Representation of Workers´ Interests outside Collective Bargaining

by Wolfgang Däubler, Bremen

I. Introduction

The importance of collective bargaining is decreasing all over Western Europe. Unions lose members and become unable to conclude collective agreements in more and more fields of the economy. Despite its well-established economic position, Germany may serve as an example. The number of unionized people went down from 11.3 millions in 1993 to 6.2 millions in 2012 (retired persons included both times). In the sixties and still in the eighties of the last century, 90 % of the workers were protected by collective agreements; now this number has decreased to 59 %.

It would be misleading to regard exclusively the quantity of agreements and of workers covered by them. In most of the sectors, the level of protection has gone down, too. Between 2000 and 2010, the real wages decreased in the whole German economy by 2.5 % (considering taxes, contributions to the social security and the inflation rate). As there is no minimum wage (except in certain sectors) one can find collective agreements providing from three to four Euros an hour. That is the case e. g. for agricultural workers, employees in hairdressers´ shops and some temporary agency workers.

All this concerns the formal sector of the economy. Informal workers and illegal immigrants are not covered by these figures. Normally they are in a worse position – still some steps down the ladder.

There are many lawyers supporting the unions in their fight to keep at least some domains of their traditional fields of collective bargaining. In the countries of Southern Europe as well as in France, their efforts have a very limited impact considering the clear decisions of the legislature which follow the councils of the “troika” or other comparable instances. The weakness of trade unions is no more counterbalanced by a ”legislazione di sostegno”. On the contrary, the law creates obstacles to an effective representation of workers´ interests.

What can labour lawyers do in such a situation? Reduce the big evil by interpretation – an effort which will under good circumstances lead to a smaller evil? Why not? If everybody is in a certain way helpless seeing no perspective for a better future, even the smallest attempts to improve the situation are welcome.

Despite the special interests of Antonio Ojeda Avilés in collective bargaining, I will try to offer a different contribution. Which are the possibilities to represent workers´ interests outside the system of collective bargaining? Could we perhaps compensate some losses in the field of collective bargaining in using some new means of pressure? Is collective bargaining not quite useful for the employers´ side and for the stability of the political system, too? Would spontaneous actions even of small groups of workers not disturb the production much more than a strike announced or at least foreseeable within the framework of collective negotiations? What about public campaigns against firms which treat their employees as pure objects of exploitation? It will perhaps be useful to look for examples in countries with no well developed bargaining system: In the U.S. only a small part of perhaps 5 % of the workers in the private sector is covered by collective agreements, and in China an observer will find no bargaining process in the European sense: There are other mechanisms to increase wages and improve working conditions.

I hope that Antonio will appreciate this excursion to a foreign field outside traditional labour law thinking. He is now a person celebrating a jubilee (what will not come into your mind if you meet him) but I am sure he will continue to participate very actively in new developments.

II. Reducing the quality of performing work

Traditional industrial work as well as delivering services requires motivated workers. They have to identify themselves with what they are doing; this is an elementary condition for productivity. Assembly-line work may be an exception where the attitude of the worker plays a minor role, but it is nowadays restricted in Europe to very small parts of the economy. The dominating form of work is today delivering services – even within the industrial sector; and services require at least a positive approach of the worker to what he has to do.

There is no perfect way to bring workers to this attitude. As far as I see, acceptable working conditions and a certain stability of the labour relationship are of high importance. “Working conditions” imply a good behaviour of the boss who has to respect the personality and the performance of the workers. “Stability” means that you can be sure not to be dismissed without a sufficient reason from one day to the other. If there is in your factory or your office a “hire-and-fire” system – why should you try to improve the quality of your work, propose a better organisation or treat customers friendly even if they are annoying you? According to national traditions and national culture, the sensibility for “unjust” conditions may be quite different. Managers who do not pay attention to this, may come into serious difficulties.

Let me give you some experiences I collected during different stays in China. In a small firm owned by a German investor the only driver was the person with the highest seniority. A new boss coming from Germany did not know it and treated him the same way as other people; according to Chinese informal rules he had to be asked the first if there was a problem to be discussed. He was angry and looked into his contract of employment. His working hours were described there as well as the nature of his job – but there was no requirement to understand or speak foreign languages. From one day to the other he only understood Chinese. When the new boss was on tour with him the communication was somehow difficult: The boss had to phone to his secretary to tell her that he wanted to stop for going to the toilet; then he handed over the mobile phone to the driver and the secretary told him in Chinese what the boss wanted. After some time the boss was told why the driver did no more understand any English; as he was an intelligent person he changed his behaviour and the driver slowly remembered his English key phrases.

