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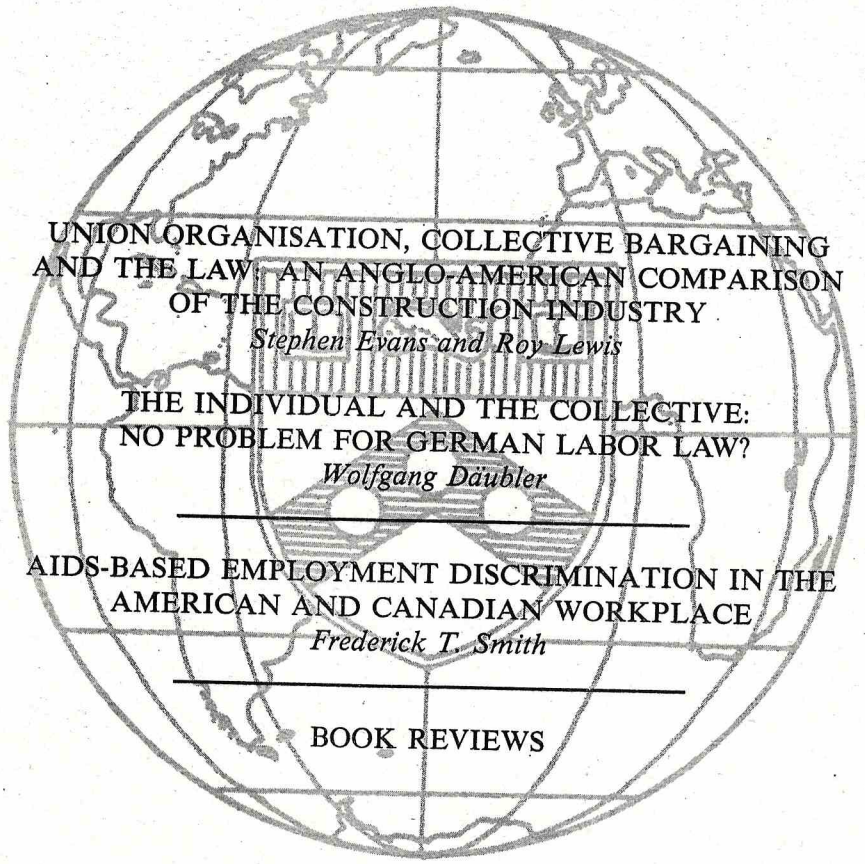

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THE INDIVIDUAL AND THE COLLECTIVE: NO PROBLEM FOR GERMAN LABOR LAW?

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INTRODUCTION: THE RISE IN THE VALUE OF THE INDIVIDUAL

Today it is uncommon to speak about the individual *and* the collective in the context of labor law. Rather, the spirit of the times demands that the single individual be put at the center of consideration. From this perspective, the investigator may then ask how the individual can prevail against the numerous powers in an environment that is very difficult to understand.

This viewpoint is not merely a passing fad. On the contrary, sociologists confirm that we are living in a period of "detraditionalization," the decoupling of the individual from traditional social orders.[1] An important indication of this development is the decline of the family unit. The family is increasingly being replaced by unmarried partnerships; the singles lifestyle is also becoming more prevalent. The dissolution of traditional forms of housing is another indicator—the pure "working class" neighborhood is a thing of the past. "Working class culture" can be found only in its last traces—at least in the Federal Republic of Germany. In addition, the established political parties in that country no longer represent a value system that is necessarily derived from the interests of wage earners. As popular political parties, they seek the votes of the self-employed and wage workers, Catholics and Protestants equally.

The conditions of the work place can no longer be easily described in a single schema. The increasing number of office workers demonstrates that assembly line and machine work have lost their dominant roles.[2] The automated factory of the future is going to be dependent

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1. For a summary, see U. BECK, RISIKOGESELLSCHAFT. AUF DEM WEG IN EINE ANDERE MODERNE, 115 (1986).

2. In 1986 45% of all employees in the Federal Republic of Germany were employed as white collar workers, 45.5% as blue collar workers and almost 10% as civil servants. *See* Imiela, Krieger & Löhrlein, *Perspektiven gewerkschaftlicher Angestellten politik*, in GEWERKSCHAFTSJAHRBUCH

upon an independently thinking, flexible employee who is competent in his or her specialty.[3] Indeed, the numerous flexitime models (*Gleitzeitmodelle*) already take the individual preferences of employees into account. The general development is in the direction of increased flexibility, however narrow or broad, however employer- or employee-oriented this development may be.[4]

I. THE DISPLACED COLLECTIVE

It is not surprising that, under current conditions, the collective, in a general sense, has become a threatening image. One associates the collective with a specter of regimentation. One might also assume that the true interests of the workers as individuals will be ignored under a collective form if they do not comport with the interests of a random majority. This kind of mistrust is directed particularly toward trade unions. Some see unions as an unscrupulous representative of group interests. Others see them as a sort of dinosaur, whose weighty immobility makes it impossible to even perceive a problem, let alone arrive at a solution. Unflattering comparisons are drawn between unions and a team of engineers struggling to make progress.

It is easy to see why those who espouse this view question the capability of labor unions to perform such traditional functions as the achievement of fair wages and decent working conditions. Has collective labor law lost its legitimacy with the disappearance of traditional class society?[5] Is the return to a free market in labor the best way to master unemployment? Neoclassical economic theory demands the elimination of collective labor law because it allegedly distorts the play of supply and demand, not unlike a monopoly.[6]

The disassembly of collective labor can take varied legal paths. For example, it might be required that the binding effect of collective agreements be eliminated, in order to permit contractual modification at the

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1987, at 50 (Kittner ed. 1987). In the 1930s the ratio of white collar to blue collar workers still stood at four to one; in 1882 at twenty-one to one. *See* R.-D. FALKENBERG, 7 DAS ARBEITSRECHT DER GEGENWART 67 (1970).

3. *See generally* KERN-SCHUMANN, DAS ENDE DER ARBEITSTEILUNG? (1984).

4. For a West German perspective on this point, see FLEXIBISILIERUNG—DEREGULIERUNG: ARBEITSPOLITIK IN DER WENDE (Oppolzer, Wegener & Zachert eds. 1986); H. WOLTER, FÜR EIN BESSERES ARBEITSRECHT 30 (1986); *Beschäftigungsoffensive der Arbeitgeber*, (Bundesvereinigung der deutschen Arbeitgeberverbände eds. 1986) (record from Congress, Berlin, October 27-28, 1986). For a French perspective, see CENTRE DE RECHERCHE DE DROIT SOCIAL, UNIVERSITÉ DE LYON III, FLEXIBILITÉ DU DROIT DU TRAVAIL: OBJECTIF OU RÉALITÉ (1986).

5. *See* Reuter, *Gibt es eine arbeitsrechtliche Methode?—Ein Plädoyer für die Einheit der Rechtsordnung*, in FESTSCHRIFT FÜR HILGER UND STUMPF 577, 579 (T. Dieterich, F. Gamillscheg & H. Weidemann eds. 1983).

6. In West German labor law particularly, this theory is represented by the so-called Kronberger circle, a private gathering of neoliberal economists and legal scholars. *See generally* W. ENGELS, MEHR MARKT IM ARBEITSRECHT (1986).

expense of the individual worker.[7] Along the same lines, it might also be proposed that employees be made "partners" at work, that is, shareholders or members of the company.[8] If such a proposal were implemented, a whole body of labor law—"this virus which changes its form daily, like an escapee from the laboratory of a genetic engineer or a chemical weapon maker"[9]—would become irrelevant.

A full scale return to the common law has been demanded in Great Britain. Many argue that "false fictions" in labor law should be abandoned. Among these alleged "fictions" and their counterarguments are the notions that working conditions are not negotiated; that non-work during a strike only suspends the employment relationship; and that a strike is not an unpermitted act.[10] Similar views are being expressed in France, the only difference being that they demand the elimination of "sterile" legal regulations and the enforcement of rigid provisions of the civil code.[11] The recommendations of the German Advisory Council to permit temporary employment without specific justification,[12] and to reduce the "burden" of the social plan,[13] seem mild in comparison.

Is collective labor law terminally ill? Is the sickness of collective labor law only further advanced in Great Britain, France and Spain? We have reason enough to reexamine the relationship between the collective and the individual, even if Weimar "collectivism," the great social advance of the first German republic, is today more a theme of Italian than German jurisprudence.[14]

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7. *See* K. ADOMEIT, DAS ARBEITSRECHT UND UNSERE WIRTSCHAFTLICHE ZUKUNFT 13-19 (1985); Möschel, *Arbeitsmarkt und Arbeitsrecht*, 1988 ZEITSCHRIFT FÜR RECHTSPOLITIK 48.

8. *See generally* Adomeit, *Vom Arbeitnehmer zum Mitarbeiter*, 1985 ARBEIT GEBER 76. Similar questions are posed by Beuthien, *Das Arbeitsverhältnis im Wandel*, in ARBEITNEHMER ODER ARBEITSTEILHABER? DIE ZUKUNFT DES ARBEITSRECHT IN DER WIRTSCHAFTSORDNUNG 28 (1987).

