COLLECTIVE LABOR LAW IN A CHANGING ENVIRONMENT: ASPECTS OF THE GERMAN EXPERIENCE

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I. INTRODUCTION

The environment for collective regulation of working conditions in Germany has changed for the worse. This kind of regulation is no longer regarded as the natural way to even the interests of both sides of the industry. On the contrary, many in the public debate see it as a problem rather than a solution to problems. There are other pressures as well.

Germany suffers from a relatively high unemployment rate. According to official statistics it is (as of August 2005) 11.4% in the country as a whole. That equals 9.6% in the west and 18.2% in the east.

Collective regulation needs actors. Union membership, however, has declined in the last years. Membership in employers' associations is declining as well. Only about one in five employees is still organized.[1] The figure used to be one in three. There are differences as to the kind of industry concerned. The public sector and traditional industries such as the metal industry or the chemical industry have a much higher percentage of organized workers than the service sector, including IT firms, where there is virtually no union membership. In 2001 the percentage of employers covered by a bargaining agreement was 48 in western Germany but only 28 in the east. That equals 71% of the workforce in the west and 56% in the east.

Another pressure to collective agreements is the restructuring of undertakings and businesses. The restructuring is very often linked to reasons of globalization. Management tries to answer the competitive

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1. See for this and the following data, U. Klammer & R. Hoffmann, *Unvermindert wichtig. Gewerkschaften vor alten und neuen Aufgaben*, AUS POLITIK UND ZEITGESCHICHTE, B 47-48 (2003).

challenges of the international marketplace by streamlining enterprises. Very often workers and their representatives are threatened with the movement of work to other countries, in particular to eastern Europe.[2] This is also a challenge to the system of collective regulation concerning working conditions.

I shall describe the German system of collective labor law in Section II. After that it will be shown how the pressures mentioned effect the system in one important regard—pacts for work (Bündnisse für Arbeit)[3]—and how the law reacts in Section III. Since "the law" is to a very important part the Federal Constitutional Court and the Federal Labour Court, it will further be explained how the Justices of these bodies get their jobs. And challenges to the system of Labour Courts will be discussed as well. That is the subject matter of Section IV.

II. THE GERMAN SYSTEM OF COLLECTIVE LABOR LAW

A. Two-Tier-System

The German system of collective regulations is characterized by two legally separated ways of workers' representation:[4] Union representation and representation by works councils. Both are governed by different rules and each has another jurisdiction. Different legal means to actually regulate working conditions follow from this.

B. Trade Unions

1. Legal Basis for Activity

Trade unions are voluntary organizations of employees to further their own interests. In Germany there is no statute concerning the special status of unions, the rules of organization, or a right to representation. It is the general rules of the civil law governing associations that apply. However, there is a constitutional basis for their activity (as well as for those of employers' associations). Article

2. This is an almost daily occurrence. For example, the newspaper *Tagesspiegel* reported on September 25, 2005 that Volkswagen is going to produce the Marrakesch, a new car, in Wolfsburg, Germany, and not as intended earlier by the board in Portugal because of negotiations with the labor side; these negotiations are said to be "very constructive"—not really a surprise. *Viel Zustimmung für Porsches Pläne*, DER TAGESSPIEGEL, Sept. 26, 2005, at 24, *available at* http://archiv.tagesspiegel.de/archiv/26.09.2005/2080242.asp.

3. There are, of course, other problems with legal repercussions. I will not go into them.

4. There is a third tier: co-determination by employees' representation in the supervisory council of companies. It is not further discussed here.

9, subsection 3, of the Basic Law, as for historic reasons the Federal Constitution is called in Germany, provides that associations that have the purpose to secure and further working and economic conditions are protected. It is illegal for anybody to interfere with their activities and "coalitions"—i.e., organizations to which the rule applies—may claim injunctive relieve.[5]

This covers nearly everything unions do and have to do in order to exist. The constitution protects the freedom of the individual to enter or not to enter a coalition and the right of such a coalition to exist, as an organization, as well as any activity, to secure and further working and economic conditions, such as persuading employees to enter. This is not limited to core functions of coalitions. Statutes, however, may limit and regulate such activity in accordance with constitutional principles.[6]

2. Means to Regulate

The means of unions to actually regulate working conditions are collective bargaining agreements ("Tarifverträge"). These are regulated by the "Collective Bargaining Agreements Act" (hereinafter "TVG" for "Tarifvertragsgesetz").[7] Under the Act collective bargaining agreements may regulate nearly every aspect of the conditions of employment. As far as this is done, agreements are legal norms, comparable to bylaws. They apply directly to those covered by the agreement (section 4, subsection 1, TVG). An implementation by contract is not necessary. As long as the parties of an employment contract are bound by the collective bargaining agreement, individual terms unfavorable to employees are not valid (section 4, subsection 3, TVG; principle of advantage—"Günstigkeitsprinzip").

