LABOR LAW SCHOLARSHIP IN FRANCE, GERMANY, AND ITALY: SOME REMARKS ON A DIFFICULT QUESTION

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I. INTRODUCTION

It is a commonplace that labor and employment law is more affected than "normal" private law by national history; this includes the role of specialized legal institutions and the perhaps idiosyncratic characteristics of the national system of industrial relations. This aspect precludes a simple analysis; it complicates any country-by-country comparison. Though this observation opens up a whole line of thought, it is not the question which will be dealt with here. My purpose is not to describe one or more national labor law systems,[1] but to look at each of three countries to see how scholarship in labor and employment law[2] has developed both inside and outside the academic setting.

Not surprisingly, there is scant debate on this subject in all of the three countries concerned[3] simply because national labor law discussion is mainly dominated not by a debate on the scholarly level, but far more by parochial questions and issues that arise in the context of the nation's legal system.[4] At the same time, however, such a struggle over practical, diurnal details can disclose much about scholarly discussion in labor law than general and abstract intellectual

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1. Most useful on that are the essays in R. BLANPAIN & C. ENGELS, INTERNATIONAL ENCYCLOPEDIA OF LABOUR LAW AND INDUSTRIAL RELATIONS (1996), which are often published also as separate books.

2. In the rest of this paper, the term "labor law" should cover both (collective) labor and (individual) employment law.

3. The article of R. Dubischar, *Zur Entstehung der Arbeitsrechtswissenschaft als Scientific Community*, RdA 83 (1990) remains a singular and rare exception and not only for Germany.

4. The earlier the theoretical and dogmatic discussion in a country began the more evident becomes this trend. In France, Italy, and the United States, we have actually a very intensive debate on labor law theory. This is not the case in Germany.

statements. As much as can be done here is to pursue this theme by referring to some examples.

My task here is not to describe the national legislation and its evolution. Legislation does not mean scholarship, and scholarship, especially in labor law, can be found after and not before labor legislation.[5] This is true of all three countries. Historically, a theoretical and doctrinal debate on labor law cannot be found before the end of the nineteenth century. At that time, in all three countries, labor legislation—mostly on the safety and health of certain weak groups such as children—had just been adopted; though in Germany, Social Security legislation under Bismarck predominated as the endeavor for a statutorily based labor law. Nor was scholarship in labor law a simultaneous phenomenon in all three countries. It developed as an identifiable branch of legal science first in Germany, then in Italy, and finally in France. This sequence influenced the theoretical elaboration of labor law concepts and issues from one country to another.[6]

Historically, labor law scholarship started as an effort to emancipate itself from the general and classic private law and its concepts.[7] One of the fundamental elements of labor law scholarship was, therefore, the development of its own, singular terminology: This served simultaneously to signify its scholarly independence and to serve as one of its elements. The earliest use of the phrase "labor law" (*Arbeitsrecht*) was in an academic treatise of 1876.[8]

What allows us to talk about and use the term "scholarship" in labor law? Are there common, transnational standards for scholarship in law and especially in labor law? (And what challenge does the European Community bring to this question?) We see question after question; but, what questions can be answered?

Our attempt to find relevant answers will be guided firstly by the search for and effort to describe a general elaboration of national and transnational standards. I will then deal with particular questions and

5. For France, *see* JEAN-PIERRE LE CROM, DEUX SIÈCLES DE DROIT DU TRAVAIL—L'HISTOIRE PAR LES LOIS (1998).

6. A good example is LUDOVICO BARASSI, IL CONTRATTO DI LAVORO (1915, 1918), which was the reelaboration of LUDOVICO BARASSI, IL CONTRATTO DI LAVORO NEL DIRITTO POSITIVO ITALIANO (1901).

7. The prephase in Germany is succinctly described and documentated by Günther Bernert, *Arbeitsverhältnisse im 19. Jahrhundert—Eine Kritisch-Dogmatische Analyse der Rechtswissenschaftlichen Lehren über die Allgemeinen Inhalte der Arbeitsverträge und Arbeitsverhältnisse im 19. Jahrhundert in Deutschland*, 8 BEITRÄGE ZUM ARBEITSRECHT *passim* (1972).

8. LORENZ VON STEIN, GEGENWART UND ZUKUNFT DER RECHTS- UND STAATSWISSENSCHAFT IN DEUTSCHLAND 212, 265 (1876).

issues in actual labor law and labor law research, not on a country-by-country basis, but in tracing national approaches to common problems.

From an historical perspective labor law always has had a very close relationship to legal sociology. One could say that the discipline of labor law grew in the shadow of legal sociology. However, sociology of law had priority in time to the emergence of labor law: Rudolf von Jhering (1818-1892), Eugen Ehrlich (1862-1923), and Max Weber (1864-1920) established the discipline of sociology of law quite early; labor law scholarship, at this time, found no equivalent in creating anything like the sophisticated theory of sociology of law developed by Max Weber.[9] His work, even as widely as it was acknowledged, had nevertheless scant influence on labor law doctrine. Even Hugo Sinzheimer (1875-1945), in many respects the animating spirit behind modern German labor law, mentioned Weber only when he discussed general questions of sociology of law.

II. ELEMENTS OF SCHOLARSHIP IN LABOR LAW

Scholarship in labor law does not fall from heaven. And even on earth we do not have the opportunity to refer to an abstract, undisputed notion of scholarship in law[10] and therefore also in labor law. It is a matter of consensus, i.e., of common sense, and not of an abstract scientific definition of some concepts to find the borderline between scholarship and non-scholarship (politics, ideology, "philosophy," propaganda, reasoning guided by non legal arguments) in law and consequently in labor law, and I would stress especially the term "law." It is, however, to concede that every scholar has his or her own political and ideological preferences which influence of course his or her work and writings.

In most countries with a long tradition of legal scholarship, talking about law in terms of convincing or at least examinable arguments requires some conditions concerning first the intellectual capacity of scholars and, second, the substance of what they are discovering. These conditions vary from country to country, but even the existence of different legal systems does not preclude a common core of elements allowing us to speak generally about scholarship in

9. The sociology of law forms the seventh chapter of his *Wirtschaft und Gesellschaft. Grundriss der verstehenden Soziologie*, *in* MAX WEBER, GRUNDRISS DER SOZIALÖKONOMIK, III ch. 7 (1921).