9. *See* Ehmann, *Neuere Tendenzen des Arbeitsrechts*, in PERSONALFUHRUNG 1 (1988).

10. *See* Mather, *The Future Shape of Labour Legislation*, in INDUSTRIAL RELATIONS RESEARCH UNIT, UNIVERSITY OF WARWICK, THE FUTURE OF LABOUR LAW: TWO VIEWS 8 (1987) (Warwick Paper in Industrial Relations no. 14).

11. *See* OPPOLZER, *Flexibilisierungsstrategien und Arbeitsrecht in Frankreich* 131.

12. *Jahresgutachten 1987/88 des Sachverständigenrats zur Begutachtung der gesamtwirtschaftlichen Entwicklung*, Drucksachen des Deutschen Bundestages 11/1317, no. 385, at 190.

13. *Id.* no. 392, at 192.

14. *See generally* H. SINZHEIMER, ARBEITSRECHT UND RECHTSSOZIOLOGIE, GESAMMELTE AUFSÄTZE UND REDEN (1976); H. SINZHEIMER, DER KORPORATIVE ARBEITSNORMENVERTRAG (1977). For an Italian review see Fraenkel, Kahn-Freund, Korsch, Neumann & Sinzheimer, LABORATORIO WEIMAR: CONFLITTI E DIRITTO DEL LAVORO NELLA GERMANIA PRENNAISTA (Arrigo & Vardaro eds. 1981); Fraenkel, *Democrazia Collettiva*, 1980 GIORNALE DI DIRITTO DEL LAVORO E DI RELAZIONI INDUSTRIALI 601 [hereinafter DLRI]; Lotmar, *I Contratti di Tariffa Tra Datori e Prestatori de Lavoro*, 1984 DLRI 313; Renner, *La Costituzione del Lavoro della Rivoluzione*, 1986 DLRI 743; Sinzheimer, *La Democratizzazione del Rapporto di Lavoro*, 1979 DLRI 217; Vardaro, *Crisi Istituzionale e Teoria della Stato in Germania dopo la Prima Guerra Mondiale*, 1987 ANNALI DELL'ISTITUTO STORICO ITALO-GERMANICO 24; IL PLURALISMO E IL DIRITTO DEL LAVORO: STUDI SU OTTO KAHN-FREUND (Balandi & Sciarra eds. 1982).

II. The Incomplete Questions

The relationship between the individual and the collective aspects of labor law is usually discussed in three contexts. The first group of questions involves the rights of the individual as he or she prepares to enter a collective organization. After the early liberal ban on association was overcome,[15] attention was directed toward protection of the voluntary character of union membership. In the current context, the negative freedom of association, or the right to remain outside of a combination, is emphasized.

The second group of questions goes to the heart of collectivism—the regulation of wages and working conditions by means of collective agreement. How is this sort of "private legislation" to be integrated into the traditional legal system? What rules form the basis of collective action, and which are an essential precondition for any arrangements? In the Federal Republic of Germany, these questions invoke the important concepts of strike law and codetermination authority.

The third group of questions assumes that collectivism is successful. The relevant inquiry then is whether the collective bargaining agreement or the plant agreement can limit individual rights. For example, can freedom of expression be limited or wage contract fringe benefits be lessened? The negotiating position of the collective forces are strengthened if this question is answered in the affirmative. Such strengthening in turn permits a thoroughgoing balancing of interests, as is characteristic of neo-corporative systems.

In all three groups of questions, the concept of the collective refers to organizations created by workers and to the types of action typical of such organizations. The concept is not used to connote the work process itself or the various forms of division of labor within a plant or a multinational corporation that extend far beyond the work process itself.[16] While it is a well established fact that work today is not like that performed by the traditional craftsman, it is irrelevant to discussion in the legal community. The "collective compulsion" deriving from the organization of work is not recognized. The concept of the collective is confined to combinations of persons of more or less equal status. The consequences of this are predictable: Even the most extreme forms of the division of labor, where the individual's existence is reduced to that of a

15. For a comparative study of the ban on association, see Jacobs, *Collective Self-Regulation*, in THE MAKING OF LABOUR LAW IN EUROPE: A COMPARATIVE STUDY OF NINE COUNTRIES UP TO 1945 at 193-241 (B. Hepple ed. 1986).

16. *See* INFORMATIONEN OHNE GRENZEN: COMPUTERNETZE UND INTERNATIONALE ARBEITSTEILUNG (Klebe & Roth eds. 1987).

cog in a machine, are thought of as self-evidently justified and immune from any sort of criticism.

Trade unions, on the other hand, stand in the floodlight of critical public opinion. Trade unions appear as an exception to the "normal" social system, a dubious great power whose wings should be clipped in the name of freedom. Today, the legitimacy of the trade unions rests only upon the superior position of the employer in establishing terms and conditions of employment: the bargaining ability of workers in setting those terms and conditions are to be raised to a proper level to the extent that is necessary. It follows that trade unions will become more or less obsolete when, by whatever means, the labor market no longer requires their activity.

However, if employee organizations are viewed as a counterweight that represents the interests of employees in determining terms and conditions under which work is done, then the perspective is changed. Protection of freedom of association no longer means the creation of a potential power advantage; rather, it means providing the individual with the opportunity to co-determine and collectively decide the patterns of his integration into the process of production. From this perspective, the collective restores private autonomy which has been lost on the individual level.[17] The negotiation of a collective bargaining agreement no longer appears as a regulation from above, viewed in this light, but rather as part of co-determination. Only in cases where the disposition of individual rights is at issue, that is, whether an individual is being required to make a questionable sacrifice, does skepticism towards the collective process seem appropriate.

This article will analyze the three groups of questions regarding the relationship between the collective and the individual from the point of view just articulated. Specifically, the analysis will ask how far the increasingly strong re-individualization of our legal culture, whether or not it be justified, influences the resolution of the questions. In other words, what is the impact of the "new self-employed," the part-timers, the temporary employees and the subcontracted employees being employed as isolated individuals?

III. The Right to Join and the Right Not to Join

A. *The Divided Freedom of Association*

Today, every country in western and southern Europe permits trade

17. *See generally* W. Gast, Das Arbeitsrecht als Vertragsrecht (1984); Gast, *Perspektiven des Arbeitsrechts*, 1986 Der Betriebs Berater 1513, 1515; Richardi, *Arbeitsrecht und Zivilrecht*, 1974 Zeitschrift für Arbeitsrecht 10.

unions. Usually, trade unions are expressly granted certain rights in the constitution. Early liberal prohibitions against coalitions, such as the *Loi Le Chapelier* or the English Master and Servant's Acts,[18] have been overcome, along with the fascist concept of compulsory trade syndicates. Freedom of association is not questioned anywhere in modern western Europe.

However, many real world events can intervene before the principle of freedom of association becomes a reality. The disparity between principle and reality occurs not only in the few cases of direct violations of law, such as when employment is made contingent upon resignation from a trade union.[19] Of greater concern are legal regulations and factual developments that concretely hinder the exercise of freedom of association and union membership. In other words, we are concerned with those legal regulations and factual developments that provide advantages to the so-called self-reliant, independent fighter. In the context of German law, four points require emphasis with regard to this issue.

First, the Constitutional Court of the Federal Republic has held that the right not to join a union, the "negative" freedom of association, is to be protected to the same degree as is the freedom to associate.[20] Therefore, no one may be forced to join any organization against his will. In this context, the notion of compulsion is very broad. Compulsion includes not only a legal obligation to join, as in the British union shop,[21] but also the threat by a member of a works council to disadvantage a non-union worker.[22] Union advertisements and informational publications may not contain any "unfair attacks" on non-union workers.[23] Even statements that do not rise to the level of an insult may not be voiced in the plant and can be forbidden by the employer. The prohibition against closed shops requires no further discussion under these

18. The nineteenth century Master and Servant's Acts were the legal basis for prosecutions against workers. These laws affected the right to strike by permitting employers to have all strikers arrested for breach of contract and then to confront strikers with the alternatives of returning to work on the employer's terms or suffering up to three month's imprisonment. P. BAGWELL, INDUSTRIAL RELATIONS IN 19TH CENTURY BRITAIN 30 (1974).

19. *See* Judgment of Bundesarbeitsgericht (highest federal labor court) [hereinafter BAG], 1987 DER BETRIEB 2312. For further examples see U. ZACHERT, BETRIEBLICHE MITBESTIMMUNG: EINE PROBLEMORIENTIERTE EINFÜHRUNG 59 (1979).

20. Entscheidungen des Bundesverfassungsgerichts 50, 290, 367 (federal constitutional court) [hereinafter BVerfGE].

21. Relating to its content and its principal incompatibility with Article 11 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, U. N. TREATY SERIES 221 (1950), see Case of Young, James and Webster, 4 Eur. Ct. H.R. (ser. A) (1981). The case may also be found in 1981 EUROPÄISCHER GRUNDRECHTE-ZEITSCHRIFT 559.

22. *See* W. DÄUBLER, GEWERKSCHAFTSRECHTE IM BETRIEB 461 (5th ed. 1987).