However, covered on the employees' side are only members of the trade union that have entered into the agreement. On the employers' side, coverage depends on the contracting party: If it is an individual employer, only he or she is covered. If it is an employers' association all its members are bound (section 3, subsection 1 and section 4, subsection 1 TVG). To ensure that all workers of an

5. *See*, *e.g.*, Bundesarbeitsgericht [BAG] [Federal Labour Court] Feb. 17, 1998, 1 AZR 364/97.

6. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 14, 1995, 1 BvR 601/92.

7. For German texts of many statutes an English translation thereof and for a short introduction to German Labour Law, *see* STEFAN LINGEMANN, EMPLOYMENT AND LABOR LAW IN GERMANY (2003).

employer get the same terms of employment, the employers generally use contract forms containing an implementation clause. According to this kind of clause, the relevant collective bargaining agreements shall apply between the parties. The further advantage for the employer is that there is no incentive for the employee to become a member of the union in order to obtain the working conditions laid down in the collective agreement.

The normative character of collective agreements and its effects are one aspect of those agreements. But they are not only norms, bylaws, but also contracts and cover obligations between the parties to this contract (section 1, subsection 1 TVG). According to the continental principle of a right to specific performance,[8] all parties to a collective agreement are under a duty to fulfill the terms of the agreement (Durchführungspflicht).[9]

Since getting bargaining agreements is what unions are there for, and employers' associations are there to influence, this activity is also protected by Article 9, subsection 3 of the Basic Law. Legislation has to provide a system of collective bargaining. It is permitted to influence its results, but only under limited circumstances.[10]

De facto, the overwhelming majority of collective bargaining agreements are made between unions' and employers' associations, not individual employers. They are called "area agreements" ("Flächentarifvertrag") because they typically cover all employers who are bound by their membership in the association, and who are located in a particular area described in the agreement (e.g., a federal state—"Land"—or even the whole country). The purpose of this tradition is to eliminate working conditions as a factor in competition between employers. Additionally, there is an increased chance that the union will indeed be able to get an agreement because it does not have to fight in every enterprise.

3. The Way to Get There

The way for unions to get a collective bargaining agreement is—if necessary—industrial action. The rules of such action are not

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8. This principle applies to contracts of employment and the duty of the employee to work as well. Bürgerliches Gesetzbuch [BGB] [Civil Code] § 611, subsect. 1. This claim of the employer can not be enforced in court, however. Zivilprozeßordnung [ZPO] [Civil Procedure Statute] § 888, subsect. 3. But illegal lack of performing a contract of employment may be a ground for a discharge or a claim to damages.

9. Bundesarbeitsgericht [BAG] [Federal Labour Court] Apr. 29, 1992, 4 AZR 432/91.

10. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 24, 1996, 1 BvR 712/86.

regulated by statute. They are subject matter of complicated jurisprudence by the Federal Constitutional Court and the Federal Labour Court. This, however, is not the place to go into details. It should, nevertheless, be mentioned that industrial action by both sides of the industry with the purpose of getting to a collective bargaining agreement is an activity covered and protected by Article 9, subsection 3 of the Basic Law.[11] It should be further mentioned that strikes are, as far as court decisions go, permitted only for this purpose and not for other aims such as enforcing an agreement. If a bargaining agreement exists, the parties to that agreement—i.e., the union on the employees' side—are bound by it. The union is therefore not permitted to go on strike for better conditions if the demands concern matters regulated in the agreement. Industrial action for demands not covered by current agreements on the other side is not barred (relative duty to peace; "relative Friedenspflicht").[12] This is the other side of collective bargaining agreements being legal norms and therefore legally enforceable.

C. Works Councils

1. Legal Basis

The legal basis for the existence of works councils is the Works Constitution Act (hereafter BetrVG, for "Betriebsverfassungsgesetz"). Works councils are elected by all employees on the shopfloor level, i.e., every "work" ("Betrieb"). This is a technical term meaning the basic organizational unit. Works councils can elect additional bodies on a higher level if an employer has more than one work and on a group level if the employer belongs to a group of undertakings.