Another case may be of special interest for lawyers. In Russia I had heard that nobody goes to court. The reason is probably that there will be no judgement if the judge did not receive a considerable sum of money before but nobody mentions this obstacle explicitly. One day I asked the Russian employee of a German foundation whether she would go the labour court if she would be dismissed. “No” she said, “this is for nothing. Judges do not really pay attention to what happens to ordinary people.” Well, I insisted, if you would have a male boss and if he would want you to go to bed with him and if you would refuse

and be dismissed afterwards - would you go to court at least in such an extreme case? No, she said, I would not. But in such a situation I would have three good friends. Each of them would take a baseball bat and wait for the boss coming out of the office in the evening. He would never forget this encounter during his whole life. This was obviously a fall-back to fist-law. Some years later, I asked the same question to a Chinese girl. The point of departure was the same: Courts are not useful for ordinary people. But what would happen if it was not only a dismissal but a dismissal under the described ugly conditions? Well, she told me, before leaving the office or the factory, I would tell the story to everybody. By this way, the boss would get into a very bad situation. Nobody would give him all necessary information he needs (or the wrong ones), from time to time one would forget wishes he had expressed, papers important to him could no more be found, files would disappear. After some months he would give up. The punishment would be as severe as the Russian one but the "style" would be different.

The examples may show different things.

The first one is that especially in the sector of services workers have possibilities to express their dissatisfaction. Even individuals can reduce productivity to a considerable extent. If there is a boss who can be considered to be "guilty" it is probably much easier to use these methods. In an economic crisis where nobody knows exactly who is responsible (the bankers? the capitalist system? greedy managers?) it may be much more difficult to practice it. But resistance is possible – without running a considerable risk.

The other thing is that this form of disobedience does not depend on formally democratic structures and the existence of trade unions who define themselves as representatives of workers´ interests. The Chinese unions are in their big majority organisations which see their task in finding a compromise if a conflict breaks up and in re-establishing afterwards harmony in the enterprise. Their vocation is mediation and not struggle for the interests of the workers. In Germany, you can find works councils and unions whose practical function (not their programmes and theories) is quite similar.

But will two cases be sufficient to draw conclusions? I could add some two or three more cases from China, and another one from Brazil, too. But it will be unjustified to tell "this is the way", "resistance is possible everywhere, even without trade unions", because there

may be hundreds of cases where such actions would be impossible. The message is therefore much more modest: There are possibilities of struggling for workers´ interests, the tina-principle ("**t**here **i**s **n**o **a**lternative") is wrong. It would perhaps be useful to study the conditions in a concrete country how to improve the readiness of workers to use their potential power.

III. Good employer – bad employer

Let´s shift from China to the U.S. Day labourers are precarious workers who have big difficulties to plan their lives. To organize them seems to be extremely difficult if not impossible. Without stable social relationship with colleagues and friends in a comparable situation, how could individuals join a union?

In the U.S., you can find the "National Day Laborer Organizing Network" with member organisations in many states of the U.S. with a core area in California. I had the chance to have a long conversation with its general secretary giving me a lot of information. Some points seem to be of general interest.

The "union" has a specific structure. Traditional unions resemble often an industrial plant with its hierarchic setting: There is a CEO and a board of directors at the top, there are department leaders and group leaders, and there are normal collaborators. Like in big enterprises, new ideas have a difficult position: Would they not create a lot of work? Would they perhaps have an adverse effect? Are they really compatible with the principles laid down in the general programme? Could their realization change the balance between different departments? There are so many questions without any clear answer. Would it not be reasonable to renounce to such a hazardous game? The description refers to some German experiences which hopefully cannot be generalized. Nevertheless sociologists agree that the traditional structure is not adequate if you need innovation. Enterprises have changed a lot for the same reason, too.

The day workers are organised in a "network". There are contact persons in different parts of the town. They tell the members how much is paid for a certain activity and who is a good employer and who is a bad one. The bad one will, of course, be avoided. If many people ask the contact person the bad one will have big difficulties to find day workers at

all. The union gives information which can lead to a kind of boycott. We can find the same principle in the movement of the “travelling journeymen” (called in German “Gesellenbewegung”) which existed in Central Europe since the 13th century. Bad employers i. e. (at that time) craftsmen were formally “discredited”; no journeyman could conclude a contract with them without being discredited, too. The boycott replaces in a certain way the strike and other forms of collective actions.

Can this form of organization gain importance in nowadays Europe, too? There are some advantages of a network in comparison with traditional forms of the labour movement.

The involved persons have a clear objective and a well defined role. The information given to a member (or even to other persons) is obviously useful and can therefore justify a small fee the person has to pay monthly.

Repression against a network is difficult. Meetings between two or three persons cannot be controlled by the authorities, the contact can easily be declared to be of a private nature.