23. *See* BAG, Arbeitsrechtliche Praxis no. 10 [hereinafter AP] to GRUNDGESETZ art. 9 Bl. 5 (federal constitution) [hereinafter GG]. For the prohibition on "unfair attacks" see also Judgment of BAG, 1978 DER BETRIEB 894.

circumstances.[24]

Second, protection for those unwilling to join a trade union is incorporated into the law of collective bargaining. The bargaining parties may not exclude outsiders by limiting enjoyment of benefits to union members. Any provision that seeks to do so is void and considered an impermissible attack on the negative freedom of association. An example of this type of case involves bargaining for extra vacation pay for union members, whether or not the extra pay is equivalent to annual union dues.[25] This leads to the remarkable consequence that although the exercise of the *positive* freedom of association must be bought with an economic sacrifice, approximately 1% of a worker's monthly income, the exercise of the *negative* freedom of association may not be burdened with the loss of a vacation bonus.[26]

In recent times, this jurisprudence has been reinforced with regard to pre-pension agreements. Today, collective bargaining agreements usually require that employers make early pension arrangements with no more than 2% of their employees per year. Employers have agreed to include only union members in those given early retirement. The courts, however, have rejected this "special" advantage to union members as a violation of the non-union member's negative freedom of association.[27] Therefore, non-union employees cannot be forced to wait for an offer of early retirement until the quota of union employees has been met.

The result in the case of early pensions may seem more satisfactory than in the case of vacation pay. However, there is something inadequate in the result when one considers the implementation mode of collective bargaining agreements. According to the Collective Agreements Act, an employer who acts on his own initiative may refuse to extend the terms of a collective bargaining agreement to non-union employees.[28] An employer may also refuse to pay union wages to non-union employees or to exempt them from early retirement. However, the parties to a collective

24. On the illegality of closed shops, see A. HUECK & H. NIPPERDEY, 2 LEHRBUCH DES ARBEITSRECHTS 163 (7th ed. 1967); A. NIKISCH, 2 LEHRBUCH DES ARBEITSRECHTS 37 (2d ed. 1959); SÖLLNER, GRUNDRISS DES ARBEITSRECHTS 62 (9th ed. 1987); W. DÄUBLER, DAS ARBEITSRECHT 1, at 186 (8th ed. 1986).

25. *See* Bundesarbeitsgericht—Grosser Senat (en banc appeal to the highest federal labor court) [hereinafter BAG GS], AP no. 13 to GG art. 9, confirmed through Judgment of BAG, 1978 DER BETRIEB 1647.

26. *See* W. DÄUBLER & T. MAYER-MALY, NEGATIVE KOALITIONSFREIHEIT? 38 (1971); C. HAGEMEIER, O.E. KEMPEN, U. ZACHERT & J. ZILIUS, TARIFVERTRAGSGESETZ, KOMMENTAR 98, § 3 (1984).

27. *See* Judgment of BAG, 1987 NEUE ZEITSCHRIFT FÜR ARBEITS- UND SOZIALRECHT 233, 357; 1987 DER BETRIEB 487, 492.

28. Tarifvertragsgesetz (Collective Agreements Act) § 3, para. 1 [hereinafter TVG], [1969] Bundesgesetzblatt I, no. 83, at 1323 [hereinafter BGBl.I]; I.L.O. LEG. SERIES, Ger. F.R. 1 (1969) (English translation).

bargaining agreement are not permitted to negotiate such an arrangement.

Third, within trade unions themselves, the centrifugal forces are being strengthened. According to a decision of the Federal High Court, a group of employees is permitted to propose its own list of candidates in a works council election to compete with the official trade union list chosen in accordance with the internal rules of the union.[29] A worker may be expelled from the union only if he competes directly with the union *and* attacks its policies. Thus, election rules designed to enable the union to present a unified candidate list are of little value because they can be ignored by union members without fear of legal sanction.[30]

The jurisprudence is quite different in the case of strike breaking. In this situation, the courts consider only whether or not the strike was called according to internal union rules.[31] No other demands are placed upon the internal union structure. Although the literature recognizes that the internal union structure should correspond to democratic principles,[32] the courts have not yet accepted this idea.[33] Thus, under the law, minority protection has a rather selective character; it is employed only when it concerns the important issue of works council elections and where there exists at least minimal opposition in the plant.

The most important, and final point, however, is that the factual preconditions for union membership are excluded from consideration as not legally relevant. There is supposedly no legal problem when the individual is isolated from his colleagues in the work place or when jobs are distributed to small enterprises or for work at home. In the same vein, there is no legal problem when temporary employees, who are more dependent on the employer, are discouraged from joining a union because of their temporary status. The same is also true for part-time employees with flexible working hours who develop only limited contact with other employees and therefore stand outside union developments.[34]

Apathy in the face of such phenomena is even more astounding be-

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29. *See* Entscheidungen des Bundesgerichtshof in Zivilsachen 71, 126 (federal high court for civil matters) [hereinafter BGHZ].

30. Inasmuch as the "association opposition" rule of Gewerbeordnung a.F § 152, para. 2 (trade law decree) [hereinafter GewO], [1900] RGBl at 871, is still not entirely outdated, every member is guaranteed a right to resign immediately and the actionability of claims between union and individual member is denied. Entscheidungen des Reichsgerichts in Zivilsachen lll, 199 (federal high court) declared in 1925 that GewO § 152, para. 2 to be no longer applicable, as it was in violation of the guarantee of association of Verfassung des Deutschen Reichs [Weimarer Reichsverfassung] art. 159, [1919] RGBl at 1383.

31. Judgment of BGHZ, 1978 NEUE JURISTISCHE WOCHENSCHRIFT 990.

32. *See, e.g.*, POPP, ÖFFENTLICHE AUFGABEN DER GEWERKSCHAFTEN UND INNERVERBANDLICHE WILLENSBILDUNG 107 (1975).

33. *See* BVerfGE 7, 96, 106; 18, 18, 28 (for perpetual jurisdiction).

34. The "remoteness of the labor union" in the atypical labor market is undisputed.

cause of the Constitutional Court's effective use of fundamental rights as a central principle of interpretation.[35] By using organizational and procedural precautions, fundamental rights are anchored to reality and are actually enforced.[36] For example, article 19, section 4 of the constitution[37] guarantees legal protections; it includes injunctions[38] and protects citizens from facing an unreasonable risk of expense.[39] Numerous other fundamental rights, including the rights to life,[40] to property[41] and to asylum,[42] have also been interpreted and strengthened by specific implementation instruments. Only the positive freedom of association—in the sense of article 9, paragraph 3 of the constitution—remains an unwritten page. This is not to say that new means of restricting trade union membership are constitutionally suspect and should be balanced by decreasing protection for the negative freedom of association. The only thing that can be criticized is that this dimension, until now, has been totally ignored.

What are the immediate consequences of the present structure? A further step toward individualization is hardly conceivable, except perhaps for a concretization of democratic organizational principles. This is because non-union employees enjoy full legal protection. A further step, such as the revocation of the union's rights to sue for the back dues of members,[43] would put the fundamental principles of freedom of association into question, and thus is not feasible. To this extent, the situation is different from Great Britain because the British closed shop does not actually fit into a period which many have welcomed as the "new age."[44]

B. *The Great Exception: Representation of Shop Interests*

The discussion of positive and negative freedom of association normally ends at this point. This is unfortunate, as it overlooks the fact that within German industrial relations there really is a role for compulsory representation. It is not found throughout all levels of interest representation, but it is found within the most important sphere—the shop.

The German works council automatically represents all employees.

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35. For an overview, see Hesse, *Bestand und Bedeutung der Grundrechte in der Bundesrepublik Deutschland*, 1978 EUROPÄISCHE GRUNDRECHTE-ZEITSCHRIFT 427, 434.

36. For similar principles of interpretation in Italy, see G. GHEZZI & U. ROMAGNOLI, IL RAPPORTO DI LAVORO 26 (2d ed. 1987).

37. BVerfGE 35, 263, 274; 40, 272, 275 (for perpetual jurisdiction).

38. BVerfGE 37, 150, 153.

39. *See generally* Wassermann, in AK - GG, Neuwied 1984, art. 19, para. 4, at 48-50.

40. BVerfGE 53, 30, 65; 49, 403.

41. BVerfGE 37, 132.

42. BVerfGE 56, 216, 238.

43. These were a partial return to GewO a.F § 152, para. 2. *See supra* note 30.

44. *See* LORD WEDDERBURN, THE WORKER AND THE LAW 30, 286 (1986).

The works agreement negotiated by the works council shapes the labor relationship for all employees in the plant. Abstention from an election, protests or appeals to the employer will not enable the individual to distance himself from the works agreement. Even an appeal to freedom of conscience will not help the individual employee.

The fact that section 75 paragraph 1 of the Works Constitution Act states that the works council is neutral vis-à-vis the trade union makes this resolution easier, but this point should not be over-emphasized.[45] In practice, about 80% of all works council members are union members.[46] Many employees think that the works council is the shop representative of the union. In order to elect a works council, the initiative of relatively few employees is required.[47] Even a non-union minority must accept a representative that it may not wish to accept. This result is inherent in a system that disregards the protection of the outsider at the shop level.