Election of works councils is mandatory, but enforcement depends on employees or trade unions demanding an election. In practice, five out of six works are without a works council. Only in works in which 100 or more employees are employed are works councils created in most cases. About half the workforce of Germany works in an establishment in which there is a works council. It is estimated that about 80% of those sitting on a works council belong to a union. Their number seems to be slowly declining.[13]

11. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Sept. 10, 2004, 1 BvR 1191/03 (2d Chambers of 1st Senate) (with additional citations).

12. Bundesarbeitsgericht [BAG] [Federal Labour Court] Dec. 10, 2002, 1 AZR 96/02.

13. M. KITTNER & S. KITTNER, ARBEITS- UND SOZIALORDNUNG: AUSGEWÄHLTE UND EINGELEITETE GESETZESTEXTE 429–31 (30th ed. 2005).

2. Means to Regulate

The means to regulate working conditions between the works council and the employer are works agreements. They are directly applicable and mandatory for the employer and all employees, not just union members (section 77, subsection 4 BetrVG). However, terms to the advantage of the employee may be agreed upon in individual contracts.[14] Without expressly stating it, the Act gives works agreements normative character in a way comparable to collective bargaining agreements.

3. How to Get There

Works councils are forbidden to take industrial action (section 74, subsection 2, sentence 1 BetrVG). The substitute in the bargaining procedure is compulsory arbitration. The Act provides for conciliation boards that try to reach agreements, and make decisions if that does not happen. They consist of an equal number of assessors appointed by both sides and a neutral chairperson to be agreed upon by both sides or—if that is not possible—to be appointed by way of a court order. In practice, it is mostly Labour Court Judges who—in a private capacity—act as chairpersons.

Compulsory arbitration is instituted by the Act in certain defined matters (mostly contained in section 87, subsection 1 BetrVG). The most important are systems of enumeration, but generally not the level of wages and salaries.[15] As far as working hours are concerned compulsory co-determination is only available as far as normal working hours are temporarily increased or reduced or the question of when to work is concerned. This means there is no compulsory arbitration as to how long workers are obliged to work as a rule.[16] Voluntarily works councils and employers are entitled to enter into works agreements even if there is no particular right to co-determination (section 88 BetrVG).

D. Which Rule Prevails?

Having two means of workers' participation in rulemaking, the question arises: Which rule shall dominate? Here, the principles of

14. Bundesarbeitsgericht [BAG] [Federal Labour Court] Jan. 21, 1997, 1 AZR 572/96.

15. For this principle, *see*, *e.g.*, Bundesarbeitsgericht [BAG] [Federal Labour Court] Jan. 21, 2003, 1 ABR 5/02.

16. For this principle, *see*, *e.g.*, Bundesarbeitsgericht [BAG] [Federal Labour Court] July 22, 2003, 1 ABR 28/02.

the Works Constitution Act are clear: Collective bargaining agreements are protected against similar rules entered into by works councils. The legislature regarded collective bargaining as more important than the jurisdiction of works councils. Two particular paragraphs merit mention.

Under section 77, subsection 3 BetrVG, remuneration and other working conditions that are regulated or usually regulated by collective bargaining agreements may not be the subject of a works agreement. The purpose of this provision is the protection of an actual collective bargaining situation.[17] Therefore, if there typically exists a collective bargaining agreement that covers the works concerned and regulates a particular matter, a works agreement covering the same matter is no longer permissible. The question of whether such an agreement is actually in force is as irrelevant as the question of whether or not it would be binding on the employer.[18]

In matters of section 87, BetrVG, the main rule providing for compulsory co-determination, the act provides that this right and, therefore compulsory arbitration, is not available if a collective bargaining agreement exists. This means that the employer must be covered by a collective agreement actually in force and binding on him or her.[19] It is now settled by the jurisprudence of the Federal Labour Court that in matters of compulsory co-determination section 87, subsection 1 BetrVG sets aside the general principle of section 77, subsection 3 as a general rule.

From this, however, it does not follow that there is a wide range of matters works councils and employers can regulate if the work is not covered by an actual collective bargaining agreement. As shown, the level of wages and salaries as well as the length of working hours are not subject to compulsory co-determination. This is what is most important to employees and employers, as well as to the parties of collective bargaining agreements. Works agreements concerning these matters are therefore only permitted if there is no collective

17. Bundesarbeitsgericht [BAG] [Federal Labour Court] Dec. 3, 1991, GS 1/90 (Great Senate).

18. Bundesarbeitsgericht [BAG] [Federal Labour Court] Jan. 24, 1996, 1 AZR 597/97. This is heavily disputed. For another opinion, see, e.g.. REINHARD RICHARDI ET AL., BETRIEBSVERFASSUNGSGESETZ: MIT WAHLORDNUNG: KOMMENTAR, § 77 n.260 (8th ed. 2002).

