which is envisaged in Art. 37 par. 2 of the ILO Constitution failed. The majority of the Member States are unwilling to increase the ILO's power to enforce their norms.

For a long time it was taken for granted that it is up to the supervising committees of the ILO, the committee of experts as well as the committee on freedom of association, to interpret the vague notions of the conventions and, thereby, to specify the scope and the content of the conventions. This traditional view has now been contested. At first glance the controversy is only on the right to strike. However the right to strike only was the occasion, the impact of the controversy goes far beyond it.

The situation is becoming even worse. It started with a conflict on the right to strike. The right to strike is not mentioned in the ILO Convention 87. But the committees of the ILO supervisory system from the very beginning and for decades took the position that the right to strike is implied by Art. 3 of Convention 87 and they specified it in their case law. This was accepted by the employers' representatives in the ILO, in particular for the fact that in the communist member states strike was forbidden. Thereby, the legitimacy of communism could be attacked. When the Berlin wall and

the iron curtain fell, this attitude of the employers' camp started to change. The controversy escalated when in 2012 the employers refused to sign the list of Member States violating the right to strike. The employers' group not only insisted on the wording of Convention 87 but declared that the respective committees have no mandate to decide anything, that their work only would be for internal purposes of the ILO and would have no external effect whatsoever. This conflict is not settled yet ([4]). In a tripartite conference in 2015 a sort of cease fire has been reached by a joint declaration of the representatives of the trade unions and employers' associations. For a preliminary period the employers' side agrees to cooperate as before. But this is neither a final agreement on the right to strike nor on the mandate of the committees. Theoretically and according to the constitution of the ILO there would be a possibility to bring the conflict before the International Court in The Hague. This, however, is very unlikely. Each side is afraid of a definitive judgement. Where the conflict finally will end up, is an open question.

1.2. Can Private Actors Compensate the Enforcement Deficiency?

In view of the indicated enforcement problem the question arises whether the assistance of private actors might fill the gap between the international labour standards as law in the books and real efficient factual implementation. Already many decades ago the ILO and the Organization for Economic Cooperation and Development (OECD) tried to take use of the fact that the Multinational Enterprises (MNE) might be able to define the context in which they are active. The OECD guidelines for MNE as well as the Tripartite Declaration of Principles on Multinational Enterprises and Social Policy, both of the mid seventies of last century and until today often revised and amended, were passed to initiate such a supplementary task for the MNE. And in the turn of the century they were complemented by the UN Global Compact which serves the same goal. These 'external' guidelines were mainly meant to enrich the fantasy of management in the MNE in elaborating so called private codes of conduct. Such codes have become numerous and are mainly a product of the last decades.

Even if these codes are by no means homogeneous ([5]), they all refer to the core fundamental rights as contained in the ILO Declaration of 1998. For the rest there are big differences between them. Even more significant are the differences between different branches of activity. Some codes simply

refer to the whole set of ILO standards. The codes not only are very different in reference to their content but also in their genesis. Most of the codes are unilaterally established by the companies. However, to an increasing extent there is a new generation of codes called 'multi-stakeholder' initiatives. Human rights groups, community and development organizations participate in formulating such codes of conduct ([6]). These 'multi-stakeholder codes' contain also provisions on monitoring, verification, certification of supplier factories, enforcement mechanisms and transparency. In the meantime the certification industry has grown enormously.

All these codes are legally non binding. They are 'light touch' regulations or 'soft law'. There is only a moral obligation of the MNE to respect them. In case of unilaterally developed codes the companies are very much interested in internal conflict-resolution. Therefore, in these cases the outside observers do not learn anything about possible violations. However, there are MNE who want to make perfectly clear that they are not interested in hiding violations. They have decided to be exposed in regular intervals to so called 'external monitoring'. This of course applies – as already mentioned – to all 'multi-stakeholder codes' of the new generation.

However, this certification business should not be overestimated, in particular since the certifying agencies are paid by the MNE. The main purpose of such certificates in the meantime has become to be used as marketing strategy. 'Social labelling' plays an ever bigger role.

One of the weaknesses of the codes of conduct is the exclusion of the trade unions as an actor. Or to put it differently: codes of conduct to a great extent are to be understood as a strategy to escape the trade unions. Exactly this deficiency is supposed to be overcome by a new strategy: The International Framework Agreements (IFA).

IFA are the result of direct negotiations between the headquarters of the MNE and Global Union Federations (GUF) ([7]). The negotiations take a rather long time, in general between one and three years. The IFA are a phenomenon which really started only in the first decade of the 21st century. Mainly two developments within the international trade union camp made this new strategy possible: the transformation of the former International Trade Secretariats (ITS) into GUF and the merger of the two largest international confederations, the International Confederation of Trade Unions (ICFTU) and the World Confederation of Labour (WCL) into the single International Trade Union Confederation (ITUC) in 2006.

However, compared to codes of conduct the number of IFA is still relatively small.

Even if the IFA come closest to a traditional understanding of industrial relations, they should not be confused with traditional collective agreements concluded by the two sides of industry in a domestic context. They do not specify in detail terms and conditions of employment but rather set a framework for the relationship between the MNE and the trade unions, the workers, again quite often throughout the whole supply chain. The GUF and the MNE function in this context not so much as classical bargaining parties but rather as civil society actors shaping and channelling 'culture' as a catalyst both for change in mentalities and subsequently for the formulation of relevant public policies and laws ([8]).

The IFA are a new quality compared to codes of conduct with which they should not be confused. Whereas codes of conduct to a great extent were intended to escape any engagement with trade unions, the GUF and their affiliates in the different countries are now recognized as partners with whom arrangements are to be made.

It is of utmost importance that the IFA contain a machinery of joint monitoring which generally introduce joint monitoring committees that consist of management and workers' representatives and that are intended to meet regularly in order to assess progress or deal with conflicts. The GUF cooperate closely with national trade unions in implementing the IFA. The more this interaction works, the better the effects. Monitoring by trade unions is a new quality compared to the monitoring systems in the context of codes of conduct. The employee delegation in these joint monitoring bodies usually comprises company-level representatives and a representative from the GUF and from the union of the company's home country.

The question, how efficient these mechanisms are in actual practice has become a most interesting topic of empirical studies. Presently quite a bit of research projects is focussing on the factual implementation of IFA. Thereby factors can be identified which support the intended effects as well as factors which prevent such a development.

The spill over-effects of IFA should not be underestimated. IFA led already to the establishment of a significant number of company-based bodies of interest representation as well as to the promotion of social dialogue and cooperation which support the development of mutual trust. And there is no doubt that the efforts to negotiate for an IFA and to implement them have a significant impact on the structure of GUF, on their

interaction with national trade unions and on the transnational perspective of the trade union movement as a whole ([9]).
Nevertheless even behind this promising strategy remains a big question mark, in particular since after a promising begin unfortunately stagnation is to be observed. It seems that the enthusiasm for IFA already has more or less come to an end. Therefore, private activities in the context of the MNE only to a very limited extent can be considered as compensation for the diagnosed enforcement deficiency of international labour standards.

2. Fear of Binding Rules: the Example of Global Supply Chains (GSC)

One of the most burning problems is the lack of decent labour standards in global supply chains ([10]) and in particular the lack of liability of the headquarters of MNE in cases where in the worldwide supply or value chain employees suffer damages because international labour standards are violated as it happened in the well-known Rana Plaza case in Bangladesh where in April 2013 more than thousand workers were killed and many more injured.
This tragic event served as a wake-up call at least for better protection of health and safety. The main result was the conclusion of the Accord on Fire and Building Safety in Bangladesh less than one month after the event on May 15, 2013. It is a legally binding agreement between in the meantime more than 200 MNE and trade unions designed to build a safe and healthy Bangladeshi Ready Made Garment (RMG) Industry. It contains a comprehensive and efficient program for prevention of accidents, for sanctions in case of violations and for remedies for those who suffer damages. It expires in May 2018. Only after lengthy controversial debates - the Rana Plaza shock is no longer present – an extension for three more years has been reached.
The Accord could serve as a model for regulation of GSC. However, it only refers to health and safety and covers only one industry in one country. This evidently is by far not enough. A much more comprehensive regulation covering all countries and all branches where GSC are active and covering other important topics (wage, working time etc.) is needed.
At least as health and safety is concerned an attempt of extension to other branches and countries has been made. In October 2015 the G7 States introduced the Vision Zero Fund (VZF). It strives to realize the goal of zero work-related fatalities and severe injuries and diseases by improving

occupational safety and health practices and conditions in all sectors linked to GSC and beyond Bangladesh all over the world. The fund also seeks to strengthen institutional frameworks such as labour inspectorates and employment injury insurance schemes in countries linked to global supply chains.

An interesting attempt to strive for a comprehensive regulation for GSC took place in the UN Humans Rights Council (HRC), established in 2006 and made up of 47 Member States. In 2014 the HRC in 2014 has passed a resolution for elaborating a binding instrument. This resolution was initiated by Ecuador and South Africa. It was backed by a big majority of mainly developing countries, whereas the industrialised countries, among them Germany, France, UK, Italy, Japan, South Korea and USA voted against. The advantages of such an instrument compared to the guiding principles would be mainly three: (a) it would be an international solution with universal obligations for the Member States and indirectly for the companies; (b) it would be a uniform solution in reference to companies' responsibilities, sanctions, access to remedies, enforcement etc. and (c) it would be legally binding. A working group has been established. It meets in regular sessions, but the chances for a satisfying result tend towards zero.

At least the HRC's initiative has led to the fact that *Decent Work in GSC* became a topic on the agenda of the ILO's International Labour Conference (ILC) of 2016, based on a report of the International Labour Office ([11]). The trade union delegates were pleading for a convention on this subject which, however, was strongly rejected by the employers' camp. The result of this debate are joint conclusions on the lowest possible denominator. The ILO is asked to develop a legally non binding action plan on how to promote decent work in supply chains and companies are encouraged to conduct *Human Rights Due Diligence*. This soft law approach has been confirmed in the ILC session 2017.

3. Evaluation

There is a significant amount of international regulation, social human rights and rules for all kind of labour law aspects. However, there is a lack of implementation, it still is mainly law in the books and not law in actual practice, at least not to a sufficient extent. Voluntary codes of conduct do not lead to a significant change. IFA concluded between headquarters of

MNE and GUF might be a step forward, but their increase is more than uncertain.
There is consensus that GSC are problematic and improvement of working conditions is indispensable. In the area of health and safety some progress has been made. All attempts to elaborate legally binding international instruments failed so far. Everything remains on the level of soft law, low pressure and voluntary activity. There is not much hope that this will change in the near future.
The ILERA might act as a pressure group in this context to promote ideas on how to overcome the indicated deficiencies.

III. Impact of Digitalization on Labour Law and Industrial Relations

1. The Different Types of Digital Work

Digitalisation of working patterns has many faces, it is not to be conceived as a uniform or homogeneous phenomenon. Many details are still rather unclear. But undoubtedly it means as well as globalisation a dramatic transformation of the world of work. Each of the different working patterns leads to different implications for labour law and industrial relations. Three types are most relevant in this context.
Already for several decades communication technologies made it possible that work does not have to be performed in the premises of the employer but can be executed anywhere. The labels used for this type of work are 'tele-work' or 'mobile work' ([12]).
Another trend of this digital evolution is labelled 'industry 4.0' which stands for the fourth industrial revolution ([13]). The label is somehow misleading because this type of work not only refers to manufacturing but also in the same way to services. Collaborative robots become intelligent, which means able to adapt, communicate and interact. Smart robots communicate with each other and with humans on interlinking tasks. These cyber-physical systems are quickly widening, including various functions in production, logistics or office management.
The third important trend is the increasing platform economy ([14]) where a crowd-sourcer launches a call or competition on an online platform, gathers proposals from the crowd and evaluates the proposals to select the proposal deemed most suitable for the intended purpose. Here basically two types are to be distinguished: 'internal platforms' to which only the workforce of a specific company has access and 'external platforms' with

open access for anybody meeting specific criteria. Among the 'external platforms' again two types are to be distinguished: 'work on demand via app' where the work is performed in a traditional way (transport, cleaning etc.) and 'online crowd-work' where work is performed by a crowd-worker online. Again there has to be distinguished between platforms where relatively simple tasks are performed by unskilled or low skilled persons and complex platforms where highly skilled persons are confronted with complex tasks.

There is no doubt that at least to a certain extent human beings will be substituted by robots, thereby losing their jobs. The challenge will be to keep the number of these people as small as possible and to re-skill those who are substituted in order to re-integrate them into the labour market. The even bigger challenge, however, will be whether and how the work in view of digitalization can be regulated in a way which will guarantee that the traditional goals of labour law to protect the worker, to respect his or her dignity, in particular to guarantee his or her privacy as well as his or her physical, mental and psychic health.

The problem to be sketched in this contribution is the impact these developments have on traditional labour law and industrial relations. How these challenges can be met, is still rather uncertain. The purpose of this contribution is to briefly indicate the direction in which regulatory strategies might be developed ([15]).

2. Perspectives of Regulation

2.1. Growing Importance of Training

As indicated a main effect of digitalisation will be that the content of work will be very different compared to today and that other skills will be needed than nowadays. Therefore one implication of the new scenario is certain: life-long-learning will play a much bigger role than ever. Vocational training will have to be directed much less to specific skills and functions but to the ability on how to learn and how to adapt to new circumstances. It will be necessary to much more focus on training than ever before. Work has to be accompanied by ongoing training of the workforce. Labour law has to provide the framework for such skilling opportunities. Workers must get the time and the resources to engage in continuous learning processes. Not only the Governments but also the actors in collective bargaining as well as the actors in workers'

participation schemes are confronted with this task. Joint efforts of all these actors are needed. In Germany the metal workers trade union at least in one branch has already succeeded to conclude a collective agreement providing space and financial resources for such educational efforts. This is only a small beginning, but it shows the direction which will have to be followed.

2.2. Reconsideration of the Scope of Labour Law Protection

Already for quite a long time it has become evident that the demarcation line between employment and self-employment is very difficult to draw ([16]). To an increasing extent there are persons labelled as being self-employed but in reality being employees. They of course are to be included into the scope of application of labour law, even if it might be difficult to exactly identify their status. Problematic are those which undoubtedly are self-employed but economically in a similar position as employees. Therefore, in many countries a specific category has been invented for the economically dependent self-employed. In Germany they are called 'employee like persons'. However, only some rules of labour law are applied on them. The reason is very simple: if they are only economically but not personally dependent, their situation remains to be still different from employees in a strict sense ([17]).

This well known problem will further increase in the era of digitalisation. The degree of autonomy in performing work makes it more and more difficult to categorize the persons involved in such work. Many of those who participate in crowd-sourcing certainly are not employees but rather self employed. So far neither minimum wage rules nor health and safety standards apply to them. Or let's take the well known system established by Uber to illustrate the problem. Customers use an app on their smart-phones to request rides from a specific location. This information is instantly broadcasted to the drivers in the area. The driver who accepts is directed to the passenger and onwards to the required destination through the Uber app. Payment is taken automatically from the customer by the platform and after the deduction of a commission passed on to the driver. The drivers are rated afterwards by the customers ([18]). It has become extremely controversial whether these drivers are employees, thereby covered by labour law, or whether they are self-employed. To answer this question is very difficult. Courts all over the world have been busy to

decide this question. Quite a few lawsuits are still pending in many countries.

The problem to be resolved goes far beyond the outcomes of these lawsuits. There is growing consensus that the traditional demarcation line between employment and self-employment no longer makes sense. It does not fit into the reality of digital work. But the direction of the reform is still very controversial. One possibility might be a re-conceptualization of the notion of employee, thereby widening the scope of labour law protection. Another possibility might be the introduction of an intermediary category between employment and self employment as it is already is the case in quite a few countries. A more radical possibility would be the inclusion of self-employed up to a certain wage level into the protective roof of labour law. Finally it might be considered to develop special regulations for work in the context of platforms or at least for crowd-workers ([19]).

Each of these possible solutions has to cope with severe difficulties and uncertainties. In each case demarcation lines have to be drawn to fit in an ever changing reality: a giant task. And it is more than doubtful whether it makes sense to extend the whole protective scheme of labour law (and also social security law) to groups who so far fall under the category of self-employed. But then the question arises what kind of protection and to what extent is needed for which categories? This question is closely linked to the problem whether protective standards taking account of the specific situation of workers in platform contexts might be the same as for other economically dependent self employed or whether they have to be different. And would special rules have to be continuously adapted in view of the exponential technological development? Unresolved questions all over, no satisfying answers are in sight.

The platform economy is not only an attack to the concept of employee but also to the concept of employer. To again take the example of Uber it might be helpful to have a look into the terms and conditions where the customers are informed that they "acknowledge that Uber does not provide transportation or logistics services or function as a transportation carrier" but merely as an agent between driver and customer. It might be doubtful whether and in how far such structures fit into the traditional concept of employer. Therefore, a big debate on re-conceptualization of this notion has started, trying to develop a functional concept of employer, fitting better into the reality of platform economy and making it more difficult for platform to escape their duties ([20]).

2.3. Reconsideration of Working Time

As indicated above digitalisation will focus more on goals to be achieved in a certain time frame. Presence at the workplace will be less important. How and when within the given time-frame work is to be performed, is more or less left to the discretion of the worker. This 'autonomy' leads to the question whether traditional working time regulations still are appropriate to cope with this situation. Working time regulation so far was focussing mainly on daily and weekly maximum working time, on breaks and rest periods between the days and providing holidays and vacations. Step by step flexibility has been built in. Daily and weekly maximum working time could be exceeded to a certain extent if compensated by reduction of working time within a certain period. However, in spite of the flexibility element working time regulation still remains rather rigid.

In the digital world there is the danger that working time never ends. Workers may be supposed to remain online, to answer e-mails and phone calls also after normal working time as well as on holidays and on vacations. And even if the workers are not asked by the employer to do so, they might do it voluntarily. This has far reaching implications on health and safety of the workers as well as on their private life. Relaxation and rest, as it is supposed by traditional working time regulation, is no longer possible under these conditions. Self-exploitation is an ever increasing danger. The eight hours day, the big achievement of the labour movement in the early twentieth century is in danger to be abolished.

The question is whether regulations are possible at all. The blocking of access to crowd-platforms for specific hours might not be very helpful, the crowd-workers might still continue working on their projects and put the results later on in the platform. In Germany some companies have concluded with the works councils agreements according to which the servers are disconnected after a certain time of the day and during the weekend and employees are not to be called. During vacations the account for the respective worker is to be blocked. Thereby, the employee enjoys a right to non-availability. This shows the way into the right direction. It, however, only can be a first step. Not all employees are happy with such a regulation, some are afraid of the increased workload they are confronted with after the periods of disconnection.

Things are even more complicated when workers are involved in production or service processes with workers in other time zones. Then such disconnection might be counter-productive. In short and to make the

point: the traditional working time regulation is no longer feasible. But an appropriate alternative is not yet in sight.

2.4. Growing Importance of Data Protection

As indicated the possibility of collecting and evaluating data by digital tools will increase dramatically. This means that the workers' privacy will be more endangered than ever. It cannot be left to the discretion of the employer what data are collected, stored and connected with other available data.
However, not only the workers' privacy is at stake. It also has to be made sure that business secrets are not endangered. This is further complicated by the fact that more and more often workers are supposed to use their own devices for professional purposes (smart phones, tablets etc.). Thereby, not only business secrets are endangered but quite a few problems arise in the relationship between employers and workers. Can the employer dispose on the worker's private property? Can the employer prohibit that the worker's devices are also used by other people or that cloud services are used? And what about monitoring if business data and private data both are on such devices? Can the worker be obliged to report to the employer if his or her smart phone is lost or stolen? All these questions indicate that the policy of 'Bring Your Own Device' (BYOD) leads to a whole set of further unresolved problems.

2.5. Reconsideration of Health and Safety

Digitalization will make it necessary to totally rethink the concept of health and safety. The traditional focus on physical dangers has radically to be changed towards psycho-social problems.
It is already common knowledge that the danger of psycho-social disorders has significantly increased in the information society. This will further increase if to a bigger and bigger extend work is characterized by technology driven forms of work. De-localisation, the decreasing relevance of traditional working time patterns, the focus on work results to be produced in a certain period and no longer on presence at the workplace as well as the loss of clear-cut hierarchies promotes workers' autonomy which is considered to promote creativity and innovation. But in reality this new autonomy is very ambiguous, it implies the danger of self

exploitation. This implies a need for new patterns of stress prevention and new strategies on how to cope with the consequences of stress. How this can be regulated, is an open question and a big challenge for all the actors of industrial relations.

2.6. New Concept of Work Life Balance

So far labour law tried to develop patterns which make it possible to find a better balance between work and private life, family obligations etc. Part-time work, parental leave or leave for care of sick or elderly family members are well known examples of such a policy. However, these strategies all were developed under the assumption that work and private life are two different entities. This distinction more and more may fall apart due to digitalization of work. De-localised work and work without clear time limits more and more is intruding into private life, thereby eliminating to a bigger and bigger extent the demarcation line between the two spheres of human life. This not only will have a significant impact for family life, but for the society as a whole. It again is an open question whether, in how far and by what kind of regulation the private part of life can be rescued.

2.7. Growing Difficulties of Collective Representation

The traditional Fordist model was characterized by a relatively homogeneous workforce in a hierarchically structured factory or office. As already indicated above, this model already fell apart by the segmentation and fragmentation of the workforce, divided in core groups and non-standard groups with significantly diverse interests. This trend is dramatically increased by the digitalisation of work. The example of the platform workers shows that there is no more link between the acting individuals, they don't know each other and work in splendid isolation.
Technological innovation cycles by digitalisation of work are becoming faster and faster. The legislator will not be able to keep up with the changes and to adapt the rules to the respective needs. The legislator only can provide a relatively flexible framework. Solutions balancing the needs of the platforms and the workers are to be developed on a decentralised level be it in the area of training, of working time, of health and safety or of data protection. These solutions cannot be left unilaterally to the employer but must be developed in cooperation with representative bodies of the

workforce. In other words: the working conditions are to be shaped and monitored together with the employees representatives, be it by way of information and consultation or even by co-determination. 'Cooperative turn' has become the catchword for this approach.

The difficulties for workers' participation, of course, not only have grown due to digitalization. Outsourcing and networking strategies have made it more and more difficult to identify the employer. However, these difficulties, as indicated above, have significantly grown in the platform economy.

The basic requirement for workers' participation, be it via institutionalized schemes or be it by collective bargaining, is the possibility to develop collective structures among digital workers, in particular in the context of platforms. Whether this goal can be achieved or whether it remains to be an illusion in the digital economy, is still an open question. But there is no doubt that the answer to it will decide the future development and the sustainability of digital work.

The first step to be taken in this direction is to overcome the workers unanimity and isolation ([21]). A group of trade unions from different countries have already started to devote themselves to this task. To just give an example: Representatives from trade unions from Austria, Denmark, Germany and the United States of America as well as from the Service Employees International Union met in Frankfurt/Germany in April 2016 together with an international group of industrial relations experts to discuss possible strategies. This resulted in a joint declaration on platform-based work ([22]). Therein they explained "the possibilities for a 'co-operative turn' in labour-management relations in the 'platform economy', in which workers, clients, platform operators, investors, policy makers, and worker organizations work together to improve outcomes for all stakeholders". And they identified platform providers as "appropriate negotiating partners for platform-based workers seeking to improve their conditions of work", even if in some cases "clients may also be appropriate negotiating partners". In particular they insisted that "all workers on the platform regardless of whether they are employees or independent contractors" are to be included in "a platform's policies and information flows". And as far as the 'co-operative turn' is concerned the declaration reads as follows: "The 'traditional' conflictual processes of labour-management relations have secured crucial rights for workers over the years and will continue to be important. But insofar as platform operators understand that their long-term well-being, and that of society at large is bound up with the ability of workers – regardless of their status – to secure

good work, future labour-management interactions may be organized around interests deeply shared by all parties. This possibility offers the hope of great gains for all parties".

This optimistic view was not only accompanied by a list of topics to be regulated (wages, social protection etc.) but in particular by a request for two strategies which might serve as a first step on this way to a 'cooperative turn': establishment of transparency and of a mechanism of dispute resolution.

It is stated in detail that to a great extent the whole operation of platforms remains in the dark. This refers to processes for assigning tasks, the preconditions for account closure or computing worker reputation and other qualifications, to just mention some examples. Complaints refer to the fact that often the use of platforms is obscured by posting tasks under wrong names. The declaration resumes that "in short, the knowledge base required to make sound policy is missing". Therefore, transparency is understood to be the indispensable precondition to develop a strategy for collective voice of platform workers.

As far as dispute resolution is concerned, the declaration proposes "that platform operators work – with workers, clients, researchers, worker organizations, and other actors as appropriate – to develop transparent, accountable methods for resolving disputes between clients and workers, and, as needed, between workers". In this context it may be of interest that in November 2017 the German Metalworkers' Union IG Metall together with the German Crowd-sourcing Association and eight important Crowd-working-Platforms has established an Ombudsman's Office ([23]), composed of an equal number of platform representatives on the one side and representatives of IG Metall and crowdworkers on the other side, chaired by a judge of the Frankfurt labour court. It is supposed to mediate conflicts between crowd-workers, platforms and clients and to monitor the compliance with a code of conduct on which the participating platforms already in 2015 agreed as a form of voluntary self-regulation. The code has been amended in 2017 ([24]).

This code of conduct contains 10 principles to be respected by the platforms: offering only lawful tasks, information of the crowd-workers on the legal framework for their work, fair wages, user friendly and motivating working conditions, respectful behaviour between platforms, clients and crowd-workers, freedom of crowd-workers to accept or refuse offers without fear of negative consequences, constructive feedback and open communication, transparent procedure of acceptance of work results by the platform and finally protection of personal data and privacy. All

these details are further described and explained in order to make them workable tools.
At the same time the IG-Metall has established a platform where crowd-workers can communicate with each other and where the trade union can communicate with them. The idea is to, thereby, overcome the anonymity and isolation in order to create a collective consciousness as a basis for collective organization and collective action. To further promote this goal the IG Metall also conducts workshops with crowd-workers and platform representatives in regular intervals.
Whether such initiatives will be successful in building up a collective structure, remains to be seen. They are nothing but first steps. But at least it shows that trade unions take efforts to promote such a development. Of course, such efforts cannot remain to be limited to national contexts since crowd-workers of platforms may come from several countries. However, the already mentioned fact that trade unions in these efforts co-operate trans-nationally is a promising sign.
Whether ever the big majority of crowd-workers may be able to develop collective power, is to be doubted. The big majority are low skilled workers performing simple tasks. They easily can be substituted which evidently has a negative impact on their bargaining power. Therefore, not too much should be expected. This, however, might be very different where complex tasks by highly skilled workers are performed. It might be quite difficult to substitute them which definitely increases their bargaining power. The problem there might be whether solidarity between them can be established since they also within the platforms most of the time are competitors. In short and to make the point: there are first promising steps to overcome the isolation of crowd-workers. The future will tell where they end up. Again it is a challenge for ILERA to contribute to this development and, thereby, to make sure that crowd-workers have a chance to work under decent working conditions.

IV. Conclusion

These sketchy remarks may leave us very frustrated: lots of challenges and no feasible solutions up to now. As far as globalization is concerned, social human rights and international labour standards have to be strengthened. In particular the enforcement machinery has to be improved. And as the example of global supply chains demonstrates, the willingness of those countries who profit from unequal labour conditions to support decent

regulation has to be promoted. The question in reference to digitalization will be – to put it in a somehow pathetic formula – whether labour law, the legislator and the collective actors, will succeed to make sure that human beings will not be the slaves of this new technological phenomenon but the other way around. It is the task of labour law and industrial relations scholars as well as of practitioners in the field to make sure that the latter alternative will become reality. Digitalisation contains many risks but it also is a chance to improve working and living conditions to the benefit of workers. It is not an apocalyptic evil but something which needs to be shaped. And definitely it can be shaped if all actors involved are committed to do it. The ILERA is the ideal forum to cope with all these challenges. If the topic of this year's world congress in Seoul asks what is to be done for employment for a sustainable society, these challenges might provide some food for thought.

Re-Inventing Labour Law?*

I. Introduction

1. The Notion "Labour Law"

The notion "labour law" needs explanation. In some contexts (e.g. in the USA) it is understood as merely referring to collective labour relations, in others (e.g. in Continental Europe) it is taken for granted that it covers both, individual as well as collective labour law. This terminological difference is not only of semantic interest. It indicates totally different approaches to labour law. In the context of the USA labour law and employment law are understood as two legal disciplines only loosely linked to each other ([25]) which implies to an increasing extent that labour law is disappearing from the curricula of the law schools whereas employment law is taught as a separate entity. Such a separation would be unthinkable in Continental Europe where the two parts are conceived as closely interrelated parts of an overarching entity. This terminological and at the same time conceptual difference shows how much labour law is embedded in the cultural, legal and political tradition of respective countries. This different perception goes much further and is reflected in the structural appearance of the laws of different countries. To take again

* In G. DAVIDOV, B. LANGILLE (eds.), *The Idea of Labour Law*, Oxford University Press, 2011, p. 43.

the example of USA and Continental Europe, it is of utmost importance that one system is based on employment at will and the other on search for job security. I am pointing to these differences at the very beginning of my sketchy paper in order to show that it is difficult to make generalizations on labour law as such.

2. Reasons and Goals

The history of labour law has been told very often ([26]). In the 19th century it became evident that the competition between individual employees at the labour market was a race to the bottom and that only collectivization of employees combined with protective legislation could prevent this destiny. Therefore, the interplay between collective self-regulation and legislative intervention from the very beginning characterized labour law. The main goal always has been to compensate the inequality of the bargaining power ([27]). However there were in particular four more insights which became a driving force for labour law regulation. They all were brilliantly analysed by Hugo Sinzheimer, the most prominent founding father of German labour law. First the object of transaction in an employment relationship is not a commodity but the human being as such ([28]). Or as later on the Philadelphia Declaration of the International Labour Organisation (ILO) lists up as its first principle. "Labour is not a commodity". This insight is of utmost importance because it makes perfectly clear that the labour market is not a market as any other, and therefore cannot follow the same rules as other markets do. Secondly personal dependency is the basic problem of labour law ([29]). Thirdly, human dignity may be endangered by the employment relationship and, therefore, one of the main goals of labour law is the fight for human dignity ([30]). This already expresses the goal of the ILO's present decent work agenda. It should be stressed that the fact that labour is not a commodity, that personal dependency is a characteristic feature of the employment relationship and that human dignity is endangered are closely linked to each other. They are the three core aspects of the same phenomenon. And they explain why the employment contract is not just a contract among others: it establishes a relationship sui generis ([31]). Fourthly Sinzheimer stressed that Labour law cannot be perceived as merely law for the employment relationship but has to cover all the needs and risks which have to be met in an employee's life, including the law on creation of job opportunities. In other words: Sinzheimer understood social security law

in its broadest sense as an inseparable part of labour law ([32]). The traditional distinction between public law and private law no longer played a role in this comprehensive understanding of labour law as an autonomous legal discipline. It, however, has to be admitted that unfortunately Sinzheimers concept of labour law as including social security law has not even in Germany succeeded. This is still reflected in the universities' curricula. In spite of Sinzheimer's suggestions labour law still is conceived as an annex of private law and social security as part of public law, an evident perversion of the idea of the founding fathers.

To sum up: According to the original idea as expressed mainly by Sinzheimer the goal of labour law first of all is the protection of the employees' (including the unemployed) material needs, of their health and safety as well as of the human dignity. There is another aspect of labour law which in the course of history has become more and more important: The active involvement of employees' in management's decision-making. This, admittedly, is not a universal feature of labour law. It is most developed in Europe, and even there are big differences between different countries, even if due to the legislative activities of the European Union (EU) it is becoming a common European phenomenon.

3. Changed Reality

Labour law is a product of industrialization. It has been developed in view of a social and economic reality which is no longer the reality of today. The point of reference for the development of labour law was the Fordist model ([33]). The workplace was embedded in a factory of manufacturing industry, a more or less large unit, where employees – mainly blue-collar and only to a small extent white-collar – did not work in splendid isolation but as a collective entity. This, by the way, was the reason why in particular in Germany very early the employment contract was no longer conceived as a merely individual relationship between employee and employer but as an element of the collective relationship between the employer and the workforce. The workforce was relatively homogeneous as were the employees' interests (of course, there always have been exceptions. Therefore, special groups from the very beginning needed different treatment, as for example the home-workers). Prototype of this workforce was the male employee in an undetermined full time employment relationship. This male employee regularly was functioning as "breadwinner", responsible for the family's budget. Continuity and

stability were a characteristic feature of employment. The enterprise was characterized by a clear structure of hierarchies. It was easy to define subordination and the employer's power to command and control as criteria for the employment relationship as reference point for labour law. Homogeneous interests of the workforce as well as the experience of being part of the collective were ideal preconditions for unionization. Thereby protection by collective bargaining could be organized without serious problems. Labour law was focusing on the domestic labour market. Globalization was not a real issue.

In our post-industrial era practically everything of this scenario has disappeared. The factory as a location where employees cooperate with each other is eroding to an increasing extent. Outsourcing, networking, sub-contracting, tele-working and similar dislocating strategies are on the agenda. The enterprise often is turned into a merely virtual entity. Vertical structures are replaced by flat hierarchies. Manufacturing is becoming an ever smaller part of the economy, the service sector is increasing. Due to technological changes work organisation has changed dramatically. The workforce is no longer homogeneous, it is fragmented and segmented into core groups and marginal groups, less traditional employment and more and more new forms of work. The number of part-time jobs, of fixed-term contracts as well as of temporary agency workers is significantly increasing. There are increasing numbers of economically dependent self-employed. The labour market is no longer male dominated, feminization of the labour market has become an important feature. The male "breadwinner" model belongs to the past. Balance of work and family obligations, thereby, has become a serious problem. Globalization puts pressure on the national economies. Relocation of production to other countries is on the agenda. New communication technologies allow for dividing the process of production and providing services between different countries all over the globe.

These very sketchy and admittedly superficial and simplistic observations may be sufficient to illustrate that the reality of work has changed dramatically. This leads to the question whether and how far the traditional concept of labour law still is appropriate to cope with this new reality of work, whether smaller or bigger adaptations may be sufficient or whether a total change of paradigm, a re-invention of labour law is needed.

II. Need for Adaptation?

1. Disappearance of the Original Assumptions?

Evidently the "social question" is no longer as burning as it was in the 19th century. And it is taken for granted that at least on average the economic situation of employees has significantly improved. The question, however, is whether this has any impact on the legitimacy of labour law. As indicated above, labour law was based on the assumptions that there is a need to compensate the bargaining power of the employees, that labour is not a commodity, that employees are personally dependent and that the employee's human dignity has to be protected. These assumptions have remained to be as valid as ever.

Even if the category of subordination may no longer be applied in such a simplistic manner as before and has to be substituted by all kind of criteria and tests, the asymmetric structure of bargaining power has remained. Employees – whether in traditional employment relationships or in new forms of employment relationship – are personally dependent of their employers, even if it has become more difficult in many cases to find out who is the employer ([34]). And, of course, the assumption that labour is not a commodity has lost nothing of its validity. In view of the possibilities of new technologies there is an ever increasing danger to intrude into the employee's privacy, thereby attacking and destroying the employees' human dignity, to just mention one aspect where protection is badly needed.

In short: in spite of the dramatic changes of the work reality there is no reason to question the need for labour law as such. As far as the core assumptions are concerned on which labour law is based, I see no need for a change of paradigm. This, of course, does not mean that the structure of the field can remain as it is. It may have to be adapted to the new circumstances. Whether and in what way this is necessary and possible, is now to be discussed by taking some selected examples.

2. Diversity of Interests within the Workforce

Traditional labour law has been focusing on full time employment for an indefinite period. Other forms of work were considered to be atypical. Only recently they have been brought under the roof of labour law. In Europe this strategy was pushed by Directives on part-time work ([35]), on

fixed term contracts ([36]) and on temporary agency work ([37]). However, this strategy is based on equal treatment with full time employees on an indefinite contract. In the case of temporary agency employees even this attempt failed.

Equal treatment is not sufficient. It ignores that employees in new forms of work are in a different situation. To just give an example: If there is a system of protection against unfair dismissal this is useless for the employee in a fixed term contract if the contract comes to an end. Or if it remains possible to reduce part-time work to minimal hours, equal treatment is not very helpful for an employee who wants to make a living by this kind of employment. Instead of merely insisting on the principle of equal treatment labour law has to react to the needs of people in new forms of work by providing tailor made regulations which by necessity will be different of those for people in traditional employment. These rules have to be based on the insight that people in new forms of work are more vulnerable than those in traditional employment and, therefore, need more and not less protection.

Here the real dilemma starts. Whereas in spite of the decline of trade unions – which is in Continental Europe much less dramatic than elsewhere – for traditional employment it still is possible to be protected by collective self-regulation, this is much more difficult for people in new forms of work. Their unionization rate not only is marginal, it also is extremely difficult for traditional trade unions to integrate their specific interests into a bargaining strategy. Their focus still is on traditional employment. Bargaining for employees who do not belong to the core group of trade union members leads to difficult problems of representativity. In short: satisfying collective representation of interests for people in new work forms cannot be provided by traditional trade union and bargaining structures. Whether alternative forms of representation can be organised is an open question.

Diversity of interests and erosion of the factory model also put a question mark behind the functioning of systems of workers' participation. The reality on which these systems – for example the works council system in Germany – are built, is a workplace where a collective of employees with more or less homogeneous interests is present. Again the representation of core groups is no problem. However, for people in new forms of work it is problematic. For example the works council in a temporary work agency is almost not accessible for the temporary workers who are never there but in the users' companies. And why should a works council in the user company care for temporary workers who are there only for a limited time?

The question is whether and how such systems of workers' participation can be restructured in order to integrate the whole diversity of interests of the workforce. In Germany a modest attempt in this direction was made by giving women seats in the works council according to their proportion in the workforce of the respective establishment. But what about the integration of part-timers, of those on fixed term contracts, of tele-workers or of migrant workers, all of them with different interests? Is this possible at all? Would the strength of a representative body composed of such diverse groups be as strong to defend and promote employees interests as before? Again open questions remain.

3. Extending the Scope of Application?

Whether it is still appropriate to limit the scope of application of labour law to the employment relationship in a strict sense, has been the topic of a widespread and intensive discussion for quite a time ([38]). The demarcation line between employment and self-employment has become very difficult to draw. To an increasing extent there are persons labelled as being self-employed but in reality being employees. They of course are to be included into the scope of application of labour law, even if it might be difficult to exactly identify their status. Problematic are those which undoubtedly are self-employed but economically in a similar position as employees ([39]). Therefore, in many countries a specific category was invented for the economically independent self-employed. In Germany they are called "employee like persons". However, only some rules of labour law are applied on them. The reason is very simple: if they are only economically but not personally dependent, their situation remains to be essentially different from employees.

Extending the scope of the full amount of labour law application on economically dependent self-employed might lead to de-legitimacy of labour law. Therefore one has to be cautious. In my view more empirical evidence is needed to allow for a reliable assessment of similarities and differences, before taking such a far-reaching step. However, it might be recommendable to establish basic principles which govern such economically dependent self-employed as well as employees ([40]). This then would allow to elaborate tailor-made protective schemes, taking full account of the specific situation of this group. It has to be kept in mind that collectivization of this group is particularly difficult and rather unrealistic.

Therefore, legislation has to be the predominant protection tool in this context.
De-legitimacy of labour law definitely would be the result if one would follow the suggestions of those who plead for inclusion of all relationships which are characterized by inequality of bargaining power ([41]). In my view these suggestions ignore the specific character of the employment relationship as indicated above. Labour law is not to be misunderstood as a tool to merely compensate the position of the weaker party. Consumer protection – to just take an example – needs very different instruments, last not least for the evident impossibility of collective self-regulation.

4. Closer Link between Labour Law and Social Security Law

In spite of Sinzheimer's warning and as already mentioned above labour law and social security law too seldom are seen as the two sides of the same medal. This has to be changed. Such a change is more urgent than ever. The modern world of work is characterized by instability of employment. To remain in the same job until retirement has become a rare exception. In an employee's biography mobility between different jobs has become the normal situation. A satisfying legal response to such a challenge cannot be given exclusively by traditional instruments of labour law, as for example job security. It needs a close interaction between rules of labour law and social security law. The latter has to care for decent conditions in the periods of transition and for facilitating possibilities of re-employment, including training and retraining. This in essence is meant by the often misinterpreted notion of "flexicurity". Or to take another example: If part-time work is to be made attractive in order to facilitate compatibility of family and work responsibilities for men and women, traditional labour law alone cannot resolve the problem. The situation of the part-timer is not only shaped by the working conditions regulated by labour law but to at least the same extent of coverage of social security law, be it unemployment benefits, health insurance or retirement pension. In short and without offering more examples: Sinzheimer's request for conceiving social security law as integral part of labour law finally has to be met.

5. Human Dignity and Fundamental Rights

Sinzheimer's request to maintain human dignity is based on the assumption that the employee is not to be treated as an object but as a bearer of fundamental rights. Fundamental rights have to be fully implemented within the employment relationship. This not only refers to the so called fundamental social rights but to all the fundamental rights human beings enjoy in modern society. These rights are embedded in national constitutions as well as in international and supranational Charters. In the European context There are two important regimes. One is the European Convention of Human Rights as elaborated in the context of the Council of Europe ([42]). It has gained importance by the case law of the European Court of Human Rights (ECHR). There is in addition the Charter of Fundamental Rights of the European Union (EU). It has become legally binding by integration into the so called Lisbon Treaty which came into force on 1st December 2009. This Charter contains a whole chapter of fundamental social rights (the right to collective bargaining; the right to strike; the right to information and consultation; the right to working conditions which respect his or her health, safety and dignity; the right to protection against unfair dismissal etc.). It particularly reacts to challenges of modern society by guaranteeing the right to the integrity of the person, respect for private and family life, the right to protection of personal data or the right to education and to have access to vocational and continuing training, to just give a few examples. Of course the right of non-discrimination in its broadest sense is guaranteed as well as freedom of thought, conscience and religion or freedom of expression and information. Labour law has to make sure that all these fundamental rights are fully respected in the employment relationship. The method of horizontal application of fundamental rights is to be applied everywhere. Much still remains to be done in this respect. The controversies in the course of the transposition of EU Directives on anti-discrimination ([43]) have shown the opposition particularly of those who consider strict anti-discrimination rules as endangering business interests. The opposition of business so far has succeeded in preventing a Directive on protection of personal data in employment. Such opposition of course is to be overcome. Fundamental values expressed by fundamental rights cannot be pushed aside by business interests or economic considerations.

6. From Shareholder to Stakeholder Capitalism

If the employee is not to be treated as a mere object it is also necessary that the democratic structure of modern society is reflected in the employment relationship. Therefore, it is necessary that the employee is not merely an object of management's decision-making but participating – either directly or by representatives – in the decision-making process. Employee involvement in management's decision-making is becoming more and more important. Even if its driving force is the idea of workplace democracy it should be seen that employees' involvement in management's decision-making has also advantages for the respective companies and for the economy as a whole. The legitimacy of management's decision making is increased, implementation of decisions is facilitated and conflicts are absorbed. The permanent dialogue between management and employees or their representatives helps to build up trust and confidence on both sides. The need to justify the planned decisions towards employees or their representatives evidently leads to more careful and, therefore, better decision making. Since employees and their representatives tend to favour long term strategies, the stability of the companies is supported. There is lots of empirical evidence for these positive effects ([44]). A good illustration of the success of such participation schemes may be the way the present economic crisis has been managed in Germany. Germany, as is well known, has a highly elaborated system of employee involvement in management's decision-making, not only via works councils but also via employees' representatives in company boards ([45]). Based on the participation of employees' representatives Germany has succeeded to manage the crisis without significant loss of jobs and without serious conflicts between the two sides of industry. In full agreement of both sides short-time-work schemes were introduced to prevent lay offs, to only mention the most important instrument. At least partially the gain of free time was used for further training of the employees. Thereby, the companies after the crisis can count on their skilled workforce. Unilateral decision-making by management never would have succeeded to quietly and without conflict introduce such mechanisms which after all for the employees meant a reduction of income (in spite of State subsidies). The joint crisis-management has helped to rebuild trust and confidence in management which was seriously endangered by the crisis.

However, there are at least two serious challenges for establishing schemes of employee involvement. The one refers to the diversity of interests, already indicated above: It is difficult to represent all the different interests

in bodies of workers' participation. And secondly it is – even in Germany – extremely difficult to include small and medium-sized companies in such a concept. Much remains to be done in this respect.
Schemes of employees' involvement in management's decision-making suffer of another deficiency. The promotion of employees' interests is not necessarily in line with other legitimate interests of society as are for example environmental interests or consumer interests ([46]). Therefore, there is a need to make sure that other interests are not ignored. Ways have to be found to meet this request. In some countries representatives of public interest are integrated in such schemes in order to fulfil this task ([47]). Whether this is a satisfactory solution or whether other possibilities have to be envisaged, is an open question.
The particularistic interest promotion – by the way – is not only a problem of schemes of workers' participation but also a problem of collective bargaining. However, in schemes of workers' participation it might be much easier to integrate other interests than in collective bargaining which is based on the very idea that a compromise between employers' interests and the collective interest of employees is to be achieved by way of bipolar negotiation.

7. The Trans-National Dimension

7.1. Trans-National Legislation

Multinational enterprises (MNEs) to a bigger and bigger extent play a role in the era of globalization. Re-location of production and services in other countries has become a normal pattern of global economy, as well as trans-national division of labour in the production process or in providing services. In particular trans-nationally operating companies do have the possibility of "forum shopping", thereby choosing the most convenient jurisdiction for their cases. Therefore, labour law no longer can be conceived as a national phenomenon but has to be put into the international context.
The international labour standards as developed by the ILO are to be seen as the universal basis of the international body of labour law. Of course they exceed by far the core fundamental rights as contained in the Declaration on Fundamental Principles and Rights at Work of 1998. The goals to be achieved are properly stated in the ILO's decent work agenda ([48]). However, the ILO's approach of standard setting is not without

problems. To only mention a few: First many of the conventions are outdated and no longer feasible for the modern world of work. Secondly a significant number of Member States are very hesitant in ratifying conventions. Thirdly it has to be stressed that ratification does not mean implementation. In many countries the administrative mechanisms for such implementation simply are not available. In addition the monitoring procedure by the ILO is relatively complicated but in the very end rather inefficient ([49]). Not much progress has been made in this respect. The sanctioning mechanism is still based on the idea of "mobilization of shame". But it seems that "shame" is not very widespread among those who do not live up to what they have ratified. Fourthly quite often ILO standards are shaped according to the needs and conditions of highly industrialized countries and not according to the situation of developing countries. Without going into further details: much has to be improved in ILO's standard setting, the rules are to be adapted to the challenges of today's world of work and the enforcement machinery has to be strengthened significantly.

The situation is different if standard setting on regional scale is envisaged. If Europe is taken into account a distinction has to be made between the Council of Europe and the EU. The European Social Charter developed in the context of the Council of Europe has the same problems of enforcement as the ILO. It also is based on the assumption of "mobilization of shame". This, however, is different in the context of the EU, a supra national entity with legislative and judicial powers. EU law has supremacy over national law. EU law already has shaped significantly important areas of labour law: anti-discrimination law, law on health and safety or law on new forms of employment, to take just some examples of the individual employment relationship, and promotion of information and consultation of workers representatives on the collective side. However, the EU regulation of labour law still is very fragmentary. And in view of the heterogeneous interests of the 27 Member States it may well be doubted whether a comprehensive regulation on this level can be expected.

7.2. Trans-National Collective Structures

Not only legislation but also workers' participation schemes and collective bargaining have to be internationalized. On international level countervailing powers to MNEs are to be built up. National actors are unable to cope with trans-national phenomena ([50]). However, even in

Europe collective bargaining is exclusively a matter of national policy. There have been attempts of coordination which have not turned out to be very successful. Nevertheless, there is something different on European level which is not to be confused with collective bargaining, but which should not be underestimated: the social dialogue between the European confederations of both sides of industry. In the context of the social dialogue so called voluntary framework agreements can be concluded. The inter-professional social dialogue has produced four such agreements in the last decade: on tele-work (2002), on stress at the workplace (2004), on harassment at the workplace (2006) and on violence at the workplace (2009).

The agreements voluntarily concluded are nothing else but an offer for the actors on national scale to give them some guidance and to enrich their imagination. The national actors are supposed to reflect on the basis of the framework agreements. This implies that the European actors have no choice but to convince the national actors of the advantages of their proposals. Only close and continuous communication offers a chance of success. This form of vertical communication is of utmost importance for the growth of real European actors of both sides of industry: an important step towards a European collective bargaining system which then might deserve its name. The problems which arise in the context of the 34 sectoral social dialogues are essentially the same.

The development of trans-national workers' participation in Europe goes much further. As already indicated, its structure has been established by EU law. Most important in this context are the European Works Councils (EWCs) ([51]). EWCs were designed as a tool for information and consultation. However, in the meantime the system of EWCs has developed dynamics of its own and gone far beyond information and consultation towards negotiations, leading to agreements. These agreements refer to a whole variety of topics. The most spectacular agreements were concluded in the automobile industry. There several agreements were concluded in which rules for restructuring (including relocation) were established. The legal effect of all these agreements is still totally unclear. Nevertheless they have a factual impact. Since in this context the interaction between national and European actors is far more developed than in the context of the inter-professional and sectoral social dialogue, the EWC pattern might be somehow the forerunner for a system of European collective agreements, of course confined to the respective groups of undertakings. This development is not without risks. The danger might be that the focus is too much on big groups of undertakings, thereby

neglecting other companies, in particular small and medium-sized enterprises. One of the difficult tasks in developing a European system of collective bargaining will be to find the right balance between big groups of trans-nationally operating undertakings and all the many other companies which are not linked to the EWC structure.
Without any legal base, the workforce of some MNEs (as for example VW, Daimler or Renault) has established world works councils whose powers should not be overestimated. But they certainly are a sign into the right direction ([52]).
In short and to make the point: There are rudimentary signs of developing trans-national collective schemes and agreements. This development has to be strengthened in the future.

7.3. Codes of Conduct

Already in the seventies of last century the ILO and the OECD have developed guidelines for MNEs which up to now several times were amended. These guidelines mainly recommend the MNEs to implement the ILO labour standards. And in 2000 the UN presented the "global compact" program. Undoubtedly these initiatives were an important input for the codes of conduct as developed by the companies themselves.
Most of these codes of conduct were elaborated in the last decade of the last century and in the present first decade of the 21st century. The main driving force were consumer protecting NGOs which in the countries of origin of the MNEs not only have put the consumers' attention to the MNEs' violations of the mentioned guidelines of the ILO and the OECD but who also have succeeded in organizing consumer boycotts which proved to be extremely efficient. This has led to a sensitivity of the public in the industrialized countries. Therefore, in order not to lose consumers in the markets of their home countries MNEs presented codes of conduct which go far beyond the patterns of the guidelines of the ILO and the OECD. This wave of self-obligation started in the textile and sportswear industries. In the meantime it covers almost all branches of economic activity.
The codes of the different MNEs are by no means homogeneous. There are big differences between them. Even more significant are the differences between different branches of activity. Not only the content of t he codes is differing from code to code but also the genesis of these codes. Originally most codes were unilaterally established by the companies.

However, to an increasing extent there is a new generation of codes called "multi-stakeholder" initiatives. Companies, international trade unions ([53]), human rights groups, community and development organizations participate in formulating such a code of conduct. These multi-stakeholder codes contain also provisions on monitoring, verification, certification of supplier factories, enforcement mechanisms and transparency ([54]).
Many of the codes only cover the relationship between the multinational enterprises and their employees. However, to an increasing extent sub-contractors as well as the whole supply chain and some times even clients are included. Normally such codes require that in case of violations these either have to be corrected or the business relationship has to be stopped. The latter, of course, is a very ambiguous sanction since it may lead for the employees of the sub-contractor or the client to the loss of the job and, thereby, to a further worsening of their situation.
All these codes are legally non binding. They again are "soft law". There is only a moral obligation of the multinational enterprises to respect them. In case of unilaterally developed codes the companies are very much interested in internal conflict-resolution. Therefore, in these cases the outside observers do not learn anything about possible violations. However, many companies want to make perfectly clear that they are not interested in hiding violations and, therefore, have decided to be exposed in regular intervals to so called "external monitoring". This pattern applies to all "multi-stakeholder" codes of the new generation. Such monitoring procedures prove to be quite efficient. In case of negotiated codes it depends on the strength and vigilance of the partner with whom the code was established whether and in how far the public can be mobilized and thereby put pressure on the company's management. In this respect up to now the NGOs have proved to be much more efficient then trade unions. In short and to make the point: even if the codes are not legally binding and even if there are still deficiencies in implementing them, to a bigger and bigger extent the external pressure in case of violation can no longer be ignored. The future development of such codes very much depends on the activities of trade unions, media and NGOs.

III. Conclusion

Labour law has not to be re-invented, there is no need for a new paradigm. However, there is an urgent need for adaptation to new circumstances. Far-reaching legislative re-regulation is the predominant tool to be envisaged.

It is also necessary to restructure and further develop the mechanisms of collective self-regulation and employees' involvement in management's decision making. In particular it is necessary to develop labour law on international scale. The international institutions for standard-setting are to be significantly strengthened. In the attempt to trans-nationalize labour law the most promising strategy is a public-private-policy mix as well as a combination between "hard law" and "soft law".