This is not a situation unique to Germany. The French *comité d'enterprise* speaks for the entire shop,[48] as does the Italian *consiglio di fabbrica*.[49] Even Spain is not an exception; according to article 63, paragraph 1 of the Spanish Worker's Charter, the *comité de empresa* is the representative body of the entire shop.[50] Article 87, paragraph 1 of that charter also gives additional rights to the *comité de empresa*, such as the right to establish collective agreements which are binding on all employees.[51] From this point of view, the system in the United States is not as different as is usually assumed. In the United States, as is generally known, the majority union within the bargaining unit represents all employees therein and has the right to speak for them and to establish collective agreements.[52]

Why is there such a contradiction? Searching decades-old traditions does not provide a sufficient explanation. One must assume that there exists an interest, especially on the part of employers, for broad shop-

45. Betriebsverfassungsgesetz (Works Constitution Act) § 75, para. 1 [hereinafter BetrVg], [1972] BGBl.I no. 2, at 13; I.L.O. LEG. SERIES Ger. F.R.1 (1972) (English translation). All references are to the 1972 enactment of the Works Constitution Act, unless otherwise noted in parentheses.

46. See the results of the works council elections of 1972 and 1984 in 1973 ARBEIT UND RECHT 114 and 1985 ARBEIT UND RECHT 92, respectively.

47. Under BetrVG § 17, para. 2, three workers, or a trade union with at least one member in the shop can advocate a workers' assembly to choose an election committee. A minimun number of employees for these company meetings is not prescribed.

48. *See* G. CAMERLYNCK, A. LYON-CAEN & J. PÉLISSIER, DROIT DU TRAVAIL, 655 (3d ed. 1986).

49. *See* G. GIUGNI, DIRITTO SINDACALE 43 (1984).

50. For a comparative legal analysis, see O. AVILES, DERECHO SINDICAL 226 (1986).

51. *See* Worker's Charter of 1980 art. 87, para. 1.

52. For new developments, see W. LECHER, US-GEWERKSCHAFTEN—STURZ INS BODENLOSE? 430 (1986); S. ROSENBERG, NEUE TAKTIKEN DER AMERIKANISCHEN ARBEITERBEWEGUNG 439 (1986).

based representation. Supporting this assumption is the fact that numerous representatives would complicate the negotiating process and could disrupt the plant. The exclusion of a category of employees within the plant could also cause coordination problems that would be otherwise avoided.

At the same time, the power of the employer is not overly restrained through the shop-based character of the representation. This is true because despite employee protection against unjust dismissals, all shop members are employees of the plant and remain dependent upon the employer.[53] Under German law, this dependency is strengthened by the duty placed on employees to promote the shop's best interest and to cooperate in a spirit of trust with the employer, in addition to the prohibition against labor conflicts.[54]

If one would accept a universal mandate for trade unions, the result would be the opposite. To include non-union employees would mean that there would be a significant increase in union dues which would considerably extend the union's sphere of action. This could hardly be in the best interest of employers. In any case, trade unions find the status quo acceptable because at least, it broadens trade union support at the shop level.

Unions point to the fact that there is no protection under German law for minority shareholders. Yet by analogy, the special status at the shop level has rarely become a problem under German law.[55] Attempts to provide minority protection in certain elections, for instance in the determination of personnel for works council committees,[56] have been opposed by both unions and employers.[57] The opposition of the unions is less remarkable than that of the employers. Unions fear redundant trench warfare in the works councils and point to conflicts within shareholder assemblies and within the board of directors as potentially debilitating. Is the unity of action on capital's side not of greater value than the protection of minorities? Greater political opposition comes

53. From this viewpoint, the judicial control of the cost of retirement pensions, *see* BAGE AP no. 142 to BÜRGERLICHES GESETZBUCH § 242 (Civil Code), is justified with respect to company agreements.

54. *See* W. DÄUBLER, *supra* note 24, at 349.

55. *See* R. RICHARDI, KOLLEKTIVGEWALT UND INDIVIDUALWILLE BEI DER GESTALTUNG DES ARBEITSVERHÄLTNISSES 277 (1968).

56. *See* Drucksachen des Deutschen Bundestages 10/3384 and 11/2503.

57. *See* P. HANAU, DIE JURISTISCHE PROBLEMATIK DES ENTWURFS EINES GESETZES ZUR VERSTÄRKUNG DER MINDERHEITENRECHTE IN DEN BETRIEBEN UND VERWALTUNGEN 7 (1986); Däubler, *Das Spaltergesetz—der neue Angriff auf die Gewerkschaftsbewegung*, 1986 ARBEITSRECHT IM BETRIEB 99; Richardi, *Der Gesetzentwurf zur Verstärkung der Minderheitenrechte in den Betrieben und Verwaltungen*, 1986 ARBEIT UND RECHT 33. A hearing before the committee for Labor and Social Order of the 1986 Lower House of Parliament provided a clear analysis of the employer's side of this issue.

from employers' associations, who argue in favor of a functioning and reliable negotiating partner.[58]

IV. The Guarantee of Collective Forms of Action

Collective action frequently runs counter to the norms of general civil law. In the Federal Republic of Germany, as in other comparable countries, this means that general civil law has limited application in the context of collective forms of action.

A. *Existing Principles*

1. Preparing for and completing collective bargaining negotiations run counter to the immediate economic interests of the employer, in addition to undermining his traditionally understood authority. Therefore, duties established under the work contract require appropriate modification to balance the conflicting interests of both parties. Loyalty and attention to the interests of the employer[59] must be limited by preservation of the worker's own interest.

Giugni has correctly argued that permanent coexistence is not possible between systems of cooperative contract law and collective labor law constructed upon the existence of conflict.[60] Despite the constitutional guarantee of the collective bargaining system, German labor law has not adopted an adversarial model. It is true that the obligation of loyalty has diminished significantly in recent years,[61] but the individual employee is still not permitted to unfairly attack the employer.[62]

2. Minimum levels of wages and work conditions are set forth in the collective bargaining agreement, which is negotiated between the union and the employer, and the works agreement, negotiated between the works council and the plant management. Variations in the individual employment contract are permitted only if they are in conformity with these two regulatory agreements. The "advantage principle" states that existing works agreements and collective bargaining agreements establish only minimum terms and do not reduce the rights of individual employees. This "advantage principle" is an invitation for every sort of

58. For a discussion of the changes in the structure of a company's representation of interests, see Däubler, *Modification dans la structure de représentation des interêts. Les cas de la République Fédérale d'Allemagne*, Travail et Emploi, Mar. 1988, at 66.

59. For criticism of the traditional conception of "mutual fidelity," see Kempff, Grundrechte im Arbeitsverhältnis (1988).

60. *See* Giugni, *Il Diritto del Lavoro Negli Anni '80*, 1982 DLRI 384.

61. *See* BAG GS AP no. 7 to BetrVG § 102.

62. BAG AP no. 10 to GG art. 9 Bl.5. For a prohibition on unfactual assaults see also Judgment of BAG, 1978 Der Betrieb 894.

individual agreement; it is, to a certain extent, incorporation of individualism in the context of labor law.

The effect of collective bargaining agreements is similar to protective legislation. The alien character of such private legislation for civil law jurisprudence has provoked numerous explanations, all of which lack practical importance.[63] Due to the explicit statutory regulations of section 4, paragraph 1 of the Collective Agreements Act[64] and section 77, paragraph 4 of the Works Constitution Act[65], there is no difference of opinion regarding the fundamental principle of the compulsory legal effect of collective bargaining agreements.

3. A strike suspends rights and obligations that flow from the employment relationship.[66] According to a Federal Labor Court decision, this same result occurs during a legal lock-out.[67] The Court originally derived this result from the collective nature of the labor conflict.[68] By today's standards, one would rather speak of a necessary functional operation of the constitutional guarantee of the right to strike. Here too, there is no dispute concerning the result. The European Court of Justice has correctly stated that nonpayment of wages during a strike corresponds to a general legal principle of the European Economic Community member states.[69]

4. In the same vein, the codetermination rights of the works council do not flow smoothly into the contractual system. If the employer bypasses the works council, unilaterally determined measures for the employees have no legal force.[70] This is the case even if an individual contract of employment specifically permits such unilateral action. Even a modification of the employment contract agreed to by the employer and employee cannot obviate codetermination rights. For instance, the works council retains its rights to codetermine working hours under section 87, paragraph 1, number 2 of the Works Constitution Act[71] even if the employer agrees with all the employees of a department to change the

63. *See generally* HINZ, TARIFHOHEIT UND VERFASSUNGSRECHT. EINE UNTERSUCHUNG ÜBER DIE TARIFVERTRAGLICHE VEREINBARUNGSGEWALT (1971).

64. TVG § 4, para. 1.

65. BetrVG § 77, para. 4.

66. *See* Colneric, *Rechtsfolgen des Streiks: Der rechmässige Streik*, in ARBEITSKAMPFRECHT 419 (W. Däubler ed. 1987) [hereinafter ARBEITSKAMPFRECHT].

67. *See* Wolter, *Rechtsfolgen des Streiks. Insbesondere: Aussperrung als Folge eines rechtmässigen Streiks*, in ARBEITSKAMPFRECHT 612.