19. *See* the landmark case of Bundesarbeitsgericht [BAG] [Federal Labour Court] Feb. 24, 1987, 1 ABR 18/85.

bargaining agreement in the particular industry or region covering these matters and such an agreement is not usually in force as well.[20]

III. ONE TYPICAL THREAT AND THE LAW: PACT FOR WORK (BÜNDNIS FÜR ARBEIT)

A. Actual Developments

In the public discussion, the term "pact for work" is used to describe a certain form of agreement on the shopfloor level. Usually a works council and an employer agree to terms of employment on a lower level than the applicable collective bargaining agreement provides for. The employees get a guaranty against dismissals by reason of redundancy or business reorganization. The problem is that the parties of these agreements, under the traditional system, have no jurisdiction for that kind of deal. These kind of terms can only be agreed to in a collective bargaining agreement that can only be entered into by a union on the employees' side.

Under the traditional system of area agreements in Germany this is not a trivial subject. According to the philosophy of labor relations, only unions are regarded to be strong enough to get fair deals. It is the unions who can bring industrial action into play and it is the unions who are in a position to counter pressure of competition between employers, i.e., the argument that one firm has conform better than others to stay in business. But this view is indeed challenged. Two arguments seem important.

On an economic level it is argued that collective bargaining agreements are nothing but trusts. The high level of working conditions laid down in them would only lead to unemployment. According to this theory, employees are not disadvantaged compared to employers so there is, it is alleged, no justification to that argument for collective regulation.[21] This seems hardly persuading. It is simply an everyday experience that there is a need for working people to effectively counter the power of the employers' side.

It is further argued that the principle of subsidiarity demands collective regulation on the works level, and not by a collective

20. Ironically, this is the case as far as employees of trade unions are concerned because unions have no effective partner they accept or have to accept as a counterpart to collective bargaining. *See* Bundesarbeitsgericht [BAG] [Federal Labour Court] Feb. 20, 2001, 1 AZR 322/00.

21. *See* 10th Report of the Monopolkommission [Official Commission on Trusts] dated July 22, 1994, Bundestagsdrucksache 12/8323 n.873 *et seq*.

agreement covering employers of a whole area.[22] This principle is a philosophical idea and found its way into Article 5 of the European Community Treaty. It simply means that whatever can be done on a lower level should be done there and not on a higher, more remote, level. It can be doubted whether the principle is really a legal principle governing industrial relations. In any event, workers' rights cannot be protected on the shop floor as effectively as by unions on an area level. This is due to the potentially stronger action available to unions. Therefore, the job cannot be done better on the shop floor level.

B. Reaction of the Federal Labour Court

The Federal Labour Court still holds to the traditional view. It strengthened the position of trade unions as a party to collective bargaining agreements. As we have seen, a union can take legal action against the other party of a collective bargaining agreement if that party does not perform the agreement adequately. Party to an area level collective bargaining agreement is not the individual employer, even if bound by the agreement, but the employers' association. The union may lay a claim against that organization to demand the exercise of influence against an individual employer who does not comply with a binding agreement.[23] This method is complicated and very often useless since a letter from the employers' association asking the employer to comply is usually not an incentive to do just that.

In a very important landmark case,[24] the First Senate (i.e., deciding body) of the Federal Labour Court went further in protecting collective bargaining agreements against erosion on the shop floor level by way of "pacts for work." Citing the constitutional protection of collective bargaining and the constitutional prohibition of all acts directed against the freedom of coalitions, the Court gave trade unions (and presumably employers' associations as well) a right to injunctive relief if the work council and the employer work together in order to accept the implementation of working conditions below the standard of collective agreements. This is true even if a protection against dismissals is agreed upon in exchange.

22. *See* H. Hablitzel, *Das Verhältnis von Tarif- und Betriebsautonomie im Lichte des Subsidiaritätsprinzips*, 18 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 467–72 (2001).
23. Bundesarbeitsgericht [BAG] [Federal Labour Court] Apr. 29, 1992, 4 AZR 432/91.
24. Bundesarbeitsgericht [BAG] [Federal Labour Court] Apr. 20, 1999, 1 ABR 72/98.

