STUDIES IN MODERN LAW
AND POLICY

LABOUR LAW IN THE POST-INDUSTRIAL ERA

Lord Wedderburn
Max Rood
Gérard Lyon-Caen
Wolfgang Däubler
Paul van der Heijden

Trends in German Labour Law

Wolfgang Däubler

1. Three Introductory Remarks

Contributing a chapter on trends in German Labour Law to this volume gives me an uneasy feeling. My eminent collegues will likely discuss very important, if not fundamental, changes in their respective legal orders: can labour law be defined any more? Is labour law separating itself into different spheres whose contours are quite uncertain?[1] Contesting these assertions places the burden of proof on the author to give clear-cut definitions and to draw exact borderlines between labour law and the rest of the legal order. Frankly speaking, is it not more interesting to explain to the reader dramatic shifts instead of stating that 'nothing has changed'? And it is wonderful when the frictions and dangers that have been sketched do not arrive. Cassandra has been wrong, but was it not useful to listen to her words? Nevertheless, I cannot promise to fulfill the expectation of presenting dramatic events.

Another reason for my uneasy feeling is that there is no real cross-border discussion on current German labour law in Europe. Books are available in English[2] and Italian[3], and numerous articles have been published by German and foreign authors.[4] However, these works are widely ignored or treated as if they were pure facts: they present information about legal rules, but the underlying concepts are of little importance. In 1992, the French legislature has restricted employers' rights to investigate the personal data of job applicants, adopting a solution which the German Federal Labour Court had developed during the fifties[5]; an article published

on the subject in the leading French labour law journal[6] did not look across the Rhine. If Germany were to declare its labour law a state secret, the number of footnotes in many articles would decrease from 115 to 114 or 113, and the text would remain unchanged.[7] Of course, Germans are guilty as well of wearing blinders with respect to important aspects of foreign labour law. My goal, however, is to comment on important trends in the German system, and I apologize if I do not adequately explain some fundamental features of German labour law.

Finally, the 'European' labour law discussion, as found in various books and in journals such as *Giornale di Diritto del Lavoro e di Relazioni industriali*, *Lavoro e Diritto*, *Relaciones Laborales*, *The International Journal of Comparative Labour Law and Industrial Relations* and *Bulletin of Comparative Labour Relations*, has a highly hierarchic structure. To begin at the top, one is required to respectfully quote the 'saints' in the field, whose words are unerring. One also should mention the 'lesser saints', whose ideas are similarly canonical. One may choose to criticize a very select group of mortals, but only if it is done very politely. There is even a class of people at whose expense one may make a 'joke'.[8] One should heartily disagree with a group of non-existent persons whom one should not quote, because their arguments are selfdefeating. Last but not least, one should not forget a businessman, whom one meets in frequent travellers' and sometimes in VIP lounges in airports all over the world, discussing the edition of a new book for which he is writing just the preface.

Aside from these 'procedural requirements', there are some substantive restrictions to the discussion. One must refrain from discussing any connection a particular author's ideas have to powerful social interests. It would be an insult to compare progressive tone to the conservative outcome of a collegue's reasoning. Furthermore, one must not deal with the links between current labour law and the same powerful interests; this would seem to be too simplistic. Or a third point: American authors may criticize the lack of implementation of labour law rules in Mexico[9], but it would be inadvisable for a European to do the same in relation to another European country or to Japan.[10]

Deviating from these rules is dangerous; a commentator will damage his or her reputation. In case of recidivistic behaviour, he or she has a good chance of being ranked among the 'non-existent persons'. I sincerely hope I have obeyed these rules and chosen an adequate way of thinking.

2. The Great Continuity in German Labour Law

2.1. Statute Law and Case Law

In comparing the current rules of German labour law to those of 1976, it would be difficult to find changes of more than minor importance. The legal framework for collective bargaining and strikes has not changed, except for the amendment of Section 116 of the Act on Employment Promotion[11] restrictions on the employers' right to impose a lock-out, which were created by the Federal Labour Court in 1980 and confirmed by the Constitutional Court in 1991.[12] The legislature amended the Works Constitution Act ('Betriebsverfassungsgesetz') in 1989[13] in order to encourage the small trade unions, but the amendments changed little.[14] The same amendment created a special representative body for the leading personnel[15] whose importance is very restricted.[16] The dual system of interest representation[17] continues to function the same way as it did 20 or 30 years ago, the only exception being a decentralization of the bargaining system in some fields, which will be examined below.[18]

The rules dealing with the individual employment relationship have been changed in two regards. In 1980, the legislature implemented the EC-directives on equal pay and equal treatment for men and women[19], leading to an important series of court decisions that improved the situation of part-time workers.[20] On the other hand, the so-called Employment Promotion Act of 1985[21] overruled the traditional jurisprudence of the Federal Labour Court which previously admitted fixed-term contracts only if the employer could invoke a 'sound reason'. The Employment Promotion Act now excludes a first-time-hiring for not more than 18 months from this general rule.[22] In comparison with other countries, the Act was quite a weak 'deregulation' - the number of fixed-term contracts in Germany probably does not exceed 6%[23], most of which would be legal even without the new legislation.