CHAPTER II
STUDIES ON THE METHOD AND EFFECTIVENESS
OF LABOUR LAW

The Future of Comparative Labor Law as an Academic Discipline and as a Practical Tool*

SUMMARY: 1. Introduction. – 2. The impact of internationalization, globalization, and regionalization. – 3. The methodological prerequisites. – 4. The use and abuse of comparative labor law. – 5. Conclusion.

1. Introduction

After having spent so many years in applying the method of comparative labor law, I consider it to be an honor and a great pleasure to contribute some reflections to the issue celebrating the twenty-fifth anniversary of the *Comparative Labor Law & Policy Journal*. Much of what I learned on how to apply and to use the method of comparative labor law is particularly based on the writings of Otto Kahn-Freund and on the cooperation with two other eminent scholars: the first editor of the *Journal*, Clyde Summers, and Bob Hepple, senior editor of the *Journal*. By co-teaching seminars on comparative labor law together with Clyde Summers at the University of Pennsylvania, I got a terrific insight into the proper use of comparative labor law in academic teaching. And together with Bob Hepple, I had the great privilege to be integrated in lucid debates on legal reform in Europe and in South Africa where I could experience the usefulness of a solid approach to comparative law in such a context.
Of course, the scholars are not to be blamed if my remarks may turn out not to be convincing for the *Journal*'s readers. The responsibility is exclusively on me.

* In *Comparative Labor Law & Policy Journal*, 2003, p. 169.

2. The impact of internationalization, globalization, and regionalization

Attempts to establish minimum standards of labor law date back to the nineteenth century. These efforts finally got an institutional structure by the foundation of the International Labor Organization (ILO) in 1919. The ILO not only has developed an impressive norm-setting activity by concluding almost two hundred conventions and a similar number of legally non-binding recommendations, but it also has established an interesting monitoring system linked to country reports. Thereby the information base for comparative research has grown significantly as well as the insight into the difficulties of how to implement universal minimum standards into the context of individual countries. In particular, it has led to the insight that labor law is by no means merely a national topic, but, to a significant degree, an international one.

Internationalization is not only important as far as norm-setting is concerned. At least as important is the factual development, known under the label "globalization." The catchword "globalization" is referring to quite a few different trends characterizing the world of today: First there is globalization of finances and capital. The capital markets are deregulated and liberalized. The international mobility of capital is achieved to a great extent. Liberalization of capital markets is combined with transparency of those markets. This means that profits can be realized in an optimal way. Or, to put it differently, capital moves to where the expectations to maximize profit are the highest. Second, there is globalization of production and services. This implies in particular the rapid increase of multinational enterprises and of foreign direct investment. Today, about 40,000 multinational enterprises (MNEs) and an estimated figure of 250,000 affiliates employ about 190 million people worldwide. Third, there is a globalization of markets and market strategies. Global strategic alliances are formed to optimize the distribution of goods and services. Finally, there is globalization of technology. To just take the most well-known example: Information communication technology makes it possible to store, manipulate, and transmit knowledge worldwide without significant costs. This has far-reaching implications for the organization of enterprises. Global out- and in-sourcing has become a common phenomenon. "Networking" and "virtualization" have become the catchwords to describe this new organizational pattern on trans-national scale. Even if there is, up to now, no corresponding globalization of industrial relations, the complex phenomenon of globalization evidently

has significant impacts on the structure of labor markets and industrial relations. To just mention the most evident and most important ones: The regulatory capacity of national states is rapidly and significantly decreasing. This increases the factual power of the MNEs and of the capital markets. Or, to put it differently, the political actors and the national states are becoming more and more dependent of the transnational economic power. In addition, global competition leads to an increased pressure to reduce costs and to restructure (and quite often downsize) enterprises. Downsizing in this context may have the perverse effect to lift up the value of shares of the respective company. By the employers' and employers' associations' threat to transfer production elsewhere, trade unions are coming under pressure to an increasing extent. The temptation of using strategies of social dumping has become a real danger in the relationship between different countries all over the world. Since labor law is, to a bigger and bigger extent, understood as an important factor in the competition between different countries, it is pretty evident that national labor law can no longer remain disconnected from labor law elsewhere or from international labor law.

While the ILO is trying to promote universal minimum standards, regional arrangements in the meantime are trying to establish minimum standards focusing on the specific regional circumstances. Europe is a good example in this context. The European Council, in 1961, developed the European Social Charter, amended in the meantime, fixing minimum standards for all Member States ratifying the Charter. A specific supervisory body has the task to monitor the correct implementation. Here again country reports enlarge the already available information base and the difficulties of implementation in individual countries become evident. The most ambitious project in this context is the European Union (EU) which, as a supranational entity, does have far-reaching powers to legislate in the area of labor law, thereby not being dependent on the Member States' willingness to ratify international treaties. In this context, a specific legislative instrument, the Directive, has been developed to make sure that the European input remains flexible enough to be integrated into the legal structure of individual countries. The Directive only regulates the purpose to be achieved and provides some framework considerations: the institutional transposition is left to the Member States. In particular, the jurisprudence of the European Court of Justice (ECJ) is an excellent information base to study the implementation problems arising in the different Member States and to provide a comparative perspective. According to Article 6 of the EU-Treaty, the ECJ in its jurisdiction has to

take account of the "principles of liberty, democracy, respect for human rights and fundamental freedoms, and the rule of law, principles which are common to the Member States." These common principles, of course, also govern labor law. In fulfilling its task, the ECJ by necessity has to make a comparative assessment of how these principles are applied in the different Member States.

All these developments have a significant impact on comparative labor law. The comparative approach is not only facilitated by these developments, but it has become inevitable. The international, regional, and comparative dimension is, to a larger and larger extent, influencing the national systems. Therefore, the first conclusion can be drawn. The environment for comparative labor law as an academic discipline and as a practical tool has become more favorable than ever: a promising perspective for its future. Comparative labor law as such does not need further justification. The real problem, however, refers to the questions on what are the methodological prerequisites for comparative labor law, on what can be its use in academia and in practice, and whether there are dangers of abuse.

3. The methodological prerequisites

A. Functional Instead of Institutional Approach

In labor law, the same effects may be reached by very different instruments, legal rules, or institutions. Limits of management prerogatives may be established by legislation, by collective bargaining, by systems of workers' participation or it may be organized by a mixture of all those instruments. The balance between job security and external flexibility may be achieved by rules on protection against dismissals, by rules on fixed term contracts, by rules on temporary work, or by a mixture of all these elements. Similar effects achieved in one country by the judicial system might be achieved in another country by mechanisms of alternative dispute resolution or by administrative bodies. These three very simple examples may be sufficient to demonstrate that the comparison of instruments, legal rules, or institutions is misleading and not helpful at all. The focus has to be on the function to be achieved.

This, of course, is much more difficult. It is not sufficient to merely provide an analysis of the differences in the legal structure. The focus is on their intended and real effects. This, however, is transcending traditional legal expertise. The implication is evident: Comparative labor law cannot be

merely an exercise for legal scholars and legal practitioners. Of utmost importance is the dialogue with experts of social sciences: economists, experts of business administration, political scientists, sociologists, anthropologists, etc. The future of comparative labor law and the quality of this methodological approach will very much depend on whether the institutional setting for such interdisciplinary cooperation and dialogue can be improved. Up to now, unfortunately, in many countries a strict segmentation of these different disciplines is maintained. In this respect, the Anglo-American countries, which from an early stage on have tried to focus not only on labor law but on industrial relations as a conglomerate of different academic disciplines, are in a better position than most other countries on the globe (including those of Continental Europe) where industrial relations up to now are not an established field for university teaching and research.

The insight into the need of a functional approach instead of an institutional one does have another important implication: it would be misleading to concentrate the analysis on the effect of one specific element of a country's labor law system. The function only can be properly assessed if the specific element is seen in its interaction with all the other elements of a specific system. Let's take as an example a system of institutionalized workers' participation. The functional perspective only could be revealed by putting such a system of workers' participation into the overall context of the respective country, thereby analysing not only the other parts of the overall system (as are collective bargaining, the system of conflict resolution, the minimum level guaranteed by employment law, etc.), but also the shape of the actors; the prevailing attitudes; the cultural, political, and economic environment, etc. As this example demonstrates, the elements to be analyzed are not only legal ones but also – and in particular – extra-legal ones. To take all of them into account is an extremely difficult task. Therefore, valuable studies only can be expected if in-depth investigation in respective countries takes place. Comparing functions in two different countries is already very difficult. If the comparison exceeds this sample and – what often happens – tries to compare many countries or even the whole (at least industrialized) world, the comparison most often tends to be superficial, misleading, and therefore not very helpful at all. Nowadays such studies are quite often used as arguments in the political arena, thereby only demonstrating the abuse of comparative labor law that will be discussed in more detail later on.

B. Beyond Terminology and Traditional Categories

Whoever compares labor law of different countries has to cope with terminology. At first glance, it is very seductive to assume that identical terms, whether they are expressed in the same or in a different language, refer to identical phenomena. This, however, is by no means the case. Let's take the well-known term "collective agreement" as an example. Its meaning is by no means the same in different countries. Whereas in one country (as for example in the United Kingdom) collective agreements are merely considered to be gentlemen's agreements, they are strictly legally binding in other countries. The possibilities of normative regulation are as different as the rules on the relationships between the obligatory and the normative part. In one country, collective agreements apply only to union members, in other countries to all workers, be they unionized or not. Some countries observe a strict peace obligation, others do not. The rules on the relationship between agreements on different levels, or between old and new agreements, are different from country to country. Subject-matters for regulation by collective agreements are by no means the same: in some countries there are significant limitations, in others there are almost no limits. The rules on extension of the scope on collective agreements again are different. Significant differences also exist as far as procedures are concerned. In some countries there is a duty to bargain, in other countries such a duty is totally unknown. In some countries the proceedings of negotiation are highly formalized, in others it is more or less left to the discretion of the actors. The prerequisites for the actors are significantly different too: criteria for being representative in systems of a pluralistic union movement follow other legal patterns than criteria applied in systems with amalgamated unions. The process of conflict resolution is also regulated in a very different way. There are different institutions for conciliation and arbitration in different countries, some do not even know such kind of intervention. Even if industrial conflict in most countries is an instrument for conflict resolution, the rules on strike, lock-out, etc. are quite different. In some countries going on strike is an individual right, in others a collective one. The legitimate goals and the effects of strikes are regulated differently in various countries. Finally, the implementation of collective agreements differs from country to country: in some there is access to specialized labor courts, in others to ordinary courts, in others still to other institutions, while yet in others there is no such access at all. In short and to make the point: the example of "collective agreements" shows that the same notion has a huge variety of different meanings. Therefore, the terminology as such remains meaningless for the scholar of

comparative labor law, it only reveals its meaning by being put into the whole context of its structure and its functioning.

Legal comparison quite often remains within the cage of traditional subdivisions of the legal field: public law versus private law, labor law in a narrow sense understood as the rules on collective relationships versus employment law referring to individual relationships and versus social security law. However, the bars of these cages have to be overcome for at least two reasons. First, these subdivisions do not exist in every country in the same way. Whereas, for example, in some countries the distinction between public and private law still plays a role, it has been meaningless in others from the outset. The second reason, however, is more important. In order to understand whether and how a specific function in a country is fulfilled, it is necessary to ignore these subdivisions. Only the interaction between instruments of collective labor law and instruments of employment law reveals the impact on workers and employers: as long as these two categories are studied as isolated phenomena, they are misleading as far as functions are concerned. Quite often the same question in one country is dealt with by employment law and in another country by social security law (e.g., sickness pay). If one wants to study the legal regime of external labor market flexibility, it is not sufficient to look into the rules established in labor law and employment law referring to job security, etc. Only if the mechanisms of unemployment benefits, of retraining, and of reintegration into the labor market as provided by social security law are included, a comprehensive insight into the complex situation is possible. To again make the point, the scholar in comparative labor law needs a comprehensive view, not being disturbed by traditional subdivisions of the legal field. In this respect, it may be stated that, paradoxically, comparative labor law only can be performed by exceeding the borderlines of labor law.

C. Beyond Hard Law Toward Soft Law

To a bigger and bigger extent, problems in the labor field are no longer dealt with by law in a strict sense, so-called "hard law," but by rules that are of a weaker nature. Let me give two examples to illustrate what is meant.

The first example refers to so-called codes of conduct for MNEs. In line with efforts of the ILO, the Organization for Economic Cooperation and Development (OECD), and the United Nations (UN) a significant number of MNEs based in industrialized countries in the meantime have developed codes of conduct that are supposed to guarantee minimum working

standards for employees of companies of the MNEs (and quite often also for the companies of their suppliers and even customers) in developing countries. This development was significantly pushed by Non-Governmental-Organizations (NGOs) who organized consumer boycotts in the home countries of these MNEs. The threat to lose market positions at home led to the "voluntary" establishment of such codes by which the companies promise to respect certain standards. These codes are by no means uniform as far as their content is concerned. Some are unilaterally established, others are the result of negotiations with NGOs and/or trade unions. Some do not know any monitoring system at all, others are exposed to more or less efficient internal or external monitoring systems. It is very difficult to make an assessment of their impact on the employment relationships. They are on the move and changes are going on continuously.

The second example refers to the "open method of coordination" as established in the Treaty of the European Community (EC). A good example for this method is the employment policy. In the late 1990s, "a coordinated strategy for employment" has been integrated into the EC-Treaty. The genuine competence of the Member States in this very area remains uncontested. The Community is required to contribute to a high level of employment "by encouraging cooperation between Member States and by supporting and, if necessary, complementing their action." To make sure that this aspiration has a chance to be realized, the Chapter on Employment provides for several institutional arrangements: There is the Employment Committee, which is mainly supposed to monitor the situation on the labor market and the employment policies in the Member States and the Community and thereby help to prepare the relevant joint annual report by the Council and the Commission. In fulfilling its mandate, the Committee is required to consult the social partners. In order to make sure that the activities of the Employment Committee as well as the joint annual report by the Council and the Commission do not remain without consequences, the Chapter on Employment establishes additional powers for the Community. After examination of the joint annual report by the Council and on the basis of the Council's conclusions, the Council "shall each year draw up guidelines" that, of course, are not legally binding. This arrangement has led to manifold measures and significantly increased the interrelated activities between the Member States. However, the results in detail are of less importance in the context to be discussed here. Important is the fact that the Chapter on Employment establishes a mutual learning process for the Community and the Member States, including not only

governments but also the social partners. None of the Member States can escape the permanent dialogue and the permanent pressure implied by it. Best practices do not have to be reinvented all the time, but can easily be communicated and imitated. The awareness of the media is growing significantly.
The two examples are very different. The codes of conduct of the MNEs are "rules" made by private actors, whereas the "rules" governing the European employment policy are initiated and conducted by public authorities. However, whether the source of the respective "rules" is public or private, the function is similar. Without being hard law this "soft law" does have effects and is shaping, to a certain extent, the employment relationships in the MNEs and the employment policy measures in the EU. Therefore, it cannot be ignored by comparative labor law. The example of the codes of conduct teaches us an additional lesson: rule-making can no longer be conceived as an exclusive monopoly of State authorities. It is rather to be understood as a public-private-policy mix, thereby broadening significantly the perspective for comparative labor law.

4. The use and abuse of comparative labor law

So far it has been argued that, in view of internationalization, globalization, and regionalization, the future perspectives for comparative labor law are more favorable than ever before and that comparative labor law as a method has to meet specific requests. The most important question – on what is the usefulness of comparative labor law in academia and in practice – is still left open. Therefore, an attempt is now made to indicate possible answers to this extremely complex question.

A. Better Understanding of One's Own Legal System

The perspective of studying a legal system from within is never sufficient. There is not only the danger that the occupation with too many details prevents an adequate view on the overall structure and its function. The problem is much more profound: the peculiarities of the system cannot be identified due to the lack of contrasting them with alternatives elsewhere. Only the comparison with structures performing similar or even identical functions in other systems opens one's eyes to characteristic elements of one's own system. This discovery serves as stimulus for further reaching questions referring to the cultural, political, social, or economic reasons for the pattern established in one's own country. The knowledge of the

functioning of other legal systems provides a new perspective: the possibility to assess one's own system from outside and thereby put it into the context of other experiences made elsewhere. This, in my view, is the only way to really identify the uniqueness of one's own system. It is preventing an attitude that tends to take the own system for granted or even for superior due to lack of knowledge. In this respect, comparative law is an exercise in developing modesty. And it has a further effect: it enables the development of a well-founded critical approach toward one's own system beyond the usual and mostly not very exciting controversies on details.

If the assumptions made in this last paragraph are valid, they do have tremendous implications for legal education and of course also for education in labor law. It necessarily means that comparative labor law as a method is of utmost importance in any curriculum containing labor law in whatever country. Otherwise, the effects described above cannot be achieved, the students will never be able to properly assess the peculiarities of their own system. In integrating comparative labor law into legal teaching, it is by no means recommended to cover as many other countries as possible. It is more efficient to take one or at most only few examples to simply demonstrate the functioning of the comparative method by way of providing examples that might enable the students to transfer the method to systems of other countries.

B. A Tool for Legal Reform?

The most interesting problem for academic research as well as for practical politics refers to the question whether and in what way comparative labor law can be used as a tool to legal reform and for the adaptation of the labor law system to new conditions. First, there is no doubt that comparison with other systems can significantly enrich the reformers' imagination of what could be done. Let's take the example of the scope of application of labor law. Traditionally, labor law was constructed to meet the needs of workers in the manufacturing industry where the factory is the place of work, where the workforce is relatively homogenous, and where the employment relationship can easily be defined by using the criterion of subordination. None of these assumptions still apply: the manufacturing industry, to a great extent, is replaced by the service sector, the factory as place to work is more and more replaced by network structures, the workforce is fragmented and segmented in core groups and periphery groups, the demarcation line between an employment relationship and self-employment no longer can be drawn by simple reference to the criterion

of subordination. This leads to many questions, among them the question of inclusion and exclusion: Should self-employed or at least specific groups of them also be covered by labor law? Or more generally: Should the scope of application of labor law be enlarged? Or should it be narrowed down, reserved for the core groups in the workforce, leaving those at the periphery outside? Should the periphery workers be on the same footing of protection as the core workers? These questions are not listed here in order to start an attempt to find answers. The problem to be dealt with, instead, is the question whether comparative labor law as a methodological tool can help to find appropriate solutions. Of course, the same question could be put forward if other examples would be taken: whether job security should be lowered or increased, whether it should be based on a concept of reinstatement or financial compensation, whether working time patterns should be shaped in a way to better allow compatibility between family and job obligations, etc. The list could be extended indefinitely; the problem remains always the same.

There is no doubt that comparative labor law can enrich the reformers' imagination, thereby increasing the set of alternatives to be taken into account. In this context, it has to be stressed once again that comparative labor law only provides a valid input if the prerequisites sketched above are met. Then it becomes pretty clear that solutions developed elsewhere are linked to the specific context of respective societies and therefore cannot easily be transplanted to the reformers' country. This leads to the most difficult question: Is transplantation from one system to another possible at all?

Let me take an example to illustrate the problem. In the 1970s, the EC, in an attempt to harmonize the system of workers' participation of big companies, had promoted a legal pattern whereby the German model of workers' participation in the supervisory boards of big companies (more or less) would have been imposed to all Member States. This attempt met strong opposition and turned out to be without any political chance. In the meantime, the EC has continued to develop patterns of workers' participation by significantly changing the philosophy. Instead of imposing one and the same model to all Member States, it provides for an extremely flexible framework that leaves each Member State and even the respective companies and their workforce the freedom to develop the institutional pattern that best fits their needs.

The lesson to be learned from this example is simple but far-reaching. Transplantation is not impossible. However, the possibility of transplantation refers to principles and functions (in our example, the

principle of workers' involvement in management's decision-making) but not to institutional arrangements. The institutional patterns have to be shaped according to the legal, economic, political, cultural, etc. circumstances in each respective country. However, this is presently an extremely difficult task, in particular for the new Member States of the EU who each have to develop their own institutional pattern in order to integrate in their systems the flexible framework provided by European legislation. Instead of simply imitating models developed elsewhere, they have to find their own way. In this respect, Europe has become a most interesting laboratory in demonstrating how experiences made elsewhere, functions performed elsewhere, and principles developed elsewhere can be used in the debate on how to reform their own system. In addition, it should be pointed out that the insight into the limited possibilities of transplantation has led the legislative bodies on EU level to give up the concept of harmonization and uniformity and to replace it by a concept of providing minimum conditions and promoting principles to be applied throughout the Community.

The usefulness of comparative law goes beyond legal reform in a strict sense. It also applies to judge-made law going beyond interpretation of already existing statutory norms. The Courts have no choice but to take into account the possible practical impact of the rules they develop. These effects are not easily to be assessed. Quite often in the respective country – due to the lack of the rule to be developed – there might not be any empirical evidence, such an assessment can be based on. Here again comparative analysis can be a useful tool.

In taking all this together, it may be stated that comparative labor law definitely does have significant merits in law reform. However, it has to be made perfectly clear that the mere existence of patterns fulfilling certain functions elsewhere does not decide the question of whether it is recommendable to borrow such a function for their own system. The discovery, for example, that a country might have gone the way of strict de-regulation, de-institutionalization, and decollectivization, of course, does not mean that the impact of such a strategy is to be transferred to another country. The normative (or political) decisions are still to be made autonomously by each country, even if to a larger and larger extent, such decisions are predetermined by international or regional norm-setting.

C. The Abuse of Comparative Labor Law and the Task of Scholarship

As already indicated, one of the abuses consists in the fact that the methodological prerequisites described above are not met. Thereby,

misleading results are produced. This failure is quite often combined with another one: results of such lousy scholarship are used by politicians and by interest groups as arguments in debates on reforms. The media are communicating these views, thereby strengthening the power of such strategies. An irrational debate and doubtful reforms are the consequence. The recent debate in Germany on the reform of the law on protection against dismissal was a very frightening example of this kind of abuse. Simplified, superficial, and inadequate information on systems abroad was published by interest groups and communicated by the media.

In view of this, unfortunately very often observed, abuse, academia does have an important task. By confronting the political debate with the insights of solid comparative labor law analysis scholars might bring some rationality to it. However, whether the media are inclined to transport such complex positions is more than doubtful. After all, they normally are not as popular as the ones gained superficially. Therefore, the role of scholarship in comparative labor law most likely in the future will also consist in at least developing a critical approach toward the abuse of this fascinating method.

5. Conclusion

As argued in these brief remarks, comparative labor law as a method will be indispensable in the future more than ever before. As I have tried to demonstrate, its impact on the development of national and international labor law will very much depend on whether the prerequisites sketched above are met. In this respect, an interdisciplinary approach is of utmost importance. The *Comparative Labor Law & Policy Journal* provides an ideal forum for promoting such an interdisciplinary dialogue as it already has proven in the past. Let's hope that scholars from all over the world will continue to use the *Journal* as a platform for an interdisciplinary exchange of ideas on the comparative method in labor law.

CHAPTER III
THE SOCIAL DIMENSION OF THE EUROPEAN UNION

The Social Dimension of the EU*

SUMMARY: 1. Introduction. – 2. The Status Quo of Social Minimum Standards. – 3. The Obstacles for Further Legislation. – 4. Alternative Strategies. – 5. European Pillar of Social Rights. – 6. Possible Strategies to Overcome the Deficiencies of the Status Quo. – 7. Conclusion.

1. Introduction

The future of the European project to a great extent will depend on the fact whether it can provide social justice throughout the EU. The need for improving the 'European social dimension', to take up Jacques Delors' well-known formula, as a tool for the people to identify themselves with the European project has never been more urgent than it is today after the Brexit.

The Europeanisation of labour law was not on the agenda of the European Economic Community (EEC) in 1957. In its origins the European project was understood as being primarily an effort to construct a common market. Market freedoms and the guarantee of fair competition within the common market, therefore, were the pillars of the Treaty of Rome. Social policy almost exclusively was left to the Member States. The original Treaty did not contain legislative powers in this field.

In the meantime, the European integration of labour law has become an important part of the European project. Th e first steps in this direction were made in the 1970s. In spite of the lack of legislative powers of the EEC in the area of labour law, directives in this field were passed (in particular equal pay for men and women ([55]), comprehensive equal treatment of men and women in employment ([56]), protection of workers in

* In J. CHAISSE (ed.), *Sixty Years of European Integration and Global Power Shifts*, Hart, 2020, p. 6.

case of collective redundancies ([57]), in case of transfers of undertakings and in case of the insolvency of the employer) ([58]). They were based on articles in the original Treaty (100 and 205) which had nothing to do with labour law and which required unanimous voting in the Council. Th is shows that the Treaty is more or less irrelevant if there is a consensus between all Member States. In reference to labour law this was the case until 1979 when Thatcher came into power in the UK.

Only when in 1987 the Treaty was amended by the Single European Act did the EEC become empowered to legislate in a very limited area of labour law (work environment) with qualified majority vote in the Council. By further amendments, by the social protocol to the Maastricht Treaty in 1992 and later on in 1998 by the Treaty of Amsterdam, the EEC not only was renamed the European Community (EC) but the legislative powers in the area of labour law were significantly extended. These amendments now simply were transferred into the Lisbon Treaty on the Functioning of the European Union (TFEU). Accordingly, the EU is empowered to establish minimum standards for practically all aspects of labour law except 'pay, the right of association, the right to strike and the right to impose lock-outs' (Article 153 paragraph 5 TFEU). Legislation is possible on most of the subject matters by qualified majority.

The indicated amendments have brought another innovation. If the Commission wants to initiate legislation it has twice to consult the social partners of the inter-professional social dialogue, the European Trade Union Confederation (ETUC) on the employees' side and the Confederation of European Enterprises (BUSINESS EUROPE), the European Association of Craft Small and Medium-Sized Enterprises (UEAPME) as well as the Centre of Employers and Enterprises providing Public Services (CEEP) on the employers' side. First, they are to be consulted on the question 'whether' a specific piece of legislation on subject matters listed up in Article 153 paragraph 1 TFEU should be initiated and second on the question 'how' such a piece of legislation should look. In the latter consultation the social partners are entitled to take away the project from the Commission and are invited to try within a certain period to reach an agreement by themselves. Such an agreement then by the social partners can be brought via the Commission to the Council which may transfer it into a directive. This happened only three times in the 1990s. Afterwards it did not work out again, except in reference to a minor amendment of the directive on parental leave. Therefore, this structural innovation should not be overestimated.

Finally, it should be remembered that after a long and very controversial discussion a Charter of Fundamental Rights of the EU was passed in 2000 as a legally non-binding declaration which expressed the consensus of all 15 Member States of that time ([59]). The Charter now has become a legally binding part of the Lisbon Treaty. It contains a whole set of fundamental social rights, among them the right to protection against unjustified dismissal, the right to fair and just working conditions, the right to collective bargaining and collective action as well as rights for either workers or their representatives on information and consultation, to just give an impression.

These developments have to be kept in mind while in the following section the status quo of European labour law and industrial relations is briefly sketched.

This assessment is a necessary precondition to evaluate the impact of the Lisbon Treaty for further developments and to discuss the possibilities for further legislation on labour law.

2. The Status Quo of Social Minimum Standards

A. Labour Legislation

In individual labour law major progress has been made particularly in legislation on health and safety, on working time, on work and life balance, on atypical work, on protection of employees in case of transnational services and on discrimination. In addition, the directives on collective redundancy ([60]) and on transfer of undertakings ([61]) have been amended in a double sense: they now include cases where the decisions are taken by transnational headquarters and they are adapted to the case law as developed by the Court of Justice of the EU (CJEU).

The core instrument for protection of health and safety is the Framework Directive of 1989 ([62]), surrounded by a whole set of so-called daughter directives on specific risks for health and safety. The Framework Directive – at least in principle – covers all private or public areas of activity, contains the basic principles to fight risks of health and safety and lists up the duties of employers as well as of employees in this respect.

The Working Time Directive of 1983 ([63]) not only serves health and safety considerations but to a great extent is devoted to the organisation of working time flexibility. Mainly three issues covered by the directive have become very controversial: the very notion of working time, the period within which an average maximum working time per week has to be

reached and the possibilities of opting out. Many efforts to again amend the directive have not succeeded up to now.

In the area of work/life balance the already mentioned directive of 1996 on parental leave ([64]) is of importance, even if it is only a very small step in making work and family obligations more compatible. It is the first directive which is based on an agreement reached by the social partners. Parents thereby got a right to parental leave for a minimum period and the right to return – at least in principle – to the same job. However, due to the fact that pay is not part of the EU's legislative power the directive does not say anything to the financial conditions of parental leave, thereby neglecting a very relevant part. More important in the context of work/life balance is the directive of 1997 on part-time work ([65]), the second directive based on an agreement by the social partners. Even if this directive can be understood as the lowest possible denominator, it contains two important elements: equal treatment pro rata in reference to working conditions and protection against dismissal if an employee refuses to transfer from full-time to part-time or vice versa. Thereby, part-time in quite a few Member States has been elevated to a much better status than before.

Of course, the directive on part-time work can also be put in the box 'atypical work' together with the directive of 1999 on fixed term contracts ([66]) and the directive of 2008 on temporary agency work which have to be put in context with the directive of 1991 on the health and safety of workers with a fixed-duration employment or a temporary employment relationship. The directive on fixed term contracts is the last one based on an agreement by the social partners. It contains two important elements: equal treatment with those in an undetermined employment relationship and prohibition of abuse of repeated fixed term contracts. However, the criteria for abuse are so wide that the repetitive use of fixed term contracts is almost unlimited. The directive on temporary agency work ([67]) is the result of a long and very controversial effort. In the very end a compromise was reached which is unsatisfactory. In principle equal treatment with the comparable employees in the user company is guaranteed. However, by way of collective agreement lower conditions for the temporary workers can be determined.

The EC's by far most important legislative input into individual labour law has been in the area of discrimination. In 1998 by the Amsterdam amendment in the EC-Treaty Article 13 was introduced which empowers the European legislator to take 'appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation' (now Article 19 TFEU). This has

become the basis for the two anti-discrimination-directives of 2000 ([68]). In addition, the concept of the already mentioned directive on sex equality has been brought fully in line with the spirit of these directives of 2000. Th e amendments now are integrated in a consolidated version of the directive ([69]).

Even more important than the inputs into individual labour are the Community's legislative measures in the area of collective labour law: they shape the interaction and the power relationship between both sides of industry and, thereby, have an enormous impact on the structure of industrial relations. In particular three legislative steps in the area of workers' participation are of utmost interest, two referring to transnational undertakings and groups of undertakings and one referring to domestic structures within the Member States.

The first step in this context is the directive of 1994 on European Works Councils (EWC) ([70]) which has been amended in 2009 ([71]). It covers transnational undertakings and groups of undertakings with at least 1000 employees within the EU and with at least 150 employees of the undertaking or of different undertakings of the group in each of at least two different Member States. Th e amendment of 2009 mainly brought clarifications on the timing and content of information and consultation, has integrated the CJEU's judgments into the directive and has strengthened the link between EWC and national workers' representatives.

The second step in this context was the directive supplementing the statute for a European Company with regard to the involvement of employees ([72]). This directive has to be read together with the Statute on the European Company ([73]) which contains the rules on company law. The main goal of establishing a European Company as an option is to save transaction costs, and to increase efficiency and transparency. It no longer should be necessary to create complicated structures of holding companies in order to overcome the problems arising from national company law.

A European Company only can be registered if the requirements of the directive are met. Thereby it is guaranteed that the provisions on employees' involvement cannot be ignored. The crucial and interesting topic of the directive refers to employees' participation in company boards.

Whereas these two directives refer to the transnational context, the directive on a framework for information and consultation of 2002 ([74]) shapes the participation structure within the Member States. It covers public or private undertakings of at least 50 employees and establishments of at least 20 employees in Member States. It establishes a minimum level

of workers' participation within the Member States leaving them a high amount of flexibility.
There are further directives on workers' participation. However, this very sketchy assessment should be sufficient to show that employees' involvement in management's decision making has become an important feature of European collective labour law.

B. Evaluation
Taking everything together, legislation on social minimum standards is unsystematic and fragmentary. Important areas as for example protection against unfair dismissals are still missing. Th is deficiency has become particularly evident when in the course of the management of the financial crisis in the context of the austerity strategy Member States in Southern Europe were forced to reduce their standards of dismissal protection and of minimum wage and also forced to dismantle their collective bargaining systems. The construction of social Europe needs a comprehensive floor of rights throughout the EU which cannot be undercut. This, of course, does not mean that diversity between the labour law systems of the Member States should be abolished. It only means that minimum standards are to be established which are in line with the worker's fundamental right to 'working conditions which respect his or her … dignity' (Article 31 of the Charter). At least this minimal social coherence is to be achieved.

3. The Obstacles for Further Legislation

A. The Diversity of Interests
In spite of the fact that the EU has a comprehensive power to legislate in the area of labour law the obstacles for legislation in this field are significant. This is first of all due to the fact that – in particular since the enlargements of 2004, 2007 and 2013 when many formerly communist States of the EU were integrated in the EU – the interests of the Member States in the EU of 28 have become so heterogeneous that it is very unlikely to get even a qualified majority for a piece of legislation. It is understandable that low wage countries want to use lower labour standards as a competitive advantage in comparison to high wage countries.

4. Alternative Strategies

Confronted with these difficulties the EU more and more has shifted the focus to alternative strategies. The main instrument in this context has become the Open Method of Coordination (OMC). It has first been developed in the context of the European Employment Policy (EEP) in the Amsterdam Treaty ([75]). According to the OMC the genuine competence of the Member States remains uncontested. The EU merely is supposed to encourage co-operation between them, to support and, if necessary, complement their action. It is mainly based on the idea that best practices as discovered in one country may be imitated by other countries, thereby leading to social progress. Instead of regulation by way of legislation the EU only tries to put soft pressure on the Member States, leaving them the task to regulate. This method, however, runs into difficulties if the gap of the economic situation between Member States is too big to allow for similar remedies. Then the capacity of the OMC is quickly exhausted.

Since the beginning of the new century the EU has tried to combine OMC with specific goals to be reached. Th e first expression of this new approach was the Lisbon strategy launched in 2000 for the EU 'to become the most dynamic and competitive knowledge-based economy in the world by 2010 capable of sustainable economic growth with more and better jobs and greater social cohesion and respect for the environment'. A whole set of ambitious targets for 2010 were listed up, among them targets for employment rates and for full employment. The concepts for reaching these goals were put in vague notions as 'flexicurity' or 'employability'.

However, soon it turned out that the strategy was much too complex, that it was lacking a clear division of tasks between EU and member states and that there was no really functioning governance structure ([76]). Therefore, the strategy was modified and re-launched in 2005. Of great importance were country specific recommendations. They were meant to help the Member States to better realise the objectives in their national reform programmes. The OMC as a mutual learning strategy was the underlying philosophy of the whole exercise.

The Lisbon strategy has, of course, not reached its goals but been replaced by the new agenda 'Europe 2020', a 'strategy for smart, sustainable and inclusive growth' ([77]) that focuses on five goals to be reached by so-called flagship initiatives. In essence it is nothing else but a slimmed Lisbon strategy in new clothes. Th ere is still the reference to the flexicurity agenda, to new forms of work – life balance, to the problem-solving

potential of social dialogue at all levels and to the European qualification framework. The new strategy remains to a great extent within the old paths. These soft law strategies have to be seen in the context of the new institutional architecture for economic and social governance. At the heart of this new architecture is the 'European Semester' of policy coordination, through which the Commission, the Council and the European Council set priorities for the Union in the Annual Growth Survey, review National Reform Programmes and issue Country-Specific Recommendations to Member States, backed up in some cases by the possibility of financial sanctions. The European Semester brings together within a single annual policy coordination cycle a wide range of EU governance instruments with different legal bases and sanctioning authority. The problem with all these mechanisms is that social policy is conceived as a residual category under the imperative of economic considerations.

The focus of all these mechanisms is on economic efficiency and not on increase of labour regulation which in the neo-liberal perspective is understood to limit the effect of market forces. Therefore, social policy is supposed to end up in de-regulation, de-institutionalisation and de-collectivisation. Reduction of labour costs is the overarching goal of this economy-oriented paradigm. Th e measures taken in the course of the austerity politics for the Member States with high debts show very well this direction: reduction of wages and pensions, reduction of protection against dismissals and de-construction of the system of collective bargaining.

5. European Pillar of Social Rights

A new approach came up when in September 2015 President Juncker, addressing the European Parliament, announced a European Pillar of Social Rights for the EU. According to him this Pillar 'should complement what … already jointly (has been) achieved when it comes to the protection of workers in the EU'. It sounded like a rebirth of the idea to establish a framework of hard law. As a first step it was only meant to 'serve as a compass for the renewed convergence within the euro area', even if Juncker indicated that the single market as a whole should profit of it, thereby inviting the other Member States to join in.

The concretisation of Juncker's idea was left to the European Commission, which in March 2016 issued a Communication ([78]). There it became clear that the Pillar of Social Rights is to be integrated in the overall economic

agenda, as 'an essential feature of the process of economic policy coordination at EU level, now known as the European Semester. The rationale behind the Pillar of Social Rights follows this logic …' ([79]) The concept of flexicurity was reconfirmed, social benchmarking was stressed as well as mainstreaming social objectives in flagship initiatives. According to the Commission the 'Pillar should become a reference framework to screen the employment and social performance of participating Member States, to drive reforms at national level and, more specifically, to serve as a compass for renewed convergence within the euro area' ([80]). This very vague and unspecific concept left open the most important question, namely whether the Pillar is meant to provide rights, meaning hard law, or whether it is merely an extension of the soft law approach. This uncertainty was not eliminated by the preliminary outline for the consultation process which was put at the end of the Communication.

The consultation with other EU institutions, national authorities and parliaments, trade unions and business associations, NGOs, social service providers, experts from academia as well as the public lasted until the end of 2016. In January 2017 the Commission held a European Conference in order to wrap up the results of the consultation and to define the future direction of the Pillar of Social Rights.

Now we have more clarity. On 26 April 2017, the Commission presented a Recommendation ([81]) and a Proposal for an Interinstitutional Proclamation ([82]) of the European Parliament, the Council and the Commission on the European Pillar of Social Rights. This pillar 'is primarily conceived for the euro area but is applicable to all Member States that wish to be part of it' and it 'shall not prevent Member States or their social partners from establishing more ambitious social standards'. It is divided into three chapters: (a) equal opportunities and access to the labour market, (b) fair working conditions and (c) social protection and inclusion. It lists goals and principles for 20 policy areas. Some of it is already part of the social acquis and some of it refers to rights contained in the Charter of Fundamental Rights. The powers of the EU as defined in the Treaties are not extended. Even if the set of principles and rights looks very impressive, most of the policy recommendations are meant as encouragement for the Member States to develop respective standards, among them the right to receive support for job search, training and requalification, the right to adequate minimum wages or the right to redress, including adequate compensation, in case of unjustified dismissal.

The pillar also provides a clarification of controversial notions in the Working Time Directive ([83]) and an initiative for a possible action addressing the challenges of access to social protection for people in all forms of employment ([84]). It also contains, even if only to a very limited extent, a program for EU legislation on work – life balance for parents and carers ([85]) and on documentation of working conditions in labour contracts ([86]). In this context the Directive on Parental Leave is to be repealed and the Directive on a Written Statement of Working Conditions is to be modernised. The question, however, where such legislative initiative can be realised in the very end, remains open. The indicated difficulties for legislation do not disappear by the proclamation of the pillar.

Undoubtedly the European Pillar of Social rights, providing a comprehensive social agenda, is a step in the right direction. However, it is too early for euphoria. There is, of course, pressure on them to implement the recommendations, but the pressure remains soft. Binding European law only can be expected to a marginal extent. Therefore, the need to reflect on possibilities for further hard law on the European level does not disappear.

6. Possible Strategies to Overcome the Deficiencies of the Status Quo

A. Enhanced Cooperation

Therefore, we have to look for more promising strategies. One could be a Europe of different speeds as it has been suggested in the declaration at the celebration of the 60th anniversary of the Treaty of Rome. The mechanism for such a strategy is already contained in the Lisbon Treaty: it is called enhanced cooperation. In essence enhanced cooperation means that a group of at least nine member states 'within the framework of the Union's non-exclusive competences', as it is the case in labour law, may make use of the EU's institutions and exercise those competences. Any Member State can participate in this strategy. Th e final decision is made by the Council where only representatives of the Member States participating in enhanced cooperation have a voting right, even if all members are entitled to participate in the Council's deliberations. The acts adopted in the framework of enhanced cooperation only are binding the participating Member States. Th e competences, rights and obligations of the non-participating Member States are to be respected. Those Member States shall not impede the implementation by the participating Member States.

In a situation where – particularly in responding to the challenges implied by the refugee problem – it has become evident that solidarity between Member States is more than fragile, the temptation to take use of the possibility of enhanced cooperation is big. However, this option by necessity leads to an EU of different speeds. Whether in the long run these differences of speed can be equalised and whether the non-participating Member States eventually will join in, remains an open question. It is very ambiguous. The gap between core Europe and the periphery could become too big. And the incentive of those who are willing to build a social Europe for all citizens within the union might get lost. Whether the EU can survive under such perspectives, is at least uncertain. Therefore, I have my doubts whether this option should be chosen.

B. Extension of Competences

In my view for a really promising strategy to revitalise the social dimension the Treaty has to be significantly amended. First the legislative competences have to be extended. As indicated, the EU legislator still has no power to legislate on pay, the right of association, the right to strike and the right to impose lock-outs. This exclusion of competences is in sharp contrast to the fundamental social rights contained in the Charter of Fundamental Rights of the EU. But not only is this contrast puzzling, it is necessary to empower the EU to establish minimum standards also in these areas. Since only minimum standards are at stake, such legislative powers would not take away the Member States' power to legislate above this minimum level in favour of the employees. To just give two examples to show how important it would be to have minimum standards in this context: (a) a minimum wage for the EU could be established, of course not the same amount for each Member State but fixed as a percentage of the average wage in the respective country. This would guarantee a minimum wage for all employees and at the same time leave the national legislator and/or the parties to collective agreements to lift up this level according to the possibilities in each country; (b) it could be forbidden to undercut the level reached in collective agreements by agreements which are not concluded with trade unions but with other actors, a pattern which has been established in some Member States in the course of austerity politics. In short and to make the point: there is no need to leave these areas of legislation exclusively in the national context, an EU-wide floor of minimum standards should be made possible.

C. Reconstruction of the Legislative Procedure

Second the legislative machinery has to be changed. As already mentioned, under the present system of legislative procedure on the EU level it is almost impossible to expect further legislation on minimum social standards. Therefore, it is necessary to facilitate the production of European hard law by all means. First the right to initiate legislation should no longer be exclusively with the Commission as it has been up to now but should be extended to qualified minorities in the Parliament and in the Council. This to a much bigger extent would force the legislative bodies into discussions on the pros and cons of legislation, thereby increasing the transparency as well as the likelihood of legislative results. Second instead of requiring qualified majority or even unanimity in the Council, secondary law should be adopted by simple majority votes in both legislative bodies, the Parliament and the Council ([87]). Third, the deliberations in the Council which so far are secret, should be made public in order to also increase transparency in this respect.
It, of course, is self-evident that in view of the unanimity requirement and the procedures for ratification in all the Member States amendments to the Treaty are an ambitious project. But perhaps the Brexit shock and the danger of populist right-wing movements all over might serve as a wake-up call to finally do something to improve the possibility for European citizens to identify with the social face of the European project.

7. Conclusion

The steps taken by the EU from an originally mere market approach to recognition of the social dimension are undoubtedly impressive. This, last not least, is symbolised by the fundamental social rights in the Charter of the Fundamental Rights of the EU which now has become legally binding. This success story, however, cannot ignore that the obstacles for further development of minimum social standards for the EU have grown significantly in the meantime. New legislation in this controversial area has become very unlikely. To a great extent European involvement in shaping labour law and industrial relations now has become a soft law approach, an ongoing discourse on measures to be taken combined with mechanisms of soft pressure. This strategy which in addition is embedded in the manifold measures for economic governance is no real alternative to an EU-wide floor of minimum rights which cannot be undercut. The European Pillar of Social Rights only to a marginal extent is an innovation in this respect.

There is an urgent need to establish further social minimum standards in order to overcome the EU legitimacy crisis. Enhanced cooperation of Member States would be a possibility. But it is an ambiguous strategy, possibly increasing the gap within the EU too far. More promising might be an extension of legislative competences in the social field and facilitation of the legislative procedure. Th is, however, would require amendments to the Treaty. Whether such a perspective is too ambitious or whether the present legitimacy crisis and the Brexit shock turns it into a realistic project, remains an open question.

The Development of Employee Involvement in the EU: Lessons to Be Learned*

SUMMARY: 1. Introduction. – 2. The Directive on European Works Councils. – 3. The History of Employee Involvement in the European Company. – 4. Lessons to Be Learned.

1. Introduction

The European Union from the very beginning has been confronted with the diversity of the Member States' systems. Some countries had no systems of workers' participation whatsoever. They refused cooperation and relied exclusively on antagonism and conflict. And where systems of employee involvement in management's decision-making existed, they were different from country to country. These differences referred to the degree of participation, ranging from information and consultation up to co-determination. It also referred to the level of participation, ranging from the shop-floor level up to the headquarters of the company or group of companies. Only some countries even had established employees' representation in company boards. One of the most important differences between the Member States referred to the relationship between bodies of workers' representation and trade unions. And some Member States rejected the philosophy of participation in management's decision-making and relied exclusively on conflict and collective bargaining.

The relationship between institutionalized systems of workers' participation and collective bargaining again differs from country to country. It has to be stressed that differences between systems of workers' participation taken as an isolated phenomenon are by no means a reliable indicator for the degree of workers' influence on management's decision-making. The extent of such influence depends on the overall assessment

* In V. PULIGNANO, F. HENDRICKX (eds.), *Employment Relations in the 21th Century*, Kluwer, 2019, p. 181.

of industrial relations, including collective bargaining and the legal framework as well as the factual possibilities for strike and other mechanisms of conflict resolution. The culture and tradition within a country also plays a significant role in this context. Therefore, even in countries which totally reject the philosophy of workers' involvement in management's decision-making and rely exclusively on conflict and collective bargaining, the workers' pressure on management can, of course, also be high.

The question for the European legislator was whether it might be better to just accept this diversity and leave it as it is or to intervene and try to regulate industrial relations at least to a certain extent in favour of participative schemes. As we all know the European legislator chose the latter option, because it expected positive effects for the European economy as well as for the relationship between business and labour.

The positive effects of the system of employee involvement in management's decision making are well documented by many empirical studies. To just mention a few features: It leads to a change of focus from shareholder value to stakeholder value and tends to promote sustainability instead of short term effects at the stock markets. It has a big advantage compared to unilateral decision-making by the mere fact that management, who has to justify towards workers' representatives what it wants to do and why it wants to do it, tends to prepare the decisions much more carefully than it would be the case without this obligation. This leads evidently to better decision-making. The consciousness that workers' representatives are involved in management's decision making and that workers' interests are taken into account tends to increase the employees' motivation and thereby the company's productivity. Last not least the permanent dialogue between management and workers' representatives leads to mutual trust, changes the attitudes of both sides and absorbs conflicts.

I do not intend to reproduce the sequence and the content of the different Directives on workers' participation which you know quite well. I rather would like to reflect on the question what we can learn from the failure of specific proposals and from the way of they were overcome. This might help us to speculate on future possibilities to further EU legislation on employee involvement in management's decision making.

The main examples I choose to illustrate failure and success are the Directive on European Works Councils and the Directive on employee involvement in the European Company.

2. The Directive on European Works Councils

Evidently national institutional arrangements on employee involvement can operate only within the national framework. If the decisions are taken by the headquarters outside the country concerned, information and consultation rights become useless. The first attempt to overcome this shortcoming was the so-called Vredeling proposal of 1980, amended in 1983. The proposal did not affect the given structure of employees' representation. The actors in the case of information and consultation were "the employees' representatives provided for by the laws or practices of the Member States". The chain of information had to go down from the parent company to the subsidiaries where information and consultation were supposed to take place. The content, the procedure and the frequency of information and consultation were prescribed in detail. Within a moratorium of 30 days after the beginning of consultations management was prohibited to take the respective decision.

This proposal met strong resistance by employers' associations and chambers of commerce, including those from USA and Japan. It was considered to be an intolerable imposition on management's decision making. Due to the increasing pressure the proposal had no chance to become a Directive. The attempt was given up in the mid-eighties: A funeral first class.

The Directive on European Works Councils of 1994 is the result of fresh efforts to revitalize social policy. Thanks to the President of the Commission Jacques Delors the notion of the "European Social Dimension" became a key issue in the discussions on the realization of the internal market. In addition, the institutional strengthening of the social dialogue at EC level by the Single European Act's amendment of the Treaty led to an increased involvement of the social partners throughout the Community. This explains why the initiative to adopt a Community Charter of Fundamental Social Rights of Workers enjoyed widespread public attention and became the subject of very heated and controversial debates.

When in December 1989 in Strasbourg the Charter was adopted by eleven Member States the content was reduced to a minimum on which practically everybody could agree. Hence, the topics contained in the Charter were also agreed upon by at least the majority of business organisations and their spokesmen. It is important in this context to mention that section 17 of the Charter reads as follows: "Information, consultation and participation for workers must be developed along appropriate lines,

taking account of the practices in force in the various Member States. This shall apply especially in companies or groups of companies having establishments or companies in two or more Member States of the European Community". And in the Commission's Social Action Programme to implement the Charter the introduction of a Community instrument on employee information, consultation, and participation procedures in transnational undertakings was proposed. In short, and to make the point: Both the legitimacy of such an instrument and the pressure to introduce it had increased tremendously compared to the period when Vredeling was being debated.

The Directive on the establishment of a European Works Council seeks to achieve the same goal as the Vredeling proposal, but uses a very different strategy: the change of paradigm from substantial detailed regulation to a merely procedural solution. The focus of the Directive is on the establishment of a body representing the interests of all employees of the undertaking or group of undertakings within the Community: the European Works Council (EWC). In order to establish such an EWC a relatively complicated procedure is provided for. First, the employees' representatives in each undertaking or each group of undertakings covered by the Directive must form a so-called Special Negotiating Body (SNB) composed of representatives of each Member State in which the Community-scale undertaking or group of undertakings employs at least 100 employees. Then the EWC has to be set up by written agreement between the central management of the Community-scale undertaking or of the controlling undertaking of the group on the one hand and the SNB on the other. If a Community-scale undertaking or group of undertakings has its central management or its controlling undertaking outside the EU, the EWC must be set up by written agreement between its representative agent within the EU or, in absence of such an agent, the management of the undertaking or of the group of undertaking with the largest number of employees on the one hand and the special negotiating body on the other. This agreement must determine specific matters: the nature and composition of the EWC; its functions and powers; the procedure for informing and consulting the EWC; the place, frequency, and duration of its meetings; and, lastly, the financial and material resources to be allocated to the EWC. Whether such an agreement is concluded, and in what manner, depends entirely on the parties on both sides. If the SNB decides by a two thirds majority not to request such an agreement, that is already the end of the matter. Only if the central management refuses to commence negotiations within six months of receiving such a request or if

after three years the two partners are unable to reach an agreement do the subsidiary requirements of the Annex to the Directive apply.
These subsidiary requirements are the only form of pressure available to the SNB. They regulate in detail the composition of the EWC, the establishment of a specific committee for certain topics and situations, the frequency of information and consultation, the content on which the EWC is to be informed, the question of who bears the costs as well as the possibility of access to expert knowledge. In short: these subsidiary requirements contain all the detailed substantial prescriptions for which the Vredeling proposal turned out to be unacceptable. They are supposed to be a threat for the bargaining parties. And it works. From the more than 1100 EWC only very few were formed by recourse to subsidiary requirements, all the others are the result of negotiations.
In addition to the change of paradigm from substantial to procedural regulation the Directive introduces a further element which explains its success compared to Vredeling Proposal. Vredeling was intending uniform patterns: the same topics for information and consultation, the same frequency of information and consultation and the same procedure for information and consultation. This now is different: the results of negotiations between SNB and central management differ significantly and lead to very heterogeneous structures. The variety of patterns not only allows each company and group of companies to develop the pattern fitting best to its specific conditions but also offers an opportunity to find out best practices by experience, an ideal setting for learning from each other.
The system of EWCs has developed dynamics of its own and gone far beyond information and consultation towards negotiations, leading to agreements. These agreements refer to a whole variety of topics: health and safety; environment; fundamental rights, in particular trade union rights and data protection; corporate social responsibility, equal treatment at work, job security, codes of conduct, mobility management; mergers; closures; relocations and restructuring. They are found in quite a few sectors, among them the chemical industry and therein in particular the pharmaceutical industry, the banking industry, the food industry, the oil industry, the metal industry and therein in particular the automobile industry, and even the tourism industry. The most spectacular agreements were concluded in the automobile industry of which the agreements at Ford and General Motors are the most prominent and far-reaching ones. These agreements lead to another question, namely whether Directives on workers' involvement may also be understood as a sort of stimulus for further developments of industrial relations.