10. This is reflected in the broad—and surprising—debate in the United States related to legal scholarship.

law and, in particular, in labor law. At the outset, it should be made clear that scholarship is not to be identified with legal research.[11] The latter must be, of course, an undisputed precondition. We have just mentioned that scholarship in labor law employs a terminology which cannot be borrowed from other fields, even from the sociology of law.[12] This includes a conceptual framework characterized by such elements as theory,[13] system, doctrine,[14] and methodology. However, the description and the analysis of each of these elements cannot be dealt with in this context, because we are not participating in a seminar on theory of science or at least on legal theory. Scholarship in labor law may mean less than a pure theoretical exercise but more than an intellectually unguided and unstructured discussion of labor law problems, as some kind of a labor law *feuilletonism*.[15] Elements of scholarship include the elaboration of theories and hence the generalization of issues and problems concerning typical aspects of labor law in a methodological process as a working-out of principles[16] or the like, or the systematization of results. Whether these results will have a practical application or a political impact on legislation is not a question of scholarship but one of legal policy. Scholarship can help to improve labor law, but its first aim and task is not to make such proposals. Most of us may be doing just this, but we do so because of our personal backgrounds and choice. This fact opens on to the hidden question: why a lawyer has chosen labor law as a field for his scholarship.

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11. See the overview in STEN EDLUND, LABOUR LAW RESEARCH IN TWELVE COUNTRIES (1981); this book contains also chapters about France (Blanc-Jouvan), Germany (Däubler, Heilmann), and Italy (Veneziani).

12. About the "sociological method" in the early labor law scholarship, *see* Hugo Sinzheimer, *Über Soziologische und Dogmatische Methode in der Arbeitsrechtswissenschaft*, *in* 9 ARBEITSRECHT col. 187 (1922), *reprinted in* HUGO SINZHEIMER, ARBEITSRECHT UND RECHTSSOZIOLOGIE—GESAMMELTE AUFSÄTZE UND REDEN 33 (O. Kahn-Freund & Th. Ramm eds., 1976).

13. Theory and doctrine are in Germany mostly covered by the term "Dogmatik," which is conceived as "Theorie des geltenden Rechts" (theory of the law in force).

14. For an analysis of the French labor law, *see* Couturier, *(Pour) La Doctrine*, *in* LES TRANSFORMATIONS DU DROIT DU TRAVAIL—ETUDES OFFERTES À GÉRARD LYON-CAEN 221-242 (1989).

15. *See*, *e.g.*, Matthew W. Finkin, *Reflections on Labor Law Scholarship and Its Discontents: The Reveries of Monsieur Verog*, 46 U. MIAMI L. REV. 1138-1143 (1992).

16. On the relevance of principles in labor law, *see* Gérard Lyon-Caen, *Du Rôle des Principes Généraux du Droit Civil en Droit du Travail (Première Approche)*, 72 REVUE TRIMESTRIELLE DE DROIT CIVIL 229-247 (1974); Gérard Lyon-Caen, *Les Principes Généraux du Droit du Travail*, *in* TENDANCES DU DROIT FRANÇAIS CONTEMPORAIN—ETUDES 35 (1978); *see also* G. COUTURIER, LES TECHNIQUES CIVILISTES ET LE DROIT DU TRAVAIL 151-158, 221-228 (1975); Antoine Jeammaud, *Les Principes dans le Droit Français du Travail*, 1982 DROIT SOCIAL 618-629 (Sept.-Oct. 1982).

Keeping in mind this more or less descriptive notion of what scholarship in labor law is, we are able to look at it in the three countries presented. Historically, the first country in which we can find scholarship in labor law is Germany. The reasons for that are not evident, however. The first steps were taken at the beginning of the twentieth-century with Philipp Lotmar and his fundamental two volume book on "Der Arbeitsvertrag" (1902, 1908).[17] (This was not only the first monograph on this subject, but, until today, it still is the most extensive one.) A second very important publication, also of two volumes, was the book "Der kollektive Arbeitsnormenvertrag" (1907, 1908) by Hugo Sinzheimer, who was also very active on the political level. Thus, at the beginning of the early 1920s, scholarship in labor law was established in the Weimar Republic as "Arbeitsrechtswissenschaft": The first special legal review on labor law was published in 1914 as "Zeitschrift für Arbeitsrecht."[18] Labor law was also becoming a subject for academic teaching in the law faculties with special chairs; institutes for labor law were founded (Jena, Leipzig). And in these years, the first great treaties and textbooks setting systematic standards were published (Alfred Hueck/Hans-Carl Nipperdey, Erwin Jacobi).[19] To be sure, labor law questions were discussed at the time in most of the other continental countries,[20] but these did not yet lead to the kind of comprehensive, coherent scholarly discussion as developed in Germany.

The second place in creating a body of scholarship specific to labor law belongs to Italy. The beginning were the two tremendous volumes on "Il contratto di lavoro" (1915, 1918)[21] by Ludovico Barassi[22] who referred very often to the work of Ph. Lotmar. This generation was very much interested in foreign law. Lotmar as well as Barassi began to elaborate the emancipation of the new labor law from the classical civil or private law which gave no practicable

17. Reprint in one volume edited by M. Rehbinder as second edition in 2001.

18. Some kind of a predecessor was the journal "*Das Gewerbegericht*," founded in 1896, which published monthly a lot of decisions of the "Gewerbegerichte" (industrial courts, established in 1890).

19. WALTER KASKEL, ARBEITSRECHT (1925); ALFRED HUECK & HANS-CARL NIPPERDEY, LEHRBUCH DES ARBEITSRECHTS (vol. I 1927 & vol. II 1930); ERWIN JACOBI, GRUNDLEHREN DES ARBEITSRECHTS (1927).

20. It is, of course, not possible to quote here to the substantial body of literature.

21. Seconda edizione. The first edition (1901) was by far not comparable to the second, which is the real masterpiece of Barassi's works.