68. *See* BAG AP no. 1 to GG art. 9 Arbeitskampf.

69. Judgment of Europaeische Gerichtshof (European Court of Justice) [hereinafter EuGH], 1976 ARBEIT UND RECHT 220.

70. *See* V. FITTING, F. AUFFARTH, H. KAISER & F. HEITHER, HANDKOMMENTAR BETRIEBSVERFASSUNGSGESETZ, § 87 (15th ed. 1987) [hereinafter HANDKOMMENTAR]; H. HESS, U. SCHLOCHAUER, & W. GLAUBITZ, KOMMENTAR ZUM BETRIEBSVERFASSUNGSGESETZ, § 87 (3d ed. 1986).

71. BetrVG § 87, para. 1.

first hour of work from 8 a.m. to 7 a.m.[72] The only exception is the case of a job applicant who is employed without the approval of the works council, as required by section 99 of the Works Constitution Act.[73] Such an employment contract is valid in that the applicant can sue for damages. The actual assumption of employment, however, is possible only under the special conditions for temporary employment of section 100 of the Works Constitution Act.[74]

B. *The Rudimentary Construction of a Collective Order*

As uncontroversial as these four fundamental principles are, their exact range is unclear. There are differences of opinion as to the factual scope of the principles. For example, what is subject to collective bargaining? What may be negotiated about and struck for? These are some objects of controversy.[75] It is clear that work stoppages are considered legal by the courts only if they have the purpose of obtaining a new collective agreement and if they take place after the peace obligation has expired.[76] We see here a drastic divergence from French,[77] Spanish[78] and Italian law.[79]

Likewise, the scope of the codetermination rights of a works council offers reasons for discussion.[80] This is true despite the fact that this issue does not assume nearly the same importance in the law of labor conflict because of the relatively precise statutory regulations involved. Court decisions have given a rather liberal interpretation to co-determination rights, especially in regard to new technology.[81] This has compensated for tighter restrictions on the right to strike.

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72. *See* HANDKOMMENTAR, *supra* note 70, § 87.

73. BetrVG § 99.

74. *Id.* § 100. This has been upheld in Judgment of BAGE, 1981 DER BETRIEB 272.

75. *See generally* W. DÄUBLER, DAS GRUNDRECHT AUF MITBESTIMMUNG 300, 325 (1976); V.JAHNKE, TARIFAUTONOMIE UND MITBESTIMMUNG 74 (1984); H. RUNGGALDIER, KOLLEKTIVVERTRAGLICHE MITBESTIMMUNG BEI ARBEITSORGANISATION UND RATIONALISIERUNG 261 (1983); Wiedemann, *Unternehmensautonomie und Tarifvertrag*, 1986 RECHT DER ARBEIT 231.

76. *See* Judgment of BAG, 1986 ARBEIT UND RECHT 220.

77. *See* Journel Officiel, Jan. 29, 1981, no. 24, at 370; Labor Code of 1981, L. 521-1, I.L.O. LEG. SERIES, Fr. 1 (1981).

78. Royal Legislative Decree No. 17 of 1977 § 1, I.L.O. LEG. SERIES, Sp. 1 (1977).

79. The differences in these European systems become blurred in situations where employees forgo a walkout out of fear of job loss, out of respect for the company, or because of the strangeness of the "strike" phenomenon. In these situations the legal consolidation of the right of co-determination in the German systems gives greater protection of the comprehensive guarantee of the right to strike than other European systems.

80. *See* R. HÜPER, DER BETRIEB IM UNTERNEHMERZUGRIFF 257 (1986) (discussing the effects of company break-ups); B. BLANKE, ARBEITNEHMERSCHUTZ BEI BETRIEBSAUFSPALTUNG UND UNTERNEHMENSTEILUNG 115 (2d ed. 1987).

81. *See generally* W. DÄUBLER, GLÄSERNE BELEGSCHAFTEN? DATENSCHUTZ FÜR ARBEITER, ANGESTELLTE UND BEAMTE 175 (1987). *See also* Ehmann, *Über Datenverarbeitung zur Generalklausel betrieblicher Mitbestimmung*, 1986 ZEITSCHRIFT FUR ARBEITSRECHT 357.

No less important than these external limitations on the system of collective action is the system's internal structure. Here we lack anything more than a very rough schema. Gaps are routinely and unthinkingly filled with references to general civil law. Two examples may serve to clarify this point.

First, in the course of a labor conflict, the parties frequently reach agreements and declarations that do not easily fit within the norms of the civil law. For example, a shop strike committee, either elected or empowered by the union, might receive a declaration that the employees were locked out of the plant.[82] Is such a body an appropriate one to receive a declaration which suspends so much of the employment relationship? Can this same avenue be used to propose changes in the employment contracts? How are the arrangements which regulate the extent of emergency and maintenance work to be agreed upon? The proposed answers do not follow a unified pattern. On the one hand, declarations to the strike committee are recognized under the rules of civil law regarding agency;[83] on the other hand agreements as to emergency work are considered a collective agreement sui generis, whose legal status and proper treatment is very uncertain.[84]

Second, if a strike violates the obligation of industrial peace or some other legal precondition, the collective character of the action is suddenly forgotten. Both the organizing union and the individual employee are jointly and severally liable for damages attributed to the strike. This legal theory derives from section 823, paragraph 1 of the Civil Code which ensures the right to create and operate a profit-making enterprise.[85] The court may regard a strike as a violation of this right, as if it were a case of slander by a competitor or a power outage caused by sabotage.[86] This theory sometimes leads to the consequence that the individual is liable for substantial sums of money in damages.[87] It is widely recognized that this is an extremely questionable legal result. Nonetheless, it is regularly modified by invoking civil law instruments excusing because of mistake due to uncertainty in the law and the like.[88] The much more plausible idea is a special theory of liability which would establish different liability risks and standards for the individual and the

82. *See* Wolter, *supra* note 67.

83. *See* Colneric, *supra* note 66; Wolter, *supra*, note 67.

84. *See* H. OETKER, DIE DURCHFÜHRUNG VON NOT—UND ERHALTUNGSARBEITEN BEI ARBEITSKÄMPFEN 68 (1984).

85. BÜRGERLICHES GESETZBUCH § 823, para.1 (Civil Code) [hereinafter BGB].

86. *See* BAG AP nos. 32-33 to GG art. 9 Arbeitskampf (labor dispute).

87. *See generally* W. DÄUBLER, *supra* note 24, at 284.

88. *See* BAG AP no. 58 to GG art. 9 Arbeitskampf Bl.6; Judgment of BAG, 1984 NEUE ZEITSCHRIFT FÜR ARBEITS- UND SOZIALRECHT 34.

union. This possibility, however, has hardly been considered.[89]

What can be seen here is that collective labor law is still an exception to civil law norms. Where there is no stated labor law proposition or where the individual deviates from the envisioned behavior pattern, the ordinary rules of civil law apply. Collectivism remains only on the surface, a thin layer of rights for which the labor movement has struggled, covering the traditional liberal protrusions of civil law only with difficulty.

C. *An Independent Labor Law or a Return to the Civil Code?*

1. The Meaning of the Problem

The precarious, uncertain condition of collective labor law makes it susceptible to disassembly. In order to destroy the entire foundation for negotiating procedure, collective bargaining agreements and strikes, it would be sufficient to revoke the character of collective agreements as binding contracts.[90] What sense would it make to strike for a collective bargaining agreement if lesser terms could be added at any time? Who would make a sacrifice for such an agreement? For this reason, the literature correctly argues that any undermining of the principle of free collective bargaining in this manner would violate the guarantee of freedom of association in article 9, section 3 of the constitution.[91]

The very extensive legalization of the German system of industrial relations serves as a protection against a reversion to market individualism.[92] Whether this legalization will also be effective against the attempt to redefine the employment relationship as a sort of legal business partnership[93] is doubtful. In those countries which do not have a written constitution or a developed system of constitutional appeal, there is no such protection at all.

We are thus left with the pointed question as to whether it was a serious error not to develop an independent system of labor law at the outset. If labor law was an independent entity, equally distant from pub-

89. For a commentary on this aspect of Swedish law, see F. SCHMIDT, LAW AND INDUSTRIAL RELATIONS IN SWEDEN 212 (1977).

90. *See supra* note 7 and accompanying text.

91. *See* Herschel, *Kernbereichslehre und Kodifikationsprinzip in der Tarifautonomie*, 1981 ARBEIT UND RECHT 266; Wiedemann, *Aufgaben der Koalitionen in der Unternehmensrechtsordnung*, in ARBEITNEHMER ODER ARBEITSTEILHABER? DIE ZUKUNFT DES ARBEITSRECHTS IN DER WIRTSCHAFTSORDNUNG 157 (Beuthien ed. 1987); W. DÄUBLER, *supra* note 24, at 107.

92. For an analysis of the very different situation in the United Kingdom, see Wedderburn, *Labour Law: Autonomy from the Common Law?* 9 COMP. LAB. L.J. 219 (1987).