Ideological differences play no role. The fulfilment of the function does not depend on the political conviction of the persons involved. The collaboration requires only the conviction that the situation of day workers should be improved. Whether it comes from a Christian, a socialist or a communist view of society is without any interest.

New ideas coming from a contact person may be realized at once. Each collaborator can try to fulfil his tasks in a better way – there is no hierarchy that has to give its approval.

The network solution is no universal solution. It is confronted with the problem of instability – the value of the information given may be doubtful, people do no more come seeking information elsewhere. But there is one argument difficult to refute: A lot of lawyers being on the side of the workers live in networks: In big towns you will find one or several law firms of this kind and they are normally in contact to comparable law firms in other towns. There are even networks all over Europe. It would be very difficult to bring these people together in the same political party; but collaboration in the interest of workers is possible. In this field you will even find persons who kept their political

position from the seventies and the eighties whereas unions often gave it up without replacing it by a new perspective.

IV. Mobilizing public opinion

Schlecker, a German retail chain, had a very specific reputation since a lot of years. During a long time, they had trouble with their works council whose rights were often neglected. The press wrote about it the majority of newspapers supporting the works councils who were in the position of an underdog. Eventually Schlecker fully recognized the legal situation; the discussion calmed down. But the story continued. Schlecker had economic difficulties and restructured a lot of shops especially putting smaller ones together. Workers were dismissed. During the period of notice, they received a "kind offer" to come to a firm called "Meniar" which was an abbreviation for "bringing people into jobs" ("Menschen in Arbeit"). Meniar was a temporary employment agency and a 100 % branch of Schlecker. Workers were offered new contracts with wages more than 35 % below the former level. Those who accepted were sent to a shop quite near to the place that had worked; sometimes it was the same shop. They had to perform the same kind of work as before, but for much lower wages.

Trade unions protested but were not able to organize a strike. Press and television gave critical reports. The majority in the population was on the side of the workers; some lawyers tried to prove that the way of treating them was a circumvention of the law which guarantees acquired rights in cases of transfer of enterprises and plants. But this was not decisive. The volume of sales went down and it seemed possible that this was a consequence of the public campaign. The owners decided to close down Meniar, their temporary employment agency, improving by this way their reputation and getting back their customers. Workers gut their previous salaries again.

The story is told here because it shows some features which are never dealt with in labour law. Let´s assume that in the shops of Schlecker there would be a union density of 80 %. The union would have decided to fight against the intended decrease of wages demanding that Meniar should go out of business. Of course, Schlecker would have refused, the union would threaten the workers going to strike. What would be the consequence? Schlecker would get an injunction against the union at the labour court. The strike would be

prohibited because of its illegal aim: To continue or not to continue a business is a so-called entrepreneurial decision which must not be an object of a collective agreement or a strike. One could organize a strike for better working conditions at Meniar – but it is still doubtful whether workers not affected by the measures could participate in a kind of solidarity strike. All these legal obstacles do not exist if press and television advocate the end of the temporary employment agency and if some consumers go to another firm. Leaving the sphere of collective bargaining becomes an advantage for the workers. Dear labour law colleagues – please bear it in mind!

What is possible in Germany may happen in China, too. On January 1st 2008 the new labour contract law came into force. One of its provisions contained the rule that after ten years of service with the same employer a fixed-term-contract was transformed automatically into an open-ended-contract. Huawei, an IT-firm, had a lot of employees who fulfilled this condition. The enterprise "asked" them to cancel the employment contract in October or November 2007. In den beginning of January they would get a new fixed-term-contract with the conditions they had before. Legally it was as doubtful as Schlecker´s strategy, but it is difficult for a worker who wants to continue with the employer to go to court. However, the press intervened: It seemed to be obvious that the new rule was circumvented. Huawei gave in and granted open-end-contracts to all workers concerned.

Using the route of labour law would have been quite risky, too. It was quite unclear how the courts would decide: if it would be obvious that Huawei pressed workers to sign a cancellation contract, the court would probably have decided in favour of the workers. But what would happen if the pressure could not be proven? "The worker had asked for unpaid leave" – the employer will say. Why not? There is no necessity to use the suspension of the employment contract; an interruption of the contractual relationship is admissible, too.

Why can the public opinion get such results? The first thing you need is the personal commitment of some critical journalists and a political framework that permits such a kind of reports. A possible private owner of the newspaper will normally not be opposed as long as the articles will be read and the newspaper often quoted. The second thing is that a lot of people share social values thinking that over-exploitation is unacceptable and

immoral. That is still the case in Germany as well as in France or in Spain; whether it will be the same in the United States seems to be more doubtful. In China, capitalist exploitation is still considered as a transitional phenomenon; to criticize excesses will be accepted by the big majority of the people. To share certain values is a much lower threshold than engaging in trade union activity or in a strike. Even boycotting certain goods does not require a high degree of courage. Public pressure can therefore be organized much easier than traditional collective actions.