22. For a short—very critical—appreciation of the work and life, *see* Lorenzo Gaeta, *Ludovico Barassi (1873-1961)*, XI LAVORO ET DIRITTO 520-533 (1997). A more balanced view can be found in Giuseppe Pera, *Rileggendo Il contratto di Lavoro (1915-1917) di Ludovico Barassi*, RIVISTA ITALIANA DI DIRITTO DEL LAVORO 3-18 (1998).

answers to the new "social question." In the era of Mussolini, a year after the fascist "Carta del lavoro" (1927), the first Italian legal periodical dedicated to labor law was founded in 1928: "Il diritto del lavoro." The young scholarship in labor law had new points of orientation, namely the new "diritto corporativo."[23] After the Fascist period, labor law has to be reconstructed. Despite the civil code of 1942, which contained a long chapter on "Lavoro" (labor), the modern evolution of Italian labor law and so of scholarship in labor law restarted in 1948 with the new constitution. The more recent history is sketched elsewhere,[24] but the first twenty post-war years were not characterized by a broad ideological and political debate. The elaboration of a viable theoretical basis was the overall aim of most of the Italian scholars in labor law. The fruit of these endeavors were a number of very comprehensive and impressive treaties.[25]

At the end of the sixties the situation changed dramatically. We find now a very robust debate by the next post-war generation of labor law scholars. Not surprisingly, these scholars, reflecting the political situation, mainly concentrated on collective labor law and based their ideas on those of the political left.[26] Even today, the role of liberal, moderate, or more conservative scholars—in general less conflict orientated—has not regained considerable influence on the public or in published debate let alone to take leadership of academic opinion.

The development of French scholarship in labor law[27] did not start as early as Germany or Italy and achieved its rank not before the late thirties.[28] In contrast to the other two, the beginning of French scholarship is not to be dated earlier as in the late 1920s.[29] At this time we find some interesting labor law monographs, but systematic

23. *See* LODOVICO BARASSI, DIRITTO SINDICALE E CORPORATIVO (1934); LODOVICO BARASSI, DIRITTO CORPORATIVO E DIRITTO DEL LAVORO (1939).

24. *See* LAURA CASTELVETRI, IL DIRITTO DEL LAVORO DELLE ORIGINI (1994). *See also* Casanova, *Il Diritto del Lavoro nei Primi Decenni del Secolo: Rievocazioni e Considerazioni*, RIVISTA ITALIANA DI DIRITTO DEL LAVORO 231-259 (1986).

25. I refer here only to some authors as—again—Barassi, Corrado, Prosperetti, Riva Sanseverino, Santoro Passarelli, and Supppiej.

26. Especially represented by Giugni and his "school."

27. The book of NORBERT OLSZAK, HISTOIRE DU DROIT DU TRAVAIL (1999), does not contain a special chapter on scholarship in labor law.

28. There is a considerable time lag between the beginning of French legislation concerning labor law and the development of a relevant scholarship in labor law. For the development of legislation, *see* JACQUES LE GOFF, DU SILENCE À LA PAROLE—DROIT DU TRAVAIL, SOCIÉTÉ, ETAT (1830-1989) (3rd ed. 1989); DEUX SIÈCLES DE DROIT DU TRAVAIL—L'HISTOIRE PAR LES LOIS (Le Crom ed., 1998).

29. This does not preclude the possibility that we can find also earlier monographs and articles in labor law.

discussion started in earnest with the textbook "Le Droit Ouvrier" in 1929 by Georges Scelle,[30] later known as an eminent specialist in public international law.[31] At the time of the "Front populaire," the first French labor law periodical was published, in 1938, under the title "Droit Social"; it is still published today. However, comprehensive discussion of labor law in France, in theory and practice, is a fruit of the post-war era. Not by accident the first real treatise on French labor law was published by Paul Durand in three volumes during the immediate post-war period (1947-1957)[32] Durand, in turn, was significantly influenced by German labor law.[33]

The development in France was not characterized by the appearance of a great treatise, as in Germany and Italy, but it is hard to explain why that is so only by reference to the political situation. Time-lag may explain why theoretical and ideological questions of the post-war period are still very dominant today. As in Italy, the general orientation in labor law as a whole was pragmatic; purely theoretical or dogmatic questions were of secondary importance. This orientation is fully reflected in Paul Durand's great and comprehensive treatise on French labor law.

In the following years, Gérard Lyon-Caen became more and more the leading French scholar in labor law. He and others formed and shaped in the following two decades the theoretical structure of the French individual and collective labor law. This development is evidenced in the great treatise on labor law, in eight volumes, edited and directed by Camerlynck. To this collection, authors from different ideological and political positions brought their contributions.

The next generation of French labor law scholars devoted its efforts to a more theoretical conceptualization of the labor law, mostly in the ideological context of Marxism or, at least, under the influence of the ideas and demands of the political left. The discussion seems, in the eyes of a foreign observer, sometimes a bit too abstract.

30. Second edition. Another relevant work was GEORGE SCELLE, PRÉCIS ÉLÉMENTAIRE DE LÉGISLATION INDUSTRIELLE (1927).

31. GEORGES SCELLE, L'ORGANISATION INTERNATIONAL DU TRAVAIL ET LE B.I.T. (1930); GEORGES SCELLE, PRÉCIS DE DROIT DE GENS (1932 & vol. II 1934); GEORGES SCELLE, MANUEL ÉLÉMENTAIRE DE DROIT INTERNATIONAL PUBLIC (1943).

32. PAUL DURAND & R. JAUSSAUD, TRAITÉ DE DROIT DU TRAVAIL (1947); PAUL DURAND & ANDRÉ VITU, TRAITÉ DE DROIT DU TRAVAIL (vol. II 1950, vol. III 1956).

33. *Cf.* DURAND & JAUSSAND, *id.* at 404.