The collective bargaining agreement in question must be in force and binding on the employer. It is not necessary that a formal works agreement be reached. Informal agreements are sufficient to give a right to this remedy. If a formal works agreement is reached it may even be sufficient that a collective bargaining agreement is not actually, but usually, in force (section 77 BetrVG (see above)).

The Court expressly rejected the argument that in cases of job protection, a lower level of working conditions could be agreed upon by the parties of a contract of employment and therefore by a works council and an employer as well. The reasoning goes that such an agreement is to the advantage of the employee (section 4, subsection 3 TVG, see above) because of the employment security gained. The Court argued against this reasoning: The effects of bargaining agreements on jobs are part of what parties to such an agreement think about when entering into it. It is their constitutional right to consider these questions and not for the courts to go into it. Therefore, what might be a better term compared to a collective agreement can only be decided if there is a connection of subject matters. If there is no such connection no legal evaluation of advantage or disadvantage to the employee is possible.

From this decision a technical problem arose. According to the First Senate, what can be demanded by the union depends to a certain degree on what the employer intends. If he or she wants to practice the lower level working conditions as far as all employees are concerned regardless of trade union membership, this is forbidden. Trade union members are bound by the collective bargaining agreement (see above). If the employer includes them in a bid intended as one act generally applying to all employees, the bid as a whole is illegal. The illegality then extends to the agreement with the works council to give way to the employer making the bid. On the other hand, if the employer has no principal objection to union members not accepting an offer of lower level working conditions, things change. In this case the union can only be successful with a claim not to actually include union members in the offer.

This, at least in the latter case, raises a problem of procedure. Does the union have to give the names of members being employed in the particular work (i.e., organizational unit) in question or not? The Fourth Senate of the Federal Labour Court answered this in the affirmative.[25] Therefore, in many cases unions may abstain from legal

25. Bundesarbeitsgericht [BAG] [Federal Labour Court] Mar. 19, 2003, 4 AZR 271/02.

proceedings in order to not disclose who is organized, which would endanger their members.

C. Legislative Proposals

1. Content

There was a reaction in the Parliament as a direct answer to the landmark decision of the Federal Labour Court. It came from the conservative Christian Democrats and the Liberal Party,[26] at that time opposition parties. They introduced legislation[27] that proposed to amend section 4, subsection 3 of the Collective Bargaining Act, the rule concerning the principle of advantage ("Günstigkeitsprinzip"). According to these proposals, job security was to be regarded as a factor when evaluating if a term of employment was advantageous to the employee compared to the terms of a collective bargaining agreement. Both parliamentary parties tried to involve the work force and the works council in the procedure.[28]

Under the Liberals' proposal, an agreement was regarded as to the advantage of the employee if a protection against dismissal by reason of redundancy or business reorganization was provided and either the works council agreed, or 75% of employees who got the same offer accepted. The Conservatives were more moderate. Under their proposal the works council and two-thirds of the workforce had to agree to the proposal. In addition, the agreement of lower level working conditions could only be agreed for the period during which the bargaining agreement in question was in effect.

Both legislative proposals were reactions to the jurisprudence of the Federal Labour Court. In the official reasons accompanying the draft acts both parliamentary parties stressed the need for more flexibility in order to create or protect jobs. This philosophy is contrary to the traditional thinking in a very direct way.

These suggestions did not become law during the last legislative period. Germany just had a general election. The new government is

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26. The Liberals in Germany cannot be compared with the Liberals in the United Kingdom or those politicians in the United States accepting that title. They are neo-liberal in economic policy, but mostly tolerant in cultural ("social" in the American term) questions.

27. Conservatives: Drucksache [Parliamentary Paper] 15/1182; Liberals: Drucksache [Parliamentary Paper] 15/1225.

28. As an extra, the liberals wanted to see an advantage even if the employee had the right unilaterally to demand treatment according to the collective agreement for the future after a certain period, provided there was a protection against dismissals by reason of redundancy or business reorganization.

formed by the Christian Democrats and the Social Democrats. Pacts for work are not on its legislative agenda.