3. The History of Employee Involvement in the European Company

The second example I want to present you, the Directive on employee involvement in the European Company, has an even longer history which dates back to the late sixties of last century. When the Commission of the European Communities in the mid-sixties asked two eminent experts, (Pieter Sanders and Gérard Lyon-Caen), for an expertise on a possible structure of the European Community, it looked as if the Commission would be willing to build its proposal on the insights of expert knowledge. This, however, was not the case. In spite of the fact that in view of the existing huge differences between the systems of industrial relations within the Community Lyon-Caen stressed the impossibility of a uniform pattern of workers' participation in company boards, the Commission's proposal of a European Company Statute of 1970 insisted on a uniform model: a mixture of the German and the Duch system of workers' representation in company boards was to be imposed on each European Company, no matter in which country its seat would be.

This strategy not only ignored the existing differences of the systems of industrial relations in the different Member Countries, but it also ignored the fact that for many countries this would mean a total reconsideration of their traditional pattern of company law: The model as contained in the proposal only made sense in a two-tier system with a management board and a supervisory board, but not in a system where both functions of these separate boards are contained in one single board, in the so called one-tier system. Hence it was not astonishing at all that this first draft met nothing but strong resistance. The Commission, however, decided to remain stubborn: even the amended version of the European Company Statute of 1975 maintained the original pattern of employee board representation. Compared with the first draft, which provided only a representation of one third from the workers' side as against two thirds for shareholders' representatives, the new draft merely changed the board composition: one third workers' representatives, one third shareholders' representatives, and another third reserved for persons agreed upon by the other two groups.

The maintenance of this uniform pattern is even more surprising if linked to another activity of the Commission in the same year 1975. Based on the controversial debate which marked the beginning of a real awareness of the differences in the basic structures of company law, differences in trade union structures and trade union policies, and differences in the role played by law in industrial relations in the various Member States, the Commission presented a highly sophisticated Green Paper on Employee

Participation and Company Structure in the European Community. This paper served as a very informative and stimulating input to this debate, in the course of which the heterogeneous nature of the industrial relations' landscape throughout the Community became even more evident and was discovered to its full extent. Against this background it became more and more apparent that future drafts and amendments would have to abandon the approach of imposing one identical model on all who wanted to take use of the European Company as an option. Otherwise the chances of realization in the political process would tend towards zero.

It took quite a long time until the Commission pushed a new initiative. For a long time the Commission was focusing on another, even more ambitious project: the harmonization of national company law by a Fifth Directive on the Structure of Public Limited Companies. There again in a first draft of 1972 the Commission presented the same pattern of workers' participation as contained in the proposal for the European Company. When it turned out that this approach had no political chance whatsoever the Commission presented a new proposal in 1983. This new draft no longer offered only one fixed menu for all the Member States seated around the Community table, but replaced it by a sort of cafeteria system in which each Member State is able to choose whatever best suits its taste. First of all, it contained models for the one-tier structure of company law as well as for the two-tier structure. It, however, has to be stressed that the one tier system somewhat was supposed to be modified to look like a two-tier system. The board of directors was supposed to be divided into a smaller number of managing members and a larger number of monitoring members, thereby arriving at a division of labour similar to that between a management board and a supervisory board in a two-tier structure.

As far as the two-tier was concerned, there was a choice of four models, the representation of workers German-style, leaving each Member State free to fix the proportion of workers' representation at between one third and a half, in the latter case providing a casting vote for the shareholders' representatives. This option also included the alternative of three groups as previously contained in the amended draft of the European Company Statute of 1975. Secondly, a model as used in the Netherlands could be chosen: the supervisory board co-opts members who are neither workers' nor shareholders' representatives. According to the third model a separate body representing the company's employees has to be established. This body has the right to regular information and consultation on the company's situation. The rights of this separate body were in essence the same as the information rights of the supervisory organ appointed by the

general meeting. Furthermore, this body had to be consulted the same way as the supervisory organ. The separate body was supposed to meet prior to each supervisory board meeting and had to provide all the documentation and information relating to the agenda for the supervisory board meeting. Lastly the fourth model tried to introduce workers' participation by way of collective agreements. Where, however, such an agreement could not be reached within a certain period, Member States were supposed to regulate workers' participation in accordance with one of the other options. If the one-tier system was chosen, the same rules applied, at least in principle.

The proposal not only offered a significant degree of variety, but also allowed workers' participation to be circumvented altogether: if the majority of workers voted against it, a participation model did not have to be introduced.

Even if this proposal was much more flexible than the first one, it quickly turned out that even this offer of many options politically had no chance. The European Trade Union Confederation (ETUC) opposed it for the reason that it was possible to get rid of participation by majority vote. And for the Employers' Confederation of European Industries (UNICE, now Business Europe) the pattern still was too imposing for countries so far not acquainted with any employees' board representation whatsoever. In view of the opposition of both sides - which of course related in addition to many other points not mentioned here - it was no surprise at all that this amended proposal had to share the destiny of its predecessor: it was very soon considered to all intents and purposes moribund.

The failure of the strategy to harmonize national company law meant at the same time a new starting point for an attempt to realize the project of a European Company. The more it proved that the integration of workers' participation into the national company law structure remains illusionary, the more efforts were renewed to introduce workers' participation on a Community scale by way of redefinition of the European Company Statute. Consequently, in the Commission's White Paper of 1985 on completing the internal market the European Company Statute was mentioned as one of the goals to be achieved by the end of 1992. Therefore, in 1987 the European Council requested the relevant bodies "to make swift progress with regard to the company law adjustments required for the creation of a European company". Urged by these initiatives, in 1988 the Commission drew up a memorandum in which the key problems of a Statute for a European Company were listed. In this memorandum the European Parliament, the Council, and the two sides of industry were invited to express their views. On the basis of the feedback obtained from

these actors, the Commission prepared a new proposal, which was presented in August 1989. In order to achieve the necessary flexibility, the element of workers' participation was now separated from a Statute proper, which was supposed to be contained in a Regulation: workers' participation was to be covered by a Directive. There were, however, safeguards that the Regulation could not be passed without the Directive. Both were closely interrelated. This pattern of division between Regulation and Directive and the interrelation between the two has survived and become also the basis of the now exiting legislation in this area.

The proposal of 1989 contained a range of options which was very similar to the alternatives provided in the last draft of the Fifth Directive: first, the German model in which the workers' representatives were supposed to have a minimum of one third and a maximum of one half of the seats, without a casting vote for the shareholder's side in the latter version; secondly the Dutch model of co-optation; thirdly the separate body for workers' representation with specific rights of information and consultation; and last systems agreed by collective agreements. Where in the latter case such an agreement could not be reached, the most advanced national model in the respective Member State was supposed to be applied. In case such a model did not exist, the draft Directive stipulated a set of minimum standards for information and consultation. Most importantly, the possibility of opting out of workers' participation altogether was abolished.

In spite of the fact that this new proposal offered different options to be chosen, it soon turned out that it still was considered to be too rigid to be politically acceptable. Therefore, in the early nineties the hope that the European Company Statute with a scheme of workers' participation might be realized, became weaker and weaker. Finally it somehow passed away. It seemed to be just impossible to reconcile the peculiarities and philosophies of national industrial relations patterns with a transnational structure of workers' participation whatever it might look like. The project seemed to be dead for ever.

The revitalization of the project of a European Company is due to the success of the Directive on European Works Councils and the change of paradigm from substantial regulation to 'proceduralisation'. The Commission impressed by the success of the Directive on European Works Councils was considering whether the method applied there could not be repeated in the case of workers' participation in the European Company. It established in 1996 a group of experts on "European Systems of Worker

Involvement" chaired by the former Deputy President of the Commission, Etienne Davignon. The Davignon-group presented its report in 1997: its recommendations were based on the logic and on the principles of the Directive on European Works Councils. It defined actors for negotiation and left in principle everything to these negotiations. As in the Directive on European Works Councils for the case of failure of such negotiations a safety net, so called subsidiary requirements, was suggested, guaranteeing the workers' representatives at least one fifth (in any case two) of the seats in the supervisory board or the corresponding body.

In spite of the very positive reaction the Davignon report got throughout the European Union it soon became pretty clear that it still was very difficult to transfer the ideas of this report into legislation. The crucial point of controversy was the level of workers' board representation guaranteed by the subsidiary requirements. Member States with a higher amount of seats were reluctant to accept such a low proportion of workers' representation. Therefore, in a first phase the attempt to turn the Davignon report into law mainly failed because of the German and Austrian opposition. Under the UK's presidency in the first semester of 1998 a compromise was developed in order to overcome this resistance. According to this new version the highest level of board representation of a company participating in a merger has to be decisive and to be guaranteed by the subsidiary requirements. If for example a German company would engage in a merger, the German level of workers' representation would be extended to the new European Company if not a different pattern would be the result of negotiations. This maintenance strategy, however, has been combined by a trade off: there is no need for workers' board representation at all if there was none in the pre-existing companies. This pattern – for a long time opposed by Spain – has survived when finally after quite a few futile attempts in Nice in December 2000 agreement on the content of the draft Directive was reached by the Council.

It is important to stress that also in the case of the European Company The subsidiary requirements are merely functioning as a threat. To my knowledge so far all negotiations ended with a positive result. Recourse to the subsidiary requirements was not necessary.

4. Lessons to Be Learned

This very enlightening history of workers' participation in the EU teaches us important lessons. Since each system of industrial relations does have its own history embedded in the respective country's culture and institutional framework, there can be no harmonization or uniformity of institutional arrangements all over the EU. It is particularly impossible to impose one country's system to all the others, as the early history of workers participation in the European Company demonstrates. But even predefined options seem still to be too rigid to fit in the overall framework of a given country, as is shown by the later proposals for the European Company and the fifth company law Directive. And as the Vredeling proposal teaches us, substantive prescriptions on what has to be done within the companies have no chance to be politically accepted.

The way out of this dilemma is 'proceduralization', establishing a framework for negotiations in order to elaborate compromises fitting to the needs of the respective companies and employee representatives. The result is not uniformity but utmost variety.

Finally the Directive on European Works Councils teaches another important lesson: Once such a scheme is established by a Directive it develops its own dynamics exceeding by far the intention of the legislator. Or to put it differently: legislation is only the beginning, depending on the actors' strategies the schemes can grow beyond the limits drawn by the legislator. This scenery is not to be perceived as static but as highly dynamic.

The Future of Labour Law in Europe: Rise or Fall of the European Social Model?*

I. Introduction

The future of the European project to a great extent will depend on the fact whether it can provide social justice throughout the EU. The need for improving the "European social dimension", to take up Jacques Delors' well known formula, as a tool for the people to identify themselves with the European project has never been more urgent than it is today after the Brexit. In this context it is of utmost importance to know whether European labour law can provide conditions which help to promote this ambitious goal.

The Europeanization of labour law was not on the agenda of the European Economic Community (EEC) in 1957. In its origins the European project was understood as being primarily an effort to construct a common market. Market freedoms and the guarantee of fair competition within the common market, therefore, were the pillars of the Treaty of Rome. Social policy almost exclusively was left to the Member States. The original Treaty did not contain legislative powers in this field.

In the meantime the European integration of labour law has become an important part of the European project. The first steps in this direction were made in the 1970s. In spite of the lack of legislative powers of the EEC in

* In *European Labour Law Journal*, 2017, p. 344.

the area of labour law, Directives in this field were passed (in particular equal pay for men and women ([88]), comprehensive equal treatment of men and women in employment ([89]), protection of workers in case of collective redundancies ([90]), in case of transfers of undertakings and in case of the insolvency of the employer ([91])). They were based on articles in the original Treaty (100 and 205) which had nothing to do with labour law and which required unanimous voting in the Council. This shows that the Treaty is more or less irrelevant if there is a consensus between all Member States. In reference to labour law this was the case until 1979 when Thatcher came into power in the U.K.

Only when in 1987 the Treaty was amended by the Single European Act the EEC became empowered to legislate in a very limited area of labour law (work environment) with qualified majority vote in the Council. By further amendments, by the social protocol to the Maastricht Treaty in 1992 and later on in 1998 by the Treaty of Amsterdam, the EEC not only was renamed in European Community (EC) but the legislative powers in the area of labour law were significantly extended These amendments now simply were transferred into the Lisbon Treaty on the Functioning of the European Union (TFEU). Accordingly the EU is empowered to establish minimum standards for practically all aspects of labour law except "pay, the right of association, the right to strike and the right to impose lock-outs" (art. 153 par. 5 TFEU). Legislation is possible on most of the subject matters by qualified majority.

The indicated amendments have brought another innovation. If the Commission wants to initiate legislation it has twice to consult the social partners of the inter-professional social dialogue, the European Trade Union Confederation (ETUC) on the employees' side and the Confederation of European Enterprises (BUSINESS EUROPE), the European Association of Craft Small and Medium-Sized Enterprises (UEAPME) as well as the Centre of Employers and Enterprises providing Public Services (CEEP) on the employers' side. First they are to be consulted on the question "whether" a specific piece of legislation on subject matters listed up in art. 153 par. 1 TFEU should be initiated and secondly on the question "how" such a piece of legislation should look like. In the latter consultation the social partners are entitled to take away the project from the Commission and are invited to try within a certain period to reach an agreement by themselves. Such an agreement then by the social partners can be brought via the Commission to the Council which may transfer it into a directive. So far this happened only three times in the 1990s. Afterwards it did not work out again, except in reference to

a minor amendment of the Directive on parental leave. Therefore, this structural innovation should not be overestimated.
Finally it should be remembered that after a long and very controversial discussion a Charter of Fundamental Rights of the EU was passed in 2000 as a legally non binding declaration which expressed the consensus of all 15 Member States of that time ([92]). The Charter now has become a legally binding part of the Lisbon Treaty. It contains a whole set of fundamental social rights, among them the right to protection against unjustified dismissal, the right to fair and just working conditions, the right to collective bargaining and collective action as well as right for either workers or their representatives on information and consultation, to just give an impression.
These developments have to be kept in mind if in the following the status quo of European labour law and industrial relations is briefly sketched. This assessment is a necessary precondition to evaluate the impact of the Lisbon Treaty for further developments and to discuss the possibilities for further legislation on labour law.

II. The *Status Quo* of Social Minimum Standards

1. Labour Legislation

In individual labour law major progress has been made particularly in legislation on health and safety, on working time, on work and life balance, on atypical work, on protection of employees in case of trans-national services and on discrimination. In addition the directives on collective redundancy ([93]) and on transfer of undertakings ([94]) have been amended in a double sense: they now include cases where the decisions are taken by trans-national headquarters and they are adapted to the case law as developed by the Court of Justice of the EU (CJEU).
The core instrument for protection of health and safety is the Framework Directive of 1989 ([95]), surrounded by a whole set of so called daughter directives on specific risks for health and safety. The Framework Directive – at least in principle – covers all private or public areas of activity, contains the basic principles to fight risks of health and safety and lists up the duties of employers as well as of employees in this respect.
The Working Time Directive of 1983 ([96]) not only serves health and safety considerations but to a great extent is devoted to the organisation of working time flexibility. Mainly three issues covered by the directive have

become very controversial: the very notion of working time, the period within which an average maximum working time per week has to be reached and the possibilities of opting out. Many efforts to again amend the Directive have not succeeded up to now.

In the area of work-life balance the already mentioned Directive of 1996 on parental leave ([97]) is of importance, even if it is only a very small step in making work and family obligations more compatible. It is the first Directive which is based on an agreement reached by the social partners. Parents thereby got a right to parental leave for a minimum period and the right to return – at least in principle – to the same job. However, due to the fact that pay is not part of the EU's legislative power the directive does not say anything to the financial conditions of parental leave, thereby neglecting a very relevant part. More important in the context of work / life balance is the Directive of 1997 on part-time work ([98]), the second Directive based on an agreement by the social partners. Even if this Directive can be understood as the lowest possible denominator, it contains two important elements: equal treatment pro rata in reference to working conditions and protection against dismissal if an employee refuses to transfer from full-time to part-time or vice versa. Thereby, part-time in quite a few Member States has been elevated to a much better status than before.

Of course the Directive on part-time can also be put in the box "atypical work" together with the Directive of 1999 on fixed term contracts ([99]) and the Directive of 2008 on temporary agency work which have to be put in context with the directive of 1991 on the health and safety of workers with a fixed-duration employment or a temporary employment relationship. The Directive on fixed term contracts is the last one based on an agreement by the social partners. It contains two important elements: equal treatment with those in an undetermined employment relationship and prohibition of abuse of repeated fixed term contracts. However, the criteria for abuse are so wide that the repetitive use of fixed term contracts is almost unlimited. The Directive on temporary agency work ([100]) is the result of a long and very controversial effort. In the very end a compromise was reached which is unsatisfactory. In principle equal treatment with the comparable employees in the user company is guaranteed. However, by way of collective agreement lower conditions for the temporary workers can be determined.

EC legislation has tried to resolve the tension between the freedom of services and social considerations. In the early 1990s construction companies from member states with significantly lower levels of working

conditions and labour standards provided their services in high wage countries. Their employees of course remained to be employees with employment relationships in their country of origin, not being covered by the equal treatment principle which would have to be applied if they would have become workers of the country where the services are performed. Therefore, due to much lower labour costs these companies were able to offer their services much cheaper than companies in higher wage countries. This led to a substitution effect: companies in higher wage countries had less work, many of them went into insolvency and many workers in the construction industry lost their jobs ([101]). This led in 1996 to the Posting of Workers Directive ([102]) according to which essential employment protection standards in the host country (minimum wage, maximum work periods, minimum rest periods, minimum paid holidays, health and safety standards etc.) are to be applied to the posted workers. When later on further obstacles for the freedom of services were supposed to be removed requirements of labour protection were ignored by the draft of a Directive. It was focussing exclusively on the country of origin principle: not only the requirements for providing services but also the conditions for the posted workers were supposed to be those of the country of origin and not in line with the requirements and standards of the host country ([103]). The idea was to facilitate trans-national services as much as possible. This led to strong protests of the trade unions and also to significant fears of workers in the potential host countries ([104]). The protests were successful. The Service Directive of 2006 ([105]) even strengthens the concept of the posting workers directive by including duties of efficient monitoring to be established by the member states.

The EC's by far most important legislative input into individual labour law has been in the area of discrimination. In 1998 by the Amsterdam amendment in the EC-Treaty article 13 was introduced which empowers the European legislator to take "appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" (now art. 19 TFEU). This has become the basis for the two anti-discrimination-directives of 2000 ([106]). In addition the concept of already mentioned Directive on sex equality has been brought fully in line with the spirit of these directives of 2000. The amendments now are integrated in a consolidated version of the Directive ([107]).

Even more important than the inputs into individual labour are the Community's legislative measures in the area of collective labour law: they shape the interaction and the power relationship between both sides

of industry and, thereby, have an enormous impact on the structure of industrial relations. In particular three legislative steps in the area of workers' participation are of utmost interest, two referring to trans-national undertakings and groups of undertakings and one referring to domestic structures within the Member States.

The first step in this context is the Directive of 1994 on European Works Councils (EWC) ([108]) which has been amended in 2009 ([109]). It covers trans-national undertakings and groups of undertakings with at least 1000 employees within the EU and with at least 150 employees of the undertaking or of different undertakings of the group in each of at least two different Member States.

The amendment of 2009 mainly has brought clarifications on the timing and content of information and consultation, has integrated CJEU's judgements into the directive and has strengthened the link between EWC and national workers' representatives.

The second step in this context was the Directive supplementing the statute for a European Company with regard to the involvement of employees ([110]). This Directive has to be read together with the Statute on the European Company ([111]) which contains the rules on company law. The main goal of establishing a European Company as an option is to save transaction coasts, to increase efficiency and transparency. It no longer should be necessary to create complicated structures of holding companies in order to overcome the problems arising from national company law.

A European Company only can be registered if the requirements of the Directive are met. Thereby it is guaranteed that the provisions on employees' involvement cannot be ignored. The crucial and interesting topic of the Directive refers to employees' participation in company boards.

Whereas these two Directives refer to the trans-national context, the Directive on a framework for information and consultation of 2002 ([112]) shapes the participation structure within the member states. It covers public or private undertakings of at least 50 employees and establishments of at least 20 employees in Member States. It establishes a minimum level of workers' participation within the Member States leaving them a high amount of flexibility.

There are further Directives on workers' participation. However, this very sketchy assessment should be sufficient to show that employees' involvement in management's decision making has become an important feature of European collective labour law.

2. Evaluation

Taken everything together, legislation on social minimum standards is unsystematic and fragmentary. Important areas as for example protection against unfair dismissals are still missing. This deficiency has become particularly evident when in the course of the management of the financial crisis in the context of the austerity strategy Member States in Southern Europe were forced to reduce their standards of dismissal protection and of minimum wage and also forced to dismantle their collective bargaining systems. The construction of social Europe needs a comprehensive floor of rights throughout the EU which cannot be undercut. This, of course, does not mean that diversity between the labour law systems of the Member States should be abolished. It only means that minimum standards are to be established which are in line with the worker's fundamental right to "working conditions which respect his or her ...dignity" (Art. 31 of the Charter). At least this minimal social coherence is to be achieved.

III. The Obstacles for Further Legislation

1. The Diversity of Interests

In spite of the fact that the EU has a comprehensive power to legislate in the area of labour law the obstacles for legislation in this field are significant. This is first of all due to the fact that – in particular since the enlargements of 2004, 2007 and 2013 when many formerly communist States of the EU were integrated in the EU – the interests of the Member States in the EU of 28 have become so heterogeneous that it is very unlikely to get even a qualified majority for a piece of legislation. It is understandable that low wage countries want to use lower labour standards as a competitive advantage in comparison to high wage countries. Therefore, it may well be doubted whether today it still would be possible to get a majority for the posted workers Directive as it was the case in 1996. It was already quite difficult to pass a Directive on the enforcement of the posted workers Directive which simply is meant to make sure that the already existing Directive has better chances to play a role in actual practice and does not remain in many cases to be a mere paper tiger ([113]). It may well be doubted whether the present proposal by the Commission for an amendment of the Directive of 1996 ([114]) has any chances at all.

IV. Alternative Strategies

Confronted with these difficulties the EU more and more has shifted the focus to alternative strategies. The main instrument in this context has become the Open Method of Coordination (OMC). It has first been developed in the context of the European Employment Policy (EEP) in the Amsterdam Treaty ([115]). According to the OMC the genuine competence of the Member States remains uncontested. The EU merely is supposed to encourage co-operation between them, to support and, if necessary, complement their action. It is mainly based on the idea that best practices as discovered in one country may be imitated by other countries, thereby leading to social progress. Instead of regulation by way of legislation the EU only tries to put soft pressure on the Member States, leaving them the task to regulate. This method, however, runs into difficulties if the gap of the economic situation between Member States is too big to allow for similar remedies. Then the capacity of OMC is quickly exhausted.

Since the beginning of the new century the EU has tried to combine OMC with specific goals to be reached. The first expression of this new approach was the Lisbon strategy launched in 2000 for the EU "to become the most dynamic and competitive knowledge-based economy in the world by 2010 capable of sustainable economic growth with more and better jobs and greater social cohesion and respect for the environment". A whole set of ambitious targets for 2010 were listed up, among them targets for employment rates and for full employment. The concepts for reaching these goals were put in vague notions as are "flexicurity" or "employability".

However, soon it turned out that the strategy was much too complex, that it was lacking a clear division of tasks between EU and member states and that there was no really functioning governance structure ([116]). Therefore, the strategy was modified and re-launched in 2005. Of great importance were country specific recommendations. They were meant to help the Member States to better realize the objectives in their national reform programs. The OMC as a mutual learning strategy was the underlying philosophy of the whole exercise.

The Lisbon strategy has, of course, not reached its goals but been replaced by the new agenda "Europe 2020", a "strategy for smart, sustainable and inclusive growth" ([117]) focuses on five goals to be reached by so-called flagship initiatives. In essence it is nothing else but a slimmed Lisbon strategy in new clothes. There is still the reference to the flexicurity agenda, to new forms of work-life balance, to the problem solving

potential of social dialogue at all levels and to the European qualification framework. The new strategy remains to a great extent within the old paths. Taken all these soft law strategies together, it is evident that they cannot replace legislation. The role of the EU is reduced to be at its best a promoter and coordinator of reform debates within the Member States. Where this discourse will end up is totally uncertain. To guarantee a minimum social level it needs binding instruments, it needs "hard law" which cannot be substituted by "soft law" mechanisms.

These soft law strategies have to be seen in the context of the new institutional architecture for economic and social governance. At the heart of this new architecture is the 'European Semester' of policy coordination, through which the Commission, the Council, and the European Council set priorities for the Union in the Annual Growth Survey, review National Reform Programmes, and issue Country-Specific Recommendations to Member States, backed up in some cases by the possibility of financial sanctions. The European Semester brings together within a single annual policy coordination cycle a wide range of EU governance instruments with different legal bases and sanctioning authority. The problem with all these mechanisms is that social policy is conceived as a residual category under the imperative of economic considerations.

The focus of all these mechanisms is on economic efficiency and not on increase of labour regulation which in the neo-liberal perspective is understood to limit the effect of market forces. Therefore, social policy is supposed to end up in de-regulation, de-institutionalisation and de-collectivisation. Reduction of labour costs is the overarching goal of this economy oriented paradigm. The measures taken in the course of the austerity politics for the Member States with high debts show very well this direction: reduction of wages and pensions, reduction of protection against dismissals and de-construction of the system of collective bargaining.

V. European Pillar of Social Rights

A new approach has come up when in September 2015 President Juncker, addressing the European Parliament, announced a European Pillar of Social Rights for the EU. According to him this Pillar "should complement what...already jointly (has been) achieved when it comes to the protection of workers in the EU". It sounded like a rebirth of the idea to establish a framework of hard law, As a first step it was only meant to "serve as a

compass for the renewed convergence within the euro area", even if Juncker indicated that the single market as a whole should profit of it, thereby inviting the other Member States to join in.

The concretisation of Juncker's idea was left to the European Commission, which in March 2016 issued a Communication ([118]).There it became clear that the Pillar of Social Rights is to be integrated in the overall economic agenda, as "an essential feature of the process of economic policy coordination at EU level, now known as the European Semester. The rationale behind the Pillar of Social Rights follows this logic..." ([119]). The concept of flexicurity was reconfirmed, social benchmarking was stressed as well as mainstreaming social objectives in flagship initiatives. According to the Commission the "Pillar should become a reference framework to screen the employment and social performance of participating Member States, to drive reforms at national level and, more specifically, to serve as a compass for renewed convergence within the euro area" ([120]). This very vague and unspecific concept left open the most important question, namely whether the Pillar is meant to provide rights, meaning hard law, or whether it is merely an extension of the soft law approach. This uncertainty was not eliminated by the preliminary outline for the consultation process which was put at the end of the Communication.

The consultation with other EU institutions, national authorities and parliaments, trade unions and business associations, NGOs, social service providers, experts from academia as well as the public lasted until the end of 2016. In January 2017 the Commission held a European Conference in order to wrap up the results of the consultation and to define the future direction of the Pillar of social rights.

Now we have more clarity, On 26 April this year, just some days ago, the Commission presented a Recommendation ([121]). and a Proposal for a Interinstitutional Proclamation ([122]) of the European Parliament, the Council and the Commission on the European Pillar of Social Rights.

This pillar "is primarily conceived for the euro area but is applicable to all Member States that wish to be part of it" and sit "shall not prevent Member States or their social partners from establishing more ambitious social standards". It is divided into three chapters: (a) Equal opportunities and access to the labour market, (b) fair working conditions and (c) social protection and inclusion. It lists up goals and principles for 20 policy areas. Some of it is already part of the social acquis and some of it refers to rights contained in the Charter of Fundamental Rights. The powers of the EU as defined in the Treaties are not extended. Even if the set of principles and

rights looks very impressive, most of the policy recommendations are meant as encouragement for the Member States to develop respective standards, among them the right to receive support for job search, training and requalification, the right to adequate minimum wages or the right to redress, including adequate compensation, in case of unjustified dismissal. The pillar also provides a clarification of controversial notions in the Working Time Directive. And it also contains, even if only to a very limited extent, a program for EU legislation, mainly in the area of work-life balance for parents and carers and on documentation of working conditions in labour contracts. In this context the Directives on Parental Leave and on a Written Statement of Working Conditions are to be modernised. The question, however, where such legislative initiative can be realized in the very end, remains to be open. The indicated difficulties for legislation do not disappear by the proclamation of the pillar.

Undoubtedly the European Pillar of Social rights, providing a comprehensive social agenda, is a step in the right direction. However, it is too early for euphoria. It is uncertain how the Member States will respond to the Member States invitation. There is, of course, pressure on them to implement the recommendations, but the pressure remains to be soft. Binding European law only can be expected to a marginal extent. Therefore, the need to reflect on possibilities for further hard law on European level does not disappear.

VI. Can the Lack of Legislation Be Compensated by the CJEU?

Looking for a way to strengthen the "hard law" approach, the question arises whether the CJEU might be helpful. After all, In the past the CJEU has proved to be a body supporting and promoting European integration and strengthening the social dimension. Let me give you an example. Only to a very limited extent the Treaty allows for exceptions of the market freedoms (art. 52 par. 1 TFEU). The wording of the Treaty undoubtedly does not justify exceptions beyond "public policy, safety or health", in particular not in reference to wages and similar working conditions. Nevertheless the CJEU very early tried to establish a compromise between the market freedoms and the social dimension. The CJEU considered legislation or extended collective agreements on minimum working conditions in the host country in principle as justification to restrict market freedoms if these conditions are necessary and proportionate and are applied to the foreign service provider in a non-discriminatory way ([123]).

This formula developed by the CJEU in spite of the text of the Treaty was a precondition for the acceptability of the Posted Workers Directive of 1996 and the restrictions in the Service Directive of 2006. It should be kept in mind that the Posted Workers Directive by many experts was considered to be incompatible with the wording and the philosophy of the Treaty and denunciated as a protectionist instrument. In this context it was the CJEU who has taken the decisive move to prevent social dumping by use of market freedoms.

The Lisbon Treaty has brought by article 9 TFEU an innovation which may facilitate the CJEU's task in the future and which might give the social dimension more weight in its judgements. According to this article "in defining and implementing its policies and activities, the Union shall take into account requirements linked to the promotion of a high level of employment, the guarantee of adequate social protection, the fight against social exclusion....". In short: thereby the CJEU has a basis in the Treaty to give the social dimension more weight than before without being in the danger to lose legitimacy.

However, the Court's possibilities are very limited. Even if there are indications that the CJEU might be willing to promote the social dimension of the EU, it, of course, cannot substitute missing legislation. The CJEU has to be aware that the boundaries of the existing normative structure of the Treaty, Otherwise it risks to lose legitimacy. Therefore, only to a very limited extent the CJEU will be able to compensate the lack of legislation. Further 'hard law' by way of legislation is indispensable.

VII. Possible Strategies to Overcome the Deficiencies of the *Status Quo*

1. Enhanced Cooperation

Therefore, we have to look for more promising strategies. One could be Europe of different speeds as it has been suggested in the declaration at the celebration of the 60th anniversary of the Treaty of Rome. The mechanism for such a strategy is already contained in the Lisbon Treaty: enhanced cooperation. Art. 20 TEU in connection with Art. 326 to 334 TFEU contain a rather complicated procedure to be observed for this strategy. In spite of this complexity it has already three times ([124]) taken the obstacles embedded in the Treaties. In essence enhanced cooperation means that a group of at least nine member states "within the framework of the Union's

non-exclusive competences", as it is the case in labour law, may make use of the EU's institutions and exercise those competences. The idea is "to further the objectives of the Union, protect its interests and to reinforce its integration process" (Art. 20 par. 1 TEU). Any member state can participate in this strategy. The final decision is made by the Council where only representatives of the member states participating in enhanced cooperation have a voting right, even if all members are entitled to participate in the Council's deliberations. The acts adopted in the framework of enhanced cooperation only are binding the participating member states. The competences, rights and obligations of the non-participating member states are to be respected. Those member states shall not impede the implementation by the participating member states. The procedure to be followed is regulated in Art. 328 to 331.

It is important to stress that enhanced cooperation is not merely an inter-governmental strategy but takes place within the legal framework of the EU. In a situation where – particularly in responding to the challenges implied by the refugee problem – it has become evident that solidarity between Member States is more than fragile, the temptation to take use of the possibility of enhanced cooperation is big. However, this option by necessity leads to an EU of different speeds. Whether on the long run these differences of speed can be equalised and whether the non-participating member states eventually will join in, remains to be an open question.

It is not surprising that some countries have tried to oppose enhanced cooperation ([125]) as being potentially dangerous for their national interests. The fact that the CJEU ([126]) rejected this opposition does not mean that enhanced cooperation is an uncontested strategy. It is very ambiguous. The gap between core Europe and the periphery could become too big. And the incentive of those who are willing to build a social Europe for all citizens within the union might get lost. Whether the EU can survive under such perspectives, is at least uncertain. Therefore, I have my doubts whether this option should be chosen.

2. Extension of Competences

In my view for a really promising strategy to revitalize the social dimension the Treaty has to be significantly amended. First the legislative competences have to be extended. As indicated, the EU legislator still has no power to legislate on pay, the right of association, the right to strike and the right to impose lock-outs. This exclusion of competences is in sharp

contrast to the fundamental social rights contained in the Charter of Fundamental Rights of the EU. But not only this contrast is puzzling, it is necessary to empower the EU to establish minimum standards also in these areas. Since only minimum standards are at stake, such legislative powers would not take away the Member States' power to legislate above this minimum level in favour of the employees. To just give two examples to show how important it would be to have minimum standards in this context: (a) a minimum wage for the EU could be established, of course not the same amount for each Member State but fixed as a percentage of the average wage in the respective country. This would guarantee a minimum wage for all employees and at the same time leave the national legislator and/or the parties to collective agreements to lift up this level according to the possibilities in each country. (b) it could be forbidden to undercut the level reached in collective agreements by agreements which are not concluded with trade unions but with other actors, a pattern which has been established in some Member States in the course of austerity politics. In short and to make the point: there is no need to leave these areas of legislation exclusively in the national context, an EU wide floor of minimum standards should be made possible.

3. Reconstruction of the Legislative Procedure

Secondly the legislative machinery has to be changed. As already mentioned, under the present system of legislative procedure on EU level it is almost impossible to expect further legislation on minimum social standards. Therefore, it is necessary to facilitate the production of European hard law by all means. First the right to initiate legislation should no longer be exclusively with the Commission as it is up to now but should be extended to qualified minorities in the Parliament and in the Council. This to a much bigger extent would force the legislative bodies into discussions on the pros and cons of legislation, thereby increasing the transparency as well as the likelihood of legislative results. Secondly instead of requiring qualified majority or even unanimity in the Council, secondary law should be adopted by simple majority votes in both legislative bodies, the Parliament and the Council ([127]). Thirdly the deliberations in the Council which so far are secret, should be made public in order to also increase transparency in this respect.
It, of course, is self-evident that in view of the unanimity requirement and the procedures for ratification in all the Member States amendments to the

Treaty are an ambitious project. But perhaps the Brexit shock and the danger of populist right-wing movements all over might serve as a wake-up call to finally do something to improve the possibility for European citizens to identify with the social face of the European project.

VIII. Conclusion

The steps taken by the EU from an originally mere market approach to recognition of the social dimension are undoubtedly impressive. This, last not least, is symbolised by the fundamental social rights in the Charter of the Fundamental Rights of the EU which now has become legally binding. This success story, however, cannot ignore that the obstacles for further development of minimum social standards for the EU have grown significantly in the meantime. New legislation in this controversial area has become very unlikely. To a great extent European involvement in shaping labour law and industrial relations now has become a soft law approach, an ongoing discourse on measures to be taken combined with mechanisms of soft pressure. This strategy which in addition is imbedded in the manifold measures for economic governance is no real alternative to an EU wide floor of minimum rights which cannot be undercut. The European Pillar of Social Rights is not much of an innovation in this respect.

There is an urgent need to establish further social minimum standards in order to overcome the EU legitimacy crisis. Enhanced cooperation of Member States would be a possibility. But it is an ambiguous strategy, possibly increasing the gap within the EU too far. More promising might be an extension of legislative competences in the social field and facilitation of the legislative procedure. This, however, would require amendments to the Treaty. Whether such a perspective is too ambitious or whether the present legitimacy crisis and the Brexit shock turns it into a realistic project, remains to be an open question. Let me close with a quote of Roger Blanpain: “The road (to a European Social Model) seems long, the path steep and narrow. l Miracles are called for. Sometimes dreams come true” ([128]).

European Employment Policies: a Critical Analysis of the Legal Framework[*]

SUMMARY: I. Introduction. – II. The Quantitative Side of European Employment Policy. – 1. The Chapter on Employment. – 2. State Aid for Employment. – 3. Freedom of Movement of Workers. – III. The Qualitative Side of European Employment Policy. – 1. From Lack of European Social Policy to Labour Regulation. – 2. The *Status Quo* of Labour Legislation. – 3. The Difficulties to Get Further Hard Law. – IV. Evaluation and Perspectives.

I. Introduction

Employment policy is to be understood in a comprehensive sense, not only focusing on the promotion of the quantity but also on the quality of jobs. As far as the quantitative aspect is concerned, the EU's task is described in Art. 3 (3) TEU whereby it is supposed to aim at "full employment". At first glance it might be misleading that Art. 9 TFEU only speaks of a high level of the "promotion of a high level of employment". However, there is no contradiction: Art. 9 TFEU is to be interpreted in the light of the basic Art. 3 TEU: the common goal is full employment.

Article 151(1) TFEU, referring to fundamental social rights contained in the European Social Charter (ESC) of 1961 and in the Community Charter of the Fundamental Social Rights of Workers of 1989, lists among the objectives the EU and the Member States are supposed to be aiming on "the promotion of employment". This is to be linked to legislative powers contained in Art. 153 (1) whereby measures, including secondary legislation, are to be taken "with a view to achieving the objectives of Art. 151" including promotion of employment.

This basic framework has been strengthened by the fundamental rights for everyone to have "access to vocational and continued training" and to have "access to a free placement service" contained in Art. 14 and 29 of the

[*] In *European Labour Law Journal*, 2017, p. 1.

Charter of Fundamental Rights of the EU (CFREU). According to Art. 166 (1) TFEU the EU shall implement "a vocational training policy which shall support and supplement the action of the Member States". The aims of this policy are listed in par. 2 of Art. 166 TFEU. And Art. 166 (4) TFEU empowers the European Parliament and the Council to "adopt measures to contribute to the achievement" of these objectives. However, there is no power to harmonize laws and regulations of Member States.

The qualitative aspect is best expressed by Art. 31 (1) CFREU which guarantees every worker "the right to working conditions which respect his or her health, safety and dignity". More specifically the "right to protection against unjustified dismissal" (Art. 30 CFREU), the "right to limitation of maximum working hours" as well as on "paid leave" (Art. 31 (2) CFREU) are mentioned as examples. Most important is the right of young people to "have working conditions appropriate to their age" and to protection "against economic exploitation" (Art. 32 CFREU) as well as guarantee "to reconcile family and professional life" (Art. 33 (2) CFREU). These impressive fundamental social rights are to be linked to the EU's comprehensive powers to legislate minimum labour standards as contained in Art. 153 (1) and (2) TFEU.

The discussion of the legal framework concerning the quantitative side of employment policy will cover mainly three topics. First there is the chapter on employment policy which was introduced by the Amsterdam Treaty and now is contained in Art. 145-150 TFEU. According to these rules the genuine competence of the Member States in this very area remains uncontested. The EU is required to contribute to a high level of employment "by encouraging co-operation between Member States and by supporting and, if necessary, complementing their action" (Art. 147 par. 1 TFEU). To make sure that this aspiration has a chance to be realized, the Chapter on Employment provides for several institutional arrangements and a procedure to be followed. The second element in this context refers to the question whether in line with Art. 107 and 108 TFEU State aid for employment is allowed. Finally the guarantee on freedom of movement for workers (Art. 45 TFEU) plays an important role in this context, particularly as it is specified by the Regulation (EU) Nr. 429/2011 of the European Parliament and the Council of 5 April 2011 ([129]).

The discussion on the legal framework of the qualitative side of employment policy will focus on minimum standards for working conditions. It has to address the legal powers for legislation contained in Art. 153 TFEU and provide an overview on the EU legislation in individual and collective labour law. It will not include the voluntary

framework agreements in the context of the Social Dialogue according to Art. 155 (1) and (2) TFEU which are "soft law" measures to be implemented "in accordance with the procedures and practices specific to management and labour and the Member States".
The evaluation of the legal framework for employment policy will have to discuss the implication of the fact that "pay, the right of association, the right to strike and the right to impose lock-outs" (Art. 153 (5) TFEU) are not included in the EU's legislative powers. In particular it will have to evaluate whether the legislation on minimum standards is appropriate and it has to indicate the areas where EU legislation would be badly needed as for example in the area of job security and in reference to self-employed who are in a similar position as employees. Finally it will have to discuss the reasons why further hard law on minimum standards is unlikely to be passed on EU level and what it means for the social dimension in the EU that everything in this area remains in the sphere of so called soft law (from the Lisbon strategy up to the envisaged 'European Pillar of Social Rights').

II. The Quantitative Side of European Employment Policy

1. The Chapter on Employment

Perhaps the most important attempt to live up to the objectives sketched above is the coordinated strategy for a European employment policy, first introduced by the Amsterdam Treaty in 1998, now contained in Art.145 - 150 TFEU. It is designed to enhance a European wide job creation policy. According to this Chapter on Employment the genuine competence of the Member States in this very area remains uncontested. The Community is required to contribute to a high level of employment "by encouraging co-operation between Member States and by supporting and, if necessary, complementing their action" (Art. 147 par. 1 TFEU).
To make sure that this aspiration has a chance to be realized, the Chapter on Employment provides for several institutional arrangements: There is first the Employment Committee which is mainly supposed to monitor the situation on the labour market and the employment policies in the Member States and the Community and thereby help to prepare a joint annual report by the authorities of the EU. In fulfilling its mandate, the Committee is required to consult the trade unions and the employers' associations. In order to make sure that the activities of the Employment Committee as well as the joint annual report by the Council and the Commission do not

remain without consequences, the Chapter on Employment establishes additional powers for the Community. After examination of the joint annual report by the European Council and on the basis of the European Council's conclusions, the EU authorities shall each year draw up guidelines. These guidelines, of course, are not legally binding. But they put pressure on the addressed Member States. In case of disobedience the Member States have to justify why they did not follow the guidelines.
This arrangement has led to manifold measures and significantly increased the interrelated activities between the Member States. However, the results in detail are of less importance in the context to be discussed here. Important is the fact that the Chapter on Employment establishes a mutual learning process for the Community and the Member States, including not only governments but also trade unions and employers' associations. None of the Member States can escape the permanent dialogue and the permanent pressure implied by it. Best practices do not have to be reinvented all the time but can easily be communicated and imitated. The whole structure to an increasing extent is understood as a joint European activity. The goal – in spite of the wording of the Treaty – is a gradual de-nationalization and Europeanization of employment policy. In the meantime a catchword has been invented for such strategies focussing on mutual learning and benchmarking: the Open Method of Coordination. The problem with this approach, however, is that in spite of the impressive procedural arrangement EU Employment policy does not involve real sanctions against Member States not adhering to the guidelines. Perhaps even more important is the fact that the employment guidelines are subordinated to monetary policies and economic considerations ([130]), thereby making employment policy to a residual category.

2. State Aid for Employment

One of the basic elements of the internal market in the EU always has been the fight against any distortion of competition. Therefore "any aid granted by a Member State or through State resources in any form whatsoever which distorts or threatens to distort competition by favouring certain undertakings or the production of certain goods shall, in so far as it affects trade between Member States, be incompatible with the internal market" (Art. 107 (1) TFEU). This does not apply to aid for individuals that does not favour certain undertakings or affect trade between Member States because they are general measures to promote employment not distorting

competition. Such general measures may for example include general reduction of the taxation of labour and social costs or general assistance and training for the unemployed.

As far as state aid in the sense of Art. 107 TFEU is concerned, there are, however, exceptions of the general principle if the object of the state aid is the promotion of employment, leaving trade unaffected. The details for this exception are laid down in Commission Regulation (EC) No 2204/2002 of 12 December 2002 ([131]). This regulation applies to all branches of activity apart from coal-mining ([132]), ship-building ([133]) and transport ([134]) which remain subject to sector specific rules. It was initially scheduled to expire on 31 December 2006 and later on several times extended.

The regulation allows for state aid leading to job creation (Art. 4). This type of state aid requires a net increase in the number of employees, maintenance of this increase for a minimum period of three years or two years in the case of SME and must benefit workers who never had a job before or are unemployed.

Even more generous is the state aid for disadvantaged and disabled workers (Art. 5). It is to be stressed that the notion of "disadvantaged worker" comprising among others any person who is under 25 or is within two years after completing full time education and who has not previously obtained his or her first regular paid employment; any migrant worker who moves or has moved within the EU or becomes resident in the EU to take up work; any member of an ethnic minority within a Member State who requires development of his or her linguistic, vocational training or work experience profile to enhance prospects of gaining access to stable employment; any person who wishes to enter or re-enter working live who has been absent both from work and from education for at least two years, and particularly any person who gave up work on account of the difficulty of reconciling his or her working life and family life; any person living as a single adult looking after a child or children; any person older than 50 who does not have a job or who is losing his or her job and any long-term unemployed person who has been unemployed for a certain minimum time. These examples show the wide range of the notion. For disabled persons not only state aid is allowed for recruitment but also for costs for adapting premises, for employing staff to assist the disabled worker and for adapting or acquiring equipment (Art. 6).

There are ceilings for the amount of state aid. And there is in particular a very detailed monitoring process to make sure that there are no abuses.

3. Freedom of Movement of Workers

Freedom of movement of workers as guaranteed in Art. 45 TFEU is a precondition for optimal allocation of employment in the common market and thereby an important and indispensable pillar of employment policy in the EU ([135]). On the basis of Art. 46 TFEU this freedom has been further specified by the already mentioned Regulation (EU) No. 492/2011 of 5 April 2011. In addition to clarifying the impact of equal treatment of workers the Regulation establishes a system of cooperation between the Member States and with the Commission. For this purpose it establishes three bodies: (1) The European Coordination Office (Art. 18-20), (2) the Advisory Committee (Art. 21-28) and (3) the Technical Committee (Art. 29-34).

The European Coordination Office, established within the Commission, is responsible for coordinating the clearance of vacancies and applications for employment within the EU. The machinery for vacancy clearance is described in detail in Art. 13-16 of the Regulation. On the basis of the information it gets through this procedure the Office of Coordination is in particular responsible for coordinating the practical measures necessary for vacancy clearance at EU level and for analysing the resulting movements of workers.

The Advisory Committee is chaired by a member of the Commission and composed of six members for each Member State, two of them shall represent the Government, two the trade unions and two the employers' associations. It is confronted with a wide reach of tasks, namely it is responsible "for assisting the Commission in the examination of any questions arising from the application of the TFEU and measures taken in pursuance thereof, in matters concerning the freedom of movement of workers and their employment" (Art. 21). It particularly is responsible for assessing the effects of implementing the Regulation.

The Technical Committee again is chaired by a member of the Commission and composed by one representative of each government of the Member States. It is responsible "for assisting the Commission in the preparation, promotion and follow-up of all technical work and measures for giving effect in this Regulation and any supplementary measures". It plays a key role in the cooperation between the Member States and with the Commission as described in detail in Art. 11 - 16 of the Regulation.

This whole bureaucracy is supposed to implement the freedom of movement of workers in an efficient way, to monitor it and to improve together with the Member States the measures to be taken, respecting, of

course, the Member States' competence on employment policy. Whether this complicated and highly elaborated bureaucratic system really serves its purpose, is an open question. At least it is an attempt to make sure that the freedom of movement of workers does not remain to be merely dead letter.

III. The Qualitative Side of European Employment Policy

1. From Lack of European Social Policy to Labour Regulation

In its origins the European project was understood as being primarily an effort to construct a common market. Social policy almost exclusively was left to the Member States. The original Treaty did not contain legislative powers in this field at all.

In the meantime the European integration of labour law has become an important part of the European project. The first steps in this direction were made in the 1970s. In spite of the lack of legislative powers of the EEC in the area of labour law, Directives in this field were passed (in particular equal pay for men and women ([136]), comprehensive equal treatment of men and women in employment ([137]), protection of workers in case of collective redundancies ([138]), in case of transfers of undertakings and in case of the insolvency of the employer ([139])). They were based on articles in the original Treaty (100 and 205) which had nothing to do with labour law and which required unanimous voting in the Council. This shows that the Treaty is more or less irrelevant if there is a consensus in the Member States. In reference to minimum standards this was the case until 1979 when Thatcher came into power in the U.K.

Only when in 1987 the Treaty was amended by the Single European Act the EEC became empowered to legislate in a very limited area of labour law (work environment) with qualified majority vote in the Council. By further amendments the EEC not only was renamed in European Community (EC) but the legislative powers in the area of labour law were significantly extended (by the social protocol to the Maastricht Treaty in 1992 and later on in 1998 by the Treaty of Amsterdam). These amendments now simply were transferred into the Lisbon Treaty on the Functioning of the European Union (TFEU). Accordingly the EU is empowered to establish minimum standards for practically all aspects of labour law except "pay, the right of association, the right to strike and the

right to impose lock-outs" (art. 153 par. 5 TFEU). Legislation is possible on most of the subject matters by qualified majority.
The indicated amendments have brought another innovation. If the Commission wants to initiate legislation it has twice to consult the social partners of the inter-professional social dialogue, the European Trade Union Confederation (ETUC) on the employees' side and the Confederation of European Business (BUSINESS EUROPE), the European Association of Craft Small and Medium-Sized Enterprises (UEAPME) as well as the Centre of Employers and Enterprises providing Public Services (CEEP) on the employers' side. First they are to be consulted on the question "whether" a specific piece of legislation on subject matters listed up in art. 153 par. 1 TFEU should be initiated and secondly on the question "how" such a piece of legislation should look like. In the latter consultation the social partners are entitled to take away the project from the Commission and are invited to try within a certain period to reach an agreement by themselves. Such an agreement then by the social partners can be brought via the Commission to the Council which may transfer it into a directive. So far this happened only three times in the 1990s. Afterwards it did not work out again ([140]). Therefore, this structural innovation should not be overestimated.
Finally it should be remembered that after a long and very controversial discussion the already mentioned Charter of Fundamental Rights of the EU was passed in 2000 as a legally non binding declaration which expressed the consensus of all 15 Member States of that time ([141]). The Charter now has become a legally binding part of the Lisbon Treaty. It contains a whole set of fundamental social rights, among them the right to protection against unjustified dismissal, the right to fair and just working conditions, the right to collective bargaining and collective action as well as right for either workers or their representatives on information and consultation, to just give an impression.
These developments have to be kept in mind if in the following the status quo of European labour law and industrial relations is briefly sketched. And it is a necessary precondition to evaluate the impact of the Lisbon Treaty for further developments.

2. The *Status Quo* of Labour Legislation

In individual labour law major progress has been made particularly in legislation on health and safety, on working time, on work and life balance,

on atypical work, on protection of employees in case of trans-national services and on discrimination. In addition the directives on collective redundancy ([142]) and on transfer of undertakings ([143]) have been amended in a double sense: they now include cases where the decisions are taken by trans-national headquarters and they are adapted to the case law as developed by the Court of Justice of the EU (CJEU).

The core instrument for protection of health and safety is the Framework Directive of 1989 ([144]), surrounded by a whole set of so called daughter directives on specific risks for health and safety. The Framework Directive – at least in principle – covers all private or public areas of activity, contains the basic principles to fight risks of health and safety and lists up the duties of employers as well as of employees in this respect.

The Working Time Directive of 1983 ([145]) not only serves health and safety considerations but to a great extent is devoted to the organisation of working time flexibility. Mainly three issues covered by the directive have become very controversial: the very notion of working time, the period within which an average maximum working time per week has to be reached and the possibilities of opting out. Efforts to again amend the Directive have not succeeded up to now.

In the area of work/life balance the Directive of 1996 on parental leave ([146]) has to be mentioned, even if it is only a very small step in making work and family obligations more compatible. It is the first Directive which is based on an agreement reached by the social partners. Parents thereby got a right to parental leave for a minimum period of three months and the right to return – at least in principle – to the same job. However, due to the fact that pay is not part of the EU's legislative power the directive does not say anything to the financial conditions of parental leave, thereby neglecting a very relevant part. More important in the context of work / life balance is the Directive of 1997 on part-time work ([147]), the second Directive based on an agreement by the social partners. Even if this Directive can be understood as the lowest possible denominator, it contains two important elements: equal treatment pro rata in reference to working conditions and protection against dismissal if an employee refuses to transfer from full-time to part-time or vice versa.

Of course the Directive on part-time can also be put in the box "atypical work" together with the Directive of 1999 on fixed term contracts ([148]) and the Directive of 2008 on temporary agency work which have to be put in context with the directive of 1991 on the health and safety of workers with a fixed-duration employment or a temporary employment relationship. The Directive on fixed term contracts is the last one based on an agreement

by the social partners. It contains two important elements: equal treatment with those in an undetermined employment relationship and prohibition of abuse of repeated fixed term contracts. However, the criteria for abuse are so wide that the repetitive use of fixed term contracts is almost unlimited. The Directive on temporary agency work ([149]) is the result of a long and very controversial effort. In the very end a compromise was reached which is unsatisfactory. In principle equal treatment with the comparable employees in the user company is guaranteed. However, by way of collective agreement lower conditions for the temporary workers can be determined.