On the other side, most of the enterprises are quite sensitive as to their public reputation. They never know if some newspaper articles will have a negative impact on their volume of sales. The risk to lose customers on the market seems to be much more important than the reduction of wage costs which is normally the reason for socially unacceptable measures. The sensitivity is very high at retail firms which have a direct contact to the consumer, but it is less developed with heavy industry which sells its products to the state (weapons!) or exclusively to other enterprises.

Criticizing the behaviour of undertakings does not always deal with obvious facts like in the Schlecker or the Huawei case. It may happen that the enterprise denies the accusation affirming that everything is o.k. It may go to court in order to get an injunction giving it the right to publish a counterstatement. If the information comes from an employee we are confronted with the problems of a whistleblower whose position is quite ambiguous balancing between betrayer and hero. The European Court of Human Rights has strengthened the position of such a person who can invoke the freedom of opinion even in cases in which the facts cannot be proven. The limits of this fundamental right are passed only if the facts are wrong and the whistleblower has acted with gross negligence.

What was said for press and television is also valid for the internet. Whether a blog can replace in a certain way a newspaper and become a starting point of a campaign depends on the actual role of the internet in the country. In the near future it will be everywhere a decisive forum for public opinion. The difference to press and television is its more democratic character: one does no more need critical “journalists”; some critical bloggers can fulfil the same function. In Twitter and other social media popular persons can have many “followers” who receive automatically all their declarations. If the Chilean students´ leader Camila Vallejo has 700.000 followers this is an equivalent to the power of a big

newspaper. The internet can in a certain way give more possibilities to individuals than other media before. If some few people give a good and convincing evaluation of an event, that can be the starting point of a campaign against socially unacceptable behaviour of enterprises and managers.

V. Collective action in the internet

More and more, work is done in the internet. One can use the internet to support collective actions in the "real world" and one can disturb the working process in the internet.

As to the first alternative, I would like to mention the collective actions workers and their friends had realized with IBM Italy. Like in other countries, there is the internet platform "Second life". Each person can create a virtual human being ("avatar") giving him certain good and certain bad qualities. In 2007, about 3000 persons from more than 30 countries "played" the collective bargaining process at IBM Italy adding some important modifications to the reality: Hundreds of pickets were present, big demonstrations occurred and a meeting of the board of directors could not continue because many strikers entered the room. The decision-makers were highly impressed; could it not be possible that the actions in the game could become reality? The next day an agreement was found in which IBM renounced to all intended income reductions. The situation is similar to the public campaign: Unlike in a strike, the individuals did not run any risk. For some of them, the participation may have been even a funny thing bringing some new accents into the routine of everyday life.

IT-technology can be disturbed. In 2002, there was a new form of collective action against the German Lufthansa. The company had collaborated with the government bringing back people to their home countries, people who had tried to get political asylum in Germany but were refused. It was clear that many of them would go to prison after they arrived in their country, some of them would be tortured or brought to death. An initiative of citizens protested against this practice; they developed the slogan: Three classes with Lufthansa - economy class, business class, deportation class. The conflict escalated when a Nigerian citizen arrived dead in his country despite being accompanied by two German policemen. The initiative decided to block the Lufthansa booking system by sending so many e-mails

to it that it would break down. They developed a specific software which sent three e-mails every second to the Lufthansa computer. During some hours the Lufthansa was off-line but then found a way out in using other computers. One of the members of the initiative was prosecuted for duress but was acquitted by the court of appeal of Frankfurt.

Other forms are considered to be illegal sabotage. A computer scientist was dismissed and should be replaced by a private firm. He installed a very sophisticated computer virus which blocked the whole system two days after he left his job. He was the only person able to find out where the virus was und how it could be dealt with. So he was asked every week to come back and help until by accident his method was discovered. Another computer scientist changed the main passwords of his employer before leaving; so the firm was paralized during several days. Another story is spread concerning a system administrator: He modified the programmes in a way that everything was deleted if in his personal file the words “dismissed by the employer” would appear.

VI. Perspectives

The decline of collective bargaining is not the end of defending workers´ interests. Labour lawyers will perhaps be forced to look into other fields of law like freedom of the press, internet communication and consumers´ activities. In the medium and long term this way of action can even be more efficient than traditional collective bargaining. Would it not be a good advice for employers to tell them: Defend collective bargaining? You will be better off! This can (and should) be an object of further discussion.