93. *See* Lieb, *Wandelt sich das Arbeitsverhältnis zum unternehmerischen Teilhaberverhaltnis?*, in ARBEITNEHMER ODER ARBEITSTEILHABER? DIE ZUKUNFT DES ARBEITSRECHTS IN DER WIRTSCHAFTSORDNUNG 44 (Beuthien ed. 1987); Scholz, *Aufgaben der Koalitionen in einer sich fortentwikelnden Unternehmensrechtsordnung*, in *id.*, at 165.

lic and civil law, then *its* general principles, and not those of the Civil Code, would apply when legal rules or judicially developed norms are revoked. It would thereby be impossible to devalue the protective norms of labor law by a mere formalistic reference to civil law, as has happened in France[94] and in Great Britain.[95] What stops us today from correcting our previous error and offering a small jurisprudential contribution to the preservation of the tested structures of collective labor law?

2. Acknowledged Peculiarities of Labor Law

Beyond the basic principles outlined above, labor law today has numerous other, more specific peculiarities:

In the first place, many facets of the employment contract law do not derive from the Civil Code. Employment contract law as such rarely refers to the general part of the Civil Code or to general debtor-creditor law.[96] To give three examples: (1) The basic fact that the products of one's labor belong to the employer cannot be derived from manufacturing provisions of section 950 of the Civil Code.[97] (2) The doctrine of "Betriebsrisiko," which obliges the employer to pay the salaries if work is impossible for technical or economic reasons, has been developed without reference to sections 323 and 615 of the Civil Code so that a new rule of incomplete performance (*Leistungsstoerung*) has been developed.[98] (3) Judge-made law recoginizes an employee liability doctrine independent of the Civil Code.[99]

Second, contrary to its language, section 139 of the Civil Code[100] does not apply to employment contracts even if one part of the contract is voidable; the rest of the contract remains valid.[101] Courts have interpreted section 113 of the Civil Code[102] to allow formation of employment contracts as well as membership in trade unions.[103]

Third, the employer, in light of section 858 of the Civil Code[104], has

94. *See* Lyon-Caen, *Du Rôle des Principes Généraux du Droit Civil en Droit du Travail*, 1974 REVUE TRIMESTRIELLE DE DROIT CIVIL 229.

95. *See* Wedderburn, *supra* note 92.

96. *See* Gamillscheg, *Zivilrechtliche Denkformen des Individualarbeitsrechts*, 1976 ARCHIV FÜR DIE CIVILISTISCHE PRAXIS 197.

97. *See* BGB § 950. *See also* W. DÄUBLER, ARBEITSRECHT 2, at 93 (1986). With respect to this issue during the Weimar Republic, see H.SINZHEIMER, 1 ARBEITSRECHT UND RECHTSSOZIOLOGIE, GESAMMELTE AUFSÄTZE UND REDEN 423 (1976).

98. *See* BAG AP no. 2 and 14 to BGB § 615 Betriebsrisiko.

99. *See* BVerfGE 34, 118, 131. *See also* Däubler, *Die Haftung des Arbeitnehmers - Grundlagen und Grenzen*, 1986 NEUE JURISTISCHE WOCHENSCHRIFT 867.

100. BGB § 139.

101. BAG AP no. 2 to BGB § 139. *See also* W. DÄUBLER, ARBEITSRECHT 2, at 126.

102. BGB § 113.

103. *See* Scholz, in KOMMENTAR ZUM GRUNDGESETZ ART. 9 (Maunz, Düriz, Herzog & Scholz eds. 1987).

104. BGB § 858.

the immediate ownership of the workplace;[105] however, the Constitutional Court has based the rights of the industry supervisory agency to inspect on the rationale that a shop is a less private place than a residence, which is protected by article 13 of the constitution.[106] An employee can assert his constitutional rights when confronting an employer,[107] although such wide use of constitutional arguments is generally not permitted to other classes of citizens in their disputes.

This list of peculiarities is not exhaustive; however, this does not mean that in any individual case other areas of law will never be applied. To remain uninfluenced by the products of other disciplines, to ignore their experience and proposals would be a senseless form of isolationism that no one advocates.[108] Indeed, in actual practice labor law has tended to refer not only to civil law, drawing on not only its doctrine of obligation based upon loyalty and good faith,[109] but also on public law. Thus, for example, the fact that the successful contest of a works council election is effective only for the future[110] can best be analogized to the corresponding solution of the same problem in a political election. Another instance is the objective interpretation of collective bargaining agreements and collective shop agreements,[111] which is derived from the judicial treatment of statutes and regulations. Finally, the often-used doctrine of proportionality (*Übermassverbot*)[112] originated as a limitation on state power in relation to the citizen.[113]

3. Reasons to Recognize an Independent Labor Law

Does all of this suffice to demonstrate that we already have an independent area of law organized according to its own specific principles? One is tempted to answer this question in the affirmative and dispose of the issue. Judging from the numerous departures from the Civil Code and sometimes from general administrative law,[114] it would appear that the application of the Civil Code is the exception to the rule. Enumerat-

105. *See* Derleder, *Betriebsbesetzung und Zivilrecht*, 1987 DER BETRIEBS BERATER 818; Loritz, *Betriebsbesetzungen—ein rechtswidriges Mittel im Arbeitskampf*, 223 DER BETRIEB 1987.
106. *See* BVerfGE 32, 54 LS.
107. *See* KEMPFF, *supra* note 59.
108. *See* Richardi, *Reichtum an gefestigten Rechtsgedanken*, 1974 ZEITSCHRIFT FUR ARBEITSRECHT 21 (discussing the wide-reaching consequences of the integration of labor law and civil law).
109. *See* BAGE GS AP no. 7 to BetrVG § 102 Weiterbeschäftigung.
110. *See* HANDKOMMENTAR, *supra* note 70, § 19.
111. *See* Judgment of BAG, 1985 DER BETRIEB 130 (collective bargaining agreements); BAG AP no. 3 to BetrVG § 32 (1952) (company agreements).
112. *See* Blomeyer, *Das Übermassverbot im Betriebsverfassungsrecht*, in FESTSCHRIFT 25 JAHRE BUNDESARBEITSGERICHT 17 (1979); BAGE AP no. 64 to GG art. 9 Arbeitskampf Bl.14 (labor dispute law).
113. *See* Gamillscheg, *supra* note 96, at 199.
114. For example, the trade supervision confers with the works council or then also listens to the union, even though no explicit legal basis exists for this.

ing and evaluating all of the departures from the Civil Code, however, will not provide a satisfactory answer. For example, answering the question of whether the theory of a factual employment relationship is more important for the establishment of an employment contract than section 145 et. seq. of the Civil Code[115] does not help us assess the independent status of labor law. Nor is the expected increase in legal predictability which may result from simplification of the hybrid nature of today's laws a decisive factor in determining an appropriate role for labor law.[116] Indeed, there are other, more important arguments.

First, today's labor law has a different aim than civil law. Labor law incorporates the emancipatory interest of the labor movement by establishing certain minimum conditions on the exchange of labor for wages. It has, therefore, a protective function. This is not, however, its only goal. In addition, there are rules intended to contain the growth of trade union power which, at the same time, are designed to reduce risks to the continued existence of the collective system. The prohibition against wildcat work stoppages and the good faith obligations of the works council to shop employees and to the shop itself[117] have these goals in mind. In addition, there is a further requirement that the collective bargaining partners aim to "establish a meaningful order and pacification of working life."[118] These goals cannot be integrated into traditional civil law, the regulatory function of which is limited to general conditions for behavior in the marketplace.

Second, only some labor law rules are related to the abstract model of a commodity owner. For example, although the formal rules for bargaining and termination of the employment contract have a structural correspondence to civil law commercial contracts, this is no longer the case with safety legislation. These labor law rules are not concerned with protecting an abstract individual, but a *real* person in shop situations which may differ from one enterprise to the next.

This concern has consequences for the legal norms. While traditional civil law limits itself to abstract principles like "full business capacity," "adequate intentions" and the like, this is not the case in protective labor law. Health dangers in the chemical industry are obviously different from those in the steel industry or service sector. There is, therefore,

115. *See* BGB § 145.

116. *See* P. Blomeyer, *Die Überforderung des Arbeitsrechts—Auswirkungen auf die Rechtssicherheit im Arbeitsleben*, supplement no. 1 (*Beilage*) to NEUE ZEITSCHRIFT FÜR ARBEITS- UND SOZIALRECHT (1988). A loss of legal certainty is feared by Trinkne and Wolfer, *see* Trinkne & Wolfer, *Modernes Arbeitsrecht und seine Beziehungen zum Zivilrecht und seiner Geshichte*, 1986 DER BETRIEBS BERATER 5.

117. *See* BetrVG § 2, para, 1

118. *Compare* BVerfGE 18, 18, 27 *with* BVerfGE 50, 290, 371. *See also* BVerfGE 4, 96, 107 and BVerfGE 50, 290, 367 (referring to the "meaningful order of the working life").

a necessary decentralization of normative labor legislation, which can extend as far as shop and department rules.

At the same time, the attention to real persons means that we have a sort of "collective perspective." Because an employee does not exist in a shop as an isolated seller of labor, but rather as a part of the whole organization of the shop, any change in his situation is possible only by means of collective activity.[119] This new legal form cannot be adequately explained by using the categories of civil law relating to market conditions. The difficulties in formulating the exact fact patterns relevant to works council cases provide evidence for this proposition.