2. Constitutional Questions

As previously mentioned, the process of collective bargaining is protected by the Constitution in article 9, subsection 3. Therefore it is at least questionable if a systematic erosion of this process is constitutional. Arguments concerning what influence the protection awarded to this process has on the job market are not without constitutional validity. The Federal Constitutional Court already accepted statutes that set aside results of the bargaining procedure if this was done to create jobs or to serve the common good, provided the limitation was proportional.[29] Just a short time ago, Udo Steiner, a Justice of the Federal Constitutional Court, argued in a non-judicial capacity that old answers may not be valid for the future. The constitution should, according to him, be open for experiments by the legislature. In his opinion, this should include a new division of the role played by unions and that played by works councils.[30] The arguments were based on the principle of a social state ("Sozialstaat") as laid down in article 20, subsection 1, Basic Law and the right to choose one's profession and job as laid down in article 12 Basic Law.

Justice Steiner approvingly cited in his speech politicians of the main parties saying that a policy is really social if it creates jobs.[31] This phrase was coined by the "Initiative Soziale Marktwirtschaft" (Initiative for a Social[32] Market Society). This body is a group of more or less prominent people trying to influence public opinion with a lot of success. It is funded with about nine million Euro per year—after taxes—by the employers' association of the metal industry.[33] Thus, a political slogan coined and spread by one side of the industry became the foundation of a discussion about interpreting the constitution.

This approach constitutes a change to traditional constitutional doctrine. It seemed established law that employees' representation in addition to unions' was permitted by the constitution only as long as the functioning of the bargaining procedure is not endangered in

29. *See* Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Apr. 3, 2001, 1 BvL 32/97.

30. U. Steiner, *Beschäftigung und Beschäftigungsförderung aus grundgesetzlicher Sicht*, 22 NEUE ZEITSCHRIFT FÜR ARBEITSRECHT 657–62 (2005).

31. *Id.* at 660.

32. The term "social" is used as in social security and has nothing to do with the cultural and moral questions termed "social" in the United States.

33. C. GAMMELIN ET AL., DIE STRIPPENZIEHER 131 *et seq.* (2005).

principle.[34] As far as the relationship of unions and works councils is concerned this is part of the constitutional tradition. Under the first democratic constitution, that of the Weimar Republic, there was a guaranty of employers' and employees' coalitions, i.e., unions on the employees' side as well as one of works councils. But it was generally agreed that unions should be the dominating force.[35] They, as workers' organizations, were an integral part of the parliamentary system. The Weimar Republic provided for a system of collective bargaining, however imperfect.[36] When this system was threatened and destroyed, in the end democracy itself was destroyed.[37] In putting Article 9, subsection 3 into the basic law its framers again followed the Weimar path and integrated working people and unions as their organizations into the newly-founded democratic system.

To me this rewriting of constitutional law, described above, seems not only to deny historical experience but also to be more than problematic for other reasons: It is the function of collective bargaining to protect employees against the very pressure labor markets exercise over their fate. The threat simply to hire somebody else is a classic means of employers to lower wages and influence other working conditions.[38] Furthermore, trade union members are interested in their jobs as well. So unions are not in a position to enter into or to even fight for agreements without regard to the situation on the labor market.[39] The principles protecting the interests of people seeking jobs are therefore served by the collective bargaining procedure and its constitutional protection as well.

D. Another Way Out?

Legal considerations aside, there is of course the problem of unemployment. And indeed there are situations when the usual terms of employment are simply too expensive for an individual employer. In this kind of situation it may be wise to work on a lower level of

34. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Mar. 1, 1979, 1 BvR 532/77 et. alt.

35. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 30, 1965, 2 BvR 54/62.

36. At that time there also was a system of compulsory arbitration in place which was regarded as part of the bargaining procedure.

37. *See* MICHAEL KITTNER, ARBEITSKAMPF: GESCHICHTE, RECHT, GEGENWART chs. 31–33 (2005).

38. *See also* Thomas Dieterich, *Betriebliche Bündnisse für Arbeit und Tarifautonomie*, DER BETRIEB 2398–2403 (2001).

39. *See also* Bundesarbeitsgericht [BAG] [Federal Labour Court] Apr. 20, 1999, 1 ABR 72/98.

wages, salaries, and benefits in order to strengthen the employer economically and save jobs in the long run. This is reasonable and it is possible with union involvement as well.

As shown, area agreements are binding on employees and employers who are members of trade unions and employers' associations respectively. This does not mean that there is no way to legally apply other terms of employment. The chance is offered by the rule that governs the applicability of a particular collective bargaining agreement.