The stability of German labour law needs some explication. Did the fast train of flexibility stop in Germany? Are there any successful attempts to reduce legal rigidities and to defer more to the marketplace? How can Germany maintain its economic position? I will try to give some provisional answers.

2.2. The Impact of Constitutional Law

As in other West European countries (except for Britain), Constitutional law has penetrated labour relations more and more after World War II.[24] The text of the German Basic Law seems, however, to be rather unproductive.

Article 9 para. 3 guarantees the freedom to unionize, article 6 para. 4 states that pregnant women deserve the 'protection of the community', and art. 140 refers to art. 139 of the Weimar Constitution, which generally prohibits work on Sundays. The observer's perspective changes, however, when taking into account the more than 80 volumes containing the decisions of the Federal Constitutional Court: there is a rather dense network of judge-made constitutional law. Examples of this decisional law include the right to participate in free collective bargaining and the right to strike, derived from the freedom to unionize[25]; the implicit protection of pregnant women against dismissal contained in article 6 para. 4[26]; and the extension of the guaranty of individual property in art. 14 to include present and future social security benefits.[27] The approach of the Constitutional Court becomes particularly clear in a 1992 decision, which declared the prohibition of night work for women to be unconstitutional and gave directives for further legislation respecting the right to life and health in art. 2 para. 2 of the Basic Law.[28] In this context, the Court also evaluates private autonomy between employer and employee: this principle can provide sufficient protection only if the conditions of self-determination are fulfilled. Where an appropriate balance of power between the persons concerned does not exist, the Court continues, the rules of contract cannot provide for an adequate settlement of interests. This is normally the case when an employment contract is concluded. In such situations the basic constitutional principles ('values') like fundamental freedom (art. 2 para.1) and the welfare state (art. 20) have to be realized by legislative measures which reduce the social and economic imbalance. The Court concludes that it would be a violation of art. 2 para.2 of the Basic Law to allow the parties to an employment contract to freely negotiate the issue of night work.[29]

Amending the Constitution would require a two-thirds-majority in both the Parliament and the Federal Council (Bundesrat), a condition that is very difficult to fulfill. The Court has overruled its decisions in very few cases, none of which were related to labour law. The broad interpretation given the Constitution even made it possible to contest the constitutionality of the rule on fixed-term contracts in the Employment Promotion Act.[30] There are thus sensible limits to a legislation program in favour of deregulation.

The impact of constitutional law cannot fully explain the long-term stability described above. There remain still some important fields where the legislature is relatively free. Decisions of the Constitutional Court are not separated from social and political life; they would not find the necessary acceptance if strong forces favoured another way of dealing with labour matters.

2.3. Rules of Social Partnership

Since the Second World War, trade unions and employers' associations have practiced a form of cooperation which can best be described as 'social partnership'. One side recognizes the existence and the legitimate interests of the opposing side, and conflicts are resolved by formal and informal negotiations; industrial action is the last resort.[31] Political rhetoric and union programs will normally not use the term 'social partnership' in an affirmative sense, but it is a deeply rooted reality.

Of course, trade unions were, and are, fundamentally opposed to deregulation in the sense of going back to pure market forces. To do so would mean replacing labour law with civil law rules. For employers to have ignored this point and endangered or dissolved social partnership would have been extremely risky. It is true that union density is not very high in Germany[32], but the 33 000 works councils are, in some way, the extended arm of the union on the shop floor, despite the fact that they are elected by all workers of the plant, whether unionized or not. Their function is not only to expand the trade union mandate and field of activities, but also to create two other effects which give considerable strength to the German labor movement.

One effect is that minority groups in the union cannot be totally silenced. Like other big organizations, union bureaucracies are in danger of catering (in the best of the cases) to the majority opinion expressed during the last union congress. This temptation is especially strong in a 'unitary' trade union, such as a German union, which is normally not exposed to the activities of a rival organisation. Under these conditions, minorities, political and otherwise, are considered to have a 'nuisance value' which union leaders want to reduce by any possible means. In the German situation, there are very visible limits to such a strategy; the minority can at least survive in some works councils and wait for a come-back. The majority and the union leaders know that they normally must have a dialogue with their opponents and try to come to a common solution. The internal structure of the organization is more democratic, and the participation of the individual is of some importance.