European legislation has tried to resolve the tension between the freedom of services and social considerations. In the early 1990s construction companies from member states with significantly lower levels of working conditions and labour standards provided their services in high wage countries. Their employees of course remained to be employees with employment relationships in their country of origin, not being covered by the equal treatment principle which would have to be applied if they would have become workers of the country where the services are performed. Therefore, due to much lower labour costs these companies were able to offer their services much cheaper than companies in higher wage countries. This led to a substitution effect: companies in higher wage countries had less work, many of them went into insolvency and many workers in the construction industry lost their jobs ([150]). This led in 1996 to the Posting of Workers Directive ([151]) according to which essential employment protection standards in the host country (minimum wage, maximum work periods, minimum rest periods, minimum paid holidays, health and safety standards etc.) are to be applied to the posted workers.

The EU's by far most important legislative input into individual labour law has been in the area of discrimination. In 1998 by the Amsterdam amendment in the EC-Treaty article 13 was introduced which empowers the European legislator to take "appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation" (now art. 19 TFEU). This has become the basis for the two anti-discrimination-directives of 2000 ([152]). The concept of sex equality has been brought fully in line with the spirit of these directives of 2000. The amendments now are integrated in a consolidated version of the equal treatment directive of 2006 ([153]).

Perhaps even more important than the inputs into individual labour are the EU's legislative measures in the area of collective labour law: they shape the interaction and the power relationship between both sides of industry

and, thereby, have an enormous impact on the position of the workforce. In particular three legislative steps in the area of workers' participation are of utmost interest, two referring to trans-national undertakings and groups of undertakings and one referring to domestic structures within the Member States.

The first step in this context is the Directive of 1994 on European Works Councils (EWC) ([154]) which has been amended in 2009 ([155]). The focus of the Directive is on the establishment of a body representing the interests of all employees of the undertaking or group of undertakings of a certain minimum size within the EU: the EWC.

The second step in this context was the Directive supplementing the statute for a European Company with regard to the involvement of employees ([156]). This Directive has to be read together with the Statute on the European Company ([157]) which contains the rules on company law. A European Company only can be registered if the requirements of the Directive are met. Thereby it is guaranteed that the provisions on employees' involvement cannot be ignored.

Whereas the two Directives mentioned above refer to the trans-national context, the Directive on a framework for information and consultation of 2002 ([158]) shapes the participation structure within the member states.

As the indicated examples show, the inputs into individual labour law by the European legislator are impressive. But they have remained to be very fragmentary. There is no comprehensive concept yet. Many important areas - as for example protection against unfair dismissals - are left out.

3. The Difficulties to Get Further Hard Law

The situation since quite a time is characterized by a stagnation of labour legislation. Evidently, legislation cannot be expected for the topics which still are excluded from the legislative power of the EU. Of course, theoretically all these topics could be included into the EU's legislative power by amendment of the Treaty. In particular the trade unions fight for such an inclusion. They point to the fact that these topics are covered by the CFREU. These fundamental rights according to the Charter are to be promoted by the EU. But if the EU has no power to legislate, it cannot live up to the expectations created by the CFREU. In spite of this very convincing argument it is very unlikely that the Treaty will be amended in this direction. This would need a consensus of all 28 Member States which is difficult to imagine for the foreseeable future.

In spite of the comprehensive legislative power there are many obstacles for further legislation. This is first of all due to the fact that the interests of the member states in the EU of 28 have become so heterogeneous that it is very unlikely to get even a qualified majority for a piece of legislation. It is understandable that low wage countries want to use lower labour standards as a competitive advantage in comparison to high wage countries. Therefore, it may well be doubted whether today it still would be possible to get a majority for something like the Posted Workers Directive ([159]) as it was the case in 1996. The rather long debate on the relatively modest Directive on the Enforcement of the Posted Worker Directive illustrates very well the difficulty for even minor legislation ([160]).
The integration of the social partners into the legislative machinery will not make a difference. Of course, if they reach an agreement the pressure on the Council to turn it into a Directive cannot be denied. However, it has to be understood that the social partners in trying to reach such an agreement have no means but to put pressure on each other. Therefore, they very seldom have succeeded in the past. And there is no likelihood that they will do it in the future. Therefore, there is not much hope in the legislative potential of the social partners ([161]).
But it is not only the conflict of interests between the Member States which creates difficulties for legislation in the area of labour law. Perhaps as important is the fact that the Lisbon Treaty by a "Protocol on the Application of the Principles of Subsidiarity and Proportionality" has given these principles such an enormous significance that legislation on controversial issues has become almost impossible. Formerly it was sufficient that the Commission gave reasons to justify its view that the principles of subsidiarity and proportionality have been respected. Now a complicated procedure is established in reference to subsidiarity and proportionality which gives.
National Parliaments significant power to prevent legislation by forcing the Commission to even further justify its proposal. It may well be predicted that national Parliaments will be inclined to take use of this possibility and that afterwards it will be psychologically extremely difficult for the Commission to overrule the intervention by national Parliaments. Therefore, the expectation for legislation in such a controversial area as labour law may be to a great extent a futile hope in the future.

IV. Evaluation and Perspectives

Compared to the origins of the European Project the EU has made impressive progress in promoting the quantitative and qualitative aspects of employment policy. A framework of hard law standards has been developed. However, it remained to be insufficient and fragmentary. The possibility of producing hard law has become more and more unlikely. Therefore, the EU has chosen the alternative road of "soft law" as are the Lisbon Strategy and Europe 2020. They stimulate debates and put soft pressure on the relevant actors in the Member States. The magic formula has become the already mentioned OMC. The merit of initiating and maintaining such a discourse is not to be denied. However, this is not what is really needed.

It looked as if a new approach would arise when in September 2015 President Juncker addressing the European Parliament announced a Pillar of Social Rights for the EU. It sounded like a rebirth of the idea to establish a framework of hard law. However, the concretisation of the idea was left to the European Commission which in March 2016 issued a Communication ([162]) according to which it is perfectly clear that this new pillar will be nothing else but an extension of the "soft law" strategy and not a new approach to establish social rights.

The austerity policy in the context of the crisis management has demonstrated how protective rights for workers still can be weakened within countries of the EU because the EU floor of labour and social rights still is insufficient. It is necessary to protect employees against deregulation of protective standards as it happened for example in the context of austerity politics in reference to protection against unfair dismissal. It also is necessary to give the EU the competence to legislate in the area of collective bargaining to make sure that the system of collective bargaining cannot be dismantled as it happened for example in Greece. And in view of the experience with austerity politics it may be recommendable to also include pay in the EU's legislative competence. This would allow the development of a European minimum wage, of course not the same amount for each Member State but constructed as a certain percentage of the average wage in each country. These are only examples indicating the direction where to go to not only improve significantly the employment policy but to regain trust in the European project which more than ever is necessary after the Brexit. However, as indicated above there is not much hope that these needs will be met.

A step in the right direction would be the establishment of a European unemployment insurance scheme for the European Monetary Union (EMU) which the European Commission suggested ([163]). The EMU has no choice but to further integrate social policy (as well as fiscal and economic policy). This for the EMU is a question of survival. No further time should be lost to promote this integration.

Finally it is, of course, necessary to more effectively fight youth unemployment, in particular in the southern part of the EU. This needs first of all significant investment. For this purpose a joint fund sponsored mainly by the richer part of the EU should be established. A legal framework for such a fund is an urgent task for EU employment policy.

The European Social Dialogue*

SUMMARY: I. Introduction. – II. The Social Dialogue as Integrated into the Legislative Process. – III. Voluntary Agreements in the Context of the Social Dialogue. – IV. Trans-National Bargaining in the Context of European Works Council Systems. – V. Conclusion.

I. Introduction

In the sixties of last century dreams of legal structures which had no link to reality were in fashion. One favourite object of these dreams was the European Collective Agreement. Quite a few models for such a system of European collective bargaining were developed. This dream was based on the naïve assumption that the huge differences of the existing systems of collective bargaining in the Member States simply could be abolished and transferred into a uniform European structure. However, it soon turned out that these differences of the Member States' systems of collective bargaining – referring to all possible aspects: the different shape of the actors, the different levels of bargaining, the different legal quality and effect of collective agreements, the scope of coverage by such agreements, the mechanisms of conflict resolution, in particular strike and lock-out etc ([164]) – were the result of specific cultural traditions in the Member States, a sort of expression of national identity, which could not simply be modified or even abolished. Therefore, it is no surprise that these dreams were given up rather soon and that collective bargaining in its traditional sense up to now and certainly for the foreseeable future has remained to be a matter for the Member States.

Even if the text of the Treaty on the Functioning of the European Union (TFEU) is not very clear in this respect, it has to be mentioned that up to now the European Union (EU) not even has the power to legislate on collective bargaining. In article 153 par. 5 TFEU pay, right of association,

* In *European Labour Law Journal*, 2011, p. 155.

strike and lock-out as subject matters are still excluded from the EU's legislative power. Since collective bargaining and right of association as well as strike and lock-out are so closely linked to collective bargaining that these subject matters cannot be separated from each other, this topic also is covered by the exclusion of legislative power ([165]). Those who contest this view put their arguments on a very formalistic interpretation ([166]) of the Treaty which – at least in my opinion – is not at all convincing. All this does not mean that there would by an absence of collective actors on the European scenery. Just to the contrary. The inter-professional confederations of trade unions and employers associations as well as the sectoral associations of both sides of industry play an increasing role. As will be shown, they are not only acting as lobbyists, but the social dialogue is even integrated into the legislative machinery. In addition – and this will be the primary focus of this paper – the inter-professional confederations as well as the sectoral associations voluntarily conclude agreements in the context of the so called "social dialogue" which has been further elevated by the Lisbon Treaty in a special provision (article 152 TFEU). The relationship between this structure and real collective bargaining will be the main topic to be discussed. In this discussion an aspect will be included which at first glance may look rather strange: agreements concluded between European Works Councils (EWC) and the management of the dominating enterprise of trans-nationally operating groups of companies. This, as will be shown, is a pattern linked to the sectoral social dialogue and therefore of utmost interest in the context discussed in this paper.
The different elements of this complex structure and the problems each of these dimensions imply are to be put in the context of change and tradition. Therefore, the underlying question to be answered in this paper is the following: is the social dialogue promoting or rather preventing the emergence of a European system of trans-national collective bargaining?

II. The Social Dialogue as Integrated into the Legislative Process

According to article 154 TFEU the social partners are to be consulted twice by the Commission: first on the question "whether" a specific piece of legislation on subject matters listed up in article 153 par. 1 TFEU should be initiated and secondly on the question "how" such a piece of legislation should look like. In the latter consultation the social partners are entitled to take away the project from the Commission and are invited to try within a certain period to reach an agreement by themselves. Such an agreement

then by the social partners can be brought via the Commission to the Council which may transfer it into a Directive. If the social partners do not succeed in reaching an agreement within the given period, the project is taken up by the Commission which then is free to decide on how to further proceed.

In the inter-professional social dialogue the actors are the European Trade Union Congress (ETUC) on the workers side and Business Europe as well as the Centre of Enterprises with Public Participation and of Enterprises of General Economic Interest (CEEP) on the employers' side. So far these actors succeeded three times in concluding an agreement to be transferred into a directive: in case of parental leave ([167]), of fixed term contracts ([168]) and of part-time work ([169]). An agreement reached in 2009 on a revised version of the parental leave directive is still pending in the council.

In the context of the sectoral social dialogue the European Community Shipowners' Association (ECSA) and the European Transport Workers' Federation (ETF) reached an agreement which was put into by the Council into a Directive in 2009 ([170]). Thereby the content of the Maritime Labour Convention of the ILO is transposed into EU law.

The involvement of the social partners into the legislative machinery leads to quite a few problems which briefly are to be sketched. The first and evident one results of the fact that the European Parliament is not integrated in the procedure of transferring an agreement reached by the social partners into a Directive. Normally, if the Commission presents a proposal of its own the co-decision-procedure of article 294 TFEU is to be applied (see article 153 par. 2 TFEU) in which the European Parliament has a strong position. Whether the exclusion of the Parliament and its substitution by the social partners is helpful in overcoming the "democratic deficit" of the EC may well be doubted ([171]). In my view the democratic structure thereby is replaced by corporatism. These doubts evidently must to a certain extent even be shared by the Commission which voluntarily informs the Parliament in such contexts. This is a gesture in the right direction but by far not sufficient ([172]). Mere information cannot substitute the strong position the Parliament has in the co-decision procedure: the Parliament has no opportunity whatsoever to influence the content of the Directive. This in my view should be changed.

The second problem refers to the powers of the Council in transferring the agreement into a Directive. There is consensus that neither the Commission nor the Council are entitled to change or the wording of the agreement ([173]). The Council only can transfer the agreement as it is into European law or reject it. Whether this is a good pattern again may be

doubted. The three Directives based on inter-professional agreements are not at all a product of excellence in legal craftsmanship. Their content is a mixture of legal norms and clauses containing wishful thinking. This makes the application and interpretation unnecessarily difficult. Even if the legal profession may welcome these difficulties of interpretation as a tool for job creation, I very much doubt whether this pattern is to be maintained. It should at least be possible to polish the text without changing its content.

Thirdly I simply would like to mention that the analogy of the sketched procedure to mechanisms of extension in the different national systems of collective bargaining ([174]) is wrong. Extension is widening the scope of application of clauses with an already existing normative effect, whereas here the normative effect is only and exclusively created by a Council Directive.

A fourth problem has arisen in the scholarly discussion, namely whether in view of the topics of article 153 TFEU the social partners of the social dialogue are entitled to initiate a piece of law by reaching an agreement without any prior involvement of the Commission. This in my view has to be denied ([175]). The Treaty does not contain any indication that the Commission's exclusive right to initiate legislation should be affected by the social dialogue.

The fifth problem to be discussed is perhaps the most crucial one: the problem of representativeness. If social partners are entitled to play such an important role, even substituting the Parliament as already was shown, in the context of legislation they need legitimacy to do so. Therefore, the question arises whether the three confederations mentioned above really represent all those for whom such an agreement transferred into a Directive will apply. Or to put it differently: do the three confederations which traditionally and long before the social dialogue was introduced into the text of the Treaty had put it up as an informal structure (ETUC, Business Europe and CEEP) have a monopoly in concluding agreements in the context of the social dialogue or do they have to share their powers with other European confederations representing specific groups of employees or employers? The monopoly first was questioned in the context of the elaboration of the agreement which led to the Directive on parental leave. The Union *Européenne des Associations des Petites et Moyennes Entreprises* (UEAPME) which as a confederation of employers' associations represents the interests of the small and medium-sized companies in Europe claimed a right to participate in the elaboration of such an agreement and, therefore, attacked the Directive on parental leave

in Court ([176]). This claim was rejected by the Court of First Instance for procedural reasons. However, in its judgement the Court made perfectly clear that this problem of representativeness is a serious one and has to be resolved.

In the meantime a sort of modus vivendi was developed by the Commission. Criteria to be met by the confederations were established. In essence the respective confederations have to cover national associations of possibly all Member States, these member associations have to be relevant actors within the national system of industrial relations and finally they must be entitled to participate in the collective bargaining system in the national context ([177]). Those who meet these criteria are entitled to be informed and have a right to present their opinion, both in written. It may well be doubted whether this is sufficient.

The question may be asked whether the Commission is entitled at all to decide on this matter. One might argue that the exclusion of legislative power for the right of association and – as sketched above – for collective bargaining implies that also the Commission cannot do anything linked to these topics. And of course representativity is an element of the right of association. However, if article 155 TFEU establishes the possibility of the social partners' input into legislation, it must be possible for the Community and also for the Commission to regulate the conditions for access to the elaboration of this legislative input. In reference to the conditions of access to the social dialogue article 153 par. 5 TFEU, therefore, has to be interpreted in a restrictive way. Whether the regulation by the Commission is sufficient, may be questioned. After all the social dialogue has become part of the machinery of legislation. The composition of all other participants in the legislative procedure is regulated in detail by the TFEU itself. Thereby, any sort of manipulation is excluded and legal certainty is guaranteed. Whether a regulation by the Commission can live up to these standards, may well be doubted.

The final problem to be briefly mentioned refers to the position of the social partners of the social dialogue in Court procedures where the interpretation of Directives based on agreements is at stake. In such a conflict on interpretation of Directives the Commission always is entitled to invoke the European Court of Justice (ECJ) and to present its view in the court procedure. The social partners, in spite of the fact that they are fully substituting the Commission's function, do not have such a position. This is a lack of consequence. If the social partners are elevated to be producers of European law they also have to be integrated in the judicial process of resolving conflicts of interpretation of this law ([178]). Otherwise

in spite of the power to conclude agreements and get them transferred into Directives by the Council they remain to be second class actors in the legislative context compared to the Commission.
Having indicated all these problems implied by the social partners' involvement, the main question guiding this paper should not left aside: what is the contribution of this structure to the development of a European Collective Bargaining system? On the one hand it may be doubted whether the integration into the legislative machinery is really helpful to promote an autonomous system of collective bargaining, on the other hand one very important spill-over effect should not be ignored which first became relevant in the context of the elaboration of the agreement which led to the Directive on parental leave. Before starting negotiations on this agreement the European confederations became aware that they did not even have a mandate for an agreement with such far reaching effects. Therefore, they had no choice but to communicate intensively with their member associations in the different Member states in order to get such a mandate. This led to a significant reformulation of the by-laws of these confederations, bringing them and the member associations closer together. This vertical communication in the meantime even has increased and can be seen as an important step towards the building of real European actors who on the long run might become the base for a European system of collective bargaining.

III. Voluntary Agreements in the Context of the Social Dialogue

In discussing the voluntary aspect of the social dialogue it seems to be appropriate to start again with the inter-professional dimension. The social partners in the inter-professional social dialogue not only are integrated into the legislative machinery but are also entitled to conclude voluntarily agreements whose content might go far beyond the topics covered by article 153 TFEU. Examples are the framework agreements on tele-work of (2002), on stress at the workplace of (2004), on harassment in the workplace (2006), on violence in the workplace (2009) and on inclusive labour markets (2010). This voluntary side of the social dialogue was particularly in the focus of the Commission's communication of 12 August 2004 ([179]) and of its Social Agenda for 2005-2010 ([180]).
The agreements which are voluntarily concluded by the social partners of the inter-professional social dialogue are to be implemented "in accordance with the procedures and practices specific to management and

labour and the Member States" (article 155 par. 2 TFEU). The signification of this formula is extremely controversial. Some insist that this has to be understood as a duty of the national actors to implement such agreements. Thereby, these agreements are not only considered to be binding between the concluding parties but are meant to contain obligations for third parties: the national actors. Such a perspective qualifies these agreements more or less as collective agreements in a strict sense ([181]). This view is combined with another approach: once such framework agreements exist and are to be implemented it is considered not to be sufficient if they are transposed into collective agreements which according to national law only cover members of the parties concluding the collective agreement. Extension mechanisms are to be used and if they do not exist yet, they are to be established. This perspective in my view is nothing else but wishful thinking of those who have not given up to dream of a European system of collective bargaining as a reality of today. National actors then are nothing else but instruments executing the rules laid down by European actors.

This approach is based on a fundamental misunderstanding of the function of such voluntary agreements. They are nothing else but an offer for the actors on national scale to give them some guidance and to enrich their imagination. Or to put it differently: they are to be understood as a European input intending better coordination of collective bargaining on national scale by offering ideas on how to cope with specific problems (as "tele-work", "stress at the workplace" etc.). The national actors are supposed to reflect on the basis of these framework agreements. This implies that the European actors have no choice but to convince the national actors of the advantages of the content of the framework agreement. Only close and continuous communication offers a chance of success ([182]). This form of vertical communication is again of utmost importance for the growth of real European actors of both sides of industry: another step towards a European collective bargaining system which then might deserve its name.

In an attempt to better structure the voluntary channel of the social dialogue the Commission in its social agenda for 2005 to 2010 suggested an "optional European framework for transnational collective bargaining" ([183]). According to the Commission this might give the social partners a basis for increasing their capacity to act at transnational level. Therefore, the Commission planned to adopt a proposal designed to make it possible for the social partners to formalise the nature and results of transnational collective bargaining. But as the Commission stressed "its use will remain optional and will depend entirely on the will of the social partners" ([184]).

In my view such a move is extremely problematic. First it has to be reminded that the European authorities have no power to legislate on collective bargaining. This of course implies that the Commission neither is entitled to such regulation. Therefore, it is self-evident that the lifting-up of results of such agreements (their legal effect and scope of application) is not possible. The Commission tried to overcome this obstacle by making all this optional. However, this cannot help. The Commission is not in a position to increase the legal effect (for example binding effect for third parties) of such agreements by simply turning such regulation into an option to be chosen by the social partners. It still would act beyond its power.

The Commission launched a study examining the issues which could be subject to collective trans-national bargaining and the effects such agreements should have. The group of scholars, led and coordinated by the Italian Professor Eduardo Ales, presented their report in 2006 ([185]). There they suggested a "European Union Transnational Collective Bargaining System" ([186]) which should be regulated by a Directive based on the former article 94 EC-Treaty (now article 115 TFEU). The very complicated proposal envisaged joint negotiating bodies which were supposed to conclude European collective agreements with a binding effect within the Member States, even if the trade unions in these joint bodies would not dispose on any means of pressure as strike or other instruments of industrial action. I doubt very much whether the suggested legal base empowers the EU to such a move. More important, however, is the insight that this resurrection of the indicated dreams of the early stages of the Community ignored the still prevailing facts of the collective bargaining scenery in the EU. This might be the reason why even the Commission no longer intents to implement this proposal.

In my view the implementation of the proposal of the Ales-Commission would have had counterproductive effects. It still is too early for European collective agreements with such a far reaching binding effect. They would endanger the system as it grew up so far. Slowly and gradually the social partners of the different Member States have learned to interact with the European confederations. Slowly and gradually they are willing to strengthen the position of the European actors. If, however, by way of the intended juridification they all of a sudden would be confronted with the fact that their autonomy may be constraint by supra-national legally binding agreements, they might become even more hesitant to transfer bargaining powers to their European confederations. Therefore, in my

view for the time being everything should be done to keep the voluntary part of the social dialogue as informal as possible.

The approach as suggested here has a very important impact. It leads to a reconsideration of the actual understanding of representativeness. Presently the question of representativeness is handled the same way for the voluntary agreements as in the context of the social partners' involvement in the legislative procedure. This definitely is wrong. In the legislative context the question of legitimacy is becoming a burning one and evident. This, however, is to be seen in a totally different way if framework agreements merely are to be understood as offers of which the national actors can make use the way they prefer. If a framework agreement is concluded between parties lacking representativeness it might be less convincing for the national actors. Therefore, the respective European confederations might try everything to increase their representativeness. However, this is not a legal question but merely a problem of practicability.

The problems which arise in the context of the sectoral social dialogue are essentially the same. Here the confederations of trade unions and employers associations of specific branches of activity are put together in a social dialogue. In the meantime there are European social dialogues for 40 sectors. The sectoral social dialogue as such is not even mentioned in the TFEU. It grew up as an informal structure and was somehow formalised by a Commission's program of 20 May 1998 to promote the sectoral social dialogue, including representativeness requirements etc. For the reasons discussed above it may well be doubted whether this is an adequate pattern for this merely voluntary structure. However, the social partners accept it and try to live up to the required standards.

So far the sectoral social dialogue was not very successful in producing framework agreements. They are still a rarity ([187]). The important aspect is that the sectoral dialogue has enormous potential in two ways. First it may help – possibly in an informal way to better coordinate collective bargaining in the Member States. And secondly it may be a helpful setting to improve the vertical dialogue between national and European actors in order to build up a multi-level-structure for all the sectors. Unfortunately there is no material by which one could document how far this process has been developed so far. For the scholar looking from outside everything remains in the dark.

IV. Trans-National Bargaining in the Context of European Works Council Systems

As already indicated above, the system of EWC normally is neglected if the future perspectives of European social dialogue are at stake. The reason is very simple: the context in which EWC are put is information and consultation. However, in the meantime – the Directive ([188]) was passed in 1994 and supposed to be transposed into the law of the different Member States in 1996 – the system of EWC has developed dynamics of its own and gone far beyond information and consultation towards negotiations, leading to agreements. These agreements refer to a whole variety of topics: health and safety; environment; fundamental rights, in particular trade union rights and data protection; corporate social responsibility, equal treatment at work, job security, codes of conduct, mobility management; mergers; closures; relocations and restructuring. They are found in quite a few sectors, among them the chemical industry and therein in particular the pharmaceutical industry, the banking industry, the food industry, the oil industry, the metal industry and therein in particular the automobile industry, and even the tourism industry ([189]).

The most spectacular agreements were concluded in the automobile industry of which the agreements at Ford and General Motors are the most prominent and far-reaching ones. Just for the sake of illustration I briefly would like to sketch the example of General Motors Europe. After a dispute – which was accompanied by European wide strikes - on relocation of production from Rüsselsheim (Germany) to Trollhättan (Sweden) the central management of General Motors Europe on the one side and the EWC as well as the European Metalworkers' Federation on the other side concluded in 2004 ([190]) a – rather complicated and detailed – agreement in which rules for restructuring were established. In essence it requires that no production units are to be closed, that dismissals for economic reasons should be excluded and that effects of restructuring are to be distributed equally among the different locations. The rules are to be supervised by a special committee of the EWC. This agreement has to be read in the context with another agreement concluded in 2005. Under the title "Principles for a fair and equal use of locations" the representatives of the plants in Gliwice (Poland), Antwerp (Belgium), Ellesmere Port (England), Trollhättan (Sweden) and Bochum (Germany) concluded a so called 'solidarity-agreement' which again intends to make sure that in the course of restructuration there should be neither winners or losers.

The legal effect of these agreements as well as of all other agreements concluded in the context of the EWC system is totally unclear. Since, however, the bodies of workers' representation of the subsidiaries in the different Member States as well as national trade unions and their European confederations normally take part in the elaboration of such agreements, they are considered to be a product of a joint effort and, therefore, are respected in practice. The factual observance, however, is not yet legally formalised. Since in this context the interaction between national and European actors is far more developed than in the context of the inter-professional and sectoral social dialogue, the EWC pattern might be somehow the forerunner for a system of European collective agreements, of course confined to the respective groups of undertakings. This development is not without risks. The danger might be that the focus is too much on groups of undertakings, thereby neglecting other companies, in particular small and medium-sized enterprises. One of the difficult tasks in developing a European system of collective bargaining will be to find the right balance between big groups of trans-nationally operating undertakings and all the many other companies which are not linked to the EWC structure.

V. Conclusion

The integration of the social dialogue into the legislative machinery of the EU leads to many problems. Its practical impact should not be overestimated. Since the late nineties of last century it has not succeeded on inter-professional level to produce significant new results.

The more important aspect of the social dialogue is its voluntary side, However, instead of a streamlined European collective bargaining system, different structures of negotiation linked with bargaining systems in the Member States and interacting with each other are growing there in a dynamic development. In my view it would be much too early for putting all this into a legal framework. It was important that the Treaty via article 139 EC Treaty (now article 155 TFEU) and the EC legislator via the Directive on EWC gave the stimulus for the dynamic development as described above. Now it seems to be important to give this development a chance for an organic growth of a multi-level system in which European and national actors are closely linked together. Such an organic growth cannot be promoted by giving European agreements too much legal effect before the actors in the Member States are convinced of such a need. If the

actors in the social dialogue use their possibilities to voluntarily conclude framework agreements in order to enrich and better coordinate collective bargaining in the Member States according to the philosophy of the open method of coordination, the actors in the Member States in a long term perspective might be convinced by the advantages of such a strategy and, therefore, willing to accept a more formalised and legally structured system on European level. In order to reach this stage, however, more intensive communication between the different levels is needed. This task – by the way – has become more difficult due to the EU enlargement. In the new Member States in Central and Eastern Europe – at least in principal – actors who could be integrated in the sectoral social dialogue on European level are almost non-existing ([191]). Much still has to be done in developing adequate sectoral structures. Therefore, it still will take time until a factual multi-level-structure is reached for which it makes sense to formalise it in a European system of collective bargaining, including legal effects for third parties. In spite of these reservations the tremendous progress made in the last two decades should not be ignored.

CHAPTER IV
INTERNATIONAL DEVELOPMENTS IN LABOUR LAW AND INDUSTRIAL RELATIONS

International Labour Standards: A Complex Public-Private-Policy-Mix*

SUMMARY: 1. Introduction. – 2. The Role of the ILO. – 2.1. The traditional Pattern of Standard Setting. – 2.2. Reform Strategies. – 2.3. Re-thinking the Role of the ILO. – 3. Codes of Conduct and Trans-national Framework Agreements. – 4. Conclusion.

1. Introduction

Tiziano Treu is not only a leading labour law scholar in Italy but a highly estimated figure in the international scholarly community of labour law. He not only served as President of the International Industrial Relations Association (IIRA) but he also has a long standing working relationship with the International Labour Organization (ILO) whose main task is standard setting. Therefore, it seems to me appropriate to honour him by some reflections on the *status quo* and the possible future of international labour standards.

The recent financial and economic crisis has put a big question mark behind the neo-liberal paradigm. For a long time the prevailing approach was deregulation, leaving everything to the market. At least as far as financial markets are concerned, there seems to be a change of perception. The search for effective regulation of financial markets has to a great extent replaced the old neo-liberal approach.

The change of paradigm should not be confined to financial market. It also should be applied to labour markets. The protagonists of deregulation of labour markets – among them for a long time also influential international

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financial institutions as the World Bank, the International Monetary Fund (IMF) and regional development banks – have been powerful up to now. They have been stressing negative economic effects of minimum wage systems, of systems of income security, of measures restricting free entry and exit of labour markets, of collective and centralized collective bargaining as well as of working time restrictions ([192]). This view, however, is not only one-dimensional because it exclusively focuses on economic efficiency but it proved to be wrong as extended empirical research demonstrates ([193]).

Even if many long-term benefits are indirect and difficult to measure, empirical evidence shows that labour standards result in improved health and human capital which increases the productivity potential of workers. It particularly shows that fair working conditions result in improved motivation and willingness of workers for high performance. Long-term and stable relationship between the worker and the company provides incentives to companies to invest in training of their workers because the company is able to recover returns from training. Job security provides incentives to workers to share their knowledge and skills with colleagues, in particular with young people and apprentices. In addition, it allows the workers to cooperate and increase productivity without fearing the loss of their job. Also at the macro-economic level empirical evidence is available for a positive effect of labour standards on trade competitiveness and growth.

In short and to make the point: the protagonists of deregulation seem to suffer of a reality gap. There should be no doubt that labour regulation is an essential input to a functioning market economy as well as a precondition for comprehensive and sustainable economic development. Therefore, implementation of labour standards should be considered as a form of investment in institutions which on the long run have not only a positive effect for the workers and the economy but a positive impact for the stability and the development of society as a whole. In the era of globalisation it goes without saying that such regulation cannot stop at national borders but has to be international.

In addition it should be stressed that the economic dimension is only one among others. Labour standards primarily are to be seen in the context of human dignity as it is expressed by the actual program of the ILO on decent work for everybody. The fundamental rights perspective is playing an ever bigger role. The famous statement in the ILO's Philadelphia Declaration that "labour is not a commodity" still is valid and indicates that market

rules are not sufficient to meet the needs of decent work corresponding to human dignity.

Summing up these introductory reflections, it becomes evident that effective international labour standards are of utmost importance. The question is whether the institutional arrangements developed so far are sufficient to meet this urgent need or whether they are to be modified or amended. This is the topic to be discussed in my sketchy contribution.

2. The Role of the ILO

2.1. The traditional Pattern of Standard Setting

The achievements of ILO in the area of standard setting undoubtedly are a success story which now lasts already more than 90 years and which barely can be overestimated. Almost 200 conventions and even more recommendations, covering all kind of aspects of labour law and social security law, are an impressive output ([194]).

However, the world of work has significantly changed during this long period of time. Therefore, it is no surprise that according to an assessment, started in 2002, it turned out that only 71 conventions and 73 recommendations are up to date. 54 conventions and 67 recommendations are totally outdated. For the remaining rest efforts of updating are made ([195]).

Conventions legally are considered to be international treaties which are to be ratified in order to be binding for the member countries. There, however, a significant problem arises. The member state's inclination to ratify is unfortunately rather low. This is particularly true for developing countries. The reason seems to be that they are afraid of competitive disadvantages in case of ratification. On the whole 60 percent of the member states of the ILO ratified less than a quarter of the conventions and more than 20 percent of the member states even less than one tenth ([196]).

The ratification record, however, is not the only problem. The bigger problem lies in the discrepancy between ratification and implementation in actual practice. It has to be kept in mind that, particularly in developing countries, there is a lack of administrative and infrastructural preconditions for such a factual implementation. Monitoring mechanisms are only available to a limited extent. In many cases trade unions are much too weak to function as a monitoring actor. Governments quite often are not very

much interested in implementation in actual practice because they are afraid of losing competitive advantages which they in a short-minded perspective see in low labour costs and a low level of workers' rights.
In addition the monitoring machinery of the ILO is not very efficient. There are rather sophisticated procedures ([197]). But their effect is rather modest. This first has to do with the fact that the material for monitoring is provided by reports which are written by the member states themselves. Trade unions and employers' associations are entitled to cooperate in the elaboration of these reports. This, however, does not change the fact that these reports remain problematic since also these organisations are often not eager to list up domestic deficiencies in these reports. But even where the reports are correct and where deficiencies of implementation are discovered by the monitoring bodies of the ILO, the monitoring procedure is merely built on the principle of mobilization of shame. The idea is that for mere image reasons a member state accused in such a way will further on be rule abiding. Whether this expectation is met, remains more than doubtful.
Nevertheless the impact of the monitoring bodies should not be underestimated. The committee of experts as well as the committee on freedom of association have developed an impressive set of case law. Even if the binding effect of this case law is very problematic, it should be seen that in many jurisdictions it serves as a point of reference and, thereby, may have an impact on shaping the legal structure in many countries.
Another well known problem refers to the fact that labour standards as elaborated in the context of the ILO only are relevant for the formal sector. However, in most developing countries in Africa, Latin America and South East Asia the informal sector is much bigger than the formal one ([198]). And it is rather increasing than decreasing. This perhaps is the biggest challenge for the ILO. It would be a futile attempt to try to simply formalize the informal sector in these countries. The informal sector will remain without a link to traditional employment relationships. The ILO is well aware of this dilemma. First attempts to develop alternatives are made. But they are by far not sufficient.

2.2. Reform Strategies

Well known and most spectacular was in 1998 the ILO's attempt by the well known Declaration on Fundamental Labour Rights to at least make sure that irrespective of ratification the member states have to abide to four

fundamental rights contained up to then in 7 core conventions. These fundamental rights are freedom of association including the right to collective bargaining, prohibition of forced labour, prohibition of child labour and prohibition of discrimination for all kind of reasons. A follow-up procedure in the declaration, to which I will come back later on, paves new ways for implementation. There is an ongoing debate whether the list of fundamental rights in the Declaration should be extended, for example by a right to a living wage or by a right to health and safety.

Moving away from mere standard setting the ILO in 1999 initiated the famous "Decent Work Agenda" focusing on decent work for all. This ambitious program is built on four pillars: (*a*) Job promotion by establishing a sustainable institutional and economic environment; (*b*) Strengthening social protection; (*c*) Promotion of social dialogue and (*d*) Promotion of employees' rights at work. These four pillars are conceived as inseparable, coherent and supporting each other. The decent work agenda has succeeded in gaining much attention throughout the world. It is not only stimulating discussions on how to meet the goals embedded in this comprehensive concept but it also serves as a base of legitimacy putting at least soft pressure on the actors in the member states of the ILO. This strategy has two recent follow-ups: (*a*) The declaration on social justice and fair globalization of 2008. Thereby, the decent work agenda is strongly confirmed and even greater emphasis is put on support and technical cooperation; (*b*) The declaration on recovering from the crisis: a global jobs pact of 2009. This is an action program containing principles for promoting recovery and development as well as mechanisms to accelerate employment creation. Jobs recovery, building sustaining enterprises, building social protection systems and stimulating social dialogue. In short, it formulates a strategy to shape a fair and sustainable globalization.

These declarations and action programs signify somehow a change of paradigm. Mere standard setting is no longer considered to be a sufficient strategy. It is combined by a soft law approach. Thereby, it establishes a link between standard setting and technical cooperation. Such a comprehensive and highly sophisticated strategy is not meant to have short term effects but to change the infrastructure of the member states as well as the actors' involvement on the long run in order to pave the ground for decent conditions on the labour market. To a great extent it is focusing on building up consciousness all over the world for the necessity of reforms as indicated in these declarations.

2.3. Re-thinking the Role of the ILO

In spite of the indicated change of paradigm the question remains whether the ILO needs further reconstruction to play its role even more efficient. Recently Brian Langille strongly attacked the ILO's activities and pleaded for a radical change ([199]). Anne Trebilcock, responding to Langille, accuses him to "knock down a strawman" ([200]). This is certainly true when Langille writes that the ILO is focusing merely on detailed rules of "hard law and when he asks for a shift from "hard law" to more "soft law" ([201]). As shown above, this shift is already happening to a great extent. However, there are areas where Langille's critical approach seems at least justified to a certain extent.

Whether conventions are too detailed and whether it would be better to more often substitute detailed rules by mere principles ([202]), deserves attention. The lack of sufficient ratification may well be implied by too detailed rules. Of course there are patterns of flexibility built in quite a few conventions ([203]), allowing for example the member states to ratify only fragments of conventions step by step, thereby giving them more time for preparing the conditions for full ratification. Convention 102 on social security is a good example of this. However, the very low ratification rate of this very convention shows that this kind of flexibility is by far not sufficient to destroy the fears in particular of developing countries to not be able to meet the still too detailed rules of this convention. Therefore, Langille's plea for fewer details and more principles should be taken seriously. A thorough analysis of all the conventions and of the reasons for not ratifying them – which cannot be provided here – might be helpful to shed light on this controversy.

More important seems to be another topic of Langille's criticism: the impact of the concept of universality. He is pleading for a shift from universal to a more local, contextual and embedded approach ([204]). Universality from the very beginning of the ILO and for good reasons has been a constitutional element of its politics ([205]). And of course the idea of universality cannot be given up in the light of a global economy and due to the fact that human rights are universal ([206]). Nevertheless it might look as if Langille again is only attacking a strawman. After all the ILO has established regional offices and tries by all kind of strategies of technical cooperation to meet specific circumstances of specific regions. This definitely is an important progress. Much has been done in this respect. However, it well may be doubted whether this regional approach has a real

impact on the machinery of standard setting. There it seems that the idea of universally equal application still prevails.

This leads to another question which is closely linked to the topic of universality. In particular in the area of social security conventions tend to be inspired by patterns of industrialized states which turn out to be rather irrelevant for developing countries. In addition they are focusing on the formal sector, ignoring the complex structure of the informal sector. As already indicated above, the ILO for quite a while has discovered the informal sector as an area to be coped with. However, the idea behind the ILO's approach still seems to be to transform the informal sector into a formal one: a futile attempt given the size of the informal sector and the very strong traditional perceptions of a labour market in developing countries. Neither the existing conventions nor the decent work agenda meet the needs of the informal sector.

This now leads to Langille's main attack. According to him the ILO's approach is a "we know what is good for your system" ([207]). He is pleading for a shift from top down to bottom up in the area of standard setting. This attack is strongly rejected by Trebilcock who refers to the fact that the process of developing labour standards gives governments and social partners many possibilities to influence their elaboration ([208]). And she also refers to the two thirds majority which is required for passing conventions. However, the question remains whether she is not underestimating the tremendous influence of the experts of the International Labour Office. It seems that the expert knowledge situated in the office is of utmost importance in shaping the conventions, limiting in practice very much the influence of the process Trebilcock is referring to. Therefore, it might well be a worthwhile effort to reflect on how to establish and strengthen a real bottom up approach.

This question of course is linked with another delicate one, namely whether the tripartite structure by itself still is appropriate to play a significant role in such a bottom up approach. In many countries, particularly in the developing world, trade unions are marginalized in a way that their input almost can be neglected. Therefore the question arises whether the traditional ILO structure is to be amended by including non governmental organizations (NGO) and by giving them a voice in this process. Of course this might imply problems of legitimacy and problems of representativity. But an attempt in this direction should be made.

A last of Langille's many proposals deserves attention: his suggestion to shift from command and sanction to assistance ([209]). If Trebilcock denies that there are sanctions at all ([210]), she seems to ignore the spirit in which

conventions are made. There cannot be any doubt that the monitoring bodies are supposed to examine whether the member states abide to the standards. Of course, as indicated above, this monitoring activity is rather inefficient. This, however, does not change the simple fact that it is supposed to end up in "naming and shaming" as a form of sanction. Member states evidently want to prevent such an outcome, even if it is inefficient. Therefore, the reports tend to be written in order to escape such a "sanction". Langille is to be supported if he thinks that the monitoring bodies should not act as small claim courts ([211]), sanctioning bad behaviour. It would be much better if these bodies were simply supposed to be confronted with deficiencies in order to help the respective countries to build up structures which allow factual implementation of the standards. Then the member states would be more willing to list up problems they are confronted with. And the link between standards and technical cooperation would become as close as possible.

This short essay is not the place to provide an in-depth analysis of how the ILO might better take use of its potential in the future than it has been doing it in the past. I simply would like to indicate that there is room for improvement. However, even if the ILO would succeed in strengthening its efficiency, there is no doubt that the ILO is only one element in a combined strategy to develop and spread international labour standards.

3. Codes of Conduct and Trans-national Framework Agreements

In the last few decades multi national enterprises (MNE) have become more and more powerful in defining the context in which they are active. This very early has led international institutions to focus on MNE, urging them to observe minimum standards for all their subsidiaries all over the world. The forerunner in this context was the Organization for Economic Cooperation and Development (OECD) which passed already in 1976 "The OECD guidelines for multinational enterprises", last amended in 2006. The ILO followed one year later in 1977 by its "Tripartite Declaration of Principles on Multinational Enterprises and Social Policy", last revised in 2007 and presently in the stage of further revision. And the latest of these codes is the United Nations' (UN) "Global Compact", issued in 1999 by Kofi Annan who then was UN General Secretary. Even if the already mentioned economic and political power of the MNE was the reason for the development of the OECD and ILO guidelines, their title is somehow misleading. They are explicitly only addressed to MNE.

However, they are intended to cover companies in general, not only MNE. They do not want to create gaps between MNE and domestic companies, even if it has turned out that this is a futile hope. In reality there is a segmentation between these two categories of enterprises.

These "external" guidelines were mainly meant to enrich the fantasy of management in the MNE in elaborating so called private codes of conduct. Such codes have become numerous and are mainly a product of the last two decades. They are in practice confined to MNE, thereby creating gaps between their working conditions and those of domestic companies.

Even if these codes are by no means homogeneous, they all refer to the core fundamental rights as contained in the already mentioned ILO Declaration of 1998. For the rest there are big differences between them. Even more significant are the differences between different branches of activity ([212]). To just give an example: In the textile industry the main emphasis is on child labour whereas in the chemical industry or in the transport sector it is on health and safety. Many codes simply refer to the whole set of ILO standards as well as to the law of the respective host country whose wording often has nothing to do with actual practice there ([213]).

It should be mentioned that not only the contents of the codes are very different from each other but also the genesis of these codes. Originally most codes were unilaterally established by the companies. However, to an increasing extent there is a new generation of codes called "multi-stakeholder" initiatives ([214]). Companies, trade unions, human rights groups, community and development organizations participate in formulating such codes of conduct. These "multi-stakeholder codes" contain also provisions on monitoring, verification, certification of supplier factories, enforcement mechanisms and transparency. Among the most prominent actors in this activity of monitoring codes of conduct are the "Fair Labour Association", the "Workers Rights Consortium", the "Social Accountability International", the "Ethical Trading Initiative", the "Clean Clothing Campaign" and "Worldwide Responsible Apparel Production", to just give you some examples of an almost endless list.

Many of the codes only cover the relationship between the MNE and their employees. However, to an increasing extent, sub-contractors as well as the whole supply chain and sometimes even clients are included. Normally such codes require that in case of violations these either have to be corrected or the business relationship has to be stopped. The latter, of course, is a very ambiguous sanction since it may lead for the employees

of the sub-contractor or the client to the loss of the job and, thereby, to a further worsening of their situation.
All these codes are, of course, legally non binding. They are "light touch" regulations or "soft law". There is only a moral obligation of the MNE to respect them. Unfortunately it happens quite often that the content of the codes is unknown to the employees as well as to those persons who are responsible for implementing them. Then of course there is no awareness of violation. In case of unilaterally developed codes the companies are very much interested in internal conflict-resolution. Therefore, in these cases the outside observers do not learn anything about possible violations. However, many companies want to make perfectly clear that they are not interested in hiding violations have decided to be exposed in regular intervals to so called "external monitoring". This of course applies – as already mentioned – to all "multistakeholder codes" of the new generation. Such monitoring procedures prove to be quite efficient. In case of negotiated codes it depends on the strength and vigilance of the partner with whom the code was established whether and in how far the public can be mobilized and thereby put pressure on the company's management. In this respect up to now the NGOs have proved to be much more efficient then trade unions. For example the NGO "clean clothing campaign" has succeeded to provoke immediate reactions of multinationals in case of violations which happened in developing countries. In short and to make the point: even if the codes are not legally binding and even if there are still deficiencies in implementing them, to a bigger and bigger extent the external pressure in case of violation can no longer be ignored.
In the meantime quite a few MNE use the standards of their employment relationships as marketing strategy and therefore initiate competition for the better in this area. In this context to a significant extent "social labelling" plays an important role. Products of companies fabricated according to the rules of the game get a label in a so called certification procedure. It is not surprising that those who get such labels use them in their marketing strategy.
The most recent development in this context consists in agreements which are concluded between global union federations and a growing number of MNE ([215]). The difference compared to the codes of conduct as sketched above is not so much the content of these agreements but the fact that on the workers' side there is a strong actor which may even better guarantee the factual implementation of these agreements.
These international framework agreements contain in particular sophisticated on monitoring procedures. This in many MNE has led to a

restructuring of management systems in order to make sure that the commitments resulting from these agreements are upheld. Nevertheless, enforcement still remains to be a problem and has to be improved.

4. Conclusion

The ILO has played, …, for more than nine decades, an important role in setting international labour standards. In spite of its admirable achievements the problems embedded in the structural pattern of the ILO should not be overlooked. The low rate of ratification, the gap between ratification and implementation in practice, the inefficiency of the monitoring procedure and the lack of proper responses to the needs of the informal sector are well known problems. The ILO has succeeded in transcending the mere standard setting approach by adding soft law strategies, thereby stimulating consciousness for the worldwide need of building up sustainable structures. However, the question remains whether the ILO needs a structural reform in order to improve its performance. There seems to be in particular a need to increase the flexibility of the standards by not going to much into details, to better combine the universal approach with regional perspectives, to develop appropriate concepts for the informal sector, to replace the top down by a real bottom up procedure and finally – and most important – to replace the sanction oriented monitoring structure by a concept of assistance, thereby closely linking standard setting with technical cooperation.

However, even if the potential of the ILO would be brought to its optimum, the institution alone still would remain only a part of the machinery to set and spread international labour standards. It needs to be complemented by the codes of conducts of MNE and by international framework agreements. These private activities should not be conceived as rivals to the ILO's mission. The two sides depend on each other and produce synergy effects by a public-private-policy mix for which no alternative is available. This not only means a combination of public and private, but also a combination of "hard law" and "soft law". Only this double combination has a chance to be successful – at least in a long-term perspective.

Realizing Decent Work in Africa*

SUMMARY: 1. Introduction. – 2. The Present Situation and Challenges. – 3. Possible Means for Improving the Situation. – 3.1. Learning from Industrialized Countries. – 3.2. The Impact of International Labour Standards. – 3.3. The Impact of Regional Arrangements Elsewhere. – 4. Conclusion.

1. Introduction

For the second time IRASA ([216]) is hosting a Regional African Congress of the IIRA. When the first event took place in South Africa in 2002, I had the great pleasure to deliver the welcome address as President of the IIRA. Now I am merely an elder observer and, therefore, very grateful to the organizers of this year's Congress for the privilege again to say a few words at this opening ceremony. As many of you know, over time I have established close ties to the African Continent and in particular to South Africa, where I feel more or less at home.

In 2002 the contributions and debates at the Congress on 'Employment Relations in a Changing World: The African Renaissance' were facing the challenges but also gave rise to great expectations. This year's Congress will offer us the opportunity to make an assessment of what has been achieved in between, and moreover indicate the direction for Africa to take to realize decent work for the entire Continent. My brief remarks are to be understood as a modest contribution to these debates over the next few days.

First, I will say a few words about the present situation in Africa as I see it and then deal with the questions first of all as to whether and under what conditions the rather sophisticated examples of industrial relations, labour law and social security law in highly industrialized countries may provide

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insights on how to improve the situation in Africa; secondly, whether the standards adopted by the ILO may be a helpful tool for this purpose, and thirdly whether something can be learned from regional arrangements in other parts of the world.

2. The Present Situation and Challenges

If we try to analyse the general situation as well as industrial relations, labour law and social security law in particular, we have to be aware that South Africa in many ways is a special case, not really representative of the rest of the continent and definitely not of sub-Saharan Africa. It is a special case even in the context of the Southern African Development Community (SADC) which is an admirable attempt at establishing a regional arrangement and which has already succeeded in making considerable progress.

The overall figures are still alarming. To give you some examples: of the 51 less developed countries in the world, 42 are situated in Africa. If South Africa and Nigeria are not counted, the average yearly income amounts to about USD 400. However, this average figure does not tell us much, due to the fact that there are significant income gaps. Therefore, it is more enlightening to stress that half of the people live in extreme poverty. In sub-Saharan Africa the number of those living below USD 1 per day remained almost the same between 1990 and the present day, in spite of the Millennium Development Goal according to which the number of those in extreme poverty should be halved by 2015. The majority of those falling into this category are women. On average half of the people of active age are still unemployed or only marginally employed. Three-quarters of all HIV-positive people live in Africa. More than 20 million have already died of HIV/AIDS, leaving behind about 12 million orphans. The average life expectancy of the population has fallen to 44 years.

Even if the dark side of the picture is still dramatic, there are promising signs. The number of countries with a democratic structure based on a plurality of political parties has increased since 1990 from five to 33. However, it has to be stressed that most of these democracies are still more formal than substantial and need consolidation, which may take time.

The average increase of gross national product in Africa has reached five percent. This is a promising sign but not enough. In order to reach the Millennium Development Goals by 2015, a rate of 7 to 8 per cent would

be necessary. Such a rate has only been achieved in four countries up to now.

Another good sign may be that to an increasing extent the highly industrialized regions of the world – in particular Europe and the United States – are developing strategies to assist Africa in coping with the problems the continent is facing. This has nothing to do with generosity but rather with self-interest. Europe and the United States need Africa as a strong trading partner. Therefore, in Africa they need the structures of a stable society in which decent economic and social patterns can emerge. Last but not least, this is supposed to decrease the flow of migrants from Africa to Europe which currently leads to deplorable situations at the borders.

In short and to make the point, Africa is facing tremendous problems, but there are promising signs of improvement. After my sketchy remarks on the general background, I would now like to shift the focus and turn to the labour market, industrial relations, labour law and social security law. What is their present status and what are the challenges?

One of the most crucial problems in Africa is the dramatic segmentation of the labour markets. For example, in the SADC countries, only 10 to 20 per cent are engaged in the formal sector. The vast majority of the population works in the informal sector. However, industrial relations structures are linked only to the formal sector. The same applies to the coverage of labour law and social security law. Therefore, the most important task for the future is to broaden the scope and include those who work in the informal economy. Labour law has to provide minimum standards also for those who work outside the formal sector. As far as social security is concerned, even an extension of this kind will not be sufficient. It has to go beyond those who work and cover the population as a whole, providing at least a minimum of social assistance. It should be borne in mind that one of the most important goals to be achieved by social security in Africa is the fight against poverty.

The second problem to be taken into account concerns the fragmentation of the labour market. Full-time employment for an indefinite peri-od in the formal sector is the exception rather than the rule. Atypical employment (workers on fixed-term contracts, part-time workers, temporary agency workers, seasonal workers and wage earners employed for short periods by different employers, to give just a few examples) is by no means atypical, but in view of its extent, the typical pattern to which industrial relations, labour law and social security law have to respond. The same may be said for those who fall outside the pattern of the traditional

employment relationship in a strict sense, that is to say, contractual workers. Labour law and social security have to make sure that none of these categories is left out and that the specific conditions of the respective groups are taken into account. This means that there is a need for tailor-made regulations rather than for uniform structures serving only those who already enjoy certain privileges.

Clearly the fragmentation is not only on the workers' side. It also is a well-known phenomenon in the employers' camp. Large companies may easily be able to cope with standards which might overburden small and medium-sized companies. Therefore again: uniform rules for the economy as a whole might not be the right answer. In South Africa efforts have been made to respond to this challenge. So far the host country of our Congress has been a forerunner, to be followed by others.