Problems may arise if, according to the rules of the Collective Bargaining Act, more than one agreement is applicable. Generally, such a conflict is solved by the principle of specialty. The agreement closer to the situation shall prevail. If the employer is bound by a collective agreement entered into by an employers' association, and by one he entered into himself, the latter prevails. This is even true if the constitution of the association forbids an individual employer to enter into such an agreement.[40] In this case the agreement entered into by the individual employer is binding on union members even if working conditions are less favorable to them compared to those in the agreement between employers' association and union.[41]

If employer on one side and representatives of the works council and union on the other side sign an agreement it is regarded as a valid collective bargaining agreement rather than as a void works agreement.[42] A lot is possible with regard to the contents of this type of agreement. There is no rule forbidding the lowering of wages and benefits of those employees who would be dismissed for redundancy if costs would not be reduced.[43] Collective bargaining agreements of this kind are indeed entered into by unions. Data, however, are not available because nobody advertises the facts.

All this shows that there are the means to solve problems involving trade unions and, therefore, there is no need to take away the employees' most efficient representation. This is an additional argument against a general reassessment as to the relationship of works council and trade union jurisdiction. There simply is no need for a change in the law, including constitutional protection of the collective bargaining procedures.

40. Bundesarbeitsgericht [BAG] [Federal Labour Court] Apr. 4, 2001, 4 AZR 237/00.
41. Bundesarbeitsgericht [BAG] [Federal Labour Court] Jan. 24, 2002, 4 AZR 655/99.
42. Bundesarbeitsgericht [BAG] [Federal Labour Court] Nov. 7, 2000, 1 AZR 175/00.
43. Bundesarbeitsgericht [BAG] [Federal Labour Court] July 25, 2003, 4 AZR 405/02.

IV. JUSTICES AND THE POLITICAL PROCESS

A. Dialectical Process

As shown there is a certain dialectic: A problem arises, the courts react, the political process reacts to the courts, and—if this reaction indeed will become law—there may be a reaction by the Constitutional Court to the reaction in the legislature. This raises the questions of what part the courts play and that of mutual dependencies: Which court decides what, and how does the political system influence the composition of the courts?

B. The Federal Constitutional Court

The Federal Constitutional Court is the final arbiter about constitutional questions. This court alone has the jurisdiction to declare statutes—be it federal or those of the states—as unconstitutional under the Basic Law (Article 100, subsection 1 Basic Law). A case may come there either by application brought by the Federal Government, a state government, or one-third of the members of the federal parliament, the Bundestag (Article 93, subsection 1, Number 2 Basic Law). If a person is of the opinion that an act of the state violates his or her constitutional rights, a constitutional complaint is possible if all other legal procedures are fruitless (article 93, subsection 1 Number 4a Basic law; section 90, subsection 2 Federal Constitutional Court Act).

The Court consists of two Senates with eight members in each Senate. One-half of the Justices are elected by the federal parliament ("Bundestag"), the other half by the federal body representing the states ("Bundesrat"; Federal Council"). One-third of the justices has to be a member of a supreme Federal Court at the time of election. The Bundestag has delegated the election to a committee. A two-third majority is necessary for the election. The Justices sit for twelve years; in addition there is an age limitation of sixty-eight. Re-election is not permitted (as to all these points see article 94, subsection 1 Basic Law and sections 2 to 7 Federal Constitutional Court Act).

As a practical matter there is a process of political agreements by the two main Parties—Social Democrats and Christian Democrats. According to this tradition, both have the right to fill four of the eight seats in each Senate. Traditionally, the other party may object if there are serious concerns about a person proposed. This includes opinions held by that person that are regarded as too extreme. Furthermore, of those seats one in each Senate is to be filled by a non party member

who is usually close to the party nominating him or her. If one of the parties—as is usually, but not at the moment, the case—has formed a coalition government on the federal level one of the seats on the Court is ceded to the smaller coalition party.[44] There is no such thing as a public hearing before election.

C. The Federal Labour Court

1. Status and Jurisdiction

The Federal Labour Court is one of five supreme Federal Courts (the others are the Federal Court, with jurisdiction in civil and criminal matters; the Federal Administrative Court; the Federal Social Security Court; and the Federal Financial Court, with jurisdiction in matters of customs and taxation—article 95, subsection 1 Basic Law). It has jurisdiction in labor law matters may they concern individual rights or collective matters. It decides as a court of appeal only points of law, not of fact, and has no regulating powers. As a court of last instance, it is above the State Labour Courts ("Landesarbeitsgericht"), which are above the Labour Courts ("Arbeitsgerichte"; see for all points the Labour Court Act). Appeals can only get to the Federal Labour Court under particular circumstances, e.g., if a point of fundamental importance is concerned.