A second effect can be derived from codetermination rights, which give the works council the possibility to veto an employer's initiative and to make their own proposals. In both cases, there is a sort of arbitration board, consisting of two or three representatives of each side and a neutral president, which will make a decision.[33] In all stages of the procedure, the works council is obliged to argue; as industrial action is forbidden in these cases, the only 'weapons' are good arguments. Codetermination rights deal with many important matters, such as working time and introduction of new

technologies, which create or enhance - as computers normally do - the employer's possibility to supervise the employees. A works council, which is aware of both the employees' wishes for flexi-time[34] and to the employer's wishes for shift-work, cannot just say 'no' and shrug its shoulders if a strike is not possible. The works council must investigate the economic and social advantages and dangers of both models, a job which the constituents expect to be done. Normally the works council will request the trade union to provide an expert to assist it. The implementation of new working-time models or new technologies - just to mention these two examples - is thus accompanied by an intensive discussion, which is often useful for both sides: the employer gets more information about possible problems, and the council and the employees get a higher degree of knowledge of what can be done at the workplace. Codetermination thus has an innovative effect which is spread out to a union confronted with all the problems the works councils have put on the table. It may be useful to compare protocols of German trade union meetings and conferences on new technologies with similar discussions in France or Spain - if they take place at all.

Why would employers be so stupid and risk an involved conflict with unions under such circumstances? Is it not better to get innovations in the field of work organisation than in the field of industrial conflict? Forced deregulation would bring unrest and a quite uncertain chance to get better profits with less labour law rules. It would be, by the way, rather difficult to find the necessary political support, even under the conservative government which has been in office since 1982: the Christian-Democratic Union attaches importance to its relations with the unions because it needs part of labour's support in upcoming elections.

2.4. The Inherent Flexibility

Even a well-established system of cooperation would fail if it contradicted clear economic necessities. Flexibilization of production has been, of course, a reality in Germany; but it was reached within existing structures. There are some specific mechanisms which may explain this development.

German labour law is market-oriented in the sense that the cost of the labour force is subject to negotiations which normally take place on the branch level, thus taking wages out of competition. There is no minimum wage, like the French SMIG, and no automatic adaptation, like it used to be in Italy ('scala mobile'). Unlike in the US, the granting of state contracts and public funds is not tied to provisions concerning the situation of the employees or the promotion of underprivileged groups ('affirmative action'). Because wages are fixed at the branch level, many enterprises give

supplementary payments which can be reduced in case of economic difficulties; the collective agreement as such remains unquestioned.[35]

Redundancy dismissals are allowed without prior state permission; exceptions exist for pregnant women, handicapped persons and works council members. The law does not even provide for automatic compensation. Only in cases of mass dismissals and other major changes in the plant, works councils and employers must negotiate a 'social plan', which normally grants compensation in accordance with the economic situation of the enterprise.[36] Why should an employer disagree with such rules?

Redundancy dismissals must, however, conform to certain rules. The employer must try to place the worker in another position within the plant or the enterprise. If he does not comply with this obligation, the dismissal will be declared null and void by the labour courts. In practice, the employer usually tries to find another position because he or she has a significant interest in keeping the 'human capital' represented by the employee. Individual employment law gives the employer many possiblities for transferring an employee to another position[37]; seniority rules do npt restrict the decision. In the case of a business necessity, even an employment contract describing a concrete task will be no obstacle; the employer can dismiss the employee while offering him the new job.[38] The works council has only a rather weak right to 'object' to the employer's decision; it can base a refusal on a very limited number of reasons.[39] There is a lot of flexibility within the enterprise; the internal labour market replaces, in a certain way, the 'hire and fire' that can be found in the US and in other countries with weak protection against dismissals. Unlike in Japan, the employee cannot invoke the employer's duty to exhaust all other possiblities before being dismissed; he or she is restricted to alternatives only within the same enterprise.[40] However, the German worker is obliged to accept a reasonable position in another enterprise of the same group of companies[41]; if the worker refuses the transfer he or she may lose the right to compensation provided for in a social plan.[42] In addition, the employer has the right to conclude fixed-term contracts for 'sound reasons'.[43] This implies the fact that a task needs only a definite period to be fulfilled.