Third, the federal constitution[120] itself aims at an independent labor law. The legislative authority for civil law is found in article 74, number 1 of the constitution.[121] A separate legislative authority found in article 74, number 12, provides for "labor law including works constitution, health and safety, and labor exchange." [122] Additionally, the guarantee of an independent labor judiciary in article 95 paragraph 1 supports this interpretation.[123]

The Constitutional Court drew this conclusion, referring to labor law as an "independent and self-reliant area of law, standing outside of civil law."[124] Indeed, even the service contract law of the Civil Code was to be "excluded and modified" in light of labor law's independent status.[125] Labor law was to be independent of private law and a "special, unique area of law" was to be created.[126]

Parliament also appears to have assumed this viewpoint, albeit in a convoluted formulation. According to section 3 of the Vocational Training Law[127] an apprenticeship contract is to be governed by "the legal principles and legal regulations which are applicable to the employment contract." Why does jurisprudence not finally draw the obvious conclusion from all of this?[128]

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119. *See* Sinzheimer, *Das Weltbild des bürgerlichen Rechts, 1932, erneut abgedruckt*, in 2 ARBEITSRECHT UND RECHTSSOZIOLOGIE 313 (1976). *See also* G. GHEZZI & U. ROMAGNOLI, *supra* note 36, at 1.

120. GRUNDGESETZ (federal constitution) [hereinafter GG].

121. *Id.* art. 74, no. 1.

122. *Id.* art. 74, no. 12.

123. *Id.* art. 95, para. 1. On the connection between the existence of a special branch of the courts and the independence of the labor law, see Wedderburn, *supra* note 92.

124. BVerfGE 7, 342 LS 2.

125. *Id.* at 7, 342, 350.

126. *Id.* at 7, 342, 350, 351. Jurisdiction becomes ultimately confirmed through Judgment of BVerfG, 1988 DER BETRIEB 709 (under C I 2).

127. Berufsbildungsgesetz (Vocational Training Law) § 3, [1969] BGBl.I no. 75, at 1112; I.L.O. LEG. SERIES, Ger. F.R.1 (1969) (English translation).

128. *See* Gamillscheg, *supra* note 96, at 199 (reflecting a subliminal concern of many authors when he states, "Here a support of our democratic-liberal order turn could out to be in danger.") In many countries the security of labor law's special status is acknowledged. For an analysis of Swit-

V. Do Individual Rights Recede Before Collective Agreements?

The possibilities described above for collective action are not problematic from the viewpoint of the individual employee. Minimal standards have permitted many possibilities in the collective unit to be available in order to accommodate special situations. A real conflict between an individual and the collective unit occurs when the parties to a collective agreement actually dispose of the individual's rights or impose new duties upon him.

Is it acceptable for the individual employee to be placed under this sort of social guardian? Would it not be right and proper to overthrow this domination? Doesn't the independence of labor law show its reverse side here—binding the individual to additional hierarchies which cannot be effectively influenced by him?[129] German labor law deals with this problem by examining fundamental rights under the constitution and the importance of individual contractual rights.

A. *The Limiting Effect of the Employee's Constitutional Rights*

According to several decisions of the Federal Labor Court, the constitutional rights of a worker must be respected by the parties to a collective bargaining agreement or a collective shop agreement.[130] For example, the unrestricted right of non-discrimination in article 3, paragraph 2 of the constitution has great practical importance.[131] Under this right, the wage bonus provisions of collective bargaining agreements which disadvantaged women were declared invalid in the 1950s.[132]

For those rights which may be limited, such as freedom of profession, privacy of telephone conversations or freedom of opinion, the situation is less clear.[133] Invasions of these rights that are deemed consistent with the constitution by the legislature are permitted by the parties to a

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zerland, see M. Rehbinder, Schweizerisches Arbeitsrecht 15 (1986). On Austria see T. Mayer-Maly, 1 Österreichisches Arbeitsrecht 12 (1987). On France see Collin & Dhoquois, Le Droit Capitaliste du Travail 21 (1980); Lyon-Caen, *supra* note 94. On the U.K. see Mather, *supra* note 10; Wedderburn, *supra* note 92. *See also* Krotoschin, Instituciones de Derecho del Trabajo 5 (1968); Giugni, *Diritto del Lavoro*, 1979 DLRI 40-41 (referring to the possibility of overcoming the tension between labor law and civil law).

129. *See* Richardi, *supra* note 108. Before the conception of the "concrete order of the shop community" (developed in fascist thought), Richardi warned that private autonomy overlays, if not crushes, the formation of legal relationships.

130. *See* BAG AP nos. 4, 6, 7, to GG art. 3 (Tarifvertrag); BAG AP no. 28 to GG art. 3 (Betriebsvereinbarung). Whether the employer's constitutional rights also are to be payed attention is disputed, but generally affirmed by prevailing opinion. *See also* Berg, Wendeling-Schröder & Wolter, *Die Zulassigkeit tarifvertraglicher Besetzungsreglungen*, 1980 Recht der Arbeit 299, 309.

131. GG art. 3, para. 2.

132. *See* BAG AP no. 4 to GG art. 3.

133. *See* GG art. 10.

collective bargaining agreement. Thus for example, moonlighting, which includes choosing a second career, can be significantly limited.[134] Additionally, a collective bargaining agreement may also expand an employee's obligation of loyalty, thus imposing certain limits on his freedom to express his opinion.[135]

Finally, the employee is in an extremely precarious position with regard to the storage of his telephone data. According to the most recent holding of the Federal Labor Court, article 10 of the constitution protects only a veil of telephone privacy. This means that, if asked to do so, an employee must accede to measures which would not be acceptable in the relationship between the citizen and the state. For example, an employee has no constitutional protection against the practice of automatic registration of the beginning and end of phone calls made from the workplace, or against registration of any number called.[136]

This is a situation where consistent protection of the employee's privacy against invasions by the employer would be necessary. The employer should be able to invade the private sphere of the individual employee only when higher legal values are unequivocally at issue.[137] Nonetheless, the general approach of the Federal Labor Court is correct: The plant should not be a zone of reduced freedom.

B. *Respect for Contractual Rights*

Much more controversy has been provoked in the last few years by the question of whether a collective agreement, especially a works agreement, may limit or even eliminate contractual rights of employment. During the periods of economic boom, employers frequently agreed to provide uniform fringe benefits ranging from reduced-price canteen meals to company old age pensions applicable to all employees. Usually these services were provided according to unilaterally established "bonus systems" that referred explicitly or implicitly to the employment contracts of all employees.

At the beginning of the 1980s a new problem arose, namely how to

134. *See* BAGE AP no. 6 to GG art. 12. *See also* Judgment of BAGE, 1971 DER BETRIEB 581; Judgment of BAGE, 1977 DER BETRIEB 544.

135. *See* Bundes-Angestellentarifvertrag (Bund, Länder, Gemeinden) § 8, para. 1, sentence 2, [1961] Ministerialblatt des Bundesministers der Finanzen, at 214, which requires that the white-collar public service employee acknowledge the liberal democratic fundamental order through his overall conduct. The high labor court displayed this in a constitutionally-conforming manner, differentiating the degrees of political allegiance required according to the demands placed upon a worker by the scope of duty of his profession. *See* Judgment of BAG, 1976 NEUE JURISTISCHE WOCHENSCHRIFT 1709.

136. *See* BAGE EzA, BetrVG § 87 Kontrolleinrichtung no. 16, at 158.

137. For the development of these attempts in the area of the privacy of employee personal data, see W. DÄUBLER, *supra* note 81, at 60.

most simply reduce the legal commitments in the individual employment contract in order to adapt to the deteriorating economic situation. According to an original Federal Labor Court decision, the works agreement was the appropriate instrument to accomplish this goal. By utilizing works agreements, uniform contractual provisions could be modified to the disadvantage of the employee—with the exception of those "individual agreements" which had been negotiated previously, or contained arrangements tailored to the particular individual.[138]

The reasoning behind this decision was rather formalistic. The Federal Labor Court supported its decision with a "good order principle" whereby the collective system established by the uniform employment contractual provisions was to be replaced with one established by works agreements.[139] Later, the court utilized the so-called successor principle (*Ablösungsprinzip*)—that the agreement later in time was prevailing—in order to obtain the same result. This principle was, in essence, justified by practical considerations.[140]

On the basis of rather extensive scholarly debate,[141] the Grand Senate of the Federal Labor Court reversed the holding in the case. Entitlements generated by the employment contracts were not to be altered by means of a collective shop agreement even if the entitlements were based upon a uniform contractual rule.[142] The court used the "advantage principle" (*Günstigkeitsprinzip*)—that collective or works agreements established only minimum terms—as the basis for its decision.[143] The employer is therefore limited in modifying the individual employment contract, because any change requires statutory notice and a "just reason." The employer may announce a change in advance or, in an extreme case, he may claim a change in the present circumstances, such as the substantial and unexpected loss of a business. However, if the employer were to choose to announce a change in advance, he would face enormous difficulties if his employees included older, protected employees, members of the works council or handicapped workers. The collectivization of individual rights is thus pushed aside.