One of the core problems in Africa is the lack of collective structures giving workers a voice. In quite a few countries trade unions are almost non-existent, as they have not succeeded in developing effective organizational structures. In other countries a decline of formerly stronger unions can be observed. The existence of bilateral arrangements for collective bargaining is the exception rather than the rule. Also in most countries tripartite bodies for developing social policy guidelines are absent. There are in some countries patterns of workers' participation within companies, but they mostly remain a formality without any impact on management decision-making. 'Trade unions and workplace democracy in Africa' is the title of a recent book by Gérard Kester. But reading it one gets the impression that this is to a great extent more wishful thinking than reality. Bipartite and tripartite collective structures, giving workers a voice, are crucial for empowering the workforce to exert influence in order to achieve decent working conditions. In addition, participation in collective bodies to promote working conditions is an essential element strengthening and consolidating political democracy. The most difficult task will be to include those working in the informal economy in collective structures. This sector is evidently much more difficult to organize than workers in the formal sector.

Perhaps the most significant deficiency to be mentioned in this sketchy analysis is the lack of instruments to monitor and enforce the rules of labour law and social security law. In most countries law enforcement is inefficient, mainly due to a lack of institutions and to a lack of adequate resources. Systems of conflict resolution – be it mediation, conciliation, arbitration or judicial review – are weak or non-existent. Again, in this respect South Africa is an exception. In particular the Commission for

Conciliation, Mediation and Arbitration (CCMA) as established by the Labour Relations Act has turned out to be a success.
To sum up: what is needed is a significant extension of the scope of application of labour law beyond the formal sector, a much broader coverage of the population by social security law, minimum standards for workers in all categories in and outside of the formal sector, tailor-made rules for the different types of workers and enterprises, trilateral as well as bilateral structures for developing policy guidelines and for collective bargaining, and finally efficient monitoring and enforcement mechanisms as well as functioning conflict resolution systems.

3. Possible Means for Improving the Situation

It is not difficult to define the direction in which industrial relations, labour law and social security law have to go in Africa. The problem is how to achieve these ambitious goals. As indicated above, I will only deal with a small aspect of this huge question, namely whether and how far a look at developed systems in highly industrialized countries can help, what the contribution of the ILO in this context can be, and what can be learned from regional arrangements elsewhere.

3.1. Learning from Industrialized Countries

Let us start by asking whether and how far the study of highly developed systems elsewhere may be a helpful strategy. Such a discussion has to start from the insight that there is no ready-made model which can simply be copied. Each system is deeply rooted in cultural and historical traditions and embedded in the overall framework of the respective country. In spite of globalization, such differences between the different systems have remained. Even within regional arrangements, as for example the European Union, the country-specific differences still play an enormous role and will continue to do so in the future. Quite often this lesson that foreign systems cannot simply be imitated has been ignored. Let me illustrate this by an anecdote. When in 1983, exactly 25 years ago, the ILO sent me to Zambia to find out why the system of institutionalized workers' participation was not functioning at all, I discovered that after liberation from colonial rule the Zambians had introduced a German-style works council system. However, the functioning of the works council system in

Germany is dependent on many specific factors which were all missing in Zambia. Therefore, it was evident that this works council system could not deliver in Zambia what it does in Germany. It did not fit at all into the overall structure of industrial relations in Zambia, and therefore weakened the system as a whole. Hence, the introduction of this institutional element was worsening the situation rather than improving it.

The Zambian example not only shows us that the simple transfer of one country's system to another is not possible. It also shows us that it would be misleading to focus on one specific element of a country's system of industrial relations, labour law and social security law. The function can be properly assessed only if the specific element is seen in its interaction with all the other elements of a specific system. Let us stay for a moment with the system of institutionalized workers' participation. The functional perspective of such an institutional arrangement can only be revealed by putting such a system of workers' participation into the overall context of the respective country, thereby analysing not only the other parts of the overall system (such as collective bargaining, the system of conflict resolution, the minimum level guaranteed by employment law etc.) but also the profile of the actors, the prevailing attitudes, and the cultural, political and economic environment. The elements to be analyzed are manifold. To take all of them into account is an extremely difficult task. Therefore, valuable studies can only be expected if an in-depth investigation in the respective countries takes place. Comparing functions of parts of the industrial relations system in two different countries is already difficult. If the comparison goes beyond this sample and – as is often the case – tries to compare many countries, it often tends to be superficial, misleading and therefore not very helpful at all.

When foreign systems are studied, it has to be understood that the same functions can be performed in very different ways. The same effects may be achieved by very different instruments, legal rules or institutions. Limits to management prerogatives may be established by legislation, by collective bargaining, by systems of workers' participation, or by a mixture of all those instruments. The balance between job security and external flexibility may be achieved by rules on protection against dismissals, by rules on fixed-term contracts, by rules on temporary work or by a mixture of all these elements. Similar effects achieved in one country by the judicial system might be achieved in another country by mechanisms of alternative dispute resolution or by administrative bodies. Therefore, in order to find out which country might offer the best solution, it would be

totally misleading to compare instruments, legal rules or institutions with the same label. The focus has to be on the function to be achieved.

However, to analyse the real effects of institutional arrangements in a given society is not an easy task. It transcends the expertise of a single academic discipline. Only an interdisciplinary effort can achieve reliable results. Economists, experts in law and administration, political scientists, sociologists, psychologists and anthropologists, to name but a few of the relevant disciplines, have to cooperate. For this task the institutional setting for such interdisciplinary cooperation and dialogue is crucial. Up to now unfortunately in many countries a strict segmentation of these different disciplines has been maintained. In this respect our association, the IIRA, is an important forum for such functionally-oriented research. From the very beginning we have tried to focus on industrial relations as a conglomerate of different academic disciplines. Or to put it differently: we have the intellectual resources to assist Africa in making proper use of comparative research in an attempt to learn from experiences elsewhere.

Let me draw your attention to another aspect to be borne in mind in studying and comparing systems of different countries: terminology. At first glance it is very seductive to assume that identical terms, whether they are expressed in the same or in a different language, refer to identical phenomena. However, this is by no means the case. Terminology as such remains meaningless for the scholar of comparative research in industrial relations, labour law and social security law. It only reveals its meaning by being put into the whole structural and functional context.

However, the basic question to be asked is whether it makes sense at all for reformers in Africa to study the sophisticated systems of highly industrialized countries. Aren't the conditions there too different to be of any use for the African situation? It would be wrong to ignore the fact that there are limits on insights by comparison. Nevertheless, this is by no means a totally useless effort, in particular if comparison also includes the historical development of today's patterns. There is no doubt that such studies enrich the imagination of the reformer, thereby increasing the set of alternatives to be taken into account. On the other hand, I have made clear that solutions developed elsewhere are linked to the specific context of respective societies and therefore cannot easily be transplanted to a different environment. However, the impossibility of transplantation only refers to institutional arrangements. This does not mean we cannot learn from experiences elsewhere and transfer principles and functions. Consider the example of prohibition of discrimination for reasons of race, ethnic origin or gender, certainly a principle which is attractive in the

African context and which by the way is implemented in an admirable way in the new post-apartheid South Africa. It is evident that institutionally this principle can be implemented in many different ways, be it by affirmative action, be it by quota or otherwise. Here the real difficulty is situated. The institutional patterns have to be shaped according to the legal, economic, political, and cultural circumstances in the respective country. This by the way is not a problem only for African countries, but at present an extremely difficult task for the new central and eastern European Member States of the European Union (EU) who each have to develop their own institutional pattern in order to integrate into their systems the flexible framework provided by European legislation. Instead of simply imitating models developed elsewhere, they have to find their own way. In this respect Europe has become a most interesting laboratory in demonstrating how experiences made elsewhere, functions performed elsewhere and principles developed elsewhere can be used in the debate on how to reform one's own system. For African countries this means the search for institutional arrangements which fit into the overall African environment, which are compatible with the mentality of the people and which respect traditions as well as cultural norms. Or to put it differently: lessons learned by studying other systems have to be brought to a compromise with domestic conditions. The catchword for such a strategy is 'path-dependency', which is too often ignored by those who tell us that the result of globalization is the convergence of systems of industrial relations, labour law and social security law. They ignore the fact that up to now, and also in the future, institutional arrangements somehow are and will remain expressions of national identity.

Since it is extremely difficult to learn from abroad and at the same time to develop the institutional patterns fitting in with the domestic traditional framework, reforms cannot be left to so-called external experts. Close interaction between those who provide insights from abroad and domestic experts with a profound knowledge of domestic conditions is crucial. The elaboration of the Labour Relations Act in South Africa is a good example of such a practice. In addition, reforms have to be made in the spirit of trial and error. The willingness to correct reforms if they turn out to be incompatible with the domestic framework and, therefore, cannot properly fulfil their function, is a precondition for sustainable improvement. Innovations in the fields of industrial relations, labour law and social security are not to be made for eternity but remain subject to adaptation to better insights. It may seem a paradox, but only if reforms remain dynamic can they provide sustainable stability. In my view, once again the Labour

Relations Act of South Africa may serve as a positive example for such a strategy: the amendments made since the first version in 1995 demonstrate this pragmatic approach.

3.2. The Impact of International Labour Standards

Let us now turn to the international labour standards as developed by the ILO. The origins of the idea of establishing international minimum conditions in the labour field lay in Europe and date back to the nineteenth century. The driving force originally was the elimination of social dumping between different countries. When in 1919 the ILO was founded, another reason was added for the foundation of this institution: to fight the poverty of the working class internationally in order to prevent political upheavals. As you all know, the ILO has a very specific structure which is unique among international institutions: not only the governments of the Member States, but also both sides of industry, trade unions and employers' association, are represented there. The importance of this composition, for reasons of legitimacy, can hardly be overestimated. Originally the ILO consisted of 42 Member States, now the figure is 177, including the African countries.

Standard setting from the very beginning has been a key activity of the ILO. There are two instruments: conventions and recommendations. Conventions are international treaties that become binding for a Member State after ratification. Recommendations are legally non-binding. Either they contain guidelines on how to apply a specific convention, or they are devoted to a topic which has not yet attained the two-thirds majority in the annual assembly which is needed for a legally binding convention. Up to now the ILO has passed about 190 conventions and even more recommendations, covering most areas of industrial relations, labour law and social security law.

However, there are quite a few problems. I will only mention four of them, without going into any detail. First, many of these instruments are outdated. A review which started in 2002 has shown that only 71 conventions and 73 recommendations are still up to date, whereas 54 conventions and 67 recommendations are so far removed from today's requirements that they cannot be rescued at all. The rest have to be updated.

Secondly, quite a few Member States are hesitant to ratify conventions. As far as labour law is concerned, the list of non-ratifying countries is less dramatic than in the area of social security law. Nevertheless, 60 per cent

of the Member States have ratified less than a fourth of the conventions. The reluctance to ratify is particularly evident in less developed countries, including all the African countries. For example, only 7 per cent of them have ratified Convention 102, which contains the core principles for social security and social assistance in its broadest sense. Not a single country in this group has ratified Convention 168 on employment protection and protection against unemployment, or Convention 183 on maternity protection. And only two of these countries have ratified Convention 128 on old-age, invalidity and survivors' benefits, or Convention 130 on medical care and sickness benefits.

In 1998 the ILO made an attempt in a famous Declaration to make sure that the Member States have to abide by at least four fundamental rights contained up to then in seven core conventions. These fundamental rights are: freedom of association, including the right to collective bargaining; prohibition of forced labour; prohibition of child labour, and prohibition of discrimination for all kinds of reasons. These rights are to be applied in all Member States and no ratification is needed. A follow-up procedure in the declaration lays out new ways for implementation. There is an ongoing debate whether the list of fundamental rights in the Declaration should be extended, for example by a right to a living wage, or by a right to health and safety.

Thirdly, it has to be stressed that ratification does not mean implementation. The monitoring procedure by the ILO is relatively complicated but in the end rather inefficient. Not much progress has been made in this respect. The sanctioning mechanism is still based on the idea of 'mobilizing shame'. But it seems that 'shame' is not very widespread among those who do not live up to what they have ratified.

Fourthly, and in our context most important: international labour standards as developed by the ILO only cover the formal sector. The informal economy remains excluded, even if it has to be stressed that the ILO for quite a few years has been reflecting on how to develop measures to protect those working in the informal sector.

The exclusion of the informal sector certainly is one of the reasons for the low ratification record of less developed countries. However, this is not the only one. It may also have to do with the assumption that ILO standards are shaped according to the needs and conditions of highly industrialized countries and – as the informal sector example shows – not according to the situation of developing countries. It will be a task of the future to carefully examine whether and how far such an assumption is correct. But even if this might be the case, it should not be overlooked that according

to the Constitution of the ILO (Art. 19 para. 3) standard setting has to take account of those countries where the climate, the state of development of economic organization or other circumstances require alternatives. This leads at times either to specific rules for developing countries, or to a mechanism which for example can be found in the already mentioned core convention for social security number 102: it covers all areas of social security and health protection. However, the Member States, according to their stage of development, are allowed to ratify only parts of it. This model has become widespread and should be used to a much greater extent by the Member States, also in Africa.

However, it would be wrong to focus merely on international labour standards as an isolated phenomenon. Standard setting is only one of the ILO activities: another one is technical assistance. In this way the ILO advises the Member States on how to cope with such standards and on how to achieve the preconditions for implementation. To be able to respond to the needs of specific regions, for this purpose the ILO has established regional offices as a link between the different regions of the world and the headquarters in Geneva. The ILO's operational activities in this respect are neither confined to actual implementation of standards, nor to predefined policy goals, but go far beyond them. Technical assistance is evidently also needed where ILO standards or principles do not exist as guidelines. Operational activities of this kind have to be planned and executed through interdisciplinary cooperation. Therefore, the ILO has drawn two conclusions: first to establish multidisciplinary teams, and secondly to perform those activities not only by its own resources alone but to also cooperate with external experts. This venue of technical assistance is becoming more and more important as an essential tool of support, in particular for Africa and other less developed regions of the world.

3.3. The Impact of Regional Arrangements Elsewhere

Let us now shift to regional arrangements elsewhere in the world and see whether lessons can be drawn from them. Instead of looking at the whole variety of such arrangements, I will pick out only one which is the most far reaching: the EU. This regional structure was founded over fifty years ago, originally consisting of six fairly homogeneous Member States. Now it covers 27 very heterogeneous Member States, with a population of about 500 million. The structure of the EU is unique in so far as it is a supranational entity with legislative, judicial and executive powers of its

own. This is a significant difference, for example, from the regional arrangement in the region where we are at present: the Southern European Development Community (SADC). Nevertheless we will see that developments in the EU might be of relevance for the further construction of SADC. I will mention only two of them.

The starting point for both regional arrangements is the utmost diversity between the different Member States. This diversity in the EU has increased significantly due to the recent EU enlargement, in which 10 Central and Eastern European countries were integrated into the Union. The differences of the industrial relations systems between the Member States are deeply rooted in each country's history and culture, and cannot easily be changed. Therefore, even if the European Community is a supra-national entity with legislative, executive and judicial powers, it has been clear from the very beginning that harmonization leading to uniformity cannot be the goal. The strategy, therefore, was to merely establish minimum conditions by way of a very specific legislative instrument, the Directive. A Directive only defines the purpose to be achieved and fixes some cornerstones but leaves all the rest to the implementation by the Member States. Therefore, each Member State has the possibility to adapt the European rules into its specific context in a different way. What does this mean for SADC? When even a supranational regional arrangement is not able to overcome the differences of national systems of industrial relations, labour law and social security law, deeply rooted in national history and culture, this must apply even more to a regional arrangement which is not a supra-national entity. In other words: harmonization of industrial relations, of labour law and social security law across borders is not a realistic option. The realistic goal is coming closer together by elaborating minimum standards respected by all. In this way, the gap between countries can be decreased, and this will have an enormous impact on the political stability of the region.

There is another aspect which might be of use for the development of SADC. Due to the heterogeneous structure, it has become difficult to get a majority of countries which is needed for legislation. Therefore a new strategy has been developed. Let us take the example of employment policy. In the late 1990s 'a coordinated strategy for employment' was integrated into the EC Treaty. The genuine competence of the Member States in this area remains uncontested. The Community is required to contribute to a high level of employment 'by encouraging co-operation between Member States and by supporting and, if necessary, complementing their action'. To make sure that this aspiration has a chance to be

achieved, the Chapter on Employment provides for several institutional arrangements: There is the Employment Committee which is mainly supposed to monitor the situation on the labour market and the employment policies in the Member States and the Community and thereby help to prepare the relevant joint annual report by the Council and the Commission. In fulfilling its mandate, the Committee is required to consult the social partners. In order to make sure that the activities of the Employment Committee, as well as the joint annual report by the Community's authorities, do not remain without consequences, the Chapter on Employment establishes additional powers for the Community. It 'shall each year draw up guidelines' which are not legally binding. This arrangement has led to manifold measures and significantly increased the interrelated activities between the Member States. However, the detailed results are of less importance in the present context. What is important is the fact that the Chapter on Employment establishes a mutual learning process for the Community and the Member States, including not only governments but also the social partners. None of the Member States can escape the permanent dialogue and the permanent pressure implied by it. Best practices do not have to be reinvented all the time but can easily be communicated and imitated. The label for this soft-law strategy has become 'open method of coordination' which is to a greater and greater extent now replacing the establishment of hard law. This might also be an option for a regional arrangement like SADC if agreement on legally binding minimum standards becomes a problem.

4. Conclusion

As we have seen, Africa still faces dramatic challenges. This also applies – with exceptions – to industrial relations, labour law and social security law. Considerable efforts are needed to which we as scholars of industrial relations cannot contribute very much. However, it was my intention to show that there are ways in which even we can make a difference: by providing insights gained from the study of foreign systems, by getting involved in the application of international labour standards and by reflecting on possible lessons to be drawn from regional arrangements elsewhere in the world. Realizing decent work for all in Africa is still an enormous task, but as we have seen, we have the means that might lead us in the right direction.

Some Reflections on the Future of the ILO*

The KO's unique and impressive record in promoting social justice all over the world is uncontested. Any reflection on improvements therefore has to be understood as being merely an attempt to optimize the of an already well-functioning and highly successful institution. In the course of its evolution the ILO has continuously tried to adapt its structure and its instruments to changed conditions. Learning by experience has always been the underlying philosophy of this institution, which has never remained static but has always proved dynamic. Therefore it is no surprise that the ILO has already dramatically changed its outlook as compared to the early days of 1919. This process of change will continue in the future.
1. Tripartism, the most significant feature of the ILO structure, has had to meet serious challenges. As far as the socialist countries were concerned, the mere existence of an independent employers' group was called into question. With reference to States with nondemocratically elected regimes, serious doubts were expressed about the independence of trade unions. The ILO has so far succeeded in overcoming these difficulties by abolishing a purist approach to independence. Owing to the disappearance of the socialist bloc in Eastern Europe, the problem has lost much of its relevance; but in essence it will remain a challenge. In this context it should be remembered that tripartism has been one of the main sources of the LO'S success. The collaboration of employers' and workers' delegates in the preparation and implementation of standards leads not only to greater legitimacy but also to increased motivation on the part of employers' organizations and trade unions to get involved in the formulation and application of international labour law. In my view, therefore, tripartism as a basic concept should also be maintained by all means in the future. This of course implies a pragmatic
approach to the idea of independence of employers' organizations and trade unions. It does not mean simply accepting the status quo in a given

* In ILO, *Visions of the future of social Justice*, 1994, S. 313.

country -it has to be made perfectly clear that the autonomy of organizations must be respected everywhere. In the meantime, however, flexible arrangements or temporary exceptions should allow for the continuation of tripartism, as was the case in the past.

2. From the very beginning, *universality* has been one of the pillars of the ILO. With regard to membership, the ILO has been highly successful in turning this principle into reality the original number of 39 member States in 1919 has reached 168 today. On the one hand, this tremendous increase in membership has led to almost universal representation of the ILO. On the other hand, it implies a very serious challenge to the principle of universality. The family of 168 member States is by no means a homogeneous one. There are significant political, economic and social differences among them. Consequently, it has become much more difficult to set universal standards. Is it possible to provide the same standards for highly industrialized countries as for developing ones? Are those standards becoming meaningless, either for industrialized countries because they are too low, or for developing countries because they are too high?

Questions like this have led to a reexamination of the universality approach. In principle, however, the idea of universality has been maintained. But even if the concept of setting different standards for different regions was never seriously taken into consideration, the need for more regionalization was recognized. Regional conferences, regional offices and regional advisers are nowadays an essential part of the ILO structure, and ensure that, in the preparation of standards as well as in their implementation, regional peculiarities are taken into account. The question, however, is whether these attempts to meet regional and local needs go far enough or whether it would be desirable to strengthen these decentralized structures. It seems to me that such a strengthening of decentralization is inevitable. It will, however, lead to a new problem, namely how to keep the proper balance between centralized and decentralized bodies in the overall structure. Otherwise the goal of universality, and thereby the basis of legitimacy of the ILO, would again be under attack.

3. The social, economic and cultural differences between the ILO member States pose a very serious challenge to the *pattern* of *standard setting.* On the one hand, there is the goal of developing universal standards; on the other hand, it is quite evident that actual differences between member States have to be taken into account. The problem cannot be solved by taking the lowest common denominator as a relevant standard. Such a strategy would undoubtedly miss the aim of defining a universal concept

of social justice. If, however, standards were fixed at a higher level, they would remain meaningless to those who simply cannot afford to turn them into reality.

The ILO's answer to these problems up to now has been flexibility. Instead of setting rigid standards, Conventions often allow for options with reference to the scope of the standards or to the method of their application. Often they leave a choice between obligations of varying strictness or allow for temporary exceptions. The mechanisms used in this context are numerous and the drafting of such flexible patterns shows high sophistication. The most striking example of flexibility in standard setting is the so-called "promotional Conventions", containing only the principles to be achieved, and more or less leaving it to the discretion of member States to develop a proper method of implementation. Quite often such promotional Conventions are supplemented by Recommendations containing more precise and detailed suggestions on how to transform the principles of the Convention into national law. Undoubtedly, the flexibility approach is a pragmatic way to cope with the difficulties of standard setting for a very heterogeneous reality. The question, however, is whether it makes sense to use Conventions as the instrument for the mere fixing of policy goals. This might easily lead to an undermining of the effects of Conventions which have to be applied rigidly, for example where basic human rights are at stake. Would it not be better, therefore, to separate legally binding standards and mere policy goals?

There is no easy answer to these questions. Of course Conventions, once ratified, become subject to the ILO machinery to implement and supervise their application. This explains why ratification is still conceived as an indication of a Convention's success. But such a perspective may be misleading. Ratification quite often has nothing to do with actual implementation; in view of the current figure of more than 5,500 ratifications, the monitoring instruments (i.e. reporting as well as complaint procedures) are simply not in a position to cope with all the shortcomings on the part of member States, in spite of the admirable work of the Committee of Experts or the Conference Committee on the Application of Conventions and Recommendations. The functioning of the monitoring system depends to a great extent on the cooperation of national governments and the way they present their reports. Evidently, certain problems are well known. Therefore, in order to increase the efficiency of the monitoring system, it might be recommendable to limit the number of Conventions and to develop a different strategy for the fixing of policy goals. Instead of focusing mainly on a legalistic approach, it might be

desirable to fix a more educational or political perspective. In this context one should remember that, in the past, non-ratified standards have proved to have a powerful influence on the policy of many member States. It should be made perfectly clear that the decisive quality of policy goals is not their character of being legally binding, but the mere fact that they are agreed upon by the bodies of the ILO. The prestige of the ILO as the world's social conscience should be considered as the main source of the real strength of such a principle. Such a shift of focus would make it evident that problem-solving in different countries should not only be confined to law and to the legislative level, but should be understood as a continuous task for all actors involved in social policy.

4. The recognition that the ultimate purpose is not the incorporation of standards into national law is well reflected in the ILO's *operational activities.* These, in fact, are not confined to actual implementation of standards and/or predefined policy goals, but go far beyond them. Technical assistance is evidently also needed where ILO standards or principles do not exist as guidelines. The question, however, is whether the conditions under which such programmes are performed guarantee their utmost efficiency. There are doubts. First of all, it seems that there is a lack of coordination between ILO activities and similar activities of other institutions and organizations. Joint efforts would certainly be cheaper and more efficient. Operational activities of this kind have to be planned and executed through interdisciplinary cooperation. Therefore, the recent replacement of regional advisers by multi- disciplinary teams is a step in the right direction. In addition, the ILO has never tried to perform those activities with its own manpower alone. It has always cooperated with external experts and will certainly do so in the future. The question, however, arises whether the organization of this cooperation between staff and external experts has already reached its optimum. It might be a good idea not only to have recourse to external experts to carry out such missions but also to integrate them in the planning stage. It might be especially helpful to offer more intensive and regular communication between experts, as well as between experts and the ILO. Common strategies could thereby be developed, as well as an improvement in the interdisciplinary capacity to cooperate. In short: by offering a forum for and with its external experts, the ILO could undoubtedly increase the quality and efficiency of these experts' work to a significant extent.

CHAPTER V
WORKERS' PARTICIPATION

Challenges for Workers' Participation*

SUMMARY: I. Introduction. – II. The Variety of Systems of Workers Participation. – III. The Advantages of Workers' Participation. – IV. The Approach of the European Union. – V. The Preconditions of Workers' Participation. – VI. The Need for Workers' Participation Bigger Than Ever. – VII. Does Workers' Participation Have a Future? – VIII. Conclusion.

I. Introduction

Employees are not supposed to be mere objects of management's decisions but must participate in management's decision making in order to live up to human dignity and to establish a democratic workplace. This insight by the founding fathers of labour law ([217]) is as valid today as it was in the formative era of labour law. Such continuation has recently been confirmed in Europe by Art.27 of the Charter of Fundamental Rights of the EU (CFREU) and by the 8th Principle of the European Pillar of Social Rights. The question is whether and how labour law has lived up to this goal so far and whether in the future it will be possible to establish a satisfying structure to meet this ambitious goal.
Starting from a sketchy description of the variety of patterns of workers participation within the company and of the advantages of such systems this contribution tries to highlight the approach of the European Union towards workers participation and tries to reflect on the challenges for workers participation in view of modern working patterns, particularly those implied by digitalization.

* In T. ADDABBO *et al.* (eds.), *The Collective Dimension of Employment Relations*, Palgrave Macmillan, 2021, p. 15.

II. The Variety of Systems of Workers Participation

Institutionalised patterns of workers' participation exist in many countries. However, there are big differences from country to country. These differences refer to:

– the degree of participation, ranging from information and consultation via veto rights up to co-determination where management and workers' representatives are on the same footing in decision-making for a whole range of topics;
– the level of participation, ranging from the shop-floor level up to the headquarters of companies or groups of companies. Some countries even know employee representation in company boards where again the differences are tremendous, in particular as the percentage of seats are concerned;
– the composition of bodies of workers' participation which is different from country to country. In some countries exclusively employees, in others chaired by management side;
– the relationship between bodies of workers' representation and trade unions, thereby, of course also to the relationship between workers' participation and collective bargaining ([218]).

There is one common deficiency of the different systems of workers' participation: they only very seldom are implemented in small companies. And often the threshold established by law does not necessarily correspond with implementation – as for example in Germany – where small establishments of at least 5 employees are included in the works council law on but by far not implemented in actual practice.

In view of the variety of the systems of workers participation it is important to stress that they all are embedded in the cultural tradition and overall institutional framework of the respective country in which they are established. Therefore, the institutional arrangements cannot be transferred elsewhere. But, of course, the idea of workers' participation can be spread everywhere.

III. The Advantages of Workers' Participation

The positive effects of the system of employees' involvement in management's decision making are well documented by many empirical studies ([219]). To just mention the most important of them:

- they lead to a change of focus from shareholder value to stakeholder value and tends to promote sustainability instead of short-term effects at the stock markets;
- they have a big advantage compared to unilateral decision-making by the mere fact that management, who has to justify towards workers' representatives what it wants to do and why it wants to do it, tends to prepare the decisions much more carefully than it would be the case without this obligation. This leads evidently to better decision-making;
- the consciousness that workers' representatives are involved in management's decision making and that workers' interests are taken into account tends to increase the employees' motivation and thereby the company's productivity;
- last not least the permanent dialogue between management and workers' representatives leads to mutual trust, changes the attitudes of both sides, employers and workers representatives - and absorbs conflicts.

These findings correspond with Marco Biagi's and Michele Tiraboschi's expectations when he wrote that "employee representation has to fulfil a trust building function" and that "representation must guarantee the legitimacy of management decisions, enhanced by their joint nature, with a favourable impact on their execution" ([220]).

IV. The Approach of the European Union

The EU from the very beginning not only was confronted with the diversity of the Member States' systems on workers' participation but particularly with the split between Member States with a tradition of participation and cooperation between business and labour and Member States with a tradition of conflict and antagonism. Instead of leaving this situation as it was the EU opted for participation and cooperation, having in mind the indicated advantages of systems of workers' participation. This approach found its expression in a whole set of Directives, starting in the seventies of last century with Directives referring to specific issues ([221]), ending up in the first decade of the new century with a Directive on a general framework on information and consultation ([222]). In addition systems workers' participation for trans-nationally operating companies were developed. Most important in this context are the Directive on European Works Councils which after long and controversial debates could be passed in 1994 ([223]) and the Directive on Employee Involvement in the

European Company of 2001 ([224]). The pattern established in the latter Directive has become a model for further Directives as for example the Directive on trans-national mergers. Nowadays the set of these Directives can be seen as a success story and as the core of the so called European Social model.

There is no longer any doubt that the promotion of employees' involvement in company's decision-making has become an essential part of the EU's mainstreaming strategy in its social policy agenda. It has transgressed definitely the "point of no return". This policy is in line with the already mentioned Art. 27 CFREU. This has an important implication: countries with a tradition of exclusively antagonistic structures have no longer a choice but to restructure their systems towards a concept of partnership and cooperation.

Of course, the Directives sketched above have their weaknesses: they are unnecessarily complicated, not always consistent and above all very vague in their terminology. The Directive supplementing the Statute of the European Company as well as the Directive on a national framework for information and consultation have been watered down during the legislative process: the result is a real minimum consent. However, in assessing the importance of these measures for the future of industrial relations in the EU these deficiencies should not be overstated. The decisive element is the fact that these instruments, taken as a whole, force all actors involved – trade unions and workers' representatives, employers' associations, employers and employees – to discuss and reflect on the potential of employees' information and consultation and in the case of the Directive supplementing the Statute on the European Company even on the potential of workers' participation in company boards.

There is another aspect worth to be mentioned. The EU has proved to be a learning system. In the beginning there were illusions of harmonization ([225]), of establishing the same system for all the Member States. Such a strategy would have underestimated the strength of national culture and tradition. Therefore, it is important to stress that the EU's approach no longer is focussing on introducing specific institutional patterns but simply stimulates and initiates procedures for the promotion of the idea of employees' involvement in management's decision-making. This is to be considered as an important step towards the establishment of industrial democracy as a basic feature of the already mentioned European social model. This strategy is based on the assumption that workers' involvement in management's decision-making – as indicated above – is favourable not only for the employees but also for the companies' economic performance.

Even if workers' participation mainly has become a trade mark of the EU, it should not be ignored that some Transnational Corporations based in Europe even went further and concluded agreements with Global Union Federations to establish World Works Councils covering all subsidiaries of the globe.
However, so far the means of these bodies of workers' representation to promote employees' interests world-wide in trans-nationally operating corporations still remain to be rather modest. Nevertheless, the importance of such strategies barely can be overestimated. Not only the number of trans-nationally operating has increased tremendously. According to the campaign organisation "Global Justice Now" in 2016 69 of the 100 largest economies in the world were trans-nationally operating corporations and not States. Walmart has higher revenues than the government of Spain, Apple has higher revenues than the government of Belgium and the German MNE Daimler has higher revenues than the government of Denmark, to just give you some examples. It is evident that the exercise of such power cannot be left to unilateral decisions by management. Workers' participation in these contexts, reaching the headquarters where ever they are located and covering all subsidiaries all over the world, ideally should be established. This, however, is still a dream due to the lack of transnational rules and also due to the lack of strong international actors on the workers' side.

V. The Preconditions of Workers' Participation

Instead of further dreaming on more workers' participation within transnational corporations it might be helpful to have a look on the constitutive elements for efficient functioning of workers participation in management's decision-making. So far they have been:

– an identifiable workplace where employees are working together in the premises of the employer;
– a hierarchical structure between management and employees with more or less homogeneous interests;
– a relatively clear method and easily recognizing criteria on how to identify who is an employee;
– an identifiable employer, namely a company to which the employees belong.

These preconditions have become more and more problematic. And this leads to the question whether and how workers' participation can survive in the future ([226]).

The fragmentation, segmentation and dislocation of the workforce are an increasing trend. Not only the diversity of interests of the different groups of employees makes it difficult to articulate a collective voice in participating but perhaps even more the fact that isolation and individualisation prevents collective consciousness. The need to be present in the premises of the employer is fading away. Digitalization to a bigger and bigger extent allows that work can be performed from everywhere.

Vertical structures more and more are replaced by so called flat hierarchies. Instead of subordination autonomy is becoming the new catchword. Thereby the still existing difference of interests between management and employees, of course, is not disappearing. But it is less visible.

Already for quite a long time it has become evident that the demarcation line between employment and self-employment is very difficult to draw. To an increasing extent there are persons labelled as being self-employed but in reality being employees. They of course are to be included into the scope of application of labour law, even if it might be difficult to exactly identify their status. But it cannot be ignored that there are to an increasing extent those who undoubtedly are self-employed but economically in a similar or even worse position as employees. This in particular refers to the so-called solo-self-employed who perform the work by themselves in person and who have no employees. The ILO just has created a label for them: "dependent self-employed".

Not only the erosion of the workforce, the disappearance of clear-cut hierarchies and the increase of dependent self-employed are features of the new world of work but also the erosion of the company structures which makes it difficult to define who is the employer. Since quite a while companies have achieved a 'new mobility' as regards company patterns and cooperative structures. It makes sense to talk of a 'volatilility' of legal structures, as virtual corporate networks emerge, areas are outsourced, companies are run without formal group structures and transnational cooperation is becoming more and more a common feature. Dis-locating strategies are on the agenda. The enterprise often is turned into a merely virtual entity. It often has become difficult to identify the employer. The "fissured workplace" has become a sort of catchword of this extremely complex development. Digitalisation and globalisation are further and mutually pushing this trend.

VI. The Need for Workers' Participation Bigger Than Ever

The transformation of working patterns is so speedy that the legislator evidently is not able to keep up with all these technological changes. Legislation only can provide a relatively flexible framework. Solutions balancing the needs of the companies and the workers are to be developed on a decentralized level, at the workplace and within the companies.

It has to be kept in mind that the consequences of the technological revolution are still quite unclear. For example the prognoses on job losses due to digitalisation are not reliable at all. Some experts expect the job loss to be dramatically, others predict that the volume of new jobs due to digitalisation will be bigger than the loss. All this is speculation. On the other hand it is uncontested that a main effect of digitalisation will be that the content of work will be very different compared to today and that other skills will be needed than nowadays. Therefore one implication of the new scenario is certain: de-skilling and re-skilling will be of utmost importance. The uncertainty of the quantity of job loss and the certainty of widespread de-skilling and re-skilling imply fears among the workforce which easily might lead to resistance against these new patterns. Unilateral decision-making by management, therefore, might not be able to achieve acceptability in introducing and implementing digital work.

The more workers' involvement already in early stages and throughout the implementation process, the higher will be the legitimacy of decision-making. This is true for all digital types of work ranging from tele-work or smart work to industry 4.0 where robots interact with each other and with human beings up to the platform economy where work is performed on demand via app or online by so called crowd workers. Therefore, another catchword is now on the agenda: "cooperative turn".

Employee involvement in management's decision making in the era of digitalization is particularly important:

- in areas of life-long-training where decisions are to be made on measures to maintain and further promote employment;
- in the area of working time in order to shape it in a way which corresponds on the one hand to the employees' autonomous decisions on working time flexibility as well as to the company's needs;
- in the area of risk management in order to prevent the psycho-social diseases which in view of the new technological environment are growing faster and faster;
- or in the area of protection of privacy which in the era of digitalization is endangered as never before.

These few examples are by far not comprehensive. But they indicate that employees' involvement in management's decision-making is more urgent than ever. The question, however, is whether and how workers participation meeting all these challenges can be organised in view of all the indicated changes. The old models might not be able to serve the purpose since – as indicated – the constitutive elements on which they are built no longer exist.

VII. Does Workers' Participation Have a Future?

The more urgent the need for workers' participation, the more difficult it might by to maintain or establish such systems in the new world of work. There are quite a few obstacles which have to be overcome in order to maintain or establish functioning workers' representation in modern company structures, including the platform economy.

The first challenge will be to overcome the individualization and isolation of the workers. This applies in particular to tele-workers and to all types of workers in the platform-economy. It is necessary to create a collective consciousness.

There are already many attempts, mainly organized by trade unions, to contact the respective workers by digital tools and bring them together in workshops where useful information is provided. These initiatives particularly try to enable the digital workers – as for example crowd-workers – to communicate with each other, thereby overcoming the isolation. The example of an initiative conducted by the powerful metal-workers-union in Germany shows that the results of such initiatives are quite promising, even if they are still in an experimental stage.

The second and perhaps biggest challenge is how to cope with those who are evidently no employees in the traditional sense. Already for quite a long time it has become evident that the demarcation line between employment and self-employment is very difficult to draw ([227]). To an increasing extent there are persons labelled as being self-employed but in reality being employees. The problem on how to draw a demarcation line between employment and self-employed will further increase in the era of digitalisation. The degree of autonomy in performing work makes it more and more difficult to categorize the persons involved in such work, even if a closer look reveals that the autonomy is ambiguous because new mechanisms of more efficient control are in place. Many of those who

participate in crowd-sourcing certainly are not employees but rather self-employed.

The question is what to do with those who undoubtedly are self-employed and work alone without employees but are economically in a similar position as employees. They are not reached by labour law protection. They are not included in minimum wage schemes, in health and safety arrangements or in guarantees of decent working time, to just give some examples. Theoretically there are different possibilities to provide for them the necessary protection: the broadening of the notion of employee, the creation of a specific intermediate category or the extension of the scope of labour law to economically dependent self employed (solo self-employed).

The broadening of the notion of employee is the pattern which can presently be seen in the many lawsuits all over the world determining the question whether Uber drivers are employees or self-employed. In many countries the notion of employee has been extended significantly. However, this strategy has limits. If the notion is extended too far, it is becoming meaningless. And it never will be possible to include all economically dependent employees.

The introduction of an intermediary category between employment and self-employment might be a solution ([228]). However, as the examples in quite a few countries show, it only has provoked uncertainties and led to many controversies. It increases the complexity, thereby rather leading to more problems than less.

A more radical possibility would be the inclusion of self-employed up to a certain wage level under the protective roof of labour law and social security law. As far as the inclusion into the social security system is concerned, some countries – as for example Austria – have followed this path already and it seems to work quite well. Whether, however, such a strategy might work also for labour law, may be doubted. It cannot be denied that many protective patterns are linked to the relationship between employer and employee in the employment relationship The rules on protection against unfair dismissal might be a good example to illustrate what I mean. Therefore, a mere extension of labour law to self employed might not be the right strategy.

Therefore, a change of paradigm might be more helpful. Instead of putting workers in different categories we should discuss the floor of rights all working people need, no matter what their status is. This is in line with the universal labour guarantee as suggested by the ILO Commission on the Future of Work (and unfortunately no longer contained in the ILO

centenary Declaration of June 2019). It focuses on protection of workers regardless of their contractual arrangement and of their employment status. The focus should be on the shape of the protective umbrella, not on the boxes where workers are put in.

The third challenge will be to define who is the counterpart of worker representatives on the management side. This is getting more and more difficult the more company structures are scattered. And it is particularly difficult in the context of the platform-economy. Who – to just take this example – in case of crowd work is treated as employer, the platform operator or in case of crowd-work the crowd-sourcer or both of them? The categorization cannot be left to the platforms themselves. Objective criteria and a functional approach – as for example suggested by Jeremy Prassl from the University of Oxford - are necessary to identify the employer. The problem is particularly complex if in a crowd-work structure where not the platform operator but the crowd-sourcer as client of the platform is getting the crowd-workers' achievements. In this tripartite structure the employer's role might be split between platform and crowd-sourcer or fulfilled by one of the two actors ([229]).

The problem of tripartite structures is not new. It is well known in the context of temporary agency work. However, it has become much more dramatic in view of the platform economy. Therefore, it is not surprising that efforts are taken to develop appropriate solutions to identify who is in such a constellation the employer and in what way. There is a lively debate on this issue, however, no satisfying solutions are found yet.

The fourth challenge is the fact that the workforce, again particularly in the context of crowd-working is trans-national. This leads to the question whether schemes of workers' representation can be established covering all workers, no matter to which country they belong. All those workers might be included to vote for the workers' representatives. And the workers' representatives might possibly speak for all of them. This would need world-wide trans-national regulation which – as already indicated above – is not easy to be developed.

VIII. Conclusion

Workers' Participation is a necessary precondition for a democratic workplace in which the worker is considered to be a citizen and not a mere object of management's decisions. Mainly in Europe systems of workers' participation are widespread. They differ from country to country. The EU

has tried to promote this cooperative pattern to a great extent. However, much remains to be done to end up in a world-wide coverage.

The real question, however, is whether in the new world of work, in particular in view of digitalization, it will be possible at all to maintain or to establish patterns of workers' participation. The sketchy article tried to show that workers' participation is needed more than ever before and it also tried to indicate the main obstacles which are to be overcome to reach this goal. The efforts to pave the way in this direction are there, but they are still rather modest. Much remains to be done.

Finally there should be no doubt that the proper functioning of any form of workers' participation depends not only on internal factors within the company but also to a great extent on external factors. It needs a specific climate, an overall pattern of labour relations where the actors on both sides, business as well as trade unions, respectfully recognize each other and have at least a basic willingness to cooperate instead of fighting each other. In this sense it may be reminded what Marco Biagi once wrote: "Participation is a viable option if there is a sufficiently widespread consensus of all stakeholders involved, including social partners, enterprises and employees. ... Only if this condition is met, can employee involvement...be intended as the option to be pursued, to reconcile efficiency values, on the one hand, and social justice and quality of work values, on the other" ([230]).

CHAPTER VI
STUDIES ON GERMAN LABOUR LAW AND INDUSTRIAL RELATIONS

The Sources of German Labour Law*

SUMMARY: I. The Sources. – 1. Constitution. – 2. Statutory Law. – 3. Court Decisions. – 4. Collective Agreements. – 5. Works Agreements. – 6. The Individual Labour Contract. – 7. Custom. – II. Problems and Trends. – 1. Failed Attempts of Codification. – 2. Experimental and Dispositive Statutory Law. – 3. The Erosion of Collective Bargaining. – 3.1. Main Reasons for the Erosion. – 3.2. Attempts to Stop the Erosion. – 4. Relationship between Different Collective Agreements. – 5. Relationship between Collective Agreements and Works Agreements. – 6. The Principle of More Favourable Conditions. – III. Conclusion. – IV. Bibliography.

I. The Sources

In Germany as well as in all other Member States of the EU European primary and secondary law is an important source of labour law. The same is true for the European Convention on Human Rights. Evidently the judgments of the Court of Justice of the EU as well as the judgments of the European Court of Human Rights are of utmost importance. And, of course, German labour law also is influenced by the European Social Charter as well as by ILO conventions and other international sources. All these, however, will be neglected here. The focus will be exclusively on German sources ([231]).

* In T. GYULAVÁRI, E. MENEGATTI (eds.), *The Sources of Labour Law*, Kluwer, 2020, p. 229.

1. Constitution

At the top of the hierarchy of sources of labour law is the Constitution. It plays a dominant role in labour law. Problems not regulated by the legislator have to be solved by recourse to the Constitution ([232]). The first and most important chapter of this Constitution contains a catalogue of fundamental rights. These fundamental rights are the strongest pillar on which Germany is built. The Constitution can be amended by a two thirds majority in the legislative bodies. But amendments by which the principles guaranteed by the articles on fundamental rights would be affected, are considered to be null and void (Art. 79 par. 3). This safeguard against the abolishment of fundamental rights (and other pillars of the Constitution) is a reaction to the experience made in the Nazi period where it became clear that majority vote does not prevent the perversion of the rule of law.
The Constitution explicitly only refers to the vertical application in the relationship between citizens and the State. This reflects the traditional understanding of fundamental rights as a defence against State power, thereby guaranteeing the citizens an area of freedom in which the State cannot interfere. In the meantime, this traditional understanding only is considered a starting point. Fundamental rights nowadays in Germany are considered to be the expression of values on which the legal order as a whole is based. Therefore, they no longer can be ignored in the relationship between private actors. Inequality of power is not only a characteristic for the relationship between State and citizens, but is a growing phenomenon also between private actors, as for example employers and employees. This insight has led in Germany to the concept of indirect horizontal application of fundamental rights. This is a soft way of introducing the fundamental rights into relationships between private actors. The fundamental rights are not applied strictly the same way as in the relationship between State and citizens. But the governing private relationships between private actors are to be interpreted in the light of values expressed by the fundamental rights. This, of course, gives the judiciary on all levels a broad leeway of interpretation in adapting the fundamental rights to the specific situation.

2. Statutory Law

Legislation sets minimum standards for all employees, whether or not they are union members. Since the competence to legislate in the field of labour

law lies with the federal legislature, it is almost exclusively federal law that counts. Thus, despite a well developed German federalism (Germany is a federation of 16 States), a homogeneous pattern of labour law evolved throughout Germany. To the extent that State laws and constitutions conflict with federal law the latter invariably has priority. There is one area where differences between the States play an important role, i.e. staff representation in the public sector. Here the Federal Act on Staff Representation only sets a framework which is interpreted differently by the acts on staff representation of the various States.

Germany does not have a Labour Code. German statutory labour law consists of a multitude of statutes on specific topics, many of which were enacted at different times. It is difficult even for experts to grasp the whole picture.

To an increasing extent, the legislature delegates the power to regulate specific matters to administrative agencies or other bodies. The Constitution requires that such a delegation be precisely defined so as to avoid the danger of vesting the respective agency or body with undue legislative powers.

3. Court Decisions

Since, as already indicated, the Constitution plays a crucial role in German labour law, it goes without saying that the judgments of the Federal Constitutional Court interpreting the Constitution are of utmost importance.

Court decisions by the labour courts ([233]) play a very important role in the field of labour law. Courts not only interpret the general clauses and general terms of laws, but also fill in the gaps left open by the legislature. According to the Labour Courts Act the Federal Labour Court has exclusive power to develop the law further. In fact, in the field of labour law, the judge made law generated by the Federal Labour Court has become almost as important as activities of the legislature. The labour courts not only interpret the law but also develop law in the light of the fundamental rights of the Constitution. This for example in absence of statutory law has led to a whole set of detailed rules on strike.

Not surprisingly, there has been since quite a time a fierce debate over the proper role of the labour courts, compared to that of the legislature. The central question of this debate is whether the actual role of the courts, particularly that of the Federal Labour Court, comports with the principle

of separation of legislative and judicial powers required by the Constitution. But given legislative inertia or the frequent inability of the legislature to generate the necessary votes on specific issues, the courts have little choice but to act on behalf of the legislature. Thus, the allocation-of power discussion remains largely academic.

4. Collective Agreements

Collective agreements in Germany ([234]) mainly are concluded between a trade union and an employer association for a whole branch of activity or at least a region of it. Collective agreements with a single company are a rarity.

The normative part of collective agreements addressing such core matters as hiring, wages and termination, stands in contrast to the obligatory part which deals with other rights and duties between the contracting parties in that it directly affects the individual employment relationship. In other words, if rights laid down in normative clauses of collective agreements are violated, the individual employee, or the employer to whom these clauses apply, has recourse to the court. In principle, however, such clauses cover only union members being employed by an employer who himself is a member of the employers' association which signed the respective collective agreement.

The relation between legislation and the normative part of collective bargaining agreements is rather complicated. If there is a legislative act which stipulates a minimum standard, the collective agreement cannot fall below, but can only rise above this standard. If the law does not set a minimum standard but only contains non-binding regulations, the collective agreement may disregard these regulations. The problem is that it is often not clear whether the legislature intended to set binding or non-binding standards, and it is left to the courts to decide these cases by interpreting the legislative intent.

The relation between collective agreements and court decisions is even more complicated. The problem arises if the courts are setting standards not simply implicated by existing legislation. This judge-made law sets minimum standards and, in principle, excludes clauses in collective agreements which fall below this standard. But this jurisprudence generally entails more freedom for the contracting parties than does legislation. It is virtually impossible to delineate a general borderline because these are matters decided on a case-by-case basis. If, however, a

court decision is held to have created merely an optional rule, the contracting parties are certainly at liberty to negotiate different terms in their collective agreements.

5. Works Agreements

The works council ([235]) and the employer in the private sector (or staff representation and employer in the public sector) may sign works agreements containing normative clauses, having basically the same effect on the individual employment relationship as normative clauses of collective agreements. There is an important difference though: works agreements always cover the entire workforce, whether or not the workers are union members. As already indicated collective agreements cover only those who are members of the union which signed the respective collective agreement. This basic disparity creates enormous problems of harmonization between the two sources of law. The complicated relationship between collective agreements and works agreements will be discussed in detail below.

6. The Individual Labour Contract

The individual labour contract is still an important source of law even for those covered by protective laws, collective agreements and/or works agreements. The area dominated by the individual contract in these cases is above the minimum level already regulated by other sources. Thus, the function of the individual labour contract serves mainly to improve the individual working conditions already guaranteed by other sources.

7. Custom

Custom may only be a source of law if it favours employees. Under certain conditions, privileges voluntarily granted by the employer cannot simply be withdrawn. The mere fact that they were granted for a certain period may nevertheless entitle employees to claim their continuation. Such a claim is then treated as if it were based on individual contract.

II. Problems and Trends

1. Failed Attempts of Codification

Since the beginning of the 20th century many attempts were made to combine at least the principal rules of individual labour law in one single code. All these attempts failed. When in 1990 West Germany (FRG) and East Germany (GDR) were unified this idea became a new push. The GDR had a comprehensive Labour Code. According to the GDR delegation negotiating the Unification Treaty (UT) the united Germany had to be achieved by way of a mutual reform of both systems of social protection in the two German states, integrating their positive elements. For labour law this was supposed to mean that historically grown social standards in both German states are to be maintained, further developed and lifted to a higher level of social protection. Such a strategy was considered to serve as a model for the economic, social, and political integration of a united Europe. Labour law in a united Germany was thus conceived to become a mixture of the better parts of both systems ([236]).

It soon became evident, however, that such a strategy would have met strong opposition in the FRG. The FRG was interested in transferring its system, including labour law, to the territory of the former GDR. In the Unification Treaty the GDR's attempt to rescue GDR labour law turned out to be unsuccessful. The FRG's strategy, stressing the overarching need of having a homogeneous pattern throughout the united Germany, was at the very end accepted. According to Article 8 of the Unification Treaty, all law of the original FRG, including, of course, labour law, was extended to the territory of the former GDR. To avoid depriving the GDR delegation of all hope, however, decisions regarding the character of individual labour law were not finalized in the Treaty. According to Article 30 par. 1 of the Treaty, the Parliament of the united Germany is supposed to codify as soon as possible, "the law referring to the individual employment relationship as well as the protective standards referring to working time, work on Sundays and holidays and the specific protection of women".

Stimulated by Article 30 of the UT In 1992 a group of labour law professors from east and west presented a draft for a code on employment contract law. It soon turned out that this draft had no chance. But the idea was not given up. Two states presented different drafts to be considered by the Federal legislator. And in 2005 the private Bertelsmann Foundation has entrusted two distinguished German scholars with drafting a Code on Individual Labour Law. However, these attempts had the same destiny as

all their predecessors. They had no chance to be realized ([237]). After all these experiences it may be predicted that Germany will continue to live with a multitude of Acts on specific problems of labour law. This after all has advantages. These acts easier can be amended and it is easier to, thereby, adapt German labour law to EU law. If labour law is spread in many single Acts there is no need to maintain a consistent system of a comprehensive Code.

2. Experimental and Dispositive Statutory Law

Modern societies are becoming more and more complex. Since many factors are interrelated between economic factors and the labour market, it is becoming more and more difficult to foresee the practical impact of legislation. Therefore, it has become risky to legislate at all because the effects might be counterproductive. This has led the legislator to limit the lifetime of legislation. The idea is to abolish the law after a certain time if it does not work or to extend it if it works.

A very illustrative example of such an experimental strategy is the legislation on fixed term employment contracts. Until the mid-eighties fixed term employment contracts only were allowed if there was a specific justification for such a limitation. Confronted with massive unemployment the legislator in 1985 tried to fight unemployment by facilitating fixed term contracts, allowing them for to conclude fixed term contracts without any precondition for the first 18 months of an employment relationship ([238]). Newly established enterprises and employer employing twenty or less employee were even entitled to conclude fixed-term contracts for up to 24 months. The idea was to motivate employers to hire more employees since they can be sure to get rid of the employees after the fixed period without facing the obstacles in case of dismissal. However, since the legislator was not sure at all about the effects of the law, it was limited for five years. The law was supposed to be examined and evaluated by experts. The evaluation should decide whether it might be extended. It was extended twice for each time five years. Only then it was (slightly modified) transferred into a law for an unlimited period ([239]). This example shows very well the legislator's insecurity in reference to the effects of legislation and it also shows the increased need for legitimacy due to the increased complexity of society.