As for flexible working time, the current labour law, used in the spirit of social partnership, offers employers all the options they could require. The reduction of weakly working time, which has now reached an average of 37.8 hours[44], is part of an 'historic compromise' first elaborated in the 1984 negotiations of the metal industry: as 'consideration' the employer gets the right to introduce flexible working hours if an agreement with the works council is reached. 'Flexibility' in this sense means different working hours in different weeks, which avoids highly paid over-time work as well as

slack. In the metal industry, collective agreements even allow different working hours for different categories of employees, a form of flexibilization which, however, is not often used.[45] Finally, it should be mentioned, that there are no legal obstacles to hiring part-time workers with a flexible time-table. The Employment Promotion Law requires only that the total number of hours be fixed in the employment contract.[46] According to the Federal Labour Court, the works council has a codetermination right as to the concrete regulation of the working schedule.[47]

2.5. Reflection in the Doctrine

From time to time, some legal scholars, especially law professors, try to introduce more neoliberal ideas in Germany.[48] Such was the case in 1988 when the government-created deregulation commission proposed to extend fixed-term contracts and to reduce the compensation negotiated in the social plan.[49] The government, however, did not support these proposals. The employers' side was also rather cautious. A well-known neoliberal, preaching the transformation of the employment relationship into a partnership, published his ideas in the official journal of the Confederation of German Employers' Associations. The editors wrote, in the foreword to the article, that his 'provocative ideas will never become a leading opinion'.[50] Ideas like those of Richard Epstein[51] would have no relevant response and need not to be refuted.[52] The 'law and economics' approach is rather uncommon and used in quite an 'un-American' way.[53]

3. New Technologies - A Challenge to the System?

3.1. Information Technologies

The German discussion has perceived the computerization of the workplace as a first step toward a computerized world, and has therefore emphasized the risks to individuals and society. One may distinguish four periods:

- In the beginning of the '80's, the on-screen work was the main object of analysis. In labour law, the topic was health protection and the works council's codetermination rights, which were accepted to a large extent by the Federal Labour Court.[54]
- During the next stage, the discussion focused on the computerized files; would the employer be able to increase, in an unprecedented way, its 'information power'? The answer was, of course, a negative one; data protection laws limited the employer's possibilities, thus adding to the protection given by the works council.[55]

- The third phase dealt with the computerization of the whole production process. If there were a complete network in the plant linking different functions, would it not be possible to track exactly what the employee was doing during his or her working-time?[56]
- The current stage deals with networks between different plants and enterprises. Following the Japanese example, enterprises reduce their 'production depth' by having many components produced by separate companies, which may or may not belong to the same group of enterprises. The coordination between these numerous 'entities' is normally realized through extensive use of information technology. The 'just-in-time' production is the most visible form of the new 'division of labour'.[57]

The computer has replaced some less complicated parts of intellectual work, just as traditional engines have replaced important parts of physical work. The number of workers required for the same output has decreased, and the character of their work has changed. Unemployment and need for requalification often is the result; both have been discussed and dealt with in the traditional framework of protection against the adverse effects of rationalization. The social plan will provide for compensations in cases of dismissals and for additional vocational training in other cases. There are some collective agreements dealing with the same matters; recently, training programs have become more important than they had been before, reflecting a general trend throughout Europe.[58]

The introduction of information technologies has brought, however, two new elements to the discussion.

The first factor is the protection of the individual worker against intrusion into his or her privacy. The general public developed a high degree of sensibility toward 'Big Brother', more so than in other European countries. Data protection law was 'integrated' into the labour law system as a specific form of protecting employees' individuality.[59] The works council's codetermination rights have been given a broad interpretation, applying even to changes in information systems. The reasons for this trend have scarcely been analyzed. German history may play a certain role (the disrespect of individuality in the Nazi period, as well as the concept of a person being a 'Dichter und Denker'), but another important factor is, that computerization of private data creates a common feeling of becoming an object of supervision. The restriction of data available to the employer and the significant involvement of the works councils facilitate the acceptance by employees of new technologies, which is indispensable for their efficient use.