III. SCHOLARSHIP IN LABOR LAW: QUESTIONS AND PARADIGMS[34]

The central concerns of scholars in all three countries was the emancipation of labor law from the overall domination of private law, the juridification of industrial relations, and the elaboration of a theory of the sources of labor law as a body of law apart.[35] At the beginning of the growth of labor law scholarship, singular and practical questions played the dominant role; but in an intermediate phase, the debate as to these general concerns became more and more important. Today, in a country like Germany, with the longest experience in labor law scholarship, the discussion is becoming oriented more and more to problems of daily life and away from abstract theory or, as it is called, *Dogmatik*.[36]

A. The Emancipation of Labor Law from Private Law

For the early beginning of scholarship in labor law, the focus of very exhaustive treatment concerned the emancipation of labor law from private law, from the domination of the contract of employment as the discipline's singular focus. We can refer here to the first paradigm of the young labor law scholarship: the "Eigenständigkeit des Arbeitsrechts"[37] (the substantive difference between civil law and labor law)[38] and, as a second paradigm, the use of "employment law" as a critique of private law.[39]

Among the three countries involved, only Germany and Italy have given some space for the employment contract in their civil code.[40] (In Italy, this is also true for the collective agreements.[41]) But this was not the real emancipation of labor law from the private law perspective. The real beginning was the critique of the private law by the so called "Kathedersozialisten"—not by laywers!—in the light of

34. For some aspects, *see* the very interesting article of Jean-Claude Javillier, *Dits et non Dits sur le Droit du Travail*, *in* IN MEMORIAM SIR OTTO KAHN-FREUND 493-515 (1980).

35. *See* KLAUS ADOMEIT, RECHTSQUELLEN IM ARBEITSRECHT (1969).

36. In some countries the term "doctrine" or "theory" is preferred.

37. To this problem, *cf.* Schnorr von Carolsfeld, *Die Eigenständigkeit des Arbeitsrechts*, RdA 297 (1964).

38. Concerning France, *see* the collection of ten articles under the heading *Droit Civil et Droit du Travail*, DROIT SOCIAL 371-427 (1988); *see also* COUTURIER, *supra* note 16, at 151-152, 225-228.

39. The French Code du travail as a separate code—even without a real substantive idea for the codification—reflects it better than the German Bürgerliches Gesetzbuch or the Italian Codice civile.

40. Germany: §§ 611-630 BGB; Italy: Art. 2094-2134, 2239-2246 C.c.

41. But, Art. 2067-2081 C.c. are today no longer applicable because of their "corporatistic" origin.

the "soziale Frage" (social question),[42] which was entirely political and had no practical impact. In the long run, the dogmatic or theoretically based efforts of Lotmar in Germany and Barassi in Italy were legally more serious and therefore more successful. Lotmar elaborated the idea that the employment contract is not only a simple example of a private contract, but that it must be treated in a different way.[43] He did this by using a legally traditional, dogmatic way of argumentation, and so found it to be more acceptable than by resort to revolutionary terminology. In Barassi he found a brilliant follower who, in his huge work, quoted the book of Lotmar constantly.[44] It was not the intention of both to eliminate private law, but to point out that many principles and rules of private law could no longer be applied indifferently to the contract of employment. They did not require a total separation of labor law and civil law.

This development, of the emancipation of individual labor law goes on today.[45] *E.g.* contrast to the rules of private law, the liability of the worker in the employment relationship is restricted or denied, it is often dependent on non-contractual elements, on the degree of fault and negligence.[46] In contrast to general contract law, the employment contract produces a lot of ancillary obligations, which have to fill in the legal content of the complex relationship between employer and worker[47] and the mutual relationship between the workers of an enterprise or establishment.[48] So, too, are other principles of the classic private law modified in the labor context.[49] However, the degree of interrelation with and independence of labor law from private law remains controversial.[50] The call for a radical separation of these two fields does not find any significant number of followers

42. *See especially* ANTON MENGER, DAS BÜRGERLICHE RECHT UND DIE BESITZLOSEN VOLKSKLASSEN 160-193 (8th ed. 1968), to the question of the employment contract and overall Brentano, DAS ARBEITSVERHÄLTNIS GEMÄß DEM HEUTIGEN RECHT, 1877 (T. Ramm ed., 1994) and with an introduction.

43. Of great interest is the very positive evaluation by Max Weber in his book review of the first volume in 17 ARCHIV FÜR SOZIALE GESETZGEBUNG UND STATISTIK 723-734 (1902), ("unzweifelhaft ein großer Wurf").

44. LUDOVICO BARASSI, 1 IL CONTRATTO DI LAVORO 10, *passim* (1915).

45. After the political change in Germany we have the opportunity to follow this debate again.

46. Thorough comparative research of this issue remains to be done.

47. This aspect seems not always sufficiently developed.

48. From the German perspective, *see* Rolf Birk, *Verrechtlichung und Rechtliche Strukturen Interpersonaler Arbeitnehmerbeziehungen*, *in* VERFASSUNG, THEORIE UND PRAXIS DES SOZIALSTAATS—FESTSCHRIFT F. HANS F. ZACHER 35-47 (1998).

49. *Cf.* GÉRARD LYON-CAEN, REVUE TRIMESTRIELLE DE DROIT CIVIL 229-238 (1974).

50. *See* ORONZO MAZZOTTA, DIRITTO DEL LAVORO E DIRITTO CIVILE. I TEMI DI UN DIALOGO 13-28 (1994).

anywhere. The "Eigenständigkeit" (autonomy) of labor law is and has always remained only a relative one. There has been no total emancipation from private law.

B. The Collective Bargaining Agreement[51]

One of the persistent questions in labor law is of the legal nature of the collective bargaining agreement. Labor law scholars in most European countries found this to be a compelling question from the very beginning.[52] Around 1900, we find descriptive monographs in France, Germany, and Italy concerning this new phenomenon in working life. The first author to discuss the subject was, again, Lotmar (1900),[53] who refined the dogmatic position in the first volume of his great treatise "Der Arbeitsvertrag" (1902).[54] It was on this foundation that Sinzheimer built his concept in the "Der korporative Arbeitsnormenvertrag—Eine privatrechtliche Untersuchung" (1907/1908),[55] which became the pioneering work on the law of the collective agreement. Sinzheimer's was for a long time the standard reference on this subject, including its international aspects, and it had an enormous impact in legislation and in practice. The theoretical discussion in Italy did not start before 1930, with Carnelutti's "Teoria del regolamento collettivo." In France, the first modern monograph on collective agreements was written by Despax.[56]

The hybrid character of the collective agreement initiated the debate over the general problem of the legal sources of labor law and the position of the collective agreement in this framework of general and special sources of labor law.[57] The assessment offered here, that the discussion of collective agreements represents one of the most important and interesting legal controversies in labor law in the

51. For a view based on comparative law, *see* Folke Schmidt & Alan C. Neal, *Collective Agreements and Collective Bargaining*, *in* XV INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW ch. 12 (B.A. Hepple ed., 1984).