This complexity has also pushed another strategy. The level fixed by legislation might by appropriate in general. But due to the differences between branches of activity or due to the impact of economic cycles it

might be recommendable to deviate not only in favour of the employees but even below the level fixed in the law. As already indicated the legislator has the power to entitle the parties to collective agreements accordingly. It is also possible to empower in such a way the parties to works agreements. The more complex society is and the less predictable the economic development, the more the legislator makes use of this possibility.

Again an example may illustrate what is meant. The Act on Working Time regulates the maximum daily working time, the minimum standards for breaks, for shift work and for rest periods between daily working time and the next day, to just list up the main topics. Since the legislator, however, is not sure whether this is compatible with the need for working time flexibility, it allows the parties to collective agreements or the parties to works agreements within a certain frame to deviate from the fixed rules of the law. Thereby they are entitled to extend the maximum daily working time or to lower the minimum standards for breaks, shift work etc.

As the example shows, it is a contribution to flexibility by the legislator. It, however, might be problematic for the trade union or the works council since it puts pressure on them to take use of those possibilities which might not necessarily be in the interest of their constituency.

3. The Erosion of Collective Bargaining

3.1. Main Reasons for the Erosion

As already indicated, the normal pattern of collective bargaining in Germany is sectoral bargaining for a whole branch of activity. Formerly the coverage of collective agreements in Germany was very high. This has changed dramatically. According to latest estimates the coverage is around sixty percent. This is an average figure. The differences between branches are as significant as the differences in reference to the size of companies.

There are several reasons for this development. One is, of course, the decline of membership in the trade unions. The average rate of unionization now is slightly below 20 percent but more or less stable since 2011. Since only trade union members employed by an employer are bound by norms of collective agreements the coverage by collective agreements even would be lower if simply the law would be applied. In practice employers and non-unionized employees often refer in the individual employment contracts to the collective agreements for the

sector, thereby extending the coverage. However, there is first no guarantee that this de facto coverage happens and secondly it is much easier to change the conditions of an individual employment contract than of a collective agreement. But this possibility of extension of coverage by individual employment agreement shows that for coverage of collective agreements in actual practice the decisive element is the rate of membership in the employers' associations.

For a long time the degree of membership in the employers' associations was very high which led to a high coverage by collective agreements. This has changed dramatically in two ways. First the organisation rate has significantly decreased ([240]). Secondly the employers associations developed a new pattern of organisation. Many employers did not want to be bound by norms of collective agreements but did not want to give up the other advantages linked to membership in employers associations (all kind of helpful services). Therefore, in order to not lose these members the employers' associations created a new type of membership: membership disconnected from coverage by collective agreements. This type became very attractive in the employers' circles. The result is that now within the same employers association there are members covered by collective agreements and members who have nothing to do with collective agreements. The members have the choice between the two types. However, if a collective agreement is already in force it is not possible during the lifetime of the agreement to change from normal membership into the new type of membership. It has to be stressed that the members of the new type in spite of being disconnected from collective agreements maintain a significant influence on the internal strategies of the employers' association (for example by electing the executive board etc.)

Since collective bargaining is the core activity of employers' associations, it was very controversial whether this new type of membership is lawful at all. The segmentation of functions of an employers' association implied by this new type was challenged as a violation of the freedom of association as guaranteed by the Constitution. The supporters of this new type of membership to the contrary were referring to the employers' associations' autonomy to regulate their internal affairs. This controversy came – at least for the time being – to an end by a judgment of 2006 the Federal Labour Court which accepted this new type of membership as being lawful ([241]).

3.2. Attempts to Stop the Erosion

The basic problem is – as already explained - that in Germany only members of the contracting trade union employed by a member of the contracting employers' association are covered by the collective agreements.
The law provides a possibility to extend the coverage of collective agreements to non organised employers and non unionized employees by way of a declaration of general binding ([242]). At first sight, this declaration of general application of collective agreements may appear to be an adequate instrument to stop the decreasing importance of the industry-wide collective agreement. However, the legislator imposed high hurdles for the use of this instrument. General application of collective agreements could be requested only if a minimum of 50% of employees falling within the scope of the collective agreement work for employers with a binding commitment to collective agreements. In addition a general application of collective agreements only can be enacted by the responsible Federal Ministry only in the event of prior agreement of a committee of three representatives each from the employers and employees umbrella organisations and if it is in the general public interest.
By an amendment to the Collective Agreements Act the legislator in 2014 has facilitated the declaration of general binding by removing the requirement of 50% and by defining the general public interest in a way which makes it easier to pass such a declaration. Now the general public interest is to be assumed if the collective agreement has gained main relevance in the sector for which it is made or if the declaration of general binding is necessary to prevent wrong economic consequences. Thereby, the legislator has significantly reduced the discretion of power of the Federal Ministry.
The trade unions, however, consider this amendment to still be too little. The prior agreement of the committee of representatives of the umbrella organisations of both sides is seen as too much of an obstacle, since the interests of the representatives of the umbrella associations not necessarily are the same as the interests of the parties in the branch of activity where the collective agreement has been concluded. The main obstacle in their view, however, is the requirement that the collective agreement has gained main relevance in the sector in order to be qualified for a declaration of general binding. The seriousness of this problem may be illustrated by the caretaking sector. There – for many reasons not easily to be changed – the rate of trade union membership is extremely low. As a consequence a

collective agreement never gains main relevance in the sector and, therefore, does not qualify for a declaration of general binding. But there is no doubt that particularly in the caretaking sector minimum conditions for all employees regulated by collective agreements are necessary. Otherwise the quality of caretaking might suffer and there might not be enough personnel to do the job. The debate on a further reform on the preconditions for a declaration on general binding is going on. A result is not yet in sight.

4. Relationship between Different Collective Agreements

The conflict between collective agreements concluded with the same trade union and covering the same topics is not resolved by legislation. But the judiciary developed for this conflict the principle of specialty ([243]). Following the logic of this principle the company collective agreement replaces the sectoral collective agreement. However, the judiciary went even further. Since collective bargaining coverage only applies to the relationship of the members of the contracting trade union with the members of the contracting employer association or the contracting individual employer, it would be possible in principle that different collective agreements concluded with different trade unions apply to different employment relationships in the company. However, the judiciary had rejected collective bargaining plurality and postulated, primarily for practical reasons, the principle of collective bargaining unity. An employer was to be bound by only one collective bargaining agreement ([244]). Subsequently, thanks to the combination of the principles of specialty and collective bargaining unity, the company agreement replaced the sector collective agreement even if it had been concluded with another trade union. A co-existence of collective agreements in one and the same business was not tolerated.

In 2010, the Federal Labour Court ([245]) performed a spectacular U-turn abolishing the principle of collective bargaining unity in favour of collective bargaining plurality. Neither side was amused about this: The employers saw themselves exposed to the potential danger of continuous collective bargaining and strikes, while the trade unions organised within the Confederation of German Trade Unions (DGB) felt threatened by the implied upgrading of the specialised unions representing individual occupational groups. This led to a united approach of the Confederation of German Employers' Associations (BDA) and the Confederation of

German Trade Unions (DGB), who produced a jointly developed draft law which was not only to lay down the return to the principle of collective bargaining unity, but also to replace the principle of specialty by the principle of majority. Hence the trade union, which had more members in the company, was to prevail. Thus the radius of action of competing trade unions is significantly limited and their possibilities to go on strike largely eliminated. In spite of irritations between the DGB trade unions the DGB continued to support the project. This approach has been fixed by a law of 2015 amending the Act on Collective Agreements. Recently the Federal Constitutional Court has approved it in principle ([246]).

5. Relationship between Collective Agreements and Works Agreements

As already indicated, Germany has a highly elaborated system of works councils representing all employees in an establishment. They enjoy strong participation rights, including co-determination for quite a few important issues. However, the works council is supposed to collaborate with the employer in good faith. Strike as a means of conflict resolution between works council and employer is excluded.

Employer and works council may conclude so called works agreements ([247]) not only in matters in which the works council has a right to co-determination, but in all matters relating to labour-management relations within the establishment. Of course, without co-determination rights for the works council there would be little leverage to induce management to sign such an agreement.

Just as a collective agreement, a works agreement may establish rights and duties between the concluding parties (employer and works council). Furthermore, it may contain normative provisions. Such normative clauses have a direct and mandatory effect on the employment relationships, no matter whether the employees are unionized or not. Works agreements may be concluded for a definite or for an indefinite period. Unless otherwise agreed upon, works agreements may be terminated on three months' notice, but the parties remain free to agree on different terms.

Works agreements dealing with remuneration or other working conditions are only permitted if the same matter is not already regulated in a collective agreement. A matter is considered "already regulated" if it is usually regulated in collective agreements in the respective region and branch of activity. In other words, an existing collective agreement that covers the

region and the industry branch, excludes a works agreement even if the former does not apply to the specific establishment and to the employment relationships within this establishment. As a result, even in establishments where neither the employer is a member of the employers' association nor the employees are union members, remuneration or other working conditions cannot be regulated by works agreements.

This rather rigid rule only applies to works agreements on matters in which the works council has no right to co-determination. In these cases the works council has no power to induce the management to sign such an agreement. The reason for excluding such works agreements in cases of already existing collective agreements is to prevent the works council from competing with trade unions. Such a competition is seen as a threat to the collective bargaining system. Should the system of collective agreements break down, then there would be no adequate substitute at plant level where works agreements cannot be enforced by the works council. Thus, in order to safeguard the strength of the collective bargaining system, the status of collective agreements as exclusive means to regulate working conditions was long left untouched.

This general rule notwithstanding, parties to a collective agreement may authorize that works agreements supplement the collective agreement. This may be done by including a so-called opening-clause into the collective agreement. In the past, few collective agreements contained opening clauses because the unions feared that this device might destroy the homogeneous standards within the branch of activity and undermine the basis for solidarity within the trade union.

The trade unions for a long time refused to include such opening clauses in collective agreements. They did not want the works council to be a competitor in collective bargaining. However, during the period of the "German economic miracle" in the formative era of the FRG this rule was gravely violated. The collective agreements for a branch of activity had to make sure that marginal companies were not overburdened. As a result the wage level fixed in collective agreements was far below the possibilities of prospering companies. Therefore, in those companies after each bargaining round the works council and the employer (who was interested to maintain a skilled workforce) started negotiations for works agreements fixing the wage level significantly above the level fixed in the collective agreement for the branch of activity. These works agreements evidently were null and void but nevertheless executed. Neither the employer nor the works council nor the employees were interested to challenge them in the labour court. And the trade unions did not dare to do it because they were

afraid to risk the loss of members in the respective companies. In short: an evidently unlawful situation was tolerated.
Starting in the eighties of last century the situation became more dramatic when due to increased competition companies to an increasing extent were forced to reduce labour costs. The pressure to reduce costs was combined with the employees fear to lose their jobs and end up in unemployment. Confronted with the employers demand to reduce costs, works councils n order to save jobs increasingly concluded works agreements which ignored the minimum standards for remuneration fixed in collective agreements. And combined it as a trade off with increased job security for a certain period. Even if also such concession agreements were evidently against the law, they again remained unchallenged for the same reasons as explained above.
However, these developments have triggered a heated debate over the future of sectoral collective bargaining. Indeed, since the 1990s, the so called crisis of sectoral bargaining became the key issue in labour law discourse on how to shape industrial relations. The question was whether the relationship between works agreements and sectoral collective agreements should not be reversed in a way that works agreements always should be allowed and have priority over the collective agreements. Since trade unions as well as employers' associations understood very well that this would have been the end of sectoral bargaining, they both fought this idea as much as possible and, thereby, prevented legislative intervention.
But the debate led to a far-reaching modification of collective bargaining. Trade unions and employers' associations have significantly modified their strategy by using opening clauses and by confining the collective agreements essentially to mere framework regulations. Thus, the works council has become increasingly integrated into the structure of collective bargaining. The collective agreements for a branch of activity now have become very flexible instruments, not only containing opening clauses but also options to be chosen by works agreements (so called cafeteria systems). In short, by radically changing the structure of the collective agreements, trade unions and employers' associations succeeded in elaborating a fair balance between centralized and decentralized bargaining ([248]). His development has brought trade unions and works councils even closer together than before.

6. The Principle of More Favourable Conditions

According to law the relationship between collective agreements and individual employment contracts is governed by the principle of more favourable conditions. This means that employment contracts cannot undercut the minimum conditions in collective agreements but grant more favourable conditions for the employees. This is uncontested. The question is what is more favourable? Is it necessary to compare each item in an isolated way or is it possible to compare the whole set of regulations in the collective agreement with the whole set of clauses in the employment contract? Since a comparison of the whole set would be very difficult and, therefore, lead to arbitrary manipulation, it is agreed that in principle each item has to be compared in an isolated way. However, the Federal Labour Court has opened the door for a solution in between: Items belonging closely to each other (for example duration of leave and supplementary payment for leave) may be put together in a group ([249]). This is problematic since it is unclear what belongs closely to each other (this for example is denied for wage and working time) and how to measure which group is more favourable for the employee (more leave and less supplementary leave payment or the other way around). A certain degree of arbitrariness cannot be excluded.
Recently it was suggested to not measure favourability in an objective way but leave it to the subjective estimation of the employee (for example to earn less but to increase job security). So far, however, this suggestion has been rejected.

III. Conclusion

On the whole the system of sources of labour law has proved to remain rather stable. The unresolved problem is the erosion of sectoral bargaining which, nevertheless, plays the dominant role in German labour relations. The new pattern of flexible collective agreements with opening clauses are a success story leading to a fair balance between centralized and decentralized bargaining. Whether the new pattern for the resolution of conflict between competing collective agreements in an establishment will survive, remains to be seen. There the European Court of Human Rights still has to give its view. Another big problem is the fact that in spite of the law in many small companies no works councils are elected and, therefore, no works agreements can be concluded at all.

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Cooperative Industrial Relations: the German Example and its Impact[*]

SUMMARY: 1. Introduction. – 2. The German System of Workers' Participation as an Example. – 2.1. The Works Council System. – 2.2. Workers' Representation in the Supervisory Boards. – 2.3. The Link to the Works Council System. – 2.4. Attempt of Evaluation. – 3. Transferability of the German System? – 4. Negative Impact by the EU Law on the German System? – 4.1. Possible Negative Impact by the SE Directive. – 4.2. CJEU on Company Law. – 4.3. Safeguarding Employee Representation in Case of Cross-Border Mobility. – 5. Conclusion.

1. Introduction

Patterns of workers' participation as an expression of cooperative industrial relations exist in many countries ([250]). However, there are big differences from country to country. These differences refer to the degree of participation, ranging from information and consultation up to co-determination. They also refer to the level of participation, ranging from the shop floor level up to the headquarter of the company or group of companies. The composition of bodies of workers' participation is different from country to country. One of the most important differences between the systems of workers participation refers to the relationship between bodies of workers' representation and trade unions.

Only a smaller number of countries has established employees' representation in company boards. And again this board level representation differs significantly, in particular as the number of seats for employee representatives is concerned. And it makes of course a difference whether there is a one board system or a two board system of company law in a respective country.

Due to the Directive on a framework for information and consultation in the European Union (EU) ([251]) now at least a minimum level of workers'

[*] In A. PERULLI, T. TREU (eds.), *The Role of the State and Industrial Relations*, Kluwer, 2019, p. 127.

participation is established in each Member State. Article 27 of the Charter of the Fundamental Rights of the EU as well as principle number 8 of the European Pillar of Social Rights stress the importance of employees' information and consultation in management's decision-making.

The relationship between institutionalized systems of workers' participation and collective bargaining again differs from country to country. It has to be stressed that differences between systems of workers' participation are by no means a reliable indicator for the degree of workers' influence on management's decision-making. The extent of such influence depends on the overall assessment of industrial relations, including collective bargaining and the legal framework as well as the factual possibilities for strike and other mechanisms of conflict resolution. The culture and tradition within a country also plays a significant role in this context. Therefore, even in countries which totally reject the philosophy of workers' participation in management's decision-making and rely exclusively on conflict and collective bargaining, the workers' pressure on management can, of course, also be high.

Instead of discussing the broad spectrum of systems of workers' participation, I briefly present the main traits of the German system and try to evaluate its effect within the German context and then ask in what way it may be relevant for other countries or for the EU. And finally I ask whether existing EU law might endanger the German system or help to preserve it.

2. The German System of Workers' Participation as an Example

2.1. The Works Council System

Workers' participation via works councils in Germany has a long history ([252]). The origins date back to the nineteenth century. The first law was passed in 1920 and served as a model for the legislative pattern after the Second World War.

According to the law, in every establishment with at least five employees a works council is to be elected. However, in practice in many small companies this rule is not followed. Only larger companies fully comply with the law. It is up to the employees of the establishment to elect a works council. There is no sanction if they fail to do so. The size of the works council depends on the number of employees in the establishment. The term of office is four years. There are no limits for re-election.

If a company has several establishments, a general works council on company level is to be elected. In a group of companies, a group works council may be formed.

As a matter of law, works councils are not affiliated with trade unions. They represent all employees of an establishment. But despite the institutional separation between unions and works councils, close links do exist. The large majority of works council members are trade union members.

Works council members are entitled to be released from their duty to work without loss of pay 'to the extent that is necessary for properly carrying out their functions, taking into account the size and nature of the establishment'. In other words, the time to be released from work is not fixed, but depends on the circumstances of the particular case. Large enterprises are required to release a certain number of works council members entirely from their ordinary job duties for the full term of their office. The exact number varies with the number of employees, but the rule does not apply at all to companies with less than 200 employees. The possibility of a full release from work duties is one of the most important features of the works constitution in Germany. It leads to more professionalism and greater efficiency on the part of works council members.

The law grants the works council an array of specific rights of participation, ranging from access to information and the right of consultation to the most important right of all, the right to co-determination. In matters in which this right applies, the decision-making process is no longer the prerogative of management. Co-determination in this context means that management cannot make any decisions without the consent of the works council. In the absence of consensus, any unilateral move by management would be illegal. However, co-determination means even more, it gives both sides an equal voice in the decision-making process.

In case no agreement can be reached in a matter subject to co-determination, there is access to an arbitration committee, composed by an equal number of representatives of works council and management and chaired by a neutral president, which has the power to provide a binding decision.

The right to co-determination is the secret of the works council's strength. Since management is very much interested in reaching a settlement in matters subject to co-determination, it tries to stay in good terms with the

works council and get the works council involved already in early stages of decision making.
If management violates the legal requirements, then the works council has access to the labour courts ([253]). Thereby, there is a guarantee that the rules are enforced.

2.2. Workers' Representation in the Supervisory Boards

According to the German two boards system of company law ([254]), it is exclusively the management board which represents and manages the enterprise. The supervisory board has only two basic functions, to elect and recall the members of the management board and to supervise the activities of the management board. In order to discharge its monitoring tasks, the supervisory board has extended rights of access to information. For certain important activities, the management board needs the consent of the supervisory board.
There are three different patterns for historical reasons. The first successes in implementing board representation occurred in the coal, iron and steel industries. After the Second World War, the enterprises in these areas of industry faced the danger of being totally dismantled by the Allied Forces. To avoid what would have amounted to obliteration, these industries sought the support of the unions. Because the unions had not been affiliated with the Nazi regime, they had an important voice in this context. In order to gain the support of trade unions, the leaders of the coal, iron and steel industries offered equal representation of employees on the supervisory boards of the companies in exchange. After much controversy, this model featuring strong employees' representative rights, was established and confirmed by the legislature in 1951. This historical development explains why until today the representation rules in the coal, iron and steel industries differ from those applying to other German industrial sectors.
By 1952 the political and economic circumstances had changed: With the danger of dismantlement banned, employers were in no need to enlist the support of the unions and were no longer prepared to make concessions. Not surprisingly in 1952, a pattern of employee representation on the supervisory board was introduced which remained far below the level of representation reached in the coal, iron and steel industries.
In the following years, the trade unions undertook great efforts to extend the pattern of the coal, iron and steel industries to all areas of industry. In

1976, these efforts led to a third model which represents a compromise between the previous two. All three different models still exist today.

In the coal, iron and steel industries, in companies of at least 1,000 employees, there is equal representation of shareholders and employees on the supervisory board, the chairpersonship being reserved for a 'neutral' person, elected by majority vote of both, employee representatives and shareholder representatives. The workers' bench is divided into members belonging to the workforce of the enterprise, external trade union representatives and an additional member who is neither a trade union member nor an employee of the respective enterprise nor has economic interests in the enterprise.

The Act on Employee Representation in the Coal, Iron and Steel Industries does not only provide for employee representation on the supervisory board. It is the only Act that also provides for some employee representation on the management board. The elected representative, the 'employee director in charge of personnel and social affairs of the enterprise,' is a full member of the management board, who enjoys the same legal status as all other board members. This representative cannot be elected against the majority of votes of the employee representatives on the supervisory board.

For the private sector as a whole, in companies of at least 500 employees one third of the seats in the supervisory board are represented for employee representatives of the company's workforce.

In companies of at least 2,000 employees, there are an equal number of shareholders' and workers' representatives. The workers' bench is composed by representatives of the company's workforce and by external representatives of the trade unions. One seat is reserved for the representative of the executive staff. There is no neutral chairperson. Here the chairperson belongs to the shareholders' side and has in case of a tie a casting vote.

In all three patterns, the vast majority of employee representatives on the supervisory board are members of a trade union. This is not only true for the external representatives but also for those employed in the respective enterprise. This, however, does not apply to the representatives of the executive staff.

Employees' and shareholders' representatives on the supervisory board are co-equals. The law assigns identical rights and obligations to either group.

2.3. The Link to the Works Council System

To better appreciate the role and influence of employee representation on the supervisory board, the works council system must be considered as well. In practice, the employees' representatives on the supervisory board belonging to the workforce of the enterprise in most cases are also works council members. On the whole, this has strengthened both instruments of participation. In particular, it has promoted communication through informal channels. Because management has an interest to stay on good terms with the works council, it is similarly interested in avoiding conflicts with works council members who are also members of the supervisory board. Thus, before informing the supervisory board, management tends to discuss critical questions with at least the internal employee representatives in informal meetings. Thereby, very problematic issues often are dropped therein and never reach the supervisory board. This explains why most decisions of the supervisory board are taken unanimously. Therefore, the casting vote of the chairperson in the pattern for companies of at least 2,000 employees does not play a big role in practice.

2.4. Attempt of Evaluation

Workers' participation is the backbone of German industrial relations, even if collective bargaining which mainly takes place on branch level should not be underestimated. There is a division of labour as well as a close link between branch-level collective bargaining and the works council system. Works councils and employers are entitled to conclude so-called work agreements regulating the working conditions of the company's workforce, but only in so far, as the respective subject matter is not dealt with in collective agreements. So the potential conflict between collective bargaining and work agreements is resolved in favour of collective bargaining. But the parties to the collective agreements are entitled to empower the works councils and employers to specify by work agreements the normally very vague branch collective agreements. This is done to a bigger and bigger extent by so-called opening clauses, thereby combining the branch level with the company level and collective bargaining with the works council system. This has led to an ever increasing link between trade unions and works councils ([255]).

The positive effects of the system of workers' participation are well documented by many empirical studies ([256]). To just mention a few features: It leads to a change of focus from shareholder value to stakeholder value and tends to promote sustainability instead of short-term effects at the stock markets. Due to the presence of external trade union delegates as well as representatives from the company's workforce in the supervisory boards, it combines the macro perspective of the branch of activity with the micro perspective of the company. And it has a big advantage compared to unilateral decision making by the mere fact that management, who has to justify towards workers' representatives what it wants to do and why it wants to do it, tends to prepare the decisions much more carefully than it would be the case without this obligation. This leads evidently to better decision making. The consciousness that workers' representatives are involved in management's decision-making and that workers' interests are taken into account tends to increase the employees' motivation and thereby the company's productivity. Last but not least, the permanent dialogue between management and workers' representatives leads to mutual trust, changes the attitudes of both sides and absorbs conflicts.

In the recent financial crisis which led to a great recession in many countries, the German system of workers' participation has demonstrated its efficiency and adaptability. Germany as other countries was hit by the crisis. There was a danger of massive collective redundancies all over. However, thanks to the mutual trust between the actors on both sides it was possible to reach agreements according to which redundancies could be prevented by short time arrangements. Reduction of working time was combined with financial compensation and with further training of the employees in their extra free time. Thereby, after the crisis there was no need to hire new employees but to start with the old, but now even better-skilled workforce A win-win situation for the employees and the companies as well.

It should be stressed that the positive effect of the system of cooperative industrial relations in Germany is based on the spirit of social partnership which characterizes the relationship between business and labour ([257]). This extra-legal factor mainly is to be explained by the important role trade unions played in the restructuration of the economy after the First and the Second World War. The role of trade unions and workers' representatives as an integral part of the German society is uncontested. Thus, the willingness of the actors on both sides to cooperate is an essential precondition for the functioning of the system. If management does not

abide to this pattern of social partnership, it means a loss of image for the company and is not tolerated by the German society. An employer who ignored this unwritten rule in the past, even was stigmatized by the other employers and, thereby, had to learn this lesson ([258]).

3. Transferability of the German System?

It is evident that the institutional arrangement of workers' participation as it has been developed in Germany cannot be exported elsewhere. Such a system has to fit into the overall institutional structure of industrial relations of a country. And this overall structure is very different from country to country.

How inadequate an institutional transfer would be, can best be demonstrated by the futile attempt in the early seventies of the last century to establish employees' board level representation in the European Company (SE). The commission presented a proposal of such board level representation which more or less was shaped by the German model ([259]). It quickly turned out that such an imposition of one country's system to the other countries using the SE was dysfunctional and, therefore, rejected. It lasted until 2001 to find a way to solve the problem by providing a procedure which allows the actors of the different Member States to negotiate for a concept which fits best into their overall framework ([260]). This procedural solution first was developed in a similar way in the Directive on European Works Councils ([261]) and, thereby, became the model for the SE.

Even if the institutional arrangement is not transferable, it of course is possible to export the idea of workers' participation. However, it has to be stressed that such a transfer only makes sense if the actors in the respective country have at least a basic willingness to cooperate with each other. This mentality cannot be imposed by law, it has to be there as a precondition.

From the German experience, the lesson can be drawn that specific criteria have to be observed to promote the success of workers' participation. One might be that it is recommendable to combine shop floor participation and board level representation of employees. Utmost access to information and consultation before decision making are necessary preconditions for the functioning of every such system. Most important is the access to an enforcement mechanism in case management does not abide to the rules. How this may look like is up to each country's situation. These are only

examples to illustrate the function of such criteria. The list, of course, could be extended.

4. Negative Impact by the EU Law on the German System?

As indicated earlier, EU law cannot impose the German system to other Member States but has to develop flexible patterns and procedures to accommodate properly the different needs and preferences of different countries. However, it might well be that thereby possibilities for weakening the German system or even for escape from the German system are provided. This is particularly a problem for the system of board level representation of employees.

4.1. Possible Negative Impact by the SE Directive

To form an SE no minimum number of employees is required, it even is possible to form an SE without employees at all. This encourages companies in Germany under the level of obligatory board level representation (1,000 for the model of the coal, iron and steel industries, 500 or 2,000 for the models covering the private sector as a whole) to form an SE. Thereby, no board level representation at all or a low level of employee representation applies. This level then is frozen which means if later on the number of employees grows and exceeds the threshold for respective systems of employees board level representation, this has no effect for the SE. In order to uphold the respective level of employee representation of the German system, the Directive should be amended to provide for new negotiations if the number of employees grows later on and exceeds the threshold for more intensive employee board level representation. However, such an amendment is not in sight yet.

4.2. CJEU on Company Law

For a long time it was taken for granted that the company law is the law where the company has its seat. By a series of judgments, the Court of Justice of the European Union (CJEU) has given up this position ([262]) and ruled that the company law of the country where the company is founded is to be applied. This founding theory is very problematic for employee

representation in Germany. It allows German companies to choose a foreign company law type (e.g., a British Limited Company) and nevertheless take the seat in Germany, thereby escaping the German company law including the board level representation. This in Germany has led to a big debate whether a law should be passed to extend employees' board level representation also to companies founded under foreign company law but seated in Germany. The debate has not yet come to a result. And it is still controversial whether such an extension would be compatible with the freedom of establishment ([263]) as guaranteed by Articles 49–55 of the Treaty on the Functioning of the EU.

4.3. Safeguarding Employee Representation in Case of Cross-Border Mobility

According to the freedom of establishment it goes without saying that a company can move to another country and, thereby, continue its activities under the roof of the other country's company law. In line with this freedom, all barriers for such a conversion have to be put aside. This so far has been the purpose of EU legislation and of the CJEU's case law ([264]).
However, thereby it is also possible to escape the company law as well as the system of workers' participation. This might be seen as an invitation to abuse the freedom of establishment to get rid of protective regulations for workers. Therefore, in order to prevent such an abuse and to safeguard workers' interests, the European Commission on 25 April 2018 has presented a proposal amending Directive (EU) 2017/1132 as regards cross-border conversions, mergers and divisions ([265]). At the same time, the proposal contains rules facilitating the companies' mobility.
This proposal provides for a rather complicated mechanism whose essential traits are the following: Reference is made to the negotiation procedure laid down in the SE Directive. It is to be applied if certain requirements are fulfilled (Article 86l(2); Article 160n(2)): (a) the company has in the six months prior to the restructuring an average number of employees equivalent to four fifths of the applicable threshold, laid down in the law of the departure Member State or (b) the law of the destination Member State does not provide for at least the same level of employee participation as operated in the company prior to the conversion or (c) the law of the destination Member State does not provide for employees of establishments of the company resulting from the cross-border restructuring that are situated in other Member States the same

entitlement to exercise participation rights as they are enjoyed by those employees employed in the destination Member State. If no agreement is reached, the SE standard rules apply.
In any case the respective company is supposed to inform and consult the employees and has to establish a plan, one for the shareholders and one for the employees. Bigger companies in addition have to apply at the respective national authority for an independent expert who examines the plan and writes a report on it. On this basis – the plan in smaller companies and the independent expert's report in bigger companies – the national authority has to decide within a limited period whether the company is allowed to perform the intended change. The system of workers' participation as indicated in the plan or in the independent expert's report is to be maintained for three years.
The proposal in the meantime has been agreed by the European Parliament and by the Council, thereby leading to a respective Directive. Nevertheless, it might become controversial whether mechanism safeguarding the workers' interests is in line with the CJEU's case law on freedom of establishment. This remains to be seen. Here it is only important to show that the freedom of establishment might be a threat to a system of workers' participation as the German one.

5. Conclusion

Institutionalized workers' participation as an expression of cooperative industrial relations has many advantages compared to merely conflicting antagonistic structures. However, the system of each country is a result of the country's historic and cultural tradition, the overall institutional framework, the political development and the economic situation. Therefore, even if such a system as for example in Germany functions well under the conditions of the respective country, it is not to be taken as a model for other countries where the preconditions are different. The institutional arrangement cannot be transferred elsewhere. However, the lesson might be that the idea of cooperation and participation may also be an advantage for the employees and for the economy in other countries. But to introduce such structures only makes sense if there is a basic willingness of the actors on both sides to cooperate with each other. And it only will be successful if certain criteria are observed. Finally, it should be kept in mind that supra-national arrangements like the EU not only are

an opportunity to help to spread the idea of cooperative industrial relations, as it has been done by the European legislator, but they also might endanger existing patterns as the one in Germany.

Workers' Participation in the Enterprise in Germany*

1. Introduction

Workers' participation in the enterprise has a long history in Germany. The origins date back to the nineteenth century. The system of workers' participation in management's decision-making normally is looked upon as being the backbone of German collective labour law and industrial relations. There are two channels: participation by works councils acting as counterparts of management and participation in supervisory boards of big companies.

Of course, workers' participation is only one element among others within a complex industrial relations structure in which collective bargaining and specified labour courts play a crucial role. Collective bargaining in Germany mainly takes place on sector level ([266]) which allows for a good division of labour between trade unions and works councils. The labour court system, organized on three levels by labour courts, labour courts of appeal and on top a Federal Labour Court ([267]), guarantees the efficient application of the rights of works councils in cases where conflicts arise with the employer. The access to the labour court system, therefore, is a necessary precondition for the works council. Conflicts arising in the

* In A. PERULLI, T. TREU (eds.), *Enterprise and Social Rights*, Wolters Kluwer, 2017, p. 293.

context of workers' representation in the supervisory boards are considered to belong to company law and, therefore, are treated by the ordinary civil law court system ([268]).
This article is supposed to briefly describe the basic elements and the functioning of the works council system (§ 2) and the system of workers' representation in the supervisory boards (§ 3), ending with an attempt to assess the system as a whole (§ 4).

2. The Works Council System ([269])

2.1. The Basic Organizational Structure

The present legal basis for the works council is the Works Constitution Act of 1972. This Act was significantly amended in 2001 to reflect the radical changes which the organizational structures of companies had undergone ([270]).
Contrary to many other countries, works councils in Germany consist exclusively of employee representatives. Works councils act as counterparts to management. Works council members are elected by secret ballot by all employees over 18 years of age. Employees over 18 years of age, who have been employed for at least six months, may be elected for a term of four years; there are no term limits.
The law provides for the election of works council members in every establishment with more than five employees over 18 years of age, provided three of them have been employed for at least six months. Nevertheless, many Small and Medium-Sized Enterprises (SME) do not have a works council. Only larger companies fully comply with the law. Ultimately, it is up to the employees of the establishment to establish a works council. There is no sanction if they fail to do so, but employees who do not take the initiative relinquish all rights vested in the works council by law. In order to encourage the creation of more such councils in SME, the amendment of 2001 facilitated the election procedure. That change has led to a significant but by far not sufficient increase of work councils in SME.
As a matter of law, works councils are not affiliated with trade unions. They represent all employees of an establishment. But in spite of the institutional separation between unions and works councils, close links do exist. The large majority of works council members are union members.

The size of the works council depends on the number of employees in the establishment. Thus, in establishments with up to twenty employees there is only one council member. Works councils in firms with more than twenty and up to fifty employees are entitled to three members. Companies with more than 7,000 and up to 9,000 employees have thirty-one works council members. Above this level, the number of works council members increases by two for each additional 3,000 employees.

Since the last amendment of 2001, blue-collar and white-collar employees are no longer treated as separate groups. According to a provision also introduced through this amendment, men and women must be represented in the works council according to their proportional rate within the workforce.

If works councils are established in different establishments of a multi-plant enterprise, they shall form a company works council. Each works council appoints two of its members to the company works council. The works councils of the individual establishments are not subordinate to the company works council. The company works council is only authorized to deal with matters which either cannot be resolved within the individual establishment or which are delegated to it by an individual works council. If is up to the company works councils of enterprises belonging to one group of companies to establish a group works council at the level of the parent company. Each company works council would have to appoint two of its members.

The works council may delegate specific functions and rights to subcommittees which play an important role in practice. In enterprises with at least hundred employees, a committee dealing with economic affairs shall be appointed by the works council (or by the company works council in a multi-establishment enterprise).

According to the law all employees of an establishment should meet four times each year. These so-called works meetings take place during working hours and do not entail any loss of wages. Works meetings must be initiated and chaired by the works council. The works council is supposed to report on its activities. The employer shall be invited to the works meetings and is entitled to address the works meeting. At least once a year the employer shall report to the works meeting on matters of personnel policy and social affairs in the establishment, as well as on the present and prospective economic situation of the establishment. It is evident that the law attaches great importance to the works meeting as a communication link between works council and its constituency. Nevertheless, in this area the legal prescriptions do not correspond with

reality. Empirical studies show that only in a small proportion of establishments all four works meetings are annually held, and that in quite a few establishments such meetings do not occur at all.
The Works Constitution Act 1972 also introduced a measure of representation for those workers who have not reached the age of majority. The organizational structure, as well as the election procedure, is very much identical to that of the works council, except that the juvenile delegation is not entitled to act directly as a counterpart to management.
According to the Works Constitution Act, executive staff is not covered by works council representation. Members of this group are neither permitted to participate in the election of works council members, nor can they be elected. The definition of this group was very controversial when the Act was promulgated in 1972. The legislature did not actually resolve the conflict but, instead, employed broad and unspecific language, thus forcing the courts to step in with their interpretation. The Courts strictly limited the scope of this group, and a 1989 amendment to the Act codified this jurisprudence. In the same year, an Act on a Representative Body for Executive Staff was passed, providing the legal basis for separate executive staff representation. Representative bodies of executive staff only enjoy information and consultation rights.

2.2. The Link to the Trade Unions

Works councils and trade unions are for historical reasons institutionally separated. Over time, however, trade unions have succeeded in overcoming the institutional pattern of dual representation due to the fact that a great number of works council members are also union members. In addition, the Works Constitution Act grants unions with at least one member in a company the right to become active within that company Thus in companies without works council, unions may take the initiative and call a works meeting during which the employees may decide whether they wish to establish a works council. Furthermore, if no works meeting has taken place for a certain period, unions may insist on having one. Considering the widespread non-existence of works councils and the low frequency of works meetings, it is apparent that these initiatives play only a marginal role in practice. More important, then, are the control functions unions assume. The unions are legally empowered to control the works council election procedure. They may even move for the nullification of a works council election by court decision if legal rules were disregarded. If

a member of the works council or the works council as such has violated its duties of office, the union may obtain a court decision excluding a works council member from office or dissolving the works council. If the employer violates the duties imposed on him by the Works Constitution Act, unions are entitled to call for the imposition of sanctions by the labour courts. Although works meetings do not take place in public sessions, external union representatives have a right to be present. At the request of at least one fourth of the works council members, an external official of a union represented in the works council is entitled to participate in the works council meeting. The same rule applies to committee meetings, including meetings of the economic committee. Provided the employer was put on notice, agents of unions that are represented within an establishment must be granted access to the establishment.
Works council members are entitled to participate in training courses at the employer's expenses. These courses are supposed to impart the knowledge necessary for works council members to fulfil their task. Because these courses are almost exclusively offered by trade unions, they obviously serve as a powerful tool to bring works council members in line with union positions.

2.3. The Legal Position of the Works Council Members

During their term of office, works council members can only be recalled on the basis of a labour court decision, which may either be initiated by a union represented in the establishment or by one fourth of the employees, or by the employer. An individual works council member may be removed from office, or the works council as a whole may be dissolved, only if the member or the council severely violated the duties pertaining to the office. Such claims are hardly ever taken to court and are rarely successful. Works council members (as well as members of juvenile delegations) enjoy far reaching protection against dismissals.
Works council members may neither enjoy privileges nor may they suffer disadvantages as a consequence of holding office. Essentially, this general rule has three specific implications: first, works council members are not entitled to receive additional payments or benefits as a compensation for holding office. Second, it is guaranteed that their remuneration stays in lock-step with the wage increases they would have received had they not joined the works council. Third and perhaps most importantly, members are guaranteed to stay employed in a position that corresponds to their level

of occupational skills. One corollary of this occupational standard guarantee is that works council members must not be excluded from further vocational training which other employees may enjoy. All these guarantees apply during the term of office and until one year after it has expired.

Works council members are entitled to be released from their duty to work without loss of pay 'to the extent that is necessary for properly carrying out their functions, taking into account the size and nature of the establishment'. In other words, the time to be released from work is not fixed, but depends on the circumstances of the particular case. According to the rules developed by the labour courts, the works council members decide what time is necessary to carry out their functions. The employer may refuse to release a works council member from his job duties only in cases of flagrant abuse.

Large enterprises are required to release a certain number of works council members entirely from their ordinary job duties for the full term of their office. The exact number varies with the number of employees, but the rule does not apply at all to firms with less than 200 employees. The possibility of a full release from work duties is one of the most important features of the works council system. Its effects are ambiguous. On the one hand, it leads to more professionalism and greater efficiency on the part of works council members. On the other hand, these professional works council members find it difficult, or unattractive, to be reintegrated in the rank and file when their term of office expires. This is why these members often work hard on their re-election and treat their status as a lifetime career. Thus, there is some valid concern that the system fosters a functionary-driven bureaucratic power structure with self-serving interests that distract from the original tasks.

2.4. The Financial Structure and the Basic Duties

It is the employer who bears all the expenses arising from the activities of the works council. In addition, the employer must provide the necessary accommodation, facilities and office staff required for meetings, consultations, and day-to-day operation of the works council. The exact scope of the duty to pay works council expenses is subject to many controversies. The decisive criterion is proportionality. It requires that there be a reasonable relationship between the costs on the one hand and the size as well as the financial resources of the company on the other hand.

The employer must provide the works council with all the information, including the files, the works council needs to carry out its tasks properly. Under certain, rather limited circumstances, the works council is entitled to call on the advice of experts. The restrictions on this choice are in place because all expenses are born by the employer. This is why in most cases union officials fulfil the function of providing expert advice to works councils free of charge.
Works councils are required by law to co-operate with the employer in good faith. Consequently, industrial action as a means of conflict resolution is explicitly prohibited. This, of course, does not mean that works council members are not allowed to participate in lawful strikes called by a trade union.
The works council is prohibited to from divulge information that was explicitly classified as secret by the employer. This applies only to information acquired by virtue of holding the office of a works council. The ban on disclosing information applies neither to the exchange of information between members of the works council nor to the communication with other bodies of workers' representation in the company. Not infrequently, this kind of information forms the basis for the decision of a works council on specific matters. On the other hand, the works council must not communicate such facts to its constituency. The resultant lack of transparency can be a source of alienation between the works council and the employees it represents.

2.5. The Arbitration Committee

Since strikes and lock-outs as means of conflict resolution are only legal in the context of collective bargaining, but are expressly prohibited under the Works Constitution Act, a special dispute settlement body has been created by law. This institution, the arbitration committee, can either be formed as a permanent committee or as an ad hoc committee for each case as necessary. In practice, the permanent committee is never used for fear that this body might be permanently biased in one way or another.
One half of the arbitration committee members are appointed by the employer, the other half by the works council. A neutral president, chosen by both sides, chairs the committee. There rarely is agreement over who this person should be. Absent an agreement, the Labour Court will appoint the president, typically a career labour judge. The total number of arbitration committee members is determined by agreement between the

works council and the employer. If an agreement cannot be reached, either side may request the Labour Court to decide the matter. A special procedure regulates the formation and composition of an arbitration committee and expedites the resolution of conflicts. Decisions can be reached within a few days. The costs of the arbitration committee, as all other costs associated with the works constitution, are to be borne by the employer.

In reaching its decision, the arbitration committee must take into account the interests of the establishment and the interests of the employees concerned. Employer and/or works council may appeal to the Labour Court within two weeks of the date of notification of the award. On appeal, the Court may annul, but not rewrite, the decision of the committee only if the arbitration committee exceeded its discretionary powers. If that happens, the works council and the employer may again call on the arbitration committee. However, in practice, appeals are very rare so that, typically, the arbitration committee's first decision becomes final. The law requires that decisions of the arbitration committee be recorded in writing, signed by the chairperson, and forwarded to the employer and the works council. During the deliberations of the committee, outsiders are not admitted. The exclusion of the public is considered necessary to allow for compromises that may be necessary to reach equitable results.

2.6. The Works Council's Rights of Participation

The Works Constitution Act grants the works council an array of specific rights of participation, which include access to information, consultation and veto rights, and the most important right of all, the right to co-determination. In matters in which this right applies the decision-making process is no longer the prerogative of management. Co-determination in this context means that management cannot make any decisions without the consent of the works council. In the absence of consensus, any unilateral move by management would be illegal. However, co-determination means even more, it gives both sides an equal voice in the decision-making process.

The works council enjoys the right to participation in reference to important topics as are for example the beginning and termination of daily working hours, including breaks and allocation of working hours over the single days of the week, temporary reduction or extension of the usual working hours in the establishment, introduction and use of technical

devices designed to monitor the employees' conduct or performance, regulations for the prevention of work accidents and occupational diseases or questions relating to remuneration arrangements which do not refer to the amount but to the distribution of remuneration within the workforce. Of course, the list is much more extended. But the few examples may be sufficient to show that these are matters which are not only important but can happen every day.

Of specific relevance are the rights of works councils in specific economic decisions which may cause substantial disadvantages to the workforce of the establishment or to a significant part of it. According to the law the works council enjoys these rights in companies with a minimum of twenty employees with respect to the following decisions: the reduction of operations, partial or total closings, a transfer of the establishment or transfer of essential parts of it, a merger with other establishments or the breaking up of establishments, basic organizational changes, basic changes of the purpose of the establishment, changes affecting the plant facilities, the introduction of new work methods and production processes. Furthermore, a reduction of the workforce is considered tantamount to a reduction of operations. Thus, the case of collective dismissal is, in principle, also included.

In all these cases, management must provide full information in advance in order to enter into negotiations with the works council. 'Information in advance' means that it has to be given at an early planning stage. 'Full information' means that management must not only disclose its plans but must supply information on all possible alternatives and modifications which were taken into account at any time. This obligation to disclose enables the works council to have some input in the decision-making process.

In addition to supplying information, management is required to reach a so-called 'reconciliation of interests' with the works council. This means that management must make an effort to reach an agreement with the works council on whether, and in what manner, the management plans will be carried out. If the parties fail to agree, either side can call on the President of the Regional Employment Office for mediation. If this mediation is not successful or does not occur because neither party called for it, either side may take the issue to the arbitration committee. But in this instance, the arbitration committee has no power to issue a binding decision. It can only present a proposal which may or may not be acceptable to the parties Thus, the law provides a procedure for the reconciliation of interests, but if the procedure fails, management has the

final say. Ultimately, then, the works council has no legal power to force management in a certain direction.
Regardless of whether management has fulfilled its duties to inform the works council and has tried to reach a reconciliation of interests, the works council is always entitled to enforce a so-called 'social plan'. A social plan means nothing less than a special works agreement to compensate or reduce the disadvantages that employees suffer in the event of a substantial change of the establishment or in cases of insolvency. A social plan is not confined to financial compensation but may include important affirmative measures such as re-training programs and transfer of employees to other establishments of the enterprise. If an agreement on a social plan cannot be reached, either side is entitled to appeal to the arbitration committee which then acts as the final decision-maker. Its decision is binding on both sides. Except in cases of insolvency, which cannot be treated here, there are no minimum or maximum financial limits for a social plan.

3. Workers' Representation in the Supervisory Board ([271])

3.1. Three Different Models

Workers' representation on company boards is understood to be one further step towards changing the power structure in the economic field. The first successes in implementing such change occurred in the coal, iron and steel industries. After World War II, the enterprises in these areas of industry faced the danger of being totally dismantled by the Allied Forces. To avoid what would have amounted to obliteration, these industries sought the support of the unions. Because the unions had not been affiliated with the Nazi regime, they had an important voice in this context. In order to gain the support of trade unions, the leaders of the coal, iron and steel industries offered equal representation of employees on the supervisory boards of the companies in exchange. After much controversy, this model featuring strong employees' representative rights, was established and confirmed by the legislature in 1951. This historical development explains why until today the representation rules in the coal, iron and steel industries differ from those applying to other German industrial sectors.
By 1952 the political and economic circumstances had changed: With the danger of dismantlement banned, employers were in no need to enlist the support of the unions and were no longer prepared to make concessions.

Not surprisingly, then, the 1952 Works Constitution Act introduced a model of employee representation on the supervisory board which remained far below the level of representation reached in the coal, iron and steel industries. In the years following the adoption of the Works Constitution Act, the unions undertook great efforts to extend the 1951 model of the coal, iron and steel industries to all areas of industry. In 1976, these efforts led to a third model which represents a compromise between the previous two. All three different models still exist today and will be briefly described below.

3.2. The Function of the Supervisory Board

In order to appreciate the impact of employee representation on the supervisory board, it is necessary to understand the general role of this board within the power structure of an enterprise. Under company law, the supervisory board is a company organ which must be present in companies with a specific company law structure. The Acts providing employee representation on the supervisory board did not create new institutions. They simply fit employee representation into the traditional corporate framework, modifying only the composition of the governing bodies. The supervisory and management boards, which existed prior to the introduction of employee participation, retained their traditional functions. The only difference is that these boards are no longer composed exclusively of individuals guided by the interest of the owners.

According to the German two boards system of company law, it is exclusively the management board which represents and manages the enterprise. The structure best may be explained by the example of the joint-stock company. The supervisory board has only two basic functions, to elect and recall the members of the management board, and to supervise the activities of the management board. In order to fulfil its monitoring tasks, the supervisory board has extended rights of access to information. At least once a year, the management board must supply the supervisory board with comprehensive information on all basic issues concerning the management of the enterprise. Furthermore, the supervisory board or any member of the supervisory board can request at any time additional information on matters of importance to the enterprise. The management board is statutorily required to meet such a request.

The shareholders' meeting, or even the supervisory board itself, may extend the powers of the supervisory board by majority vote. Either one

can establish rules which require the consent of the supervisory board to certain types of managerial decisions. However, even if the supervisory board withholds its consent, the management board may nevertheless effectuate its decision by obtaining approval in the course of a shareholders' meeting. Such approval always remedies a lack of consent on the part of the supervisory board.
To make the point: the authority of the supervisory board is significant but it pales in comparison with any management board, because it is the latter that is actually in charge of the company's operations and in a position to employ a staff of experts who prepare its decisions.

3.3. The Model of the Coal, Iron and Steel Industries

This model is based on equal representation of shareholders and employees on the supervisory board, the chairpersonship being reserved for a 'neutral' person, elected by majority vote of both, employee representatives and shareholder representatives. The Act on Workers' Representation in the Coal, Iron and Steel Industries of 1951 applies to enterprises that were created as joint-stock corporations and private limited companies employing more than 1,000 employees.
In general, the supervisory board consists of eleven members. In very large enterprises the number may increase to fifteen or even twenty-one members. Taking the normal case of a supervisory board with eleven members, shareholders and employees each appoint five members.
At least two of the five employee representatives must belong to the workforce of the enterprise. The remaining three employee representatives need not be employed by the enterprise, but may be external representatives. Whereas two of the three external members always are members of the respective unions, the third member (the so-called 'additional member') must neither be a trade union member nor an employee of the respective enterprise nor have economic interests in the enterprise. After consultation with the unions represented in the enterprise, the works council nominates the employee representative candidates belonging to the workforce of the enterprise by secret ballot. The unions represented in the enterprise propose the candidates for the remaining three seats, and the works council formally nominates these representatives, again by secret ballot. Finally, all nominated representatives must be elected and confirmed by the shareholders' assembly. However, the nominations are binding on the assembly. This election is only a formality

which reflects the original structure of the electoral power of the shareholders' assembly.
The neutral chairperson of the supervisory board is nominated by a majority vote of the other members of the supervisory board (shareholder representatives and employee representatives). This nomination is again binding on the shareholders' meeting, which should formally elect and confirm the chairperson. If a majority decision on the supervisory board cannot be obtained, a rather complicated procedure provides alternative means for the nomination of the candidate. Should this procedure fail, it is up to the shareholders to decide. A neutral chairperson is deemed necessary to ensure that the supervisory board can overcome a deadlock between shareholder representatives and employee representatives.
The Act on Workers' Representation in the Coal, Iron and Steel Industries of 1951 does not only provide for employee representation on the supervisory board. It is the only Act that also provides for some employee representation on the management board. The elected representative, the 'work director in charge of personnel and social affairs of the enterprise', is a full member of the management board, who enjoys the same legal status as all other board members. This representative cannot be elected against the majority of votes of the employee representatives on the supervisory board.
In the period after 1951, it turned out that workers' representation in enterprises of the coal, iron and steel industries was not very effective if the representatives did not have access to the supervisory board of the parent company of the group. Several Acts introduced and expanded these representation rights at the level of parent companies. Today, it applies whether coal, iron and steel activities within a group amount to a share of at least 20% of all activities, or if at least 2000 employees are employed in those industries. This legal development notwithstanding, the number of companies and groups that are actually subject to the rules of this model is steadily decreasing.

3.4. The Model of 1952

Originally by the Works Constitution Act of 1952 and since 2004 transferred into a separate Act on One Third Workers Participation in the Supervisory Board this model also covers only enterprises related to specific types of company law. All enterprises covered by this model must employ at least 500 employees.

According to the Act, one third of the supervisory board members must be workers' representatives. The size of the supervisory board depends on the rules of company law. If only one or two employee representatives can be elected, these representatives must be employed by the enterprise. If more than two representatives are up for election, at least two must be employees of the enterprise. The additional representatives may, but do not have to, be elected from external candidates. Works councils as well as groups of one tenth of the employees (or at least 100 employees) of the enterprise are entitled to nominate candidates. Workers' representatives are elected by all employees of the enterprise who are over 18 years of age.

3.5. The Model of 1976

Like the other Acts concerning employee representation on the supervisory board, the Co-Determination Act of 1976 is applicable to enterprises organized according to specific types of company law, this time with a size of at least 2000 employees. As far as holding companies are concerned, the Co-Determination Act 1976 applies to enterprises employing less than 2000 employees, provided that the holding company and the German group entities employ in the aggregate at least 2000 persons. If an enterprise covered by the 1976 Co-Determination Act is a holding company, the employees of the subsidiaries participate in the election of the employee representatives to the supervisory board of the holding company. Therefore, the number of subsidiaries which are indirectly covered by the 1976 Co-Determination Act is significantly higher than the above mentioned number of directly affected enterprises.
Until recently it was taken for granted that foreign subsidiaries are not included. This view now is under attack. According to a recent judgment ([272]) employees of foreign subsidiaries are to be included in counting the necessary number of 2000 employees. This would mean a significant extension of workers' representation in supervisory boards. However, the appeal against this judgment is still pending. Linked to this question is an even more far reaching one. In recent scholarly writing some argue that the prevention of employees to participate in the election for the workers' representatives in the foreign subsidiaries within the European Union (EU) violates Article 18 (prohibition of discrimination) and 45 (freedom of movement for workers) Treaty on the Functioning of the European Union (TFEU). This was denied by several courts ([273]). However, on appeal against the Berlin judgment the court ([274]) has handed over the respective

questions to the Court of Justice of the European Union (CJEU) where the case now is pending.