The second element deals more with questions than with solutions. The existence of a highly coordinated network of enterprises reduces the single

employer's freedom to act; traditional market constraints are supplemented by 'technical' constraints, which may demand that employees work over-time to ensure the just-in-time delivery. However, codetermination rights lose, their importance if the employer has no alternatives, in other words, if there is nothing to 'co-decide'. In many cases, newly created enterprises, with a well-defined function, like the production of a component or the delivering of a service will often belong to another branch of activity and thus not be covered by the collective agreement.[60] There are some proposals to create new representative bodies and to conclude new collective agreements which are not limited to the individual branches[61], but the social partners and the works councils have not yet taken up these proposals. In the automobile sector, there are at least some informal meetings, at which the parties coordinate the behaviour of works councils in supplier firms with those of the main enterprise.[62]

3.2. Dangerous Technologies

Nuclear technology and to a certain degree the products of chemistry and genetic research create not only dangers to workers, but also dangers to the general public. The state has enacted very detailed rules, especially in nuclear power plants, as to the selection of the personnel, the processing of the nuclear material, the repairing of defects and the protection of the plant against terrorists and other attackers.[63] All these rules have a mandatory character, and they have priority over labour law provisions. In many cases there is no space for negotiations between unions and employers' associations or works councils and employers. Labour law loses a part of its function. Proposals to extend workers' participation to the real centers of decision-making, for example the state bureaucracy, have thus far had a very limited impact. The majority of legal scholars recognizes the unique nature of this field. Unions and works councils do not conflict because there are sometimes informal consultations at the state level, and because wages are high and working conditions rather comfortable (putting aside the danger of a grave accident).

In other fields, industry applies technologies which are dangerous for the environment. The problems can come from the processing itself as well as from the products. Traditional health protection rules may influence the processing, but they will not always protect the interests of the general public. Environmental law fills this gap and it restricts the freedom to negotiate between unions/works councils and employers in some marginal fields. The current discussion tries to focus on the fact that special institutions within the plant, but with a certain independence from the employer, improve the implementation of environmental protection rules.

German administrative law has thus created special 'plant representatives' (Betriebsbeauftragte) who cooperate only to a limited degree with the works councils.[64]

Trade unions and works councils have increasingly begun to consider the protection of the environment as their own task. In the chemist industry, for example, works agreements have given consultation rights to works councils in all environmental matters.[65] As to the legal structure, the employees' side is, however, poorly developed: the Works Constitution Act does not mention environmental questions, and collective negotiations must not deal with products as such.[66] If the employers listen to the employees, it is only because the support of the works council may give the employer some additional legitimation in a field where production often is exposed to public criticism. In some cases one may even find tacit consent by both sides to continue a risky technology in order to save jobs, but as far as we know this is just a rare exception.

4. The Changing Composition of the Workforce - A Challenge for the System?

4.1. Some Facts

By looking at the statistics, one discovers that the service sector employs much more persons than the manufacturing sector: In 1990, the ratio was 56.8 to 33.7%, with the remaining 9.5% working in agriculture, energy and construction.[67] 30 years earlier the manufacturing sector had prevailed by a 44.1 to 40.2 % margin.[68]

This shift is even more visible regarding the number of white-collar- and blue-collar-workers. In 1990, 46.5 % belonged to the former and 43.0 % to the latter. In 1960, 30.4 % of the the dependent labour force was white-collar, but 62.3 % was manual labour. The remaining group of civil servants, who have a special legal status, and exercize typical white-collar-functions; it has grown during the same period from 7.2 to 10.5%.[69]

Another important development is the increase in atypical employment relationships. Part-time work went from 4 % of the workforce in 1960 to 16.8 % in 1991.[70] Six percent were employees with less than 15 hours a week, who earned less than approximately 300 $ a month and who were therefore not covered by social security.[71] Workers with fixed-term contracts totalled about 5 percent.[72] About 1 % of all employees was hired out to another employer.[73] No concrete figures are available for the workers of a specialized third firm who fulfill their job on the site of the

plant. These workers are not represented by the works council in the area where their job is; the works council might not represent the interests of all workers of that particular plant. In such a case, the comunication between the respective groups of workers and the council is made difficult. The result is that the power of the works council, and the employees as such, is diminished.

In comparison with these changes, the number of self-employed persons (often economically dependant on a single 'customer') has increased only insignificantly[74]; the same is true for the so-called electronic home-work, which at one time seemed to be a real threat to the existence of traditional plants where people work together and communicate.[75]

The fourth development is the increased participation of women, rising from 33.6 % in 1960 to 39.0 % in 1990.[76] More than one third of the working women have only a part-time-job[77], and the average incomes of full-time employed women is clearly lower than those of men.[78]

4.2. Evaluation

The fact that the majority of all employees works in the service sector can in no way justify the slogan of a 'post-industrial era' or a 'post-industrial' labour law. A large number of the services are connected to industry firms. Apart from cases like Switzerland which primarily offers services to people from other countries (tourism, banking), an economy like the German one still depends on its own industrial products. What is really changing is the way of working inside and outside industry: the assembly line is disappearing, as is heavy physical work. For labour law and industrial relations, this shift is of minor importance because their source is not a special form of work organization, but rather the economic and personal dependence of the employees. In addition, it should be mentioned that most services have nothing in common with the highly independent activity of a law professor or a judge; cleaning rooms, delivering goods or putting information in the computer is in no way a less alienating activity than that of a 1930's automobile worker. Incidentally, how could the continuity of the German system be explained if labour law followed the relative importance of manufacturing industry and services?