52. *Cf.* ADLERCREUTZ, KOLLEKTIVAVTALET. STUDIES OVER DESS TILLKOMSTHISTORIA, *passim* (1954).

53. Lotmar, *Die Tarifverträge Zwischen Arbeitgebern und Arbeitnehmern*, *in* XV ARCHIV FÜR SOZIALE GESETZGEBUNG UND STATISTIK 1 (1900).

54. Reprint 815-860.

55. Vol. I (1907), II (1908).

56. Michel Despax, *Conventions collectives*, *in* VII TRAITÉ DE DROIT DU TRAVAIL (Guillame H. Camerlynck ed., 1966).

57. Germany: Reinhard Richardi, *Rechtsquellen des Arbeitsrechts*, *in* I MÜNCHENER HANDBUCH ZUM ARBEITSRECHT §§ 8-14 (Reinhard Richardi & Otfried Wlotzke ed., 2d ed. 2000); France: NIKITAS ALIPRANTIS, LA PLACE DE LA CONVENTION COLLECTIVE DANS LA HIÉRARCHIE DES NORMES (Héléné Sinay ed., 1980); Italy: GAETANO VARDARO, CONTRATTAZIONE COLLETTIVA E SISTEMA GIURIDICO (1984).

twentieth century, is no exaggeration.[58] This discussion remains fundamental.[59]

C. New Directions and Trends

How open are the scholars to new developments, to new issues arising from new situations? Both questions demand multi-faceted answers. In the last decade of the twentieth century, labor law is no longer only a domain of national law. European[60] and international[61] law are becoming more and more relevant. Moreover, from the very beginning of labor law, it has witnessed, and has had to contend with, a growing density of labor law legislation and case law. The consequent juridification (*Verrechtlichung*) of industrial relations was a challenge for the labor law scholars in all European countries, not only on the continent. I need only refer to the complex of information, consultation and codetermination of the workers now becoming also a subject of European labor law including not only the European Union[62] but also the Council of Europe.[63] And the labor law of the European Community is steadily growing, based to a certain degree on special agreements between the social partners on the European level.

Another trend is represented by the headings "deregulation" and "flexibility."[64] The former has triggered a search for acceptable answers on both sides of the labor market. Deregulation poses an arch, a typical dilemma, in a weighing of uncertainty and of the potential reduction of the competitiveness of national enterprises and companies in a globalized market. Apart from some efforts in France, Italy, and Germany, the interrelation between labor law and competition has been, until now, not very seriously and extensively discussed. This state of affairs demonstrates also a lack of sufficient knowledge of non legal aspects—especially the resort to economic analysis so prevalent in the United States—which have an important impact on labor law and labor markets.

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58. Schmidt & Neal, *supra* note 51.

59. This concerns especially the reform states of eastern Europe where a reconstruction of collective labor law is at stake.

60. Law of the European Community resp. Union.

61. UN, ILO, Council of Europe.

62. 2002 O.J. (L 80) 29 Establishing a general Framework for Improving Information and Consultation Rights of Employees in the European Community.

63. Art. 21, 22 Revised European Social Charter.

64. *See* the contributions concerning flexibilization from comparative aspects in ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES ARBEITS- UND SOZIALRECHT 222ff (1987).

Flexibility is at stake today. A new trend in industrial relations and labor law scholarship as well as in national legislation reveals how inflexible many labor law systems and also actors of the labor markets are. The discussion among scholars and practitioners is focusing on the problem in an effort to find a viable compromise between flexibility and job security under the acronym "flexicurity."[65] In a historical perspective, labor law is not an example for a flexible system. On the contrary: The aim of labor law was to restrict the opportunity for the employer to destroy the security which labor law, as one of its prominent goals, has to guarantee. Therefore, a significant number of labor law scholars reject this "dismantling" of social advantages and preferences, often following the rhetoric (and resistance) of the trade unions.

Both a trend and an important complex of questions concerns the constitutionalization of labor law. A pioneer in this respect was the famous German professor of labor law and first president of the Federal Labor Court (*Bundesarbeitsgericht*) (BAG), Hans Carl Nipperdey.[66] During the Weimar Republic, he developed the theory of the third party effect of fundamental rights (*Drittwirkung der Grundrechte*).[67] This theory was very successful in Germany after World War II, playing an especially prominent role in labor law; and, in the last decades, it has played a role in Italy too. In this respect, fundamental rights are the freedom of association, freedom of religion, freedom of opinion/expression, and freedom of personal autonomy. Although France is the country of origin of "human rights," and despite some fundamental social rights in the French constitution of 1946, which continue to be applicable today, the relevance of the human rights was only first systematically developed by Gérard Lyon-Caen in the early 90s.[68] Suffice it to say, fundamental rights do not only bind the employer but also the parties of collective agreements.

A problem better known in corporation or company law arose in the last forty years and became more and more important in a globalized economy: the legal status or impact of the group of companies,[69] for instance, not only on the law of the employment

65. This term is used especially in the Netherlands.

66. Nipperday played a prominent role in Weimar times, even more in the National Socialist period, and then in post-war democratization. Regretfully, there is no treatment of his career in English.

67. *Cf.* FRANZ GAMILLSCHEG, DIE GRUNDRECHTE IM ARBEITSRECHT (1989).