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138. *See* BAG AP no. 142 to BGB § 242 Ruhegehalt.
139. *See* BAG AP no. 11 to Truppenvertrag art. 44.
140. BAGE AP no. 142 to BGB § 242 Ruhegehalt.
141. *See, e.g.*, Blomeyer, *Der Bestandsschutz der Ruhegeldanwartschaften bei einer Einschränkung der betrieblichen Altersversorgung*, in FESTSCHRIFT HILGER UND STUMPF 41 (1983); Hoyningan & Huene, *Ablösende Betriebsvereinbarungen für ausgeschiedene Arbeitnehmer, Pensionäre und leitende Angestellte*, 1983 RECHT DER ARBEIT 225; Hromadka, *Die belastende Betriebsvereinbarung*, 1985 DER BETRIEB 864; Pfarr, *Mitbestimmung bei der Ablösung und der Verschlechterung allgemeiner Arbeitsbedingungen*, 1983 DER BETRIEBS BERATER 2001; Richardi, *Eingriff in eine Arbeitsvertragsregelung durch Betriebsvereinbarung*, 1983 RECHT DER ARBEIT 201, 278.
142. Judgment of BAG, 1987 ARBEIT UND RECHT 378; 1987 DER BETRIEB 383.
143. *See supra* Part IV.A.*2* (discussion of "advantage principle").

The decision of the Grand Senate, however, represents a compromise insofar as it includes an important exception: If the issue is not one of reduction but rather of a new *distribution* of employee benefits, then a "restructuring" of the works agreement is permissible. The employer may compensate one group of workers more favorably and reduce the benefits offered to another group; only the total quantity of benefits must remain constant. Thus the individual does not enjoy complete protection for all of his entitlements. The Federal Labor Court, however, will examine a case if the benefits of the disadvantaged group were "unfairly" reduced.[144]

Aside from this rarely used exception, there is no way to attack employment contract rights by means of a works agreement. Specifically, employment positions cannot be negotiated in either collective bargaining agreements or works agreements. While the employer and the works council may reach agreement as to an appropriate reduction of the workforce, the individual employee retains the right to bring an action for unfair dismissal in the labor court.[145] The Federal Labor Court has even explicitly condemned the widespread practice of making the provision of benefits promised in a social plan dependent upon a waiver of such a cause of action by the dismissed employee.[146]

Even the criteria for the selection of personnel to be dismissed may not be the subject of a collective agreement. The works council may negotiate selection directives with the employer, but they must meet two decisive tests of public law. First, the criteria of age, length of service and number of dependents must be a primary consideration in the decision. Second, before a dismissal, all of the particulars of the individual case must be discussed. This last requirement eliminates any form of standardization.[147] Unions have welcomed this holding because it protects the works council from approving decisions which the works council was not able to influence.

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144. These exceptions have received overwhelming criticism in the literature. *See* Ahrend, Förster & Rühmann, *Die abändernde und ablösende Betriebsvereinbarung*, supplement no. 7 (Beilage) to DER BETRIEBS BERATER (1987), at 9; Belling, *Das Günstigkeitsprinzip nach dem Beschluss des Grossen Senats des Bundesarbeitsgerichts*, in KONGRESS JUNGE JURISTEN UND WIRTSCHAFT, WANDEL DER ARBEITSWELT ALS HERAUSFORDERUNG DAS RECHTS 19 (Hanns Martin Schleyer-Stiftung ed. 1987) (*Tagungsprotokoll* (conference protocol)); Blomeyer, *Das Kollektive Günstigkeitsprinzip*, 1987 DER BETRIEB 634; Däubler, *Der gebremste Sozialabbau*, 1987 ARBEIT UND RECHT 349, 353; Hayen, *Zum Beschluss des Grossen Senats des BAG vom September 16th, 1986*, 1987 DER BETRIEB 158; Richardi, *Der Beschluss des Grossen Senats des Bundesarbeitsgerichts zur ablösenden Betriebsvereinbarung*, 1987 NEUE ZEITSCHRIFT FÜR ARBEITS- UND SOZIALRECHT 187. The Grand Senate read without criticism HANDKOMMENTAR, *supra* note 70, § 77.

145. *See* BAG AP no. 3 to ArbGG § 80. *See also* HANDKOMMENTAR, *supra* note 70, §§ 112, 112a.

146. *See* Judgment of BAG, 1984 NEUE ZEITSCHRIFT FÜR ARBEITS- UND SOZIALRECHT 53; 1984 DER BETRIEB 723.

147. *See* Judgment of BAGE, 1984 DER BETRIEBS BERATER 671.

C. *Evaluation*

Has the conflict between the collective unit and the individual finally been decided in favor of the individual? Court decisions have indeed made clear that collective agreements will not become instruments for the reduction of social standards; that they will remain a tool for the protection of employees; and that they will not become an easy means for employers to effectuate their interests.[148] Behind these decisions there is an appropriate vision of labor law. This vision sees labor law as a means to create new possibilities for autonomous action and independence of the worker, without questioning the modest protections of civil law.[149] From this viewpoint, and in contrast to the Weimar period[150] and present-day Austria,[151] maximum wages and optimum working conditions are not subject to collective negotiation. We must therefore amend those earlier decisions which treated the coordinated notice of many employees as a wildcat strike.[152] According to the Grand Senate of the Federal Labor Court,[153] the "advantage principle" is now of universal character.

In view of the different legal situations in comparable countries,[154] one might wonder whether this sort of protection for the individual can be sustained in periods of enterprise or industry crisis. The reaction of specialists to the Federal Labor Court decision has been generally positive.[155] Even authors who regularly advise management have avoided direct criticism of the decision.[156] We can conclude from this that the existing parameters of individual labor law are generally viewed as adequate. This is true in spite of the fact that any attempt to dismiss an employee or rehire an employee under inferior working conditions can be challenged in a labor court, with the court basing its decision on the "social justification" of the action.[157]

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148. It is noteworthy, however, that existing collective agreements may be replaced by new agreements that are worse. The same applies for existing plant agreements; in industrial matters, however, a controlling equitableness is generally practiced in this respect.

149. *See* Däubler, *supra* note 144, at 354.

150. *See* H. NIPPERDEY, BEITRÄGE ZUM TARIFRECHT 8 (1924).

151. *See* Arbeitsverfassungsgesetz § 3 para. 1, [1963] BGBl § 163, Law no. 22 (Austria). This provision is only very rarely used. *See* Tomandl, ARBEITSRECHT 1, at 114 (1984). For an Austrian perspective, see Firlei, *Das Problem der Objektivierung des Günstigkeitsvergleichs im österreichischen und deutschen Arbeitsvertragsrecht*, 1981 DRdA 1.

152. *See* BAG AP no. 37 to GG art 9 Arbeitskampf. For a criticism of this, see Brox, ARBEITSKAMPFRECHT 548, 606 (H. Brox & B. Rüthers eds. 1982); H. SEITER, STREIKRECHT UND AUSSPERUNGSRECHT 389 (1975); W. DÄUBLER, ARBEITSKAMPFRECHT 1423 (1987).

153. *See supra* note 142.

154. *See generally* Pera, *I Contratti di Solidarietà*, 1984 DLRI 699.

155. *See generally* sources cited in *supra* note 144. It is worth noting that only the restructured employment agreement was generally criticized.

156. *See generally* Ahrend, Förster & Rühmann, *supra* note 144; Höfer, Kisters-Kölkes & Küpper, *Betriebliche Altersversorgung und die Entscheidung des Grossen Senats des BAG zur ablösenden Betriebsvereinbarung*, 1987 DER BETRIEB 1585.

157. For an analysis see W. DÄUBLER, *supra* note 97, at 477.

The negotiating authority of works councils and trade unions is, therefore, limited. The rights of the individual are not a disposable commodity to be thrown into the collective confrontation with the employer. The neo-corporatist model of thorough-going interest balancing has a gap,[158] but it does not appear to cause any serious problems. The expectations of the individual have been carefully considered. Interestingly, unions are also satisfied with this situation; indeed, it was the unions which sought to change the original decision of the Federal Labor Court.[159]

VI. CONCLUSION

Collective action and protection of the individual are currently in harmony. Collective labor law is well equipped to meet the challenges of the present, unthreatened by even a deeply rooted individualism. The old proposition that without collective action the individual remains a lost cause is still valid. Freedom of contract is nothing more than an empty phrase when it comes to job recruitment.[160] After all, what can an individual do when faced with the division of labor in the workplace?[161] Even these elementary truths need to be repeated from time to time.

158. The continuing Austrian solution on this matter is interesting. *See, e.g.*, Firlei, *supra* note 151.

159. *See* Pfarr, *supra* note 141; Richardi, *supra* note 141.

160. *See* Gast, 1986 DER BETRIEBS BERATER 1515 (the notion of freedom of contract of employees exhausts itself when the working world renounces all formal contracts and speaks out for practicable personal autonomy).

161. *See* O.KAHN-FREUND, ARBEIT UND RECHT 11 (1979) (discussing the freedom of labor contract).