In enterprises covered by the 1976 Co-determination Act, the supervisory board consists of an equal number of shareholder representatives and workers' representatives. The numbers are as follows: in enterprises with up to 10,000 employees twelve representatives, six from each side; in enterprises with more than 10,000 and up to 20,000 employees sixteen representatives, eight from each side; and in enterprises with more than 20,000 employees twenty representatives, ten from each side. The company statutes may provide for more representatives. A board consisting of twelve members may be enlarged to sixteen members, and a board consisting of sixteen members may grow to a maximum of twenty members.

On supervisory boards with twelve or sixteen members, two seats are reserved for external trade union representatives, and on supervisory boards with twenty members, there are three such seats. The remaining seats on the employees' side (four, six, or seven, depending on the size of the board) are reserved for the workers and the executive staff of the enterprise. Each group, if represented at all, is guaranteed at least one seat. Although the exact distribution depends on the proportion in which these groups are represented, executive staff is in fact almost always over-represented.

The chairperson and the vice-chairperson of the supervisory board are elected by a two-third majority of the board members. If an election fails to yield a two-third majority, a frequent result, the shareholder representatives elect the chairperson, and the employees elect the vice-chairperson from among their own group. In practice, then, the position of the chairperson is reserved to the shareholders' representatives. Thus, in contrast to the coal, iron and steel industries model, which features a neutral chairperson in charge of overcoming deadlocks on the board, the 1976 Co-Determination Act favours a shareholder-selected chairperson who has the casting vote.

The vast majority of employee representatives on the supervisory board are members of a trade union. This is not only true for the external representatives but also for those employed in the respective enterprise or group.

3.6. The Legal Position of Employee Representatives

Employee and shareholder representatives on the supervisory board are co-equals. The law assigns identical rights and obligations to either group. Employee representatives are privy to any information accessible to members of the supervisory board.

As under traditional company law, the members of the supervisory board are free to discuss company matters among themselves. However, they are strictly prohibited from disclosing this information to anyone else. This confidentiality requirement severely hampers the communication between the employee representatives and their constituency which, in turn, fosters alienation and the perception about employee representatives as an elitist, isolated group with limited legitimacy.

The so-called 'interest of the enterprise' is the crucial legal point of reference for the substantive board decisions which both shareholder representatives and employee representatives are called upon to make. While this criterion was formally understood as referring solely to the interests of the capital owners (shareholder value), it is today generally accepted as covering workers' interests as well (stakeholder value). However, the standard has become so malleable that it is difficult to delineate the permissible scope of the board's activities.

Equal status of employee and shareholder representatives also implies equal remuneration. For the former, this income is considered a threat to neutrality if not a source of corruption. Therefore, the standing rules of the unions require employee representatives on the supervisory board who are trade union members to transfer a high percentage of this income to a union foundation. Of course, this duty does not apply to non-union members.

Shareholder representatives obviously do not need protection against dismissal or a right to participate in vocational programs in order to become or stay qualified for their job. This is different for employee representatives. If they are employed in the enterprise, protection against dismissal may be just as necessary as for members of the works council. And if employee board members actually are to have an impact on the policy of the supervisory board, they must be highly qualified, particularly in view of the qualifications the shareholders' representatives usually bring to bear as qualified experts in economic and financial affairs. To create a level playing field, it would arguably be appropriate to let workers' representatives participate in educational programs without loss of pay. This is not an option, however, due to the principle of equal legal status of employee and shareholder representatives. On the other hand, it is

generally agreed that employee representatives ought to be released from their ordinary job duties to participate in supervisory board meetings without loss of pay.

3.7. The Implementation in Practice

Within the relationship between the management board and the supervisory board the position of the latter has been weakened by the redefinition of the criterion 'interest of the enterprise' as outlined above. It has become more difficult to argue that specific measures taken or suggested by the management board do not comport with this rather vague formula. Nevertheless the supervisory board at least continues to be an important source of information for the employees' representatives. Thus, they have access to all relevant facts which give rise to management activities, to discuss these activities and to present their views. Of course, only the model of the coal, iron and steel industries actually enables them to overrule the shareholders' bench if the neutral chairperson sides with the workers' representatives.

However, to better appreciate the role and influence of workers' representation on the supervisory board, the works council system must be considered as well. In practice, the employee representatives on the supervisory board belonging to the workforce of the enterprise are almost exclusively also works council members. On the whole, this has strengthened both instruments of participation. In particular, it has promoted communication through informal channels. Because management has an interest to stay on good terms with the works council due to its co-determination power, it is likewise interested in avoiding conflicts with works council members who are also members of the supervisory board. Thus, before informing the supervisory board, management tends to discuss critical questions with at least the internal employee representatives in informal meetings. These informal communications are most important under the coal, iron and steel industries model in which the work director functions as a crucial link. It is primarily these informal structures which make employee representation on the supervisory board effective. This informal communication tends to soften the original position of management and the manner in which it presents questions to the supervisory board. As a result, most decisions on the supervisory board are reached unanimously. Notwithstanding the right of all supervisory board members to deal with all questions arising under

its mandate, employee representatives focus primarily on the social aspects of company policies and less on economic and financial strategies that lead to basic management decisions. With little or no expert knowledge in economic and financial matters, employee representatives thus typically concentrate their efforts on preventing or mitigating the immediate negative consequences that basic business decisions would have for the workforce.

4. Attempt of an Assessment

Workers' participation nowadays is uncontested and based on a broad consensus, even if there are always controversies referring to details of the institutional arrangements. It is considered to be one of the main pillars of economic success in Germany. This became particularly evident in the international financial crisis. Due to the mutual trust gained by the permanent dialogue between management and workers' representatives it was easy to agree on arrangements in order to prevent lay-offs of employees. Thereby in particular, working time was reduced, the free time was used to further train the workforce and the State helped to compensate the loss of remuneration. Thus skilled labour was on board when the effects of the crisis were over. This gave the German economy a significant advantage compared to other countries.

Compared to unilateral decision-making workers participation has many advantages. The mere fact that workers' representatives have a voice in decision-making increases significantly the legitimacy of management's decisions and it facilitates implementation. It absorbs conflicts, leads to better motivation of the workforce and, thereby, increases productivity. It also leads – at least in principle – to better decision-making because management prepares decisions more carefully in view of the fact that it has to give and discuss reasons for what is supposed to be done or – in case of co-determination – is dependent on the consent of the workers' representatives. And it favours long term strategies rather than short term effects.

Most helpful for the understanding of the system as a whole is the report on an empirical project which was conducted not only by social scientists, led by Wolfgang Streeck, but also by representatives of trade unions and employers' associations ([275]). There it shows how closely the two levels of workers participation are interrelated and that workers' representation in the supervisory board has become a sort of 'extended arm' of the works

council's activities ([276]). The report not only confirms the already mentioned informal communication between management and works' council members in the supervisory board ([277]). It also shows that management voluntarily gets the works councils involved much beyond the limits of the law in order to integrate them already in an early preparatory stage of decision-making ([278]). A specific role of works councils is seen in the fact that they help to enforce necessary restructuring measures in order to make or keep the company competitive. In this context the report speaks of a culture of 'cooperative modernisation' ([279]). The report insists that negative economic effects of workers' participation are not to be seen. However it favours an organizational culture which might imply long-lasting consultation procedures, but thereby eliminates as much as possible dramatic mistakes. The report concluded that 'in the past workers participation has repeatedly adapted to difficult conditions', that it 'has not been an obstacle to an internationalization of the strategic perspectives of German companies' and in particular that 'there is no need to re-regulate workers' participation in order to raise the effectiveness of the supervisory boards' ([280]).

Not at all in line with the optimistic message of this report workers' representation in supervisory boards was put into question in the first decade of the new century by the confederation of employers' associations. The goal was to reduce the model established by the Act of 1976 to the level of the model introduced in 1952, now transferred to the Act of 2004 ([281]). Of course, this proposal was rejected by the trade unions. Even if the debate became rather heated, it remained to be an episode. After the success of workers' participation in the financial crisis nobody would dare any more to start such a fundamental attack against the system of workers' representation in the supervisory boards. Just to the contrary: it never was as strong and widely accepted as presently.

In spite of this generally positive assessment there are problems. The law according to which works councils are to be elected in establishments of at least five employees still is not followed in many small and medium-sized companies. This leads to a very problematic segmentation of the labour market. In addition the works council system is endangered by the fragmentation and segmentation of the workforce as well as by the erosion of the traditional pattern of the workplace. The works council system is built on the assumption that there is a workplace where a collective of employees with more or less homogeneous interests is present. Not only the diversity of the interests of the workforce but also the erosion of the workplace concept have made it difficult for such bodies to function

efficiently. This may still be possible for the core groups. However, for people in new forms of work it is very problematic. The question is whether and how the system of workers' participation by works councils can be restructured in order to integrate the whole diversity of interests of the workforce and take account of the new enterprise organization (outsourcing strategies and so forth). It may be doubted whether this is possible at all. And it may also be doubted whether the strength of a representative body composed of so many diverse groups with diverse interests would be as strong to defend and promote employees interests as before. Therefore, there is a question mark behind the future of the works council system.

The danger for workers representation in supervisory boards comes from EU law. For a long time, the headquarters of a company was considered decisive for the corporate law to be applied. Consequently, it was obvious that German corporate law including the rules for workers' participation in supervisory boards had to apply to a company headquartered in Germany. However, according to the CJEU this view is not consistent with the freedom of establishment guaranteed under EU law. It suggests that the applicable corporate law is that of the country where the company is established ([282]). The company may then decide to have its headquarters registered in any country within the EU with no change relating to corporate law. This implies that German companies can establish companies abroad and operate at home disregarding workers' representation in supervisory boards. To date, however, this possibility has been exploited only to a moderate extent. It, however, cannot be ruled out that this might change.

Finally it should be insisted that workers' participation in Germany functions in a special historical, cultural and institutional context. Whether it would work the same elsewhere, may be doubted.

Dispute Resolution in German Employment and Labor Law*

SUMMARY: 1. Introduction. – 2. The System of Labor Courts. – 3. Dispute Resolution in Disputes of Interest in. – 4. Conclusion.

1. Introduction

Because Labor Courts are the exclusive actors in handling disputes of rights in employment and labor relations, it might be helpful to put them in context of the overall court system in Germany. This court system is an offspring of the rule of law as it is contained in the Federal Constitution.
The core element of this concept is "the lawful judge." The Constitution guarantees that "no one may be removed from his or her lawful judge." ([283])
This guarantee tries to exclude any attempt of manipulation. It makes sure that no ad hoc judges or ad hoc courts can be selected to decide specific cases.
In a court with different judges or chambers, it has to be predetermined at a certain date every year which judge or which chamber will hear a specific case that is defined in abstract terms. In lower courts, this is done by simply using the letters of the alphabet (e.g., the first letter of the plaintiffs last name), while in higher courts, this is done by using subject matters of the cases. Therefore, if a case comes to a court, there cannot be any dispute over which judge or which chamber of the court has to hear the case. Everything is predetermined before the respective case comes up.
This guarantees that a case is not given to a judge or a chamber that might favor a specific result. Of course, this distribution of jurisdiction is fixed by the courts themselves according to specific legal rules, thereby respecting the independence of the court system.

* In *Comparative Labor Law & Policy Journal*, 2013, vol. 34, p. 793.

The concept of the lawful judge also applies to the relationship between the different branches of the court system. In addition to the courts of general jurisdiction for civil and criminal cases, the highest of which is the Federal Supreme Court (FSC), there are five court systems with specialized jurisdiction in administrative, labor, social security, tax, and patent matters. All these special jurisdictions are fully separated from the general court system. Cases filed in these specialized court systems never end up in the FSC. Each specialized system has a Supreme Court of its own: the Federal Labor Court (FLC), the Federal Social Security Court (FSSC), or the Federal Administrative Court (FAC), to just give three examples. It is evident that such a system can only work if the society respects such far reaching specialization. This is the case in Germany but possibly not elsewhere.

It is important to stress that the law defines the demarcation lines between these different court systems. This implies that it is predetermined which system has to hear a given case. Furthermore, only one of the court systems has jurisdiction over a given case. There is no possibility for court shopping in order to choose between different courts. If a case is wrongly filed, the respective court is forced by law to transfer the case to the court to which it belongs. This-to repeat-is a very important implication of the concept of a lawful judge.

All courts have the power and the obligation to review the constitutionality of government action and legislation within their jurisdiction, but only the Federal Constitutional Court (FCC) may declare legislation unconstitutional. Other courts must suspend proceedings if they find a statute unconstitutional and must submit the question of constitutionality to the Federal Constitutional Court for a decision. ([284])

In Germany, private patterns of resolution of disputes of rights do not exist. This is exclusively the task of the judiciary. As already mentioned, the exclusive institution in this context is the system of Labor Courts, which is described below. If rights embedded in the Constitution are at stake, the FCC may also play a role, but only after having exhausted the Labor Court system. If the law of the European Union is relevant for deciding a case, the European Court of Justice (ECJ) may be involved. The latter, of course, applies to all Member States of the European Union.

Although Germany is a Federal State with sixteen individual States, employment and labor law is exclusively a federal matter. Furthermore, although the Court system is divided between the Federal level and the level of individual States, the law to be applied is the same everywhere.

This is a large difference between Germany and the United States.

The Labor Courts are on equal footing with all other branches of the judicial system. Their judgments are enforced and implemented in the same way as judgments of ordinary courts in matters of civil law. The Labor Courts have exclusive jurisdiction on all disputes of rights in the field of labor law, whether the rights are based on constitutional law, statutory law, judge-made law, administrative rules, collective agreements, or on individual contracts. There is no difference whatsoever. In addition, there is a category of rights that plays an important role in Germany, which, however, is not examined in this Article in order to avoid confusion. The rights in this category include participation rights (information, consultation, veto, and codetermination) of the works councils (a body representing the workforce in the company) and the rights arising out of agreements concluded between works councils and employers. Disputes on these rights also fall within the Labor Courts' jurisdiction.

If disputes of interest are at stake, the situation is different. The judicial system is not involved. There are other mechanisms of dispute resolution, and they play a role in collective bargaining. They also play a role in interest disputes between works councils and employers. For the latter category, a special institution, on a statutory basis, has been developed: the Arbitration Committee, which again is neglected here in order to minimize confusion and because such conflicts are unknown in the United States.

2. The System of Labor Courts

A. Basic Structure

As already indicated, Labor Courts in Germany have comprehensive jurisdiction on disputes of employment and labor rights. The roots of the system date back to the nineteenth century, but the real starting point of Labor Courts as a special branch of the court system is the Act on Labor Court Procedure of 1926. Until then, ordinary courts for civil law matters had jurisdiction in employment and labor disputes. The legal basis for the structure, jurisdiction, and procedure of today's labor judiciary is the Act on Labor Court Procedure of 1953, revised in 1979.

The German Labor Court system consists of three levels: (1) Labor Courts of first instance (LCs), (2) Labor Appeal Courts in the second instance (LACs), and (3) on the top, the Federal Labor Court (FLC).

There are more than 120 LCs established around the country. They can easily be accessed by the respective employees and employers over which

they have jurisdiction. In principle, there is a LAC in each of the sixteen States. However two large States (Bavaria and Northrhine-Westphalia) have two LACs. Therefore, the total number amounts to eighteen. The FLC is situated in the city of Erfurt.

Only a very small percentage of the costs for the courts on all three levels is covered by the courts' own collection of fees. The LCs and LACs are financed by the individual States. The individual States are also responsible for the establishment of these courts and for the delineation of the judicial districts. The trade unions and the employers' associations in the respective individual States, however, are to be consulted before such a decision is taken. The FLC is administered by the Federal Secretary of Labor and Social Affairs, in consultation with the Federal Secretary of Justice.

LCs are composed of one or more panels, each consisting of a professional judge, serving as chairperson, and two lay judges, one from the employer and one from the employee sides. In a court with more than one panel, the jurisdiction of each individual panel is predetermined by an organizational chart set up by the courts themselves.

LACs have exclusive jurisdiction for appeals against decisions of the LCs. As a rule, their jurisdiction covers one individual State (which of course does not apply for the already indicated exceptions of Bavaria and Northrhine-Westphalia). The panels of the LACs are also composed of one professional judge and two lay judges from the ranks of employers and employees.

Judgments of a LAC may, under special conditions, be appealed to the FLC, which is comprised of ten divisions called "senates." Each senate consists of three professional judges and two lay judges from employer and employee sides. Because the FLC exclusively focuses on questions of law and, consequently, does not decide the facts of a case, the professional element has more weight than in courts of lower instances where the decision on facts is also at stake.

In addition, the FLC forms a Large Senate for special purposes. The Large Senate is composed of the Court President, one professional judge from each of the nine senates that are not chaired by the Court President, and six lay judges serving in the FLC, three from the employers' side, and three from the employees' side. If one senate of the FLC wishes to deviate from a decision made by another senate or by the Large Senate itself, the senate wishing to deviate is obliged to refer the matter to the Large Senate.

Furthermore, matters of fundamental importance may be referred to the Large Senate provided that it seems necessary for the development of the

legal system. The explicit competence to decide in certain matters regarding the development of the legal system means that the Large Senate is, within narrow limits, in effect entrusted with tasks similar to those of the legislator.

The sequence of appeals within the labor court system normally leads to the fact that the FLC has the final say in labor law matters. However, even the FLC's decisions can be challenged for being incompatible with the Federal Constitution. The FLC, as any other court, is of course not entitled to deviate from the provisions of the Constitution. If one of the parties considers the FLC's judgment to be a violation of the Constitution, it may file a complaint of unconstitutionality at the FCC. This instrument is used with increasing frequency, especially in areas in which the FLC decisions fundamentally shape industrial relations (as for example strike law).

If a subject matter is governed not only by German law, but also by law of the European Economic Community (EC), and if the latter plays a determining role in deciding the case at stake, LC as well as LAC may, and the FLC must, refer any doubts as to the interpretation of EU law to the ECJ in Luxembourg for a preliminary ruling. The judgment of the ECJ is, due to the principle of supremacy of EU law, binding on German Labor Courts of all instances as well as for the FCC.

B. The Judges

1. Professional Judges

The presiding judges of the LC and of the LAC are professional judges. They are appointed by the government of the respective individual State. Playing an important role in this selection process is an advisory committee consisting of three benches, equally representing the State's trade unions, the employers' associations, and the judiciary of the Labor Court system in the respective State. Employers' associations and trade unions provide lists of candidates, among whom the government chooses the members of the advisory committee. The committee members representing the judiciary of the Labor Court system are appointed by the government.

The professional judges at the FLC are appointed by the Federal President on joint proposals of the Federal government and the election committee for Federal judges, a body composed of the State governments and an equal number of members elected by the Federal Parliament. There is no advisory committee consisting of trade union and employers' association representatives on the Federal level-this only exists at the state levels.

The professional judges at the courts of all three levels, after three years of service, are appointed permanently (with tenure) until they reach retirement age and are thereby entitled to old age pension. They can be recalled only under very narrow circumstances. A transfer to another court-even if this would mean a promotion-is invalid without the respective judge's consent. Professional judges of the FLC must have a minimum age of thirty-five years; in the courts of lower instance there is no minimum age requirement.

Professional judges can start their careers after graduating from law school and after passing a two-year internship, which ends with another exam. At least in principle, during their education they specialize in employment and labor law. At the beginning of their career they are usually at least in their mid-twenties. There is no requirement to have worked before in another job. Becoming a judge is a lifetime career (therefore, professional judges in Germany often are described as career judges).

2. Lay Judges

When the Labor Court system was established in the 1920s, one of the big innovations was the participation of lay judges, who are familiar with the facts of working life.

Lay judges of the LC and of the LAC are appointed for a term of five years by the Secretary of Labor and Social Affairs of the respective individual State from lists submitted by the trade unions, certain other labor organizations, and employers' associations of the respective judicial district. These organizations may nominate whomever they think to be capable to serve as a lay judge. In actual practice, the lay judges nominated by the trade unions are almost always trade union functionaries; on the employer's side they may be employers' association functionaries, members of the management board of companies, individual employers, or simply other trusted persons.

In selecting the lay judges, the Secretary of Labor and Social Affairs of the respective individual State must also take account of minority organizations. This duty is usually carried out with regard to the number of members the proposing organization has. The organizations on either side can limit the margin of choice by proposing together only as many candidates as positions for lay judges are available.

The lay judges on the benches of the LC must be at least twenty-five years old. In the LAC the minimum age is thirty years, in the FLC it is thirty-five years. In order to become a lay judge in an LAC, the respective person should have served in the same capacity at an LC for at least five years.

Lay judges on the FLC are supposed to have special insight in employment and labor law as well as in labor matters. This requirement is considered to be met if they have served for at least five years in the same capacity in an LC or in an LAC.

Just as professional judges, lay judges at the Labor Courts are independent. They cannot be recalled or transferred and they are not bound by instructions. At least according to the law, the organizations nominating them have no possibility of exerting influence on the court performance of 'their' lay judges. Lay judges are not supposed to promote the interests of their constituency, but rather to act as impartial judges. In the decision-making process, the votes of the lay judges carry as much weight as those of the career judges, which at least theoretically, opens up the possibility of outvoting professional judges at the LC and at the LAC levels. In actual practice, however, this hardly ever seems to happen. ([285]) In announcing the judgment, the bench acts as a uniform body. Because the bench and not the individual judge is the relevant actor, judges-at least in principle-do have much less of a public profile than in many other countries. With the exception of the local courts in the general jurisdiction for civil and criminal law matters, which only handle small claims and criminal offences of marginal relevance, judges always hear and decide the cases before them as a team (i.e., in a chamber or senate). The decision is the team's decision.

Thereby, the court appears as an anonymous body. The idea is that it should not be possible to link the decision to a certain individual, but rather to the independent court system as such. The deliberations regarding the decision of a case take place secretly and are to be kept confidential. The same is true for the votes. Thus, the names of the individual judges are of no importance. The case is decided by the court and not by an individual judge. This is only different in the FCC. There, dissenting opinions from individual judges are possible. This was established for two reasons: the interpretation of the Constitution has a far-reaching effect, and the further development of the vague articles of the Constitution is a never-ending matter of ongoing controversial debate. Therefore, dissenting opinions in this context are often indications of future developments.

B. Parties and Their Representatives

In Germany, unlike many other countries, not only trade unions but also and first of all individual employees can be parties on the labor side to cases heard in Labor Courts. Trade unions have no means of preventing an employee from going to court. This pattern corresponds with the deeply

rooted concepts of individual autonomy, individual dignity, and equal treatment of all individuals. The employees' access to court, however, is to be evaluated ambiguously. Even if most lawsuits are initiated by employees and not by employers, it has to be stressed that in more than 80% of those lawsuits initiated by employees, the court only is involved after or in the course of the termination of the employment relationship.
During an existing employment relationship, employees are usually afraid to bring a dispute to court. Whether or not they might win the case, they fear revenge.
In LC, parties to a dispute may represent themselves, but also may be represented by a counsel. In the formative era of the Labor Court system, in the 1920s, lawyers were excluded from representing parties in LC. Only trade union representatives were allowed to act as counsel. The question of who should be allowed to represent litigants was subject to a very controversial debate in that time. Nowadays lawyers as well as legal aid representatives of trade unions, or representatives of employers' associations for litigants from the employers' side respectively, are allowed to represent litigants in LC. While legal aid representatives of employers' associations are usually fully trained lawyers, this does not apply to legal aid representatives of trade unions. Trade unions offer them special training programs to provide the knowledge necessary to be able to act on behalf of the litigants. However, representation by lawyers is increasing, whereas use of legal aid representatives of trade unions is declining. In the period from *1953* to 1978, representation by lawyers in LC almost doubled (from 28% to 47%), whereas the use of legal aid representatives dramatically decreased (from 33% to 20%). Later statistics are not available.
While representation by counsel is optional in LC, it is required on higher levels. In LAC, however, litigants still can choose between attorneys and legal aid representatives of trade unions or employers' associations.
In cases heard by the FLC, representation by a lawyer is obligatory.
The requirement for lawyers at this level is an implication of the rule that the FLC only deals with questions of law and not with assessments of fact.
In ordinary courts of civil law, lawyers were admitted only for a special judicial district until 1999. In the Labor Court system this has always been different. Any lawyer admitted to practice in Germany can represent clients before any Labor Court of any instance in the country.
The FLC especially is very unhappy with this rule, since the majority of lawyers representing cases in the FLC appear only once or twice a year, and only very few appear more often.

D. Procedure

Labor Court proceedings are based on the same general principles as proceedings in ordinary courts of civil law. The Act on Labor Courts of *1957,* however, contains quite a few exceptions in order to guarantee simple, expeditious, and inexpensive proceedings.

Every case brought before an LC begins with what is called a conciliation hearing, heard only by the professional judge sitting alone. The purpose of this procedure is to bring about a compromise between the parties. To this end, the judge is required to discuss the whole dispute with the parties as regards the facts of the matter and the legal position in the light of an assessment of the evidence presented. In the course of the conciliation hearing, the judge quite often indicates to the parties his or her opinion on the possible legal outcome, thereby promoting substantially the willingness of the parties to reach a compromise. If both parties agree, the conciliation hearing may even be continued in an additional hearing, which must take place at an early date. The conciliation hearing may result in one of the three following options: either the action is withdrawn, a compromise is agreed upon, or a date is set for a controversial hearing before the entire bench. Even if the attempt to secure conciliation fails, the court is obliged, during the entire controversial proceedings that may follow, to try to reach a friendly settlement. Approximately 30% of cases are already settled in the conciliation session. The number of compromises reached throughout the entire proceedings is even higher. For professional labor court judges, it is quite often a mark of prestige to reach a high number of compromises.

The fact that the professional judge sits alone in the conciliation hearing, and thereby gains an early familiarity with the legal problems arising out of the case, gives him or her a significant advantage compared to the lay judges, who only get involved at a later stage if no compromise is reached. This explains why the professional judge-at least in principle is never overruled by the lay judges who only later on learn about the legal implications of the case, in most cases by simply being briefed by the professional judge.

Labor courts, as ordinary courts of civil law, are only involved upon motion of a party; they are bound to base their decisions on facts brought forward and established by the parties to the dispute. This procedure, however, would often put the employee not represented by counsel at a disadvantage, as he or she usually has little or no knowledge of the law and for this reason may fail to present an adequate claim, or may neglect to bring forward facts because he or she does not understand their legal

relevance. In such a situation, the court may compensate the lack of knowledge by supporting the evidently weaker party. In procedures in ordinary civil courts, it is up to the parties to make sure that all details relevant to the case are brought forward and that adequate claims are presented. In the Labor Court system, however, it is also up to the presiding professional judge to take the initiative and ask questions or make proposals of his or her own. Hence, the court's task is not limited to merely listening and afterwards deciding the case, but to also, at least to a certain extent, intervene in favor of the weaker party.

The principle of expeditiousness plays an important role in Labor Court proceedings. If a compromise cannot be reached in the conciliation hearing, it is the professional judge's responsibility to prepare the controversial proceedings in such a manner that the case can be terminated in one session, if possible. To this end, the professional judge can summon witnesses and experts, request all relevant documents, and ask for opinions without being bound to the parties' applications. The chairperson may also request the parties to appear in person, as actually is done in most cases.

The period for responding to a complaint and the period indicated in the summons are shorter than in ordinary civil court procedure.

If proceedings cannot be terminated in one session, a date for continuation must be announced at once. If proceedings can be terminated, as a rule a judgment is pronounced immediately following the controversial hearing. The principle of expeditiousness is certainly to a great extent responsible for the fact that more than a third of the disputes pending in the LC are settled within a maximum of three months.

German Labor court proceedings recognize two forms of appeal: the first on points of law and points of fact, and the second on points of law only. Judgments of LC may be appealed to LAC within one month.

Appeal to the LAC is possible if the appeal has either been explicitly admitted by the LC, if the gravamen is worth more than 600 E, if the existence or termination of an employment relationship is at stake, or if, under certain further conditions, the decision to be appealed is a judgment in absence. In addition, an appeal has to be admitted if either the dispute is of fundamental importance, if it deals with matters relating to collective bargaining in a wider sense, or if the decision of the LC is based on a deviation from a decision of the respective LAC or FLC. The LAC reviews the case in complete detail, both on points of law and points of fact.

An appeal against judgments of LAC on questions of law only may be lodged to the FLC within one month, provided that the LAC has it explicitly admitted. The possibility to appeal must be granted if the dispute

is of fundamental importance or if the decision of the LAC deviates from a preceding ruling of the FLC. If the possibility to appeal is denied there is a special procedure to nevertheless reach a reviewing decision of the FLC under certain conditions. In cases under review by the FLC, no new facts may be put forward; the facts established by the LAC are to be accepted.
The FLC is strictly limited to questions of law.

E. Costs
Labor Court proceedings are less expensive than other court proceedings. Court fees are set up in proportion to the amount at stake. In cases dealing with protection against dismissal, for example, the law limits the reference value to three times the amount of the respective employee's monthly salary. Court fees amount to only a small percentage of this sum; they are to be paid by the losing party.
The distribution of lawyers' fees follows a different pattern. In the LC, each party, including the winning party, shall bear the costs of its own counsel. The purpose of this regulation is to minimize the employee's risk, who would otherwise, should he or she lose the case, be required to pay the fees of his or her employer's lawyer. For trade union members, however, this rule has no importance since trade unions provide legal counsel at no cost. This, by the way, is for many employees the main reason for joining a trade union. Hence, trade unions serve in a way as a sort of insurance for legal expenses.
In the LAC and the FLC, the losing party must bear the lawyers' fees of both parties. In the LAC, a trade union member may again be represented by legal counsel offered by his trade union free of charge. On this level, however, union membership does not automatically guarantee free legal counsel. The trade unions decide in each individual case whether or not they are willing to offer legal aid for the second instance, depending on their evaluation of the employee's chances to win the case. The reason for this practice is simple: trade unions do not want to waste money.
If one of the parties is not in a position to pay the costs of the proceedings without jeopardizing his or her family's income, there is a possibility to apply, under certain circumstances, for legal aid provided by the respective individual State.

F. Evaluation of the Labor Court System
On the whole, the Labor Court system enjoys high legitimacy, in no small part due to the integration of lay judges into the system. Although

occasionally particular judgments of the large senate of the FLC are difficult to bear for either the trade unions or the employers' associations, the judgments are accepted by these organizations since their own people participated. If the judgments are challenged in the FCC, it is mainly to limit the FLC's leeway for further decision making. The impartiality of the FLC is not challenged. The judges' knowledge in employment and labor law is of a high standard. The lay judges guarantee that the Labor Courts are familiar with the milieu in which the cases arise. Access to the Labor Courts is rather easy and the procedures are speedier than in other branches of the court system. Therefore, it is no surprise that the German Labor Court system has served in many countries as a sort of model, of course not to be fully copied, but to be reformulated in a way that fits into the respective circumstances of respective countries.

As already indicated, employees seldom go to the Labor Courts during ongoing employment relationships. Courts only tend to be involved in the context of conflicts on the termination of an employment relationship.

However, it should be kept in mind that there are internal-formal and informal-grievance procedures within the companies in which the works councils are involved. ([286])

3. Dispute Resolution in Disputes of Interest in

Collective Bargaining

A. From Compulsory Arbitration to Voluntary Dispute Resolution

After the First World War, collective bargaining in Germany became subject to detailed legal regulation. In this context, the Act on Dispute Resolution of 1923 is of particular relevance. According to this Act, dispute resolution boards composed of representatives of trade unions and employers' associations, chaired by a president nominated by the State, had to be established. Their primary task was to mediate on request of one of the parties. It was up to the parties to accept their proposals or not. There were, however, two important exceptions. First, the board was authorized to intervene, without having been requested to intervene by one of the parties, provided that the intervention was suitable in view of the "public interest." Second, the proposal of the board could be imposed on the parties if it was "necessary for economic and social reasons." It was exclusively up to State agencies to decide whether either of the two requirements had been met.

This system of dispute resolution by State authority was conceived to be an exception to the normal rule. However, it became increasingly important in the course of the Weimar Era (the period between 1919 and 1933), primarily in the mining industry, the iron industry, the metal industry, and the textile industry. In 1929, more than half of all collective agreements were results of dispute resolution by state authority. Due to the catastrophic economic situation (world economy crisis), trade unions were weak and no longer in a position to organize efficient pressure on the employers' side. Therefore they were quite satisfied with the system of compulsory arbitration. When in 1933 the Nazi-party came into power, trade unions and employers' associations, as well as collective bargaining, were abolished. After the Second World War, there was a consensus between trade unions and employers' associations that compulsory arbitration was a disaster. Because it was clear that the State would in the very end determine the standards of working conditions, the trade unions relied too much on state arbitration instead of keeping up their autonomous power. Employers' associations now understood that due to compulsory arbitration, labor costs had reached an amount that promoted the decline of the German economy. In short, looking back, both actors opposed the compulsory system of dispute resolution by State authorities as being inadequate. That is why it was clear that the reestablishment of such a system had no chance after the Second World War. The present situation can only be understood as a reaction to the experiences of the Weimar Era. The result of this insight into the mistakes of the past is simple. It is left to the parties of collective bargaining (trade unions and employers associations) to voluntarily establish mechanisms of conflict resolution by agreements between them. The State is no longer entitled to intervene.
However, before taking a closer look into this voluntary system, it should be emphasized that the vast majority of collective agreements up to now have been concluded without involvement of such a mechanism.

B. Voluntary Joint Dispute Resolution

In a 1954 agreement between the German Confederation of Trade Unions (DGB) and the German Confederation of Employers' Associations (BDA), the following basic terms were spelled out:
Thereby the DGB and the BDA as well as their member associations are obliged to take serious efforts to primarily conclude collective agreements by way of free negotiations. If those negotiations do not lead to a result it is the common conviction of DGB and BDA that State boards should not be involved in dispute resolution in collective bargaining, but only joint

dispute resolution boards based on voluntary agreements. This, however, requires that the necessary preconditions for such a voluntary system are established by the contracting parties. ([287])

The same agreement contains a model of such an agreement on joint dispute resolution, which is recommended to the member associations as a sort of point of orientation. At the same time, member associations were urged to conclude corresponding agreements as quickly as possible. They, of course, were free to modify the model agreement offered by DGB and BDA. It is interesting to note that the model agreement already offered two alternative types of joint dispute resolution boards: one only composed of the contracting parties, and the other chaired by a neutral president.

Meanwhile, agreements on the establishment of joint dispute resolution cover all areas of the private sector. It has to be stressed, however, that there is no homogeneous pattern; it differs from industry to industry and from sector to sector. In order to give an idea of the wide range of variety, three agreements on the establishment of joint dispute resolution are selected to illustrate this phenomenon: the agreement for the food industry, the agreement for the metal industry, and the agreement for the chemical industry.

1. Composition of Joint Dispute Resolution Boards

The structure of the joint dispute resolution boards differs very much from branch to branch. In the food industry, two instances are provided for: a board of first instance, and a board of appeal. The board of first instance consists exclusively of trade union representatives and representatives of employers' associations, four from either side. Each group of representatives elects a chairperson. The two chairpersons act as presidents, both enjoying equal rights. The board of appeal, consisting also of four representatives of each side, is chaired by a neutral president. This president is selected from a list compiled by agreement of the two sides.

The list contains three names. If the two parties cannot agree on whom to select within three days after the appeal has been initiated, the choice is made by lot.

The metal industry has a board for joint dispute resolution in general and a board for special dispute resolution during strike and/or lock-out. The board for joint dispute resolution in general is composed of two representatives of each side, as well as two presidents, of whom only one is entitled to vote. The two presidents are to be nominated by the agreement of both sides. If no agreement is reached, either side has the right to nominate one of the two presidents. The question of who has the right to

vote, and who is prevented from voting, must again be resolved by agreement. If agreement cannot be reached immediately, the lot has to decide. The composition of the special dispute resolution board is basically the same. In this case however, there are not only two but three representatives of both sides.
In the chemical industry, the board is composed of three representatives of each side. It is exclusively up to the board members to elect a president among themselves. The presidency, however, has to rotate between union representatives and employers' association representatives.
In spite of all these differences, one common feature has to be underlined: there is always a distinction between regional boards for regional agreements and national boards for industry-wide agreements.

2. Initiation of the Joint Dispute Resolution Procedure
According to the agreement for the food industry, it is only necessary that one of the two parties takes the initiative to involve the joint dispute resolution board; the respective other side is obliged to participate. The initial step, however, has to meet some formal requirements (e.g., a written, detailed description of the issues at stake, etc.). If joint dispute resolution fails to be successful in the first attempt, each party may appeal to the board of appeal in the same way.
According to the agreement for the metal industry, joint dispute resolution is only available either before negotiations take place, or after negotiations have failed. Failure has either to be agreed upon by both sides or has to be declared in writing by one side to the other. After negotiations have failed, both parties can jointly initiate the dispute resolution within two days. If this does not happen, each party can unilaterally initiate joint dispute resolution within another day. Such a unilateral attempt of initiation, however, leads to joint dispute resolution only if the counterpart, within another period of two days, agrees to participate. In other words, neither side has the power to impose joint dispute resolution on the other one. This in particular applies to the special joint dispute resolution during a strike or lockout, which can only be involved on the mutual request of both sides.
Just like the agreement for the metal industry, the agreement for the chemical industry allows joint dispute resolution only on the condition that negotiations already took place and that failure of negotiations has been declared by at least one party. There is, however, an exception that can only be understood in view of the fact that German law does not recognize a duty to bargain. That is why the agreement for the chemical industry allows access to joint dispute resolution if negotiations on a new collective

agreement or on a new subject matter are refused by the counterpart. If within a period of thirty days no consensus on a date for the beginning of negotiations is reached, joint dispute resolution can be initiated. In the chemical industry, unlike the metal industry, either side has the right to impose joint dispute resolution on the other side unilaterally. The other side is obliged to participate.

3. Joint Dispute Resolution and Peace Obligation

In Germany, industrial action on subject matters regulated in a collective agreement is prevented until the collective agreement expires or is terminated (e.g., by a peace obligation). In some agreements on joint dispute resolution, this peace obligation is extended beyond the termination of the collective agreement. The agreement for the food industry prevents industrial action for the duration of the joint dispute resolution procedure.

While the agreement for the metal industry lacks a comparable provision, strikes and lock-outs are prohibited for a period of four weeks after termination of the former agreement. The furthest reaching prolongation of the peace obligation is laid down in the agreement for the chemical industry: strike ballots, strikes, or lock-outs may only be initiated after unsuccessful termination of the joint dispute resolution procedure. In other words, in the chemical industry joint dispute resolution has to precede industrial action.

4. Procedure and Effects of Joint Dispute Resolution

There is one feature common in all industries: none of the boards meet in public. Whereas in the food industry it is up to the board whether experts or persons who can give information are invited, this is different in the two other industries. In the chemical industry, each side can bring its own experts and/or persons who can give information. In the metal industry, the situation is slightly more complicated. Both sides are free to make offers in this respect. However, if the board decides to hear an expert or another person of one side, the other side has the right to bring in an equivalent person.

According to all three agreements, the board has to hear the parties and to evaluate the documents, etc., presented by the parties. It is, however, mainly up to the board itself to develop respective procedural rules; the agreements contain no procedural rules. According to all three agreements, the boards primarily have to make an effort to stimulate an agreement between the parties instead of presenting proposals themselves.

In the food industry, a recording clerk has to write minutes. These minutes, however, are to be kept secret. The recording clerk, like the members of the board, is obliged to keep the content of the proceedings secret. Even if the respective clauses in the other two agreements are not as detailed, the regulations are the same. In the food industry, the board decides with a simple majority. No board member may abstain from voting. Normally, it is up to the parties whether or not they accept the proposal of the board. However, there is one important exception: if at least six of the eight board members have voted for the board decision, it is binding on the parties. If the board of first instance does not reach a decision, or if the parties do not accept the decision, the board of appeals can be involved. A similar rule applies for the board of appeals: while it is generally up to the parties whether or not they accept a decision, if seven of the nine board members have voted for the decision, it is binding on the parties. Parties may, however, also agree in advance that they shall be bound by each of the board decisions. Such an agreement cannot be repealed later.
In the metal industry, there is a provision according to which the board has to propose a decision within a certain period. The proposal has to be in writing. Decisions are also made by a simple majority. The decision is in no case binding, however. It is always up to the parties to accept the proposal or refuse to accept it. The parties may, however, agree in advance that the decision of the board shall be binding. This agreement can be restricted to board decisions by a qualified majority or to unanimous board decisions. There is no difference between the procedure in a general joint dispute resolution and in joint dispute resolutions during strikes and lockouts.
In the chemical industry, board decisions based on the simple majority of votes are binding. Finally, it should be mentioned that the expenses of the joint dispute resolution machinery are shared by the parties in all three industries.

5. Evaluation of Voluntary Dispute Resolution

Voluntary joint dispute resolution aims to serve two purposes: to promote an agreement and prevent strikes and lock-outs, or at least to terminate strikes and lock-outs. Negotiations in different branches do not take place at the same time every year. Usually a large trade union is put in the role of a trendsetter and the others more or less follow. Thereby, a fairly homogeneous overall pattern is established. It is usually either the IG Metall (metalworkers' trade union) or ver.di (united service workers' trade union) that plays the role of trendsetter. In those trend-setting situations,

joint dispute resolution is customarily not used to prevent a strike. If a collective agreement cannot be reached easily, industrial action has to be taken in order to show each side's constituency that every attempt is being made to improve the results of bargaining. But once strikes (and lockouts) have started, joint dispute resolution is usually used to terminate the dispute. In such instances, joint dispute resolution has proved to be a rather successful instrument, determining the pattern of the final outcome. This is due to many factors. In both sectors, in the public services as well as in the metal industry, external mediators play a decisive role. These are usually people of high authority, capable of promoting compromises and especially to selling those compromises to the general public.

It should be kept in mind that collective bargaining-at least in principle-does not take place on the company level but on the branch/sectoral level for a multitude of companies. Therefore, bargaining rounds-especially the trend setting bargaining round-enjoy high public attentiveness. Public opinion is shaped by all kinds of statements: statistics and evaluations published by different economic research institutes, statistics and evaluations published by the advisory Economic Research Council (a body linked to the Federal government, which delivers an annual report on the economic perspectives to the Federal government), the view of the Federal government on the economic perspective, and of course, the views of the two counterparts of the bargaining table, are all published in the media.

This mixture of information, which is discussed daily in the media, helps to create an understanding that an agreement should be reached within a certain range. The mediator's main task is to convince parties to a collective agreement that his or her proposal meets this expectation. Hence, the support of the general public and the support of the constituency of each side are more or less guaranteed. In order to assure this goal, the media are involved once the joint dispute resolution board is making a proposal. The media's positive reaction, at least in principle, guarantees the approval of the proposal by the parties and their constituency. This analysis, of course, would be incomplete without mentioning that the general public and the media consider strikes (and lockouts) to be events that should be stopped quickly. This attitude, of course, helps to support the attempts of joint dispute resolution.

Once the trend setting bargaining round is terminated, bargaining in other branches starts. In this context, joint dispute resolution is quite often used to prevent a strike. In such a situation, there is not much need to go on strike for reasons of legitimacy. Hence, joint dispute resolution can serve a preventive function. It normally turns out to be necessary to enable the

party representatives at the bargaining table to sell the results to their respective constituency.
On the whole, the system of voluntary joint dispute resolution has turned out to be an instrument which helps a great deal to promote suitable compromises without infringing on the autonomy of the collective bargaining of the parties involved. If from time to time individual politicians or legal scholars plead for a revival of dispute resolution by State authorities-especially for the public sector-this should not be taken too seriously. At least so far, such attempts have remained irrelevant, and they will probably remain irrelevant in the future.
Because no third party intervention is able to force the parties to reach an agreement, however, the only remaining instrument to put pressure on the parties is industrial action. This is why the legal regulation of industrial action is very important for the structure and functioning of the German system of collective bargaining. All the rules available in this area are judge-made law; there is no statutory law whatsoever.

4. Conclusion

In Germany, the distinction between disputes of rights and disputes of interests is of utmost importance. The exclusive actor for dispute resolution in disputes of rights is the judiciary. In Germany, a sophisticated and well-functioning system of Labor Courts has been developed. Its impartiality and legitimacy are not contested. The participation of trade unions and employers' associations in this system is a primary reason for its strength.
The resolution of disputes of interest in collective bargaining is nowadays exclusively up to the parties of collective agreements. It is a voluntary system that makes sure there is no State intervention whatsoever.
It is based on agreements between trade unions and employers associations.
Its appearance differs from branch to branch.

The Interface between Constitution and Labor Law in Germany*

SUMMARY: I. Introduction. – II. Freedom of Association as Prominent Example of How to Fill the Gap. – III. Vertical and Horizontal Application. – IV. Rights and Principles Derived from the Constitution. – V. Indirect Horizontal Application of Fundamental Rights. – VI. Conclusion.

I. Introduction

The Basic Law, passed in 1949 as Constitution for the Western part of Germany, became also the Constitution for the unified Germany in 1990. The first and most important chapter of this Constitution contains a catalogue of fundamental rights that is of utmost importance. These fundamental rights more or less are the strongest pillar on which the Federal Republic of Germany is built. If it is explicitly allowed by the specific provision referring to a fundamental right this right may be restricted to a certain extent by legislation. But "in no case may the essence of a fundamental right be affected" (article 19, paragraph 2). The Constitution can be amended by a two-thirds majority in the legislative bodies. But amendments by which the principles guaranteed by the articles on fundamental rights would be affected are considered to be null and void (art. 79 par. 3).

This safeguard against the abolishment of fundamental rights (and other pillars of the Constitution) is a reaction to the experience made in the Nazi-period where it became clear that majority vote does not prevent the perversion of the rule of law.

According to article 1, paragraph 3, of the Constitution, all three State powers-the legislature, the executive, and the judiciary-shall be bound by the fundamental rights. Article 1, paragraph 3, however, does not give a full picture of the scope of application of fundamental rights. It is much

* In *Comparative Labor Law & Policy Journal*, 2005, p. 181.

too narrow and therefore misleading. It only refers to the vertical application in the relationship between citizens and State. This reflects the traditional understanding of fundamental rights as a defense against State power, thereby guaranteeing the citizens an area of freedom in which the State cannot interfere. In the meantime, this traditional understanding is only considered to be the starting point. Fundamental rights nowadays are considered to be the expression of values on which the legal order as a whole is based.

Therefore, they no longer can be ignored in the relationship between private actors. Inequality of power is not only characteristic for the relationship between State and citizens, but is also a growing phenomenon between private actors, as for example employers and employees. This insight has led in Germany to the concept of indirect horizontal application of fundamental rights. This is a soft way of introducing the fundamental rights into relationships between private actors. The fundamental rights are not applied strictly the same way as in the relationship between State and citizens but the general clauses of the law governing relationships between private actors are to be interpreted in light of the values expressed by the fundamental rights. This of course gives the judiciary a broad leeway of interpretation in adapting the fundamental rights to the specific situation.

Among the fundamental rights as guaranteed in the Constitution there is only one that might be considered fundamental social rights in a strict sense. According to article 9, paragraph 3, the right to form associations to safeguard and improve working and economic conditions is guaranteed to every individual and to every occupation and profession. One might be inclined to include article 12 into this category, which guarantees freedom of profession. Here of course the social impact is evident. But, after all, freedom of profession belongs to the set of classical rights of a civic society, even if its meaning has changed during history. The other fundamental rights evidently belong in the box of classical fundamental rights: human dignity (article 1); personal freedom (article 2); equality before the law (article 3); freedom of faith, conscience, and creed (article 4); freedom of expression and freedom of press (article 5); protection of marriage and family (article 6); freedom of education (article 7); freedom of assembly (article 8); protection of privacy in correspondence, posts, and telecommunication (article 10); freedom of movement (article 11) inviolability of the home (article 13); protection of private property (article 14); protection against deprivation of citizenship (article 16); right to asylum (article 16a); and right to petition (article 17). It is the main purpose of this contribution to show that it would be a totally misleading

conception to ignore the social impact of these so-called classical fundamental rights. The strict separation between the so called classical fundamental rights and social fundamental rights does not make much sense any longer. After all, they are the two sides of the same coin. Fundamental freedoms and equality rights are useless if the social basis is lacking. If social fundamental rights are not expressly guaranteed, the classical fundamental rights have to be interpreted in a social perspective if they do not want to risk losing their function. Germany is a very good example for such a reinterpretation of fundamental rights. Fundamental rights are no longer understood mainly to guarantee freedom and equality in a formal sense, but in a substantial way. This means that the social basis has to be included. Therefore it is no surprise that labor law in Germany to a great extent nowadays is nothing else but law derived from fundamental rights. The Federal Constitutional Court as guardian of the Constitution has great merits in developing and strengthening the concept of fundamental rights. But its intervention only covers the peak: situations where the impact of fundamental rights is highly controversial. Much more important is the interpretation of ordinary law by ordinary courts in light of the Constitution. In the area of labor law this important task is fulfilled by the labor courts, in particular by the Federal Labor Court.

According to the Act on Collective Agreements, the parties to collective agreements in Germany are entitled to act as if they would be legislators, namely to set norms to be respected by the parties to an individual employment contract as if they would be a statute.

Therefore in setting such norms they are bound by the collective agreements as if they would be a legislator, which means that they are directly bound. The concept of indirect horizontal application is not needed here, even if the parties to collective agreements are of course private organizations.

Fundamental rights as guaranteed by the Constitution not only play a role where statutory law is to be interpreted but also where no legal texts whatsoever are available. Then it is the task of the judiciary to fill the gap by interpreting the Constitution and derive legal structures there from.

Fundamental rights in Germany do have a double face: they are first of all subjective rights of the individual, but to a great extent also institutional guarantees. If, for example, the freedom of press is guaranteed this not only means the freedom of those who produce the press to freely express their opinion and the right of the individuals to freely use the press to get information, but it also means the guarantee of the existence of a free press as an institution. Or if the family is guaranteed it not only means that

individuals are guaranteed to have the right to get married and have a family, but it also means that marriage and family as institutions are to be protected. This focus on the need of the institutional basis has led to a further development of the function of fundamental rights: the State not only has to provide the institutions as guaranteed by the fundamental rights but has a duty to do everything to provide a framework that makes sure that the fundamental rights are becoming relevant in actual practice: far beyond the traditional understanding of fundamental rights as mere defense against the State.

II. Freedom of Association as Prominent Example of How to Fill the Gap

In Germany there is no statute on strike and/or lock-out.
Nevertheless there is a very elaborated law on strike and lock-out, exclusively developed by the judiciary, the Federal Labor Court, and to a certain extent the Federal Constitutional Court. The Courts based the whole system of these detailed and rather complicated rules on industrial conflict on one single phrase of the Constitution: "The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession" (article 9, paragraph 3 first sentence).
Evidently this provision does not say a single word on strike and lockout.
It merely guarantees the fundamental individual right of association, the individual employee's right to form and join a trade union, and the individual employer's right to form and join an employer's association, nothing else.
In applying the philosophy sketched above the Courts made clear that individual freedom of association would be useless if the organization itself was not constitutionally protected either.
Following this insight, the so-called collective freedom of association is understood as being implied by the individual freedom of association. This means constitutional protection of the organizations' existence as well as of their activities. One of the main activities of trade unions and employers' associations, of course, is collective bargaining. Hence, it is accepted that article 9, paragraph 3, of the Constitution-in spite of its wording-also guarantees a system of free collective bargaining as an institution in which the individual freedom of association can play a relevant role in actual practice. This first step implies the second one: Once

it is agreed that a system of free collective bargaining is guaranteed by the Constitution, the philosophy sketched above requires that this system has to be shaped in a way that makes sure that it can fulfill the function to provide adequate working conditions. This is only possible if one side cannot dictate the conditions to the other one: the system needs a fair balance of power to give each side an equal chance to reach an adequate compromise. This implies the right to strike: without this right collective bargaining would be nothing but collective begging.
And according to the Federal Labor Court to a certain extent and under very specific conditions a right to defensive lock-out is needed in order to guarantee this balance of power in all circumstances of industrial action. Without going into any description of details of strike law or law on lock-out ([288]) it has to be stressed that the mere recourse to the Constitution's provision on the fundamental right of association is the only source for this whole set of law. Thereby the right to strike and-at least in principle-the right to lock-out become part of the constitutional guarantee.