The shift towards white-collar workers is of a higher importance in that union density is much lower among this new and growing group of employees.[79] A 'one-channel' system like the British or Italian one, relying only on representation by trade unions, is probably affected in quite a different manner than the German system; which builds on works councils whose strength depends only in a very indirect way on trade union militancy. The increasing percentage of non-unionized workers weakens in some way

the bargaining position of labour, but not to the degree of changing the rules of the game.

The atypical work seems to be the most important and threatening challenge to the established system of 'industrial relations'. Part-time workers and employees with fixed-term contracts are generally low-wage earners; they are only partly covered by collective agreements and normally less integrated into the communication structure of the plant. They can be used in some cases to replace full-time workers. On the other hand, it would not be in the employer's interest to having qualified workers only on a part-time basis or for a certain time; the investment in human capital would not bring enough profit. The good functioning of the organization demands a full-time and relatively stable employment relationship.

German labour courts have tried during the last ten years to assimilate the status of part-time workers to that of full-time employees in the sense that wages and fringe benefits per hour must be the same. Some courts based their decisions on art.2 para. 1 of the Employment Promotion Act of 1985, which permits employers to differentiate between full- and part-time employees only if justified by a 'sound reason', which, in reality, would never exist in the field of wages and fringe benefits.[80] Other courts referred to EC rules prohibiting indirect discrimination between men and women; because 90 % of all part-time workers are women, the legal provision which excluded part-timers with less than 10 weekly hours from sick pay was considered to be inapplicable because it contradicted Community law.[81] Neither the Federal Labour Court nor the European Court of Justice have stated whether the exemption of 'small' part-time workers from social security can be justified under EC law.[82] Rejection of this principle would be another important step toward equality between part- and full-time workers. The current discussion is focusing on the question of whether part-time work may be an attractive alternative for people who can afford to earn less and to spend their time only partially at the workplace.

As for female workers, German labour law follows the decisions of the European Court of Justice in the field of equal pay and equal treatment. This means that there is an elaborate system of anti-discrimination rules concerning job evaluation, fringe benefits and, as already mentioned, part-time work.[83] These rules, however, do not effectively control equality as to hiring and promotion. Well-paid positions and jobs with supervisory power are normally held by men; there are no affirmative action programs in Germany. In some states, laws governing the public sector provide for, in cases of equal qualification, priority of women in hiring and promotion[84], but there is uncertainty regarding who determines the meaning of 'equal' and what criteria shall be applied. In the long run, this will

probably be changed: in a market economy, it is easier to implement equal rights than to create new substantive standards.

5. The Transformation Crisis in the Former GDR - A Challenge to the System?

5.1. The Export of West-German Labour Law and Industrial Relations

Art. 8 of the Unification Treaty states that the federal law in force in the FRG shall be extended to the territory of the former GDR. Annex I to the Treaty contains some modifications, and annex II enumerates certain GDR-provisions which are to be upheld for some years. There is no annex III extending parts of GDR-law to the rest of the country and there is no annex IV upholding federal law for a period of time. The reunification was an asymmetrical process. There are no parallels in modern history for an industrialized society adopting the whole law of another country; there is also no 'Easternization' of imported rules comparable to the well-known 'Japanization' of Western law.[85]

Art. 8 of the Treaty applies to labour law, as well; annex II upholds some GDR-provisions of minor importance for two or three years. Unlike contract or tort law, labor law cannot simply be transferred; it needs some specific protagonists in order to be implemented. In the German case, these actors are works councils, unions, employers' associations and labour courts.

- In many East German plants, works councils were elected just after the crash of the former government despite the complete lack of a legal basis for their foundation. The first Treaty between the Federal Republic and the GDR, which went into force on July 1 1990, introduced the Works Constitution Act in the still existing GDR. After the reunification on October 4 1990, new councils had to be elected until June 30 1991; the existing bodies were normally recognized as having the full power of a works council. As far as we know, elections took place in nearly every plant having at least 5 employees (which is the legal pre-condition).
- The old trade unions of the GDR lost the support of the workers and dissolved themselves. The West-German unions sent a lot of their officials to East Germany in order to recruit members and build up new organisations. They succeeded in reaching a much higher union density than in the West. The works councils were offered many training courses, especially in labour law, which seemed to be of special importance considering the imminent transformation of the economy.