68. GÉRARD LYON-CAEN, LES LIBERTÉS PUBLIQUES ET L'EMPLOI (1992).

69. The book of reference in Germany is CHRISTINE WINDBICHLER, ARBEITSRECHT IM KONZERN (1989).

contract but also in collective bargaining, industrial conflict, and on works councils and codetermination in supervisory bodies. It is not surprising that in Germany the elaboration of such a field was more intensive than in any other country,[70] since the legislation on works councils and codetermination deals in several aspects with this issue. But also in France and Italy we find excellent contributions on the labor law aspects of a group of companies.[71] (The United States, however, lacks the concept: there is no English legal equivalent for the German *Konzern*.) On the broader subject of networks of companies and enterprises, the discussion in labor law is, at best, in its infancy.[72]

Two other developments are indispensable for the modern labor law and they have to be treated by labor law scholars: The rise, since the 70s, of a body of European Labor Law and the impact of globalization on labor law since 1990. While the continental states in general—and this is true specifically for France, Germany, and Italy—do not use European Labor Law as a tactical weapon, as a sword, so to speak, in the United Kingdom the case is different. There, improvements of the national labor law often are achieved by the application of European Labor Law and by the case law of the European Court of Justice in Luxembourg. In the last twenty years, European Labor Law has come into its own with a large and growing number of treatises, monographs, and articles.[73] A tangible and totally new field of labor law without any forerunner has to be worked out, in theory and in practice, from a small legislative base.

Globalization, as such, is an important phenomenon which challenges the traditional labor law scholarship insofar as it requires answers to new questions or renews old questions under new and different conditions. The global economy confronts not only many national laws and, of course, many different labor standards. This situation calls for a profound analysis of the different legal strata.[74]

70. The relevant literature and case law are abundant.

71. France: ISABELLE VACARIE, L'EMPLOYEUR (1979): Italy: SCHIANO DIPEPE, IL GRUPPO DI IMPRESE (1990).

72. *But see* Christine Windbichler, *Unternehmerisches Zusammenwirken von Arbeitgebern als Arbeitsrechtliches Problem*, ZEITSCHRIFT FÜR ARBEITSRECHT 1-18 (1996); Rolf Birk, *Unternehmenskooperation und Betriebsverfassung*, *in* 70 FESTSCHRIFT FÜR A. KRAFT ZUM 70 Geburtstag 11-22 (1998).

73. In all greater member states, one can today find textbooks and monographs on European labor law and its different topics.

74. For an overview, *see* GEORGE TSOGAS, LABOR REGULATION IN A GLOBAL ECONOMY (2001).

D. Forgotten or Neglected Subjects and Issues

Scholarship in labor law cannot be all-encompassing. Therefore, it is not at all surprising that labor law scholarship is full of gaps and shortcomings, not only concerning the debate on the theoretical structure of labor law but also on practical subjects. The reason for such shortcomings and deficiencies can be manifold: the overspecialization in labor law and, hereby, the overlooking of the ties to other fields of law, such as corporate (company) law or private international law; or even the personal ideology and preferences of a scholar.

Many of the neglected issues are related to aspects of the personal application of labor law and to some new forms of employment. The classic term of reference in labor law is the worker or employee. But in many cases this analysis is inadequate. Many people are not working on the basis of a contract of employment but on a contract for services and are not considered workers/employees. Since the 20s of the last century, Germany did not apply the whole of labor law to these people, but did apply some of its rules. In this case one speaks of "*arbeitnehmerähnliche Personen*" (employee-like persons).[75] The substantive field of the application of labor law was extended to a new group of "active people." As long as the number of new forms of employment is increasing and the classic model of the undetermined full time job is decreasing, we have to ask: what are the consequences for the social protection and hence for the applicability of labor law? The international debate was opened some years ago,[76] but besides the German/Italian theory,[77] the contribution elsewhere on the continent—or in the United States—is still not of a considerable dimension.

Another personal aspect of the employment relationship refers to the collective aspects or implications of the individual employment relationship, which is normally embedded in a network of sometimes considerable extension, *i.e.*, the collective aspects of each individual

75. In 1999, the Regional European Congress of the International Society for Labour Law and Social Security had discussed as one of these main themes "Wage Employment and Self-Employment." *See also* the Symposium, *Employed or Self-Employed: The Role and Context of the Legal Distinction*, 21 COMP. LAB. L. & POL'Y J. 1-248 (1999).

76. Concerning the debate on the EU level the report of a special working group edited by Alain Supiot is of some interest. ALAIN SUPIOT, AU-DELÀ DE L'EMPLOI—TRANSFORMATIONS DU TRAVAIL ET DEVENIR DU DROIT DU TRAVAIL EN EUROPE 321 (Alain Supiot ed., 1999).

77. The Italian terminology uses the term for this kind of workers "parasubordinati," in France there is not a generally accepted term for the "personnes semblables aux travailleurs."

employment relationship.[78] Consider, for example, the dismissal of a worker for purely economic reasons. In this case, the worker who actually is to be dismissed has to be selected according to social aspects in relation to his or her coworkers. Discrimination and equal treatment, sexual harassment, and other forms of personal interference also demonstrate the importance of this issue.

A further mostly neglected issue presents a problem of labor law, not only understood as the law of the "beati possidentes" (the employed) but also of effects on the group, *i.e.*, the unemployed.[79] The economic theory of law and a body of economic thinking can offer help here, for labor law being made more aware of the deep relation of law and the economy.[80] For example, in collective labor law the debate on the law of strikes does not sufficiently consider the impact of a strike on third parties. This is not only a problem of the so-called "essential services." The strike has been regarded too much as an aspect of a personal right and not sufficiently in terms of the negative consequences for third parties—the involved people outside the employment relationship and the public.

Another problem for collective labor law is posed by what could be called a crisis for the organized workers and their employers. There has been a long-term decline in union density; the modern worker will less and less be represented by trade unions. The decreasing number of organized workers reflects a substantive change in the understanding of what a trade union should be or should not be. The employee may well come to be regarded more as a customer than as an ideological combatant. At the same time, the internal democracy of trade unions has been placed in question. Of course, the density of membership differs considerably from one country to another; and the trade unions' interests have never been identified wholly with the interests of the individual workers. (Interestingly, a special problem arose during the transition period after the destruction of the state socialism in the so-called "Reform States." *I.e.*, to ascertain the private employer after the privatization of industry and agriculture.) All this clearly shows the need for more comprehensive studies of questions related to trade unions and, to a lesser degree, of employers' association.

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78. Richardi, *supra* note 57, § 8 no. 16, calls this "Drittdimension" resp. "Gemeinschaftsbezug."

79. An exceptional remark were insofar the very early statements of Hugo Sinzheimer, *Die Krise des Arbeitsrechts*, *in* I GESAMMELTE AUFSÄTZE UND REDEN 135, 141 (1933); and II DER HINTERGRUND DES ARBEITSRECHTS 149 (1936).