III. Vertical and Horizontal Application

As already mentioned the legislature, executive, and judiciary are bound by the fundamental rights. To make sure that violations are not tolerated there is access for any person (be it a human being or a legal person) to the Federal Constitutional Court. The procedural requirements are ignored here. It is important that in the very end it is possible to get any measure by a State power to be examined by the Federal Constitutional Court.
This power to examine also applies to statutes, no matter how big the majority was in the Parliament. If they are not in line with the Constitution they may be declared null and void. To just give a prominent example of the area of labor law: when in 1976 the Act on Co-Determination (referring to the employees' representation in the supervisory board of big companies) was passed with an impressively large majority in Parliament, employers and employers' associations challenged the constitutionality of this statute, claiming that it would violate the fundamental right of the employer's freedom of profession (article 12) and the shareholders' fundamental right of property (article 14). In a very spectacular judgment, the Federal Constitutional Court confirmed the constitutionality of the statute, at the same time drawing far-reaching borderlines for a further extension of this concept of co-determination. ([289]) These borderlines may play an important role in the actual discussion on an amendment to the Act

on Works Constitution containing the provisions on workers' participation by way of works councils. ([290])

Whether a judgment by the Federal Labor Court is in line with the Constitution, of course, may also become a question of controversy. Also, in such cases the Federal Constitutional Court may be involved. This happened quite often in the past, last not least in the already sketched area of the right to strike and the right to lockout. ([291])

There is only one fundamental right where recourse to the concept of indirect horizontal application in the relationship between private actors is not needed: the already mentioned article 9, paragraph 3, on freedom of association. There it reads: "Agreements that restrict or seek to impair this right shall be null and void; measures directed to this end shall be unlawful." This implies that private actors as potential violators of the fundamental right are in the same position as are the legislative, executive, and judicial powers of the State. Any measure by an employer or by anybody else violating the employees' freedom of association would be null and void and might lead to sanctions.

In this context, it is important to at least indicate the complicated structure of this fundamental right. It not only protects the organized but also the non-organized employees and employers. This is true in spite of the wording of article 9, paragraph 3, of the Constitution that only refers to the so-called "positive freedom of association" guaranteeing the individual's right to form an association, to join an association, and to be active in an association. The Federal Labor Court and the Federal Constitutional Court interpret this constitutional guarantee in a way that also covers the so-called "negative freedom of association." The underlying idea is that the positive freedom would be no freedom at all if there would not be at the same time a guarantee to be left alone, to enjoy the freedom not to join an association, or to leave an association.

The demarcation line between the associations' right of collective freedom of association and individual negative freedom of association is not easy to be drawn. There is a significant amount of case law where the judiciary tries to find a fair balance between the two conflicting rights. A tendency to overstate the relevance of the "negative freedom of association" and thereby to significantly limit the organizations' collective freedom of association can be observed.

This may be well illustrated by the leading case in this area. By using the instrument of collective agreement, trade unions tried to establish clauses that would lead to the effect that some financial advantages would be reserved for trade union members, there should have always remained a

certain small gap (in the area of fringe benefits) between union members and non-unionized employees. These so-called gap clauses led to a conflict between the positive freedom of association, backing the trade unions in increasing their attractivity, and the negative freedom of association, backing the non-unionized employees in their wish not to be tempted to join a trade union due to its increased attractivity. This conflict was solved in favor of the negative freedom of association, these clauses were held to be null and void. This judgment of the Federal Labor Court ([292]) provoked a critical discussion. By many authors the Court's attitude was understood as an over-estimation of the negative freedom of association. The Federal Labor Court, however, has maintained its view until today, rejecting the critical voices. ([293])

IV. Rights and Principles Derived from the Constitution

In Germany, civil law protects specific rights against violation and provides remedies in case of violation. This set of rights has been amended: not by statutory law but by the judiciary in taking recourse to the values as expressed by the fundamental rights in the Constitution. Human dignity as the core value and the right to freely develop one's personality (articles 1 and 2) were the main source for such a strategy of developing rights that-once in existence-are now integrated in the set of rights already guaranteed there by statutory law.

A. Privacy Protection

First, there is the general right to respect one's personality. This means that any infringement into the private sphere of an individual is as well forbidden as the disrespectful treatment of an individual that might harm his or her position in the estimation by others. From this general law a specific one in addition was developed: the right of self-determination in reference to an individual's personal data. The existence of these rights, of course, does not exclude the problem that they might be in conflict with other values protected by the Constitution. In such a situation it is the judiciary's task to develop a fair balance between these conflicting positions, each one backed by the catalogue of fundamental rights in the Constitution.

The functioning of the general right to respect one's personality and of the specific right to self-determination in reference to the individual's personal data may be illustrated by the way the Courts restrict the employer's

possibility to get information from job applicants. Formerly, the employer was free to ask the applicants all possible questions and make them undergo all kinds of tests. This has changed significantly: the rights just mentioned are now seen as an important restriction for such practices. However, the employer's right to get information on the applicant in principle is backed by the fundamental rights in the Constitution, in particular by the employer's freedom of profession, by the protection of private ownership of means of production, and, last not least, by the freedom to develop one's personality, which is considered to be the constitutional basis for the freedom to choose the contractual partner. In short, a fair balance has to be found between the conflicting positions. In order to find a solution to this conflict the Courts only allow questions that are in the employer's justified and approvable interest, and need to be answered because of the employment relationship to be established, may be asked. The employer's interest must actually be so strong that the employee's interest in protecting the inviolability of his privacy is considered less important. The applicant is not obliged to answer inadmissible questions and-more important for evident practical reasons-is allowed to answer inadmissible questions with a lie. Only a false answer to a rightfully asked question can be considered fraudulent misrepresentation with the legal consequence that the employer may contest the contract of employment. Due to the fact that Germany has a very efficient protection against unfair dismissals, the wrong answer to an inadmissible question may not only bring the applicant into the employment relationship but also guarantee its maintenance. The tendency, in view of the rights protecting the applicant's privacy, is to increasingly restrict the employer's right to ask questions invading the private life of the applicant. To give an example: the employer may only ask about previous convictions if the job at stake requires this. Thus, for example, an accountant or a cashier may be questioned about previous convictions for property offenses, or a truck driver may be asked about previous convictions for traffic offenses. But even then the applicant need not declare previous convictions or disclose the underlying facts of the conviction if the previous convictions are no longer registered in the Federal Central Register for Convictions or if they need no longer be listed in the policy certificate of good conduct, i.e., not in cases of insignificant offenses or offenses committed more than five years ago. The example shows that the Courts' discretionary power in drawing the demarcation line is enormous. But it is perhaps the only way to find a fair balance between the conflicting values as expressed by the Constitution. ([294])

B. The Right to Work

In Germany there is no right to work in the sense that an individual would be entitled to get a job. The right to work, however, plays a role within an already existing job, and this again is only due to articles 1 and 2 of the Constitution.

According to the statutory provision (section 611 of the Civil Code), which defines the mutual rights and duties in an employment relationship, the employee is obliged to work and the employer is obliged to pay the salary. There is no employer's duty to allow the employee to work. Therefore, the employer is fulfilling the contractual duties by simply paying the salary. This has led to situations (particularly in cases where the term of notice for dismissal was extended by contract and therefore very long) where the employer was ready to pay the salary until the end of the employment relationship but did not allow the employee to show up and perform the work to which the employee was obliged by the contract. This approach became more and more understood to be incompatible with the principles laid down in articles 1 and 2 of the Constitution, namely human dignity and the right to free development of one's personality.

Self-fulfillment of one's personality by working, at least in the German context, is considered to be an essential element of the freedom to develop one's personality. That is why the Federal Labour Court has established the employee's right to work and not merely get the remuneration. At first, this right was only granted for certain professions, now it is a general and uncontested rule. Only under certain very restricted conditions (for example, if the employee is suspected of grave misconduct) can the employer still unilaterally declare the suspension and thereby is freed from the duty to allow the employee to perform the work according to the employment contract. ([295])

This right to work has been extended by the Federal Labour Court into the context of the lawsuit on the lawfulness of a dismissal.

The German law protecting against unfair dismissals is focusing on reinstatement in case of an unlawful dismissal. However, even if the dismissal is judged to be unlawful the employer can still reach a dissolution of the employment contract and thereby prevent reinstatement. Such a dissolution, however, is granted by the Court under two conditions: first the employer has to pay a certain financial compensation and second it has to be demonstrated that further fruitful cooperation can no longer be expected. The latter precondition can be fulfilled relatively easily if the employee is no longer integrated in the company. If, however, the employee still remains there and continues working, it is much more

difficult for the employer to convince the Court that further fruitful cooperation can no longer be expected. Therefore the question of whether the employee has a right to continue working during the whole period of the lawsuit became crucial. Such a lawsuit on the lawfulness of a dismissal can last several years, if all levels of the Court system (Labour Court, Labour Court of Appeal, Federal Labor Court) are involved. This explains why this question became a matter of such enormous controversy. The Federal Labor Court in a spectacular judgment ([296]) elaborated a compromise. In view of the uncertainty as to the question of whether or not the dismissal has been lawful and therefore has terminated the employment relationship, the dismissed employee has no right to remain in the company and to continue to work there. But-and this is the important innovation-if, according to the decision of the Labour Court of first instance, the dismissal is considered to be unlawful, the dismissed employee is entitled to continue working for the remaining period of the lawsuit in the appellate levels until its final decision. In other words, once there is a strong indication of the unlawfulness of the dismissal, the employee's interest in continuing working prevails over the employer's interest.

This new approach has significantly improved the employee's possibility to get reinstated in case of an unlawful dismissal.

C. The Principle of Equal Treatment

According to article 3, paragraph 1, of the Constitution "all persons shall be equal before the law." This fundamental right has become the legitimacy basis for the principle of equal treatment that was again developed by the judiciary and that plays a very important role in employment relationships.

The principle of equal treatment only applies to group oriented regulations of working conditions. The principle of equal treatment, on the one hand, demands that every member within a group must be treated equally. It limits, on the other hand, the employer's freedom to divide the workforce into different working conditions. The principle of equal treatment does not totally exclude different treatment. It prohibits arbitrary distinctions but allows differences that are specifically justified. The requirements for such a justification become more onerous. To just give an example, if an employer gives a gratification to white-collars and not to blue-collars this evidently would be a group oriented regulation. Therefore the principle of equal treatment applies. The relevant question to be asked would be whether the distinction made between white-collars and blue-collars is

justified by the goal to be reached by the gratification. ([297]) This of course depends very much on the nature of such a gratification. If such a justification would be denied, the consequence would be that those who were excluded (in this example, the blue-collars) would get the same as the privileged group gets (in this example, white-collar workers).
It may well be that the excluded group consists of many more members than the privileged one: in such a case the principle of equal treatment may turn out to be very expensive for the employer.
This of course is very ambiguous: in order to not be trapped by the principle of equal treatment, the employer might be inclined to abolish gratifications and similar favorable conditions for the employees at all. But the example shows that the principle of equal treatment as deducted from the constitutional guarantee of equal treatment not only is understood as a formal prohibition to discriminate, but as a vehicle to equal distribution of services granted by the employer. The practical impact of this principle should not be underestimated.

V. Indirect Horizontal Application of Fundamental Rights

As already mentioned, indirect horizontal application of fundamental rights is by far the most important method to infiltrate the whole legal system, including labor law, by the values expressed in the Constitution's catalogue of fundamental rights. Therefore, it is simply impossible to give a comprehensive overview of the many varieties of cases in which this method is applied. It rather might be helpful to just indicate some typical constellations in which it plays a dominant role.

A. Monitoring the Content of the Employment Contract

According to the traditional philosophy of civil law it is up to the parties to a contract to agree on whatever they want, as long as they respect the limits set by statutory law. In labor law this traditional philosophy also applies. There, of course, not only statutes but also collective agreements and work agreements as concluded between works council and employer ([298]) narrow the limits left for individual agreements. But there is still much space for contractual freedom in actual practice.
As far as the employment contract is concerned the parties are not considered to be in an equal power position. This equality of factual power, however, is one of the basic underlying assumptions of the idea of contractual freedom: As long as there is no possibility for one side to more

or less dictate the contractual conditions to the other side there is no need for intervention, each side has the same chance to reach a fair compromise. The Labour Courts in Germany consider the employer to be typically in a stronger position than the employee.

Therefore, the power balance has to be re-established by Court intervention, of course, of only one of the parties seeks the Courts' support. According to a general clause embedded in the Civil Code, all contracts, including employment contracts, have to correspond to the principles of equity and good faith (section 242). This formula as such is more or less meaningless but it opens the door for bringing in the value system as expressed by the fundamental rights in the Constitution. And these values thereby become the decisive criteria for monitoring the contractual content. The monitoring procedure is more severe in reference to standardized contracts in comparison to contracts that are individually negotiated. But even in the latter alternative the employment contract is subject to the Courts' monitoring.

There are cases where it is pretty evident that the contract is violating the spirit of fundamental rights. To just give an example: There were employment contracts with stewardesses and stewards of airlines stipulating that the contract automatically is terminated if the stewardess or the steward gets married. This, of course, was judged by the Courts as being an evident and strong violation of the spirit of the fundamental right guaranteeing marriage and family as expressed by article 6 of the Constitution. ([299])

Most of the time the violation is not so evident. Then the monitoring is much more complicated. To again give an example: If an employer pays for specific training or educational programs in order to give the employee a chance to improve his or her level of qualification it is only natural that the employer is interested in keeping this higher qualified employee and profiting from his or her new skills. Therefore, it is common practice that the employer agrees with the employee to pay for the education but to get the payment refunded if the employee quits the job before a certain date.

Formerly such contractual clauses to repay such payments were considered to be unproblematic. The fundamental right on freedom of profession, however, not only guarantees the free choice of a profession but also the freedom to perform the profession (article 12 of the Constitution). This freedom of performance might be violated if the employee is prevented from making an optimal use of his or her qualification by not being able to move to another employer due to such a contractual clause. The contractual obligation to refund the payment in case of quitting the job turns out to a

certain extent to be a "golden chain": on the one hand the opportunity to improve the level of qualification and on the other hand the need to remain in the actual employment relationship. In examining such clauses in view of the fundamental right guaranteeing the freedom of profession the Federal Labour Court still allows such clauses to be agreed upon in principle.

However, there are significant limits. The period for which the employee must stay is to be limited. The time frame depends on the amount of payment and on the question of whether the new qualification is mainly one to be used internally in the company or one that is attractive on the labor market in general. The time frame also depends on the modalities of repayment, whether, for example, the whole amount is to be repaid whenever the employee leaves during this period or whether it is reduced step by step (full amount if quitting the first year, less if quitting the second year, even less if quitting the third year, etc.). In short and to make the point, the recourse to the fundamental right on freedom of profession has led to a very flexible pattern of limitation of such clauses that give the Courts a significant leeway in applying it to the individual case. ([300])

Numerous examples of this type of intervention could be given.

A very prominent one is the Federal Labour Court's jurisdiction on clauses by which the employee is prevented from competing with the employer after termination of the employment relationship. There is a specific statutory regulation on how to treat such clauses in the Commercial Code for white-collars performing commercial tasks. For all other groups of employees', however, there is no statutory provision whatsoever. Again, in view of the fundamental right on freedom of profession, the Federal Labor Court ([301]) has limited the possibility of such non-completion clauses and transferred the legal regime governing the white-collars with commercial tasks to all other employees. This means that the non-competition clause must be in writing, the limitation of the freedom to compete cannot exceed a period of two years after the contract has been terminated, and for the time of non-competition the employer has to pay to the employee a yearly amount of money corresponding to at least half of the yearly salary the employee received before the contract was terminated. In addition the clause is only valid if the employer has a justified business interest in the employee's non-competition and if it, in view of the region, the time, and the subject of non-competition, does not cause unreasonable disadvantages for the employee, taking into account the circumstances of each individual case. Again this pattern shows that

the Courts enjoy a significant leeway in applying the impact of the fundamental right to the individual case and in determining the limits.

B. Monitoring the Specification of the Contract

According to the rules of German labor law, the employee is obliged to work under the employer's command, authority, and control. In other words, the employer has the right to unilaterally specify the contractual obligations of the employee by giving him or her orders. This power, of course, can be delegated to supervising personnel within the organization of the establishment. The employee must obey the orders, otherwise he or she might risk a breach of contract, which might lead to sanctions. The right to specify the employee's contractual duties is limited by the wording of the contract which usually is rather vague. The problem, however, is whether there are further limits to this right to give such orders. The Civil Code contains a provision that is relevant in this context: the person who is entitled to unilaterally give orders has to use his or her discretion power in a way which respects the principle of equity (section 315). Again this general clause is very unspecific and more or less meaningless, but it opens the door for the values as expressed by the fundamental rights embedded in the Constitution.

An example may illustrate how this mechanism works. A researcher in a chemical company refuses to follow the employer's order to participate in a project that is supposed to develop pharmaceutical devices in order to reduce the injuries caused by nuclear weapons. This, at first glance, looks like an evident case of breach of contract. However, the employee claims that the participation in this project would be incompatible with his conscience. The Federal Labour Court ([302]) examined this case in view of the fundamental right on freedom of conscience (article 4, paragraph 1 of the Constitution), making reference to the content of this fundamental right as shaped by the Federal Constitutional Court. The latter developed a very far-reaching protection of an individual's conscience by stating that it is up to the individual to decide the content of his or her conscience and that there are, at least in principle, no criteria that can be applied from outside. Of course, this does not exclude the denial of the protection in cases that evidently have nothing to do with conscience. Nevertheless the individual's possibility to take recourse to this category is only limited by a very broad frame. In the case at stake, this meant that the employee's recourse to the conscience was justified and that it was not the Court's business to examine whether the employee's understanding of conscience is in line with the Court's understanding. Therefore the impact of this

fundamental right in such cases is far-reaching: the refusal is justified and by no means a breach of contract. However, it should at least be mentioned that this result is not without risk for the employee. The justified refusal may lead to the fact that the employee is incapable of performing the contractual work if, under the given conditions, there is no possibility to give him or her other work covered by the frame of the respective contractual duties. This depends very much on the position of the employee and on the size of the company at stake. However, in the context discussed here it is only important to demonstrate the limitation of the employer's unilateral right to specify the contractual duties. And here again fundamental rights turn out to be the crucial category.

C. Monitoring the Justification of a Dismissal

According to German labor law, a dismissal without notice (a so-called "extraordinary dismissal") is justified if "there are reasons which in view of all circumstances of the case and in evaluating the interests of both parties make it unacceptable for either of the parties to fulfil the contract until the end of the period of notice" (section 626 of the Civil Code). And under the regime of the Act on Protection against unfair Dismissals a dismissal with term of notice (a so-called "ordinary dismissal") is only socially justified and thereby lawful if there are reasons concerning the employee's personality, reasons concerning the employee's behavior, or urgent economic reasons (section 1). It is pretty evident that the formula for justification of an extraordinary dismissal and the broad notions for the justification of an ordinary dismissal under the Act on Protection against unfair Dismissals are very unspecific and therefore give the Courts a tremendous leeway drawing the demarcation line between justification and non-justification. In interpreting the formula referring to the extraordinary dismissal and in interpreting the notions concerning the ordinary dismissal, the Courts are obliged to perform this task in light of the values as expressed by the catalogue of the fundamental rights of the Constitution.

The function of the fundamental right on freedom of expression might be used as an example to illustrate the role that indirect horizontal application of fundamental rights plays in the area of dismissal. The Constitution guarantees to everyone "the right freely to express and disseminate his or her opinion by speech, writing and pictures" (article, 5 paragraph 1). It, of course, only plays a role if an opinion is to be expressed. According to the doctrine of indirect horizontal application of fundamental rights, there is no doubt that this guarantee also applies to employment relationships. Freedom of expression is one of the basic pillars of a democratic and

pluralistic society. Therefore, it is self-evident that it cannot be kept away from the area of employment that essentially determines the lives of the vast majority of citizens. However, it has to be mentioned that the constitutional guarantee of free expression of opinion is limited "by provisions of the general laws" (article 5, paragraph 2). According to the generally accepted interpretation, these "provisions" also include uncontested principles of law. In individual labor law this would be the duty of loyalty and the duty not to disturb the "peace" in the establishment. In finding out whether the expression of a specific opinion by an employee may constitute a justification of an extraordinary or an ordinary dismissal, the Courts have to counterbalance the fundamental right of free expression of opinion with the employee's duties. In making this evaluation, the Courts again possess a significant power of discretion. Therefore, it is difficult to predict the outcome in an individual case. It has to be stated, however, that the recourse to the freedom of expression has led to a very interesting trend. The huge amount of case law in this area clearly shows that, compared to the 1950s, more weight is given to the freedom of expression, at the same time reducing the relevance of the duty of loyalty and the duty not to disturb the "peace" in the establishment. ([303]) This is especially true in cases where public concern plays a role. This shows that the recourse to fundamental rights by way of indirect horizontal application is by no means static, but instead very dynamic. In this context the scholarly debate influencing the judges' perception of the fundamental rights plays an important role.

VI. Conclusion

The very sketchy description of the interface between fundamental rights as guaranteed by the Constitution and labor law has shown that labor law in many ways is infiltrated by these fundamental rights. Emancipated from the traditional understanding of defense instruments of the citizens against State power, fundamental rights have become a value system that defines to a great extent the content of the legal system as a whole. Since all the law has to be interpreted in the light of the Constitution, the judicial power has grown to a significant extent. The method of indirect horizontal application of fundamental rights opens the door for a flexible and soft approach to integrate the basic values into the different areas of law.
In labor law the recourse to fundamental rights is of specific importance due to the inequality of the position of the employer and the employee. On

the whole, the Courts have succeeded in developing a fair balance between conflicting fundamental values as well as between fundamental values and economic needs. The weight of the fundamental rights in labor law has increased rather than decreased during the last few decades. The Courts, as guardians of fundamental rights, have demonstrated their independence, remaining relatively unaffected by the sometimes hectic activities of politicians and interest groups to change the perspectives of labor law. This attitude is not only characteristic for the Federal Constitutional Court and the Federal Labour Court but for the Courts in general.

The position taken by the Courts also has a preventive effect.

The judiciary's focus on fundamental rights makes the legislator cautious. The threat that an intended statute could be considered unconstitutional actually works as a very efficient limitation in the legislative process. The present discussion on the planned amendment to the Act on works councils is a good illustration of this phenomenon.

The bottom line of all this is very clear: fundamental rights as guaranteed by the Constitution play a significant role in the genesis and application of labor law. Last, but not least, they are the most important safeguard against any attempt of destroying the protective function of labor law, thereby resisting modernistic trends. In the search for a labor law providing a fair balance between flexibility and security, the fundamental rights as embedded in the German Constitution are a good point of orientation.

ENDNOTES

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([75]) For the development of EEP see J Goetschy, 'European Employment Policy since the 1990s' in Reiner Hoffmann, Otto Jacobi Berndt Keller and Manfred Weiss (eds), *Transnational Industrial Relations in Europe* (Düsseldorf, Edition der Hans-Böckler-Stiftung, 2000) 137.
([76]) For an assessment of the Lisbon Strategy see the report of the High Level Group chaired by W Kok, *Facing the Challenge: The Lisbon Strategy for Growth and Employment* (Luxemburg 2004).
([77]) COM (2010) 2020 final.
([78]) 'Launching a consultation on a European Pillar of Social Rights', COM (2016), 127 final.
([79]) ibid at 3.
([80]) ibid at 7.
([81]) 26.4.2017 Com (2017) 2600 final.
([82]) 26.4.2017 Com (2017) 251 final.
([83]) Interpretative Communication on Directive 2003/88/EC of 4 November 2003 concerning certain aspects of the organization of working time, Brussels 26.4.2017, C (2017) 2601 final.
([84]) First phase consultation of Social Partners under Article 154 on a possible action addressing the challenges of access to social protection for people in all forms of employment, Consultation document of 26.4.2017, C (2017) 2610 final.
([85]) Proposal for a Directive of the European Parliament and the Council on work-life balance for parents and carers and repealing Council Directive 2010/18/EU, (SWD (2017) 202 and 203 final).
([86]) Consultation Document of 26.4.2017 First phase consultation of Social Partners under Article 154 TFEU on a possible revision of the Written Statement Directive (Dir 91/533/EEC), (SWD (2017) 205).
([87]) See in particular FW Scharpf, 'After the Crash: A Perspective on Multilevel European Democracy', *MPIfG Discussion Paper 14/21* (Cologne 2014) 17–22.
([88]) Directive 75/117/EEC of 10 February 1976, L 45/19.
([89]) Directive 76/207/EEC of 9 February 1976, OJ 1976, L 39/40.
([90]) Directive 75/129/EEC of 22 February 1975 OJ 1975, L 48.
([91]) Directive 77/187/EEC of 5 March 1977, OJ 1977, L 61.
([92]) For the genesis and the content of the Charter see M. Weiss, *The politics of the EU-Charter of Fundamental Rights*, in B. Hepple (ed.) *Social and Labour Rights in a Global Context*, Cambridge 2002, 73 et seq.
([93]) Directive 98/59/EC of 20 July 1998, OJ 1998, L 225/16.
([94]) Directive 01/23/EC of 12 March 2001, OJ 2001, L 82/16.
([95]) Directive 89/391/EEC of 12 June 1989, OJ 1989, L 183/1.
([96]) Directive 93/104/EC of 13 December 1993, OJ 1993, L 307/18, replaced by Directive 03/88/EC of 4 November 2003, OJ 2003, L 299/9.
([97]) Directive 96/34/EC of 3 June 1996, OJ 1996, L 145/9.
([98]) Directive 97/81/EC of 15 December 1997, OJ 1998, L 14/9.

([99]) Directive 99/70/EC of 28 June 1999, OJ 1999, L 175/43.
([100]) Directive 08/104/EC of 19 November 2008, OJ 2008, L 327/9.
([101]) For this development see M. Weiss, *The Implication of the Service Directive on Labour Law – A German Perspective*, in: R. Blanpain (ed.), *Freedom of Services in the European Union – Labour and Social Security Law: The Bolkestein Initiative*, The Hague 2006, 77 et seq. (78 et seq.).
([102]) Directive 96/71/EC of 16 December 1996, OJ 1997, L 18/1.
([103]) See for details of this initiative N. Bruun, *The Proposed Directive on Services and Labour Law*, in: R. Blanpain (FN 14) 19 et seq.
([104]) For the trade unions' view see S. Passchier, *The Point of View of the ETUC*, in R. Blanpain (FN 14) 141 et seq.
([105]) Directive 2006/123/EC of 12 December 2006, OJ 2006, L 376/1.
([106]) Directive 2000/43/EC of 29 June 2000, OJ 2000, L 180/22 and Directive 2000/78/EC of 27 November 2000, OJ 2000, L 303/16.
([107]) Directive 2006/54/EC of 5 July 2006, OJ 2006, L 204/23.
([108]) Directive 94/45/EC of 22 September 1994, OJ L 254/64.
([109]) Directive 09/38/EC of 6 May 2009, OJ L 122/28.
([110]) Directive 01/86/EC of 8 October 2001, OJ L 294/22.
([111]) Regulation 01/2157/EC of 8 October 2001, OJ L 294/1.
([112]) Directive 02/14/EC of 11 March 2002, OJ L 80/29.
([113]) Directive 2014/67/EU of 15. May 2014, OJ 2014, L 159/11.
([114]) European Commission, Proposal of 8 March 2016, COM (2016) 128 final.
([115]) For the development of EEP see J. Goetschy, *European Employment Policy since the 1990s*, in B. Keller, op. cit., 137.
([116]) For an assessment of the Lisbon Strategy see the report of the High Level Group chaired by W. Kok, *Facing the Challenge: The Lisbon Strategy for Growth and Employment*, Luxemburg 2004.
([117]) COM (2010) 2020 final.
([118]) 'Launching a consultation on a European Pillar of Social Rights', COM (2016), 127 final.
([119]) Ibidem p. 3.
([120]) Ibidem p. 7.
([121]) 26.4.2017 Com (2017) 2600 final.
([122]) 26.4.2017 Com (2017) 251 final.
([123]) Starting with ECJ of 27 March 1990 (Rush Portuguesa) C 113/89, ECR 1990, 1417.
([124]) Council Decision 2010/405/EU of 12 July 2010 and Council Regulation 1259/2010/EU of 20 December 2010 on enhanced cooperation in the area of the law applicable to divorce and legal separation, OJ 2010, L 189/12 and L 343/10; Council Decision 2011/167/EU of 10 March 2011, Regulation 1257/2012/EU of 17 December 2012 and Council Regulation 1260/2012/EU on enhanced cooperation in the area of the creation of unitary patent protection, OJ 2011, L 76/53, OJ 2012, L 361/1 and L 361/89; Council Decision 2013/52/EU of 22 January 2013 on enhanced cooperation in the area of financial transaction tax, OJ 2013, L 22/11.
([125]) Italy and Spain in reference to the creation of unitary patent protection.
([126]) Judgement in Spain v. Council C- 274/11 and 295/11 of 16 April 2013, EU:C 2013, 240.
([127]) See in particular F. W. Scharpf, *After the Crash: A Perspective on Multilevel European Democracy*, MPIfG Discussion Paper 14/21, Cologne 2014, 1 et seq. (17 -22).

([128]) R. BLANPAIN, *European Labour Law*, 12th edition, Kluwer, 2010, p. 878.
([129]) OJ 2011, L 141; this regulation substitutes the former Regulation (EEC) No. 1612/68 of 15 October 1968, OJ 1968, 157, which had been amended several times.
([130]) Janine Goetschy, *The European Employment Strategy: Genesis and Development*, European Journal of Industrial Relations 1999, pp. 117 - 137 (134).
([131]) OJ 2002, L 337.
([132]) Council Regulation 1407/2002 (EC) of 23 July 2002, OJ 2002, L 205.
([133]) Council Regulation 1540/1998 (EC) of 29 June 1998, OJ 1998, L 202.
([134]) Council Regulation 794/2004 (EC) of 21 April 2004, OJ 2004, L 140.
([135]) Therefore, it must be clear that the UK after the Brexit cannot remain to be linked to the common market without this freedom.
([136]) Directive 75/117/EEC of 10 February 1976, L 45/19.
([137]) Directive 76/207/EEC of 9 February 1976, OJ 1976, L 39/40.
([138]) Directive 75/129/EEC of 22 February 1975 OJ 1975, L 48.
([139]) Directive 77/187/EEC of 5 March 1977, OJ 1977, L 61.
([140]) With the exception of a not very significant amendment to the Directive on parental leave in 2010.
([141]) For the genesis and the content of the Charter see M. Weiss, The politics of the EU-Charter of Fundamental Rights, in B. Hepple (ed.) Social and Labour Rights in a Global Context, Cambridge 2002, 73 et seq.
([142]) Directive 98/59/EC of 20 July 1998, OJ 1998, L 225/16.
([143]) Directive 01/23/EC of 12 March 2001, OJ 2001, L 82/16.
([144]) Directive 89/391/EEC of 12 June 1989, OJ 1989, L 183/1.
([145]) Directive 93/104/EC of 13 December 1993, OJ 1993, L 307/18, replaced by Directive 03/88/EC of 4 November 2003, OJ 2003, L 299/9.
([146]) Directive 96/34/EC of 3 June 1996, OJ 1996, L 145/9.
([147]) Directive 97/81/EC of 15 December 1997, OJ 1998, L 14/9.
([148]) Directive 99/70/EC of 28 June 1999, OJ 1999, L 175/43.
([149]) Directive 08/104/EC of 19 November 2008, OJ 2008, L 327/9.
([150]) For this development see M. Weiss, *The Implication of the Service Directive on Labour Law – A German Perspective*, in: R. Blanpain (ed.), *Freedom of Services in the European Union – Labour and Social Security Law: The Bolkestein Initiative*, The Hague 2006, 77 et seq. (78 et seq.).
([151]) Directive 96/71/EC of 16 December 1996, OJ 1997, L 18/1.
([152]) Directive 2000/43/EC of 29 June 2000, OJ 2000, L 180/22 and Directive 2000/78/EC of 27 November 2000, OJ 2000, L 303/16.
([153]) Directive 2006/54/EC of 5 July 2006, OJ 2006, L 204/23.
([154]) Directive 94/45/EC of 22 September 1994, OJ L 254/64.
([155]) Directive 09/38/EC of 6 May 2009, OJ L 122/28.
([156]) Directive 01/86/EC of 8 October 2001, OJ L 294/22.
([157]) Regulation 01/2157/EC of 8 October 2001, OJ L 294/1.
([158]) Directive 02/14/EC of 11 March 2002, OJ L 80/29.
([159]) Directive 96/71/EC of 16 December 1996, OJ 1997, L 18/1.
([160]) Directive 2014/67/EU of 15. May 2014, OJ 2014, L 159/11.
([161]) For details see M. Weiss, *The European Social Dialogue*, European Labour Law Journal 2011, 155.
([162]) "Launching a consultation on a European Pillar of Social Rights", COM (2016), 127 final.

([163]) Communication on the Social Dimension of the EMU, COM (2013) 690.
([164]) For a more detailed assessment of these differences see M. Weiss, *Social Dialogue and Collective Bargaining in the Framework of Social Europe*, in: G. Spyropoulos / G. Fragnière (ed.), *Work and Social Policies in the New Europe*, Brussels 1991, 59 et seq. (62 – 64).
([165]) See for example F. Krebber in C. Calliess / M. Ruffert (ed.), *Kommentar des Vertrages ueber die Europaeische Union und des Vertrages zur Gruendung der Europaeischen Gemeinschaft*, Neuwied 1999, Art. 137 EGV, Rn. 9.
([166]) For an example in this direction see R. Rebhahn in J. Schwarze (ed.), *EU-Kommentar*, Baden-Baden 2000, Art. 137 EGV Rn. 19.
([167]) Council Directive 96/34/EC of 3 June 1996 on the framework agreement on parental leave concluded by UNICE, CEEP and ETUC, amended by Directive 97/75/EC of 15 December 1997, OJ 1998, L 10/24.
([168]) Council Directive 99/70/EC of 28 June 1999 on the framework agreement on fixed term contracts concluded by UNICE, CEEP and the ETUC, OJ 1999, L 175/43.
([169]) Council Directive 97/81/EC of 15 December 1997 on the framework agreement on part time work concluded by UNICE, CEEP and ETUC, OJ 1998, L 14/9.
([170]) Council Directive 2009/13/EC of 16 February 2009 implementing the Agreement concluded between ECSA and ETF, OJ 2009, L 124/30.
([171]) See for this view M. Weiss, The Significance of Maastricht for European Community Social Policy, IJCLLIR 1992, 3 et seq. (13) and in more detail G. Britz / M. Schmidt, The Institutional Participation of Management and Labour in the Legislative Activities of the European Community: A Challenge to the Principle of Democracy under Community Law, European Law Journal 2000, 45 et seq.
([172]) For this view see also A. Jacobs, *European Social Concertation*, in: Comisión Consultativa Nacional de Convenios Colectivos (ed.), *Collective Bargaining in Europe*, Madrid 2005, 347 et seq. (375).
([173]) See A. Jacobs, ibidem, 372 et seq. documenting the tremendous support this view has.
([174]) For this view which I reject see O. Deinert, *Partizipation europäischer Sozialpartner in der Gemeinschaftsrechtsetzung*, RdA 2004, 211 et seq. (220).
([175]) For disagreement with my opinion see A. Ojeda Avilés, *Applicability of European Collective agreements*, in Comisión Consultiva Nacional de Convenios Colectivos (ed.), op. cit., 427 et seq. (442).
([176]) Case T-135/96, UEAPME v. Council, Judgement of the Court of First Instance of 17 June 1998, ECR 1998, I – 2235.
([177]) See A. Jacobs (FN 8) 364 et seq.
([178]) See fort his view also A. Jacobs (FN 8) 385 et seq.
([179]) *Communication by the Commission on Partnership for a Change in an enlarged Europe – Improving the Contribution of the European Social Dialogue*, Com (2004) 557 final.
([180]) European Commission, *The Social Agenda 2005 – 2010 – A social Europe in the global economy. Jobs and opportunities for all*, Luxembourg 2005.
([181]) For this view which I strongly reject see in particular O. Deinert, *Der Europaeische Kollektivvertrag: Rechtstatsaechliche und rechtsdogmatische Grundlagen einer gemeineuropäischen Kollektivvertragsautonomie*, Baden-Baden 1999, in particular 479.
([182]) For such a perspective see already M. Weiss (FN 1), 68 et seq.
([183]) European Commission (FN 16) 24.

([184]) Ibidem, 24.
([185]) E. Ales et alii, *Transnational Collective Bargaining: Past, Present and Future*, Final Report 2006, European Commission, DG EMPL/D/2 Commitment number S12.399733.
([186]) Ibidem 36.
([187]) For a comprehensive assessment and a rather sceptical perspective in this respect see B. Keller, Social Dialogues at sectoral Level. The neglected Ingredient of European Industrial Relations, in: B. Keller / H.W. Platzer, Industrial Relations and European Integration. Trans- and supranational Developments and Prospects, Hampshire / Burlington 2003, 30 et seq.
([188]) Council Directive 94/45/EC of 22 September 1994 on the Establishment of a European Works Council or a Procedure in Community-Scale Undertakings and Community-Scale Groups of Undertakings for the Purposes of Informing and Consulting Employees, OJ 1994, L 254/64.
([189]) For this development see T. Blanke, European Works Council Agreements: Types, Contents and Functions, Legal Nature, in: Comisión Consultiva Nacional de Convenios Colectivos (op. cit.), 395 et seq. (413 et seq.)
([190]) Unfortunately the documents I am referring to in my example are not published.
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([192]) For a summary of this approach see W. Sengenberger, *International labour standards in the globalized economy: obstacles and opportunities for achieving progress*, in D.R. Craig, S.M. Lynk, *Globalization and the Future of Labour Law*, Cambridge 2006, 331 et seq. (333 et seq.).
([193]) For a comprehensive synthesis of the available research on the beneficial effects of international labour standards see W. Sengenberger, *Globalization and Social Progress: The Role and Impact of International Labour Standards*, Bonn 2002.
([194]) See for a comprehensive overview on the ILO's standard setting activities N. Rubin (ed.), *Code of International Law*, 2 volumes, Cambridge 2005.
([195]) B. Hepple, *Labour Laws and Global Trade*, Oxford-Portland 2005, 63.
([196]) B. Hepple, *ibidem*, 35.
([197]) For details see J.M. Servais, *International Labour Law*, The Hague 2005, 24 et seq.
([198]) See W. Sengenberge (FN 1), 341.
([199]) B. Langille, *Imagining post "Geneva consensus" labor law for post "Washington consensus" development*, Comparative Labor Law & Policy Journal 2010, 523 et seq.
([200]) A. Trebilcock, *Putting the record straight about international labor standard setting*, Comparative Labor Law & Policy Journal 2010, 553 et seq. (553).
([201]) B. Langille, *op. cit.*, 545.
([202]) B. Langille, *op. cit.*, 530.
([203]) A. Trebilcock, *op. cit.*, 556 provides examples of such flexibility.
([204]) B. Langille, *op. cit.*, 542.
([205]) See M. Weiss, *Some reflections on the future of the ILO*, in ILO (ed.), *Visions of the future of social justice. Essays on the occasion of the ILO's 75th anniversary*, Geneva 1994, 213 *et seq.* (214).
([206]) See also A. Trebilcock, *op. cit.*, 554.
([207]) B. Langille, *op. cit.*, 532.
([208]) A. Trebilcock, *op. cit.*, 554 et seq.

([209]) B. Langille, *op. cit.*, 542 and 545.
([210]) A. Trebilcock, *op. cit.*, 563.
([211]) B. Langille, *op. cit.*, 538.
([212]) For an example of such branch specific codes see G. Van Liemt, *Codes of Conduct and International Subcontracting: a 'private' road towards ensuring minimum labour standards in export industries*, in R. Blanpain (ed.), *Multinational Enterprises and the Social Challenges of the 21st Century*, The Hague-London-Boston 2000, 167 et seq.
([213]) For an illustration of the big variety of codes see C. Scherrer, T. Greven, *Global Rules for Trade: Codes of Conduct, Social Labeling Workers' Rights Clauses*, Muenster 2001 and K. Webb (ed.), *Voluntary Codes: Private Governancem the Public Interest and Innovation*, Ottawa 2003.
([214]) For details of this development see L. Compa, *Corporate Social Responsibility and Workers' Rights*, Comparative Labor Law & Policy Journal 2008, 1 et seq. (5 et seq.).
([215]) For an interesting account of this development see R.-C. Drouin, *Promoting Fundamental Labor Rights through International Framework Agreements: Practical Outcomes and Present Challenges*, Comparative Labor Law & Policy Journal 2010, 591 et seq.
([216]) The Industrial Relations Association of South Africa.
([217]) See for example H. Sinzheimer, *Das Wesen des Arbeitsrechts* (1927), reprinted in H. Sinzheimer, *Arbeitsrecht und Rechtssoziologie*, Band 1, Bund 1976, 108 (110).
([218]) For an overview of the different patterns see M. Biagi / M. Tiraboschi, Forms of Employee Representational Participation, in R. Blanpain (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, 9th and revised edition, Wolters Kluwer 2007, 503.
([219]) See for example the comprehensive study on the impact of the German model of workers' participation by Bertelsmann Foundation / Hans-Böckler-Foundation (Eds.), *Mitbestimmung und neue Unternehmenskulturen – Bilanz und Perspektiven*, Gütersloh 1998.
([220]) See M. Biagi / M. Tiraboschi (FN 2) 554.
([221]) See in particular Directive 75/129/EEC of 22 February 1975 OJ 1975, L 48, on protection of workers in case of collective redundancies and Directive 77/187/EEC of 5 March 1977, OJ 1977, L 61, on protection of workers in case of transfer of undertakings.
([222]) Directive 02/14/EC of 11 March 2002, OJ L 80/29.
([223]) Directive 94/45/EC of 22 September 1994, OJ L 254/64, amended by Directive 09/38/EC of 6 May 2009, OJ L 122/28.
([224]) Directive 01/86/EC of 8 October 2001, OJ L 294/22.
([225]) See M. Weiss, *The Development of Employee Involvement in the EU: Lessons to be learned*, in V. Pulignano / F. Hendrickx, E*mployment Relations in the 21st century*, Bulletin of Comparative Labour Relations 107, 2019, 181.
([226]) For this debate see T. Klebe / M. Weiss, *Workers' Participation 4.0 – Digital and Global ?*, in Comparative Labor Law & Policy Journal 2019, 263.
([227]) See for a comprehensive discussion of this problem G. Davidov / B. Langille (eds.), *Boundaries and Frontiers of Labour Law*, Oxford / Portland 2006.
([228]) Germany has such a pattern. For details see B. Waas, *Crowdwork in Germany*, in B. Waas et alii, *Crowodwork a Comparative Perspective*, Frankfurt 2017, 142 – 186 (160 – 162.
([229]) See for this problem J. Prassl / M. Risak, *Uber, Taskrabbit, and Co.: Platforms as Employers? Rethinking the Legal Analysis of Crowdwork*, Comparative Labor & Policy

Journal 2016, 619 and J. Prassl / M. Risak, *Working in the gig economy – flexibility without security ?*, in. R. Singer / T. Bazzani (eds.), *European Employment Policies: Current Challenges*, Berlin 2017, 67.
([230]) M. Biagi, *Quality of Work, Industrial Relations and Employee Involvement in Europe: Thinking the Unthinkable?*, in: M. Biagi (ed.), *Quality of Work and Employee Involvement in Europe*, Kluwer Law International 2002, 3 (22).
([231]) For a detailed description of these sources including the international ones see M. Weiss / M. Schmidt, *Labour Law and Industrial Relations in Germany*, 4th edition, Wolters Kluwer 2008, 38 et seq.; see also M. Weiss, *Labor Law*, in J. Zekoll/M. Reimann, *Introduction into German Law*, 2nd edition, Kluwer Law International 2005, 299 et seq. (300 et seq.).
([232]) For a detailed description see M. Weiss, *The Interface between Constitution and Labor Law in Germany*, Comparative Labor Law and Policy Journal, 2005, 181 et seq.
([233]) For a description of the labour court system see M. Weiss, *Labour Dispute Settlement by Labour Courts in Germany*, Industrial Law Journal (Johannesburg / South Africa) 1994, 1 et seq.
([234]) For a detailed description of the collective bargaining system see M. Weiss / M. Schmidt (op.cit.), 180 et seq.
([235]) For a description of the works council system see M. Weiss / M. Schmidt, op. cit., 222 et seq.
([236]) For a detailed description of the whole process see M. Weiss, *The Transition of Labor Law and Industrial Relations: The Case of German Unification – A Preliminary Perspective*, Comparative Labor Law Journal 1991, 1 et seq.
([237]) For all the different attempts and their failure see E. Ianone, *Die Kodifizierung des Arbeitsrechts – Ein Jahrhundertprojekt ohne Erfolgsaussicht?*, Peter Lang 2009.
([238]) Act on the Promotion of Employment of 1985.
([239]) Act on Part-Time and Fixed Term Employment of 2000.
([240]) According to the last available figures the organization rate in companies between 200 and 499 employees is 49 % and in companies above this size 78 % on average. The figure of companies below 200 employees is significantly lower.
([241]) Federal Labour Court judgment of 18 July 2006.
([242]) For a description of this instrument see M.Weiss / M. Schmidt, op. cit., 190 et seq.
([243]) Federal Labour Court, judgment of 26 January 1994.
([244]) Federal Labour Court, judgment of 20 March 1991.
([245]) Federal Labour Court, judgment of 7 July 2010.
([246]) Federal Constitutional Court, judgment of 11 July 2017.
([247]) For a detailed description see M.Weiss / M. Schmidt, op. cit., 242 et seq.
([248]) For this development see A. Seifert, *Employment Protection and Employment Promotion as Goals of Collective Bargaining in the Federal Republic of Germany*, The International Journal of Comparative Labour Law and Industrial Relations 1999, 343 et seq.
([249]) Initiated by Federal Labour Court, judgment of 24 May 1984.
([250]) *See* M. Biagi/M. Tiraboschi, *Forms of Employee Representational Participation*, in R. Blanpain (ed.), *Comparative Labour Law and Industrial Relations in Industrialized Market Economies*, revised edition, Wolters Kluwer 2007, 503–556.
([251]) Directive 2002/14/EC, OJ 2002, L 80.
([252]) For a comprehensive description *see* M. Weiss/M. Schmidt, *Labour Law and Industrial Relations in Germany*, 4th edition, Wolters Kluwer 2008, 222–247.

([253]) For detailed description of the system of labour courts *see* M. Weiss/M. Schmidt, *supra*, 149–162.
([254]) For a comprehensive description *see* M. Weiss/M. Schmidt, *supra*, 248–260.
([255]) For this relationship between collective agreements and work agreements *see* M. Weiss, *Labor Law*, in J. Zekoll/G. Wagner (eds), *Introduction to German Law*, Kluwer Law, 3rd edition, 2019, 375–415 (398).
([256]) Most important, the study which integrates all the different empirical results: Bertelstmann Stiftung / Hans Boeckler Stiftung (eds), *Mitbestimmung und neue Unternehmenskulturen – Bilanz und Perspektiven*, Guetersloh 1998.
([257]) *See* for an assessment of social partnership M. Weiss, *German Trade Unions: Their Role in Collective Bargaining*, in J. Carby-Hall/M. Rycak (eds), *Trade Unions and Non-union Employee Representation in Europe – The Current State of Play and Prospects for the Future*, Beck Warszawa 2016, 33–49.
([258]) This was the notorious Erwitte case. An employer declared openly not to abide to the rules of workers' participation. Then he became totally isolated in the employers' camp and stigmatized by the public. Finally he had no longer a chance on the market and went bankrupt.
([259]) OJ 1970, C 241, for an assessment of this history as a learning process *see* M. Weiss, *Workers' Involvement in the European Company*, in M. Biagi (ed.), *Quality of Work and Employee Involvement in Europe*, Kluwer Law International 2002, 63–79 (65–68).
([260]) Directive 2001/86/EC of 8 October 2001, supplementing the Statute for a European company regarding the involvement of employees, OJ 2001, L 294/1.
([261]) Directive 94/45/EC on the establishment of a European Works Council or a procedure in Community-scale undertakings and Community-scale groups of undertakings for the purposes of informing and consulting employees, OJ 1994, L 254/64.
([262]) CJEU of 9 March 1999 – C-212/97 – (Centros), ECR 1999, 1459; CJEU of 5 Nov. 2002 – C-208/00 – (Ueberseering), ECR 2002, 9919; CJEU of 30 September 2003 – C-167/01 – (*Inspire Art)*, ECR 2003, 10155.
([263]) M. Weiss/A. Seifert, *Der europarechtliche Rahmen fuer ein Mitbestimmungserstreckungsgesetz*, ZGR – Zeitschrift fuer Unternehmens- und Gesellschaftsrecht 2009, 542–580.
([264]) For recent legislation, *see* Directive EU/2017/1132 of 14 Jun. 2017, OJ 2017, L 169/46 and for recent case law CJEU of 25 October 2017 – C-106/16 – (Polbud), ECLI:EU:C 2017, 804.
([265]) COM (2018) 241 final.
([266]) For a detailed description *see* Manfred Weiss, Marlene Schmidt, *Labour Law and Industrial Relations in Germany*, 180 et seq. (4th edition Kluwer 2008).
([267]) For a detailed description *ibid.*, 149 et seq. and 261 et seq.
([268]) *Ibid.*, 264 et seq.
([269]) For a more detailed description Weiss, Schmidt, *supra* n. 1, at 222 et. seq.
([270]) Manfred Weiss, Modernizing the German Works Council System: A Recent Amendment, IJCLLIR 251 et seq. (2002).
([271]) For a more detailed description Weiss, Schmidt, *supra* n. 1, 248 et seq.
([272]) LG Frankfurt, judgment of 16 February 2015.
([273]) LG Landau, judgment of 18 September 2013, LG Munich, judgment of 27 August 2015 and LG Berlin, judgment of 1 August 2015.
([274]) KG Berlin, decision of 16 October 2015.

([275]) Kommisson Mitbestimmung, Bertelsmann Stiftung, Hans-Boeckler- Stiftung, *The German Model of Codetermination and Corporate Governance – Report from the Commission on Codetermination* (Bertelsmann Foundation Publisher 1998).
([276]) *Ibid.*, at 10.
([277]) *Ibid.*, at 103.
([278]) *Ibid.*, at 76.
([279]) *Ibid.*, at 77.
([280]) *Ibid.*, at 24 and 25.
([281]) For this debate see Manfred Weiss, *The Future of Employee Involvement in Company Boards in Germany*, BNyström et al. (ed.) *Liber Amicorum Reinhold Fahlbeck*, 633, 644 et seq. (Lund, 2005).
([282]) CJEU, judgment of 9 March 1999, case C-212/97, Rec. 1999, I-1459 et seq. (Centros); CJEU judgment of 5 November 2002 – case C-208/00, Rec. 2002, I-9919 et seq.(Überrseering);CJEU judgment of 30 September 2003 – case C-167/01 (Inspire Art).
([283]) Grundgesetz For Die Bundesrepublik Deutschland [Grundgesetz] [Gg] [Basic Law], May 23, 1949, BGBL. 1, art. 101, I (Ger.).
([284]) *Id.*ar t. 100, 1.
([285]) This insight is only based on informal and unofficial channels of information.
([286]) For details, see Manfred Weiss, *The Role of Neutrals in the Resolution of Shop Floor Disputes in the FRG,* 8 COMP. LAB. L.J. 82 (1987).
([287]) Schlichtungsvereinbarung zwischen dern DGB und der BDA, *reprinted in* Recht der Arbeit 1954, 383, 383-84 (Ger.).
([288]) For details of this development see Manfred Weiss, *Germany, IN* Strikes and Lockouts in Industrialized Market Economies 67 (Roger Blanpain et al. eds., 29 Bulletin of Comparative Labour Relations Series 1994).
([289]) Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], judgment of Mar. 1, 1979 in BVerfGE 50, (290) (F.R.G.).
([290]) See Manfred Weiss, *Zur aktuellen Bedeutung des Mitbestimmungsurteils, in* Kritische Vierteljahresschrift Fuer Gesetzgebung Und Rechtswissenschafr 405 *et seq.* (2000).
([291]) See as prominent recent examples BVerfG, EzA Nr. 97 and Nr. 107 zu GG [Federal Constitution] art. 9 Arbeitskampf.
([292]) BAG [Federal Labor Court], EzA Nr. 3 zu GG [Federal Constitution] art. 9.
([293]) *See, e.g.,* BAG, EzA Nr. 42 zu GG [Federal Constitution] art. 9.
([294]) For this development, see Manfred Weiss & Marlene Schmidt, Labour Law and Industrial Relations in Germany 73 (2000).
([295]) *See id.* at 80.
([296]) BAGE 48, 122.
([297]) As examples see BAG [Federal Labor Court], EzA Nr. 38 - 40 zu § 242 BGB [Civil Code] Gleichbehandlung (and behind Nr. 40 M. Weiss, Gemeinsame Anmerkung).
([298]) For this category see Weiss & Schmidt, *supra* note 7, at 205.
([299]) BAG [Federal Labor Court], AP Nr. 1 zu Art. 6 Ehe u. Familie.
([300]) As examples of this jurisprudence see BAG [Federal Labor Court], EzA Nr. 13 and 21 zu GG [Federal Constitution] art. 12.
([301]) BAG [Federal Labor Court], EzA Nr. 10 zu § 74 HGB.
([302]) BAGE 62,59.
([303]) See the overview in G. Schaub, *Die Freiheit der Meinungsaeusserung im Individualarbeits- und Betriebsverfassungsrecht,* Recht Der Arbeit 137 (1979).

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Manfred Weiss has written extensively in German. However – and in line with his international approach – this bibliography is more concerned with his academic work produced in English, which discusses labour law and industrial relations issues over a period of forty years.

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