- The employers' associations had more difficulties. The state-owned enterprises were administered by the so-called Treuhand, a federal agency which had the task of privatizing or liquidating East German assets. Most of the surviving economic entities joined the western employers' associations, but their 'density' has not yet reached the usual western level of about 90%.
- The law of the GDR did not provide for special labour courts, but there were special panels in the general courts. Lawsuits were viable and inexpensive, but they were rare: In 1989, 360 000 complaints were filed in the FRG, whereas only 15 000 were filed in the GDR. Even if one takes into account that the population of the FRG was 3.6 times larger than that of the GDR, the ratio of West German to East German labour lawsuits was 100 to 15. Considering the problems that were to come, especially the foreseeable mass dismissals, it was clear that the GDR courts would not be able to fulfill their tasks in an adequate period of time. In addition, all GDR-judges were 'checked' as to their political past, leaving many with no chance of continuing on with their jobs. The West-German states sent a lot of judges to East-Germany and hired many young lawyers. In 1991 and 1992, there were nevertheless grave difficulties; parties had to wait for more than a year before getting a judgement at a labour court of first instance.[86]

5.2. De-industrialization

The newly established protagonists of industrial relations were faced with an economic crisis which had never occurred before in the Federal Republic. The sudden creation of the monetary union on July 1 1990 revealed the fact that the industry of the GDR was not competitive enough to sell its products on the world market. For reasons which cannot be discussed here there was no transitional period like, for instance, in the case of the accession of Spain and Portugal to the EC, which would have allowed an adaptation to the new conditions. Another complication was the collapse of the markets in Eastern Europe and the former Soviet Union, both being the main export fields for the former GDR.

Very few enterprises could survive under these circumstances.[87] The number of persons employed in the industry-sector decreased from 2.7 million in 1989 to 0.7 million in 1992. The service sector, especially insurance and banking, expanded to a certain degree, but there is nearly no demand coming from industry. The total number of employed persons in the former GDR has decreased from 9.5 to about 6 million people. The official unemployment rate of about 20 % does not reflect the real situation of the labour market, because it does not count short-time workers ('Kurzarbeiter'),

early retirees, those who moved to the West, and those who commute to the Western parts of the country.

5.3. Managing the Crisis?

From 1990 to 1993, there were two main fields of negotiations. On the one hand, unions and works councils tried to 'cushion' the unavoidable transition to unemployment. In different branches there were collective agreements prohibiting redundancy dismissals; workers kept their employment relationships for half a year or more to get short-time work benefits from the Federal Employment Agency.[88] When the dismissals came, works councils negotiated social plans providing for compensation. The 'Treuhand' granted a lump-sum of about 3 000 $ for each worker who was dismissed or left the enterprise on the initiative of the employer; the negotiations on the plant level could only deal with the distribution of this sum by usually following the seniority principle.[89] The 3 000 $ sum was very modest in comparison with social plans in the West, symbolizing in a way the bankruptcy of the GDR-economy. Without the intervention of the 'Treuhand', most of the enterprises would not even have been able to pay this small amount of money. The basis for Treuhand's involvement was, by the way, a very curious one; 'Treuhand' and the Confederation of German Trade Unions (which is not entitled to conclude collective agreements) signed an 'understanding', a sort of common declaration, whose legal character was, and is, quite uncertain. The same is true for the 'Agreement' for the creation of so-called employment companies ('Beschäftigungsgesellschaften'), which was concluded between the trade unions, the governments of the new states, the employers' associations and the 'Treuhand'. The companies take over parts of bankrupt plants and individual workers in order to provide additional vocational training and to tackle some tasks of common interest, for instance environmental protection.

The second field of negotiations were wages and working conditions for those who could continue to work. Employers and unions agreed at a very early stage not to maintain the low wages which were paid in the beginning of the monetary union, which came to about 40 % of the West-German level.[90] The common policy was to assimilate wages and working conditions in both parts of the country; the main economic reason was the danger that skilled workers would move from a low-wage-area to the West, making the development of East Germany still more complicated. The timetable is different from branch to branch; the construction industry in East Berlin reached the Western level in 1993. In the metal industry, the collective agreement concluded in 1991 had provided for different targets for 1992 and 1993, aiming to reach 100 % in 1994. Without any legal basis the

Employers' Association revoked the agreement in 1993 because of economic difficulties. After two weeks of strikes, a new compromise was reached which pushes back the final target date to 1996, and which provides for exceptions when unions and employers agree that the wage increase is not adequate for a concrete enterprise.[91]