80. *See* the interesting book of PAOLO ICHINO, IL LAVORO E IL MERCATO (1996).

E. The Paradigms

For sophisticated labor law scholarship, the paradigms behind the rules of legislation and case law—a part of their background—play a decisive role; they are the indicators for a developed debate that influence a living scholarship in labor law. The ideas and principles behind a legislative act, or a complex of rules elaborated by the research and the discussion of scholars, are the essentials of a necessary theoretical basis for and, in fact, an indicator of the very existence of anything called a system of labor law. Paradigms, as understood here, in relation to scholarship, can have different meanings: they can have the role of structural principles as well as models or "Leitbilder," "Leitideen" (internal guidelines). Paradigms have some normative, guiding, and legitimating aspect, especially as far as the construction or interpretation of labor law rules is concerned. A general paradigm in labor law, especially in collective labor law, had been "the abstention of law" in British and Danish labor law; this paradigm had much less influence in France, Germany, and Italy. In general, since the very beginning of scholarship in labor law the ruling paradigm has been in a critique of civil law. The emancipation of labor law, its autonomy, was a fruit of this process.

In all three countries, for the interpretation of rules concerning the individual employment relationship labor law scholars take as model the fulltime employment contract entered into for an undetermined period of time (*Normalarbeitsverhältnis*[81]). Each modification of, or deviation from, this model demands legitimation. However, as noted above, the very idea of full time employment has been subject to change in recent years. Today, in addition to the full time contract, a growing number of new forms of employment have appeared as a fixture on the scene. Concerning the stability of employment, especially in Germany, scholars and courts have been oriented toward the inflexible but precise and calculable system of the civil service (*Beamtenrecht*). Another paradigm or principle, especially elaborated in France and Germany, is grounded in the need to control the economic or organizational power of the employer. Case law and scholars give the employer considerable freedom of decision not subject to legal control, even in such cases as dismissal based upon economic reasons: this is called the *freie*

81. SUPIOT, *supra* note 76, at 98; Ulrich Mückenberger, *Non Standard Forms of Work and the Role of Changes in Labour and Social Security Regulation*, 17 INT'L J. SOC. L. 381-402 (1989).

Unternehmerentscheidung of the employer, the employer as the "seul juge de l'entreprise"[82]—in American usage, "managerial prerogative."

The relation between employer, works council, and trade unions is characterized differently in the northern and southern parts of Europe. In Germany and in the Nordic countries, the maxim of cooperation prevails between employer and the works council, and between employers and trade unions: social peace and not conflict should be the guideline, without denying the existence of individual and collective conflicts. The situation in France and Italy is different in individual as well as in collective labor law. French and Italian scholars are more conflict oriented.[83] The political, ideological backgrounds of these scholars play a more dominant role than in Germany.[84] In France and Italy, "the left" is of more importance; but scholars are everywhere divided in two or more groups and sometimes into a definable "school."[85] A real problem is whether it is possible for dialogue to proceed on any basis of common criteria between the groups.[86]

IV. SCHOLARSHIP IN LABOR LAW: NATIONAL STYLE AND SCHOOLS OF LABOR LAW?

A. *National Style*

Is there a special national style of labor law scholarship? What are its elements? Are there certain "schools" in labor law scholarship? All three countries (France, Germany, Italy) belong to the continent, and superfluous to say, on the continent we have a certain style not only in law in general but also concerning labor law. Whether we can speak of a French, German, or Italian style in labor law scholarship depends upon various criteria and aspects above and beyond the question how the term "style" should be used here. Let me mention the aspects which are of importance for me: the style of legislation, the recruitment of scholars, the teaching (content and methods) of labor law, the culture of research (form, methods, elaboration of theories and systems), and the culture of publication.

82. *Cf.* Javillier, *supra* note 34, at 493, 495; *id.*; *supra* note 31, at 279, 320, 353-354, 564.

83. A lot of contributions in the *Giornale di diritto del lavoro e di relazione industriali* reflect this position.

84. *Cf.* THILO RAMM, DIE "LINKE" UND DAS ARBEITSRECHT 33 Juristen Zeitung 184-187 (1978).

85. It is regrettable that no accepted criteria exist under which conditions we can speak more precisely of what defines a "school."

86. The controversies are not openly and rigorously discussed in Europe.

Joint research projects between researchers and labor law scholars were common in the European Community from the very beginning,[87] and concerning "European subjects," they give some insight into different styles. Time and space allow me to mention only a few aspects. In all three countries, it is not easy to become a labor law scholar; the academic institutions—mostly the law faculties—require, for appointment or an academic career, that the applicant has written at least two scholarly books in the field. The selection committees are not always free to prefer applicants from a certain "school" or movement. And the danger of overspecialization becomes greater in a system where, in the law schools, we have teachers only for one subject, *e.g.*, Italy. In Germany, however, the opportunity exists to look also across the border of labor law as narrowly defined.

As far as research is concerned, all three countries cultivate highly qualified scholars who follow common research techniques and are subject to common standards of academic quality.[88] Some are more theoretically, others more practically orientated. Previously, the general *teoria* was more significant in Italy than the discussion of concrete questions, but this has changed in the last 25 years. Today, especially in France, the debate on general topics seems to be more important than in Germany, where this discussion was more concentrated in the Weimar period.

The most significant element that enables us to give a qualified but nevertheless positive answer to the question of the existence of a national style in labor law scholarship is a formal one: it is the style of the publications. In France, certain archetypical forms of publication dominate: The textbook, especially the encyclopaedia (Dalloz, Juris-Classeur), the monograph on a specific subject, articles in law reviews, and the annotations to actual cases of the Cour de cassation and to a lesser degree of other courts. In Germany, with the exception of encyclopedias, all forms of publication mentioned for France also exist, but, in addition, commentaries on particular laws have an overwhelming significance and they include very often a systematic

87. Under the European Community for Coal and Steel, leading scholars of labor law have started a series of comparative studies in labor law consisting of a general comparative report and reports on certain subjects such as the contract of employment, the sources of labor law, strike and lock-out, etc. subdivided into national reports. *See e.g.*, GUILLAUME CAMERLYNCK ET AL., DER ARBEITSVERTRAG NACH DEM RECHT DER MITGLIEDSTAATEN DER EGKS (1965), the comparative report was written by Camerlynck (France).

88. *See* the contributions France, Germany, and Italy *in* LABOUR LAW RESEARCH IN TWELVE COUNTRIES 81, 101, 143, 167 (Edlund ed., 1986) (Germany by Däubler und Heilmann, France by Blanc-Jouvan, and Italy by Veneziani).

and theoretical discussion of special subfields in labor law. To a much larger degree than in France, the more theoretical debate takes place in the many *Festschriften*. This kind of publication is also of great importance in Italy. In contrast to earlier times, nowadays commentaries on different laws have become more and more relevant in Italy.

What of the substantive elements which are decisive for a certain national style in labor law? What elements form a national style? Main elements or criteria are certainly: the style of legislation and its construction, the system of courts and the style of their decisions, as well as the structure of legal doctrine. They form not only the general style of a legal system but have a special labor law aspect.

Where labor legislation is concerned, the difference is more a formal than a substantive one. France, Germany, and Italy belong to the continental model of legislation. This means that the acts and statutes are characterized by relative short and generally formulated norms, and not, as it is mostly the case in the Anglo-American states, by very detailed and very specially-orientated provisions. But the difference between France, on the one hand, and Italy and Germany, on the other hand, consists in the existence of a code in France and the non-existence of one in Germany and Italy. The former, however, is not a real codification; it is only a more or less systematic collection of the several acts and statutes concerning labor law in one book. The interpretation and methodology of the legal instruments of labor law do not differ very much in any of these countries. It is guided over all by the teleological method.

A separate, fully developed system of labor courts can be found only in Germany. In France and Italy, questions of labor law are decided in the ordinary court system, but France does have an autonomous court of first instance, the *conseil des prud' homes*, which functions without professional judges. The form of the decisions of the courts varies considerably between the three countries: In France the decisions of the Cour de cassation are very short and contain no substantive reasoning, while in Germany they are sometimes very long, with an evaluation of the arguments. Opinions very often quote not only previous case law, but also dwell at length on relevant doctrine including the work of legal scholars. Italian decisions, however, more similar to the German method, refer to case law but not to theory and doctrine.

In sum, the scholarly discussion of labor law doctrine in these countries reflects not only different, opposing interests, but also different ideological positions from the "left" to the "conservative."

(This demonstrates that law, and so labor law, is not a hard science.) In a general way, it can be said that labor law is dominated in France and Italy more by the views of the "left" than in Germany.

B. Schools

What constitutes a "school" in labor law? Are such schools found in Germany, France, and Italy? When talking about a "school" some common elements, essential traits, values or the like must join its members and indicate its particular intellectual, social, ideological, or political direction; adherents of a certain legal theory normally do not form a school. It is very hard to say what are specific positive elements which characterize a school of thought in labor law. Not all scholars who have earned a great reputation, who are important and influential, can be called founders of a school in labor law. In all three countries one can find such people. Neither Philipp Lotmar, nor Paul Durand, nor Ludovico Barassi—as fundamental as their writings were and are—formed a school or were thought to head one.

It seems to me that in the field of labor law, more than in other branches of law, the elaboration of a theoretical or doctrinal framework and the education of future scholars in it is insufficient to establish a school. Something more must be added. This "more" is mostly supplied by a common political, ideological, or philosophical background into which a certain theoretical or doctrinal framework is embedded. To that extent, it is possible to identify a certain scientific attitude or *wissenschaftliche Richtung* with the term "school," but it seems to me not sufficient to speak of a school in labor law as referring only to the common political or ideological view of some authors. This may be a first step to a school in labor law but not yet to a school itself (*e.g.* to a socialist, marxist, christian, liberal, or conservative orientation and perspective). Certainly, a school does not absolutely need a head or a leading figure, but a school of labor law is connected, in general, to a certain scholar who represents it.

Given these preliminary observations, politically left and Marxist labor law scholars as such are not yet members of a labor law school, they are only representatives of a *courant de pensée*,[89] often taking a critical stance against the extant system of labor law, analyzing it as being in a more or less permanent crisis as well as "discovering" unstated ideologies in the current labor laws.[90] The first school of

89. *Cf.* the volume *Le Droit Capitaliste du Travail*, with contributions especially of Jeammaud and G. Lyon-Caen. FRANCIS COLLIN, LE DROIT CAPATALISTE DU TRAVAIL (1980).

90. *Cf. id.* at 125 (ideology of the enterprise) and 129 (ideology of neutrality).

labor law in Germany arose in the circle around Hugo Sinzheimer with his young followers and former assistants—Otto Kahn-Freund, Ernst Fraenkel, and Franz Neumann. But this Marxist oriented school had, apart from Sinzheimer, practically no or very little influence on the growth of labor law in the Weimar Republic. In France, a certain labor law school around Gérard Lyon-Caen can be identified. Some of their members (A. Lyon-Caen, J.-E. Ray) exert a considerable influence in the theoretical debate aside from their practical and ideological background. And in Italy Gino Giugni and his "progressive" circle around the *Giornale di diritto del lavoro e delle relazioni industriali* can be characterized as a certain school of labor law mainly based on the ideas of *l'ordinamento intersindicale* and the *teoria della pluralità degli ordinamenti*.[91]

V. RETROSPECTIVE SUMMARY

This paper can only be a more or less superficial attempt to bring together three countries and to describe their development in terms of labor law scholarship. One cannot be surprised that these countries are connected by common roots in continental law, on the one hand, and, on the other hand, by the process of professionalization of labor law. The overall beginning in industrial relations legislation commenced first in Germany and extended gradually and then very intensively to the other two countries. In all three countries scholarship in labor law had a very large effect on theory but also on practice. Labor law is today not a mere collection of incoherent bits and pieces of legislation concerning the social protection of workers. Labor law owns an accepted system developed by scholars and their principles.

91. GINO GIUGNI, INTRODUZIONE ALLO STUDIO DELLA AUTONOMIA COLLETTIVA *passim* (ristampa 1977); GINO GIUGNI, DIRITTO SINDICALE 15 (2001).