6. Globalization of the Economy - More than a Challenge to the German System?

6.1. The Point of Departure

From its very beginning, the economy of the Federal Republic was integrated to a large extent into the world market. Exporting goods was and is the most important cornerstone of German economic success. In the beginning of the eighties, 28 % of the gross national product consisted of exports; in 1990, this amount rose to 38 %.[92] German investments abroad were important, but were not considered to threaten the stability of the national labour market. Some industries transferred parts of their production which did not require skilled work to South-East Asia, to Brazil or to low-wage areas in Europe; during the eighties the workforce in these foreign subsidiaries grew faster than the workforce in Germany.[93]

6.2. The Employment of Foreign Workers

At the beginning of the sixties, the Federal Republic began to systematically hire foreign workers, as the influx of refugees from the GDR had stopped after the construction of the 'wall'. In 1973, foreign workers comprised 11% of the workforce. At the beginning of the oil crisis, this recruitment stopped.[94] Only family members of migrant workers already established in the country could get a work permit, a legal situation which has not changed since. The percentage has dropped to about 8 %. Legally, migrant workers have the same rights as nationals; equal treatment was the most important condition for the unions to give their assent to recruitment in the sixties.[95] In reality, more or less hidden forms of discrimination cannot be excluded. Union density among foreign workers is relatively high.[96]

The political changes in Eastern Europe in 1989 have created a new situation. On the basis of special agreements between Germany and the respective governments, some 200 000 workers from Poland, Hungary, the Czech Republic and Slovakia are admitted to the German labour market for a limited period of 1 or 2 years.[97] As a rule, they have been sent by employers who have German contracts, for instance in the construction

industry. On the other hand, the existence of illegal immigrants is quite obvious. Theoretically, they are entitled to the same rights as other workers for work they have performed, but it is widely known that they will not go to court to sue the employer for not fulfilling his or her obligations which are derived from the so-called factual relationship.[98] Until now, labour law experts have given little attention to the situation of illegal migrant workers; the black labour market has remained a black box.[99]

6.3. European Integration

From the very beginning, the membership of the Federal Republic in the European Community was accepted by the labour movement. The Internal Market program created a preoccupation with possible social dumping: As the wages in Portugal are about one third of those paid in Germany, some employers would perhaps move out of the country and establish themselves in the low-wage areas of the Community. As we know now, there have been very few cases of relocation; other factors as, for example, the infrastructure, the availability of a skilled workforce and the reliability of the public administration are more important than wages and working conditions. Even the European Monetary Union is not considered to be a threat to German workplaces.[100]

6.4. Problems of the World Market

In the beginning of the nineties, trade unions and employers have been preoccupied by the productivity gap in relation to Japan. For a foreign observer, it may be astonishing that one of the most profound analyses of the possible reasons comes from a trade union's economist.[101] There is no fundamental disagreement as to the necessary modernization of production methods; the debate deals more with the way of out-sourcing and the way of implementing 'lean production'. The competition with the US may be influenced in the future by the fact that NAFTA gives to the US some supplementary chances of recruiting low-wage labour: Will it not be a temptation for German employers to build up a maquiladora industry just behind the border with Poland and the Czech Republic?[102] The answer may be 'no' - higher quality and better management can be realized only in the own country.

But the competition with Japan and the US nevertheless has its repercussions. The argument 'we can afford a good social security system' or 'we can afford not to work on Sundays' seems to lose more and more its legitimacy. The possible gain in productivity tends to be the only convincing idea in discussions on labour relations. The results of recent researches

which underline the assumption 'more participation of the employees improves productivity'[103] have been well accepted among German trade unionists. But is there not the danger that the market defines the limits of thinking? Fundamental values such as the right to get a job, to work in a humane environment and to keep the living standard in case of unemployment are put to the background and may be evoked only on a mass meeting on May 1st. Labour law changes its nature - it is no more a condition the market has to cope with but becomes itself an element of a market structure devised in a more or less intelligent manner.[104]

Would Sinzheimer ever have accepted such a restriction? Even the question seems inadequate - his ideas were not conceivable without referring to fundamental values such as human dignity and workplace democracy. Shall we abandon this heritage in order to improve our position in the world market? There is some hope that we can say 'no' without being condemned to economic failure. Does not the practice of German and Japanese labour relations prove that employment stability and codetermination bring the better results? Human beings must not be reduced to elements in an economic system comparable to engines or marketing strategies. And even if this would be wrong: We can still use political power to reduce the constraints of the world market. History has not come to an end.