2. Choosing of Justices

The Court consists of ten Senates. They sit with three legally trained professional Justices and one non-professional judge from each side of the industry. The non-professional judges are appointed by the Federal Ministry for Labour from lists provided by employees' and employers' associations. The professional justices are chosen by a particular procedure laid down in the Basic Law, the Justices Election Act, and the German Judges Act.

Justices are elected by the Justices Election Council ("Richterwahlausschuss"). It consists of the ministers of the sixteen states in administrative charge of the particular courts for which the supreme Federal Court is the court of appeal and the same number of members elected by the federal parliament according to the strengths of the parliamentary parties. The procedure goes on behind closed doors and the election is by secret ballot. Before the election a body

44. *See* U. WESEL, DER GANG NACH KARLSRUHE 205 *et seq.* (2004), and R. LAMPRECHT, VOM MYTHOS DER UNABHÄNGIGKEIT 76 (1996).

consisting of justices sitting on the court in question has to make a statement as to the qualifications of the candidate. Members of this body are partly elected by the justices, partly ex-officio members. The statement is not binding on the Justices Election Council. The federal minister in administrative charge of the particular court has to agree to the election. As far as justices of the Federal Labour Court are concerned, this was never a problem.[45] Justices have a lifetime tenure but there is a compulsory retirement age of sixty-five.

Little is officially known as to how the procedure really works and what the criteria for election are. A survey of professional justices sitting on the Federal Social Security Court shows that they are of the opinion that luck, party affiliation, and having clerked for that court or the Federal Constitutional Court are the most important factors.[46] Article 36 of the Basic Law provides that persons of all states have to be chosen for positions in federal agencies in an adequate proportion. This rule is followed as far as justices are concerned as well.

3. Judicial Review

According to Article 33, subsection 2 of the Basic Law, all public offices are to be filled according to usefulness, ability, and professional performance. There are voices that want to apply this rule and the right of a competitor to challenge a selection for public office to the choosing of federal justices as well.[47] However, there are very good arguments that, due to the particular function of the supreme Federal Courts in developing the law and to their democratic legitimacy, the decision can only be set aside by a court if the Election Council and the responsible minister acted arbitrarily.[48]

D. Limited Influence

The system of selecting justices is designed to mix democratic influence with long term stability. The government of the day has little chance to directly influence the jurisprudence of the courts. This

45. HANS-JÜNGEN DÖRNER, GEMEINSCHAFTSKOMMENTAR ZUM ARBEITSGERICHTSGESETZ § 42 n.9.

46. WOLFGANG SPELLBRINK, DEUTSCHE RICHTERZEITUNG 23, 25 (2005).

47. Bundesverwaltungsgerich [BVerwG] [Administrative Appeal Court of Schleswig-Holstein] Oct. 15, 2001, 3 M 24/01.

48. Verwaltungsgericht [VG] [Administrative Court of Schleswig – Holstein] June 17, 2001, 11 B 10/02; this point was expressly left open in the same matter in the decision of the Oberverwaltungsgericht [OVG] [Administrative Appeal Court of Schleswig – Holstein] July 31, 2002, 3 M 34/02.

does not exclude public moods to have effect on judicial opinions. That is a fact of life. Whether attacks on the process of collective bargaining will prevail remains to be seen. Such an attack only seems possible if there is a majority in the legislature for this and a fundamental rewriting of the constitution will prevail in the Federal Constitutional Court.

E. Getting Rid of Labor Courts?

The German Court System came under discussion. Mergers are in the air. At the moment, this concerns the courts adjudicating administrative matters. But there are demands for a merger between Labour Courts and the Courts having general jurisdiction in civil law matters. Two leading staff members of the Federal Employers Association ("Bundesvereinigung der Deutschen Arbeitgeberverbände"), the umbrella organization of all employers associations, favor this solution. Apart from efficiency arguments, they do not see any relevant difference between labor law and civil law as a whole. In particular, freedom of contract is, according to them, a principle of labor law as well.[49]

As shown, this is not true as far as collective bargaining agreements are concerned. It would be a fundamental re-interpretation of the Collective Bargaining Agreements Act if individual contracts of employment could legally contain terms on a lower level than binding bargaining agreements provide for. This might only be possible if a job guaranty is provided as well and the courts accept this as an advantage to the employee, thereby undermining the protective function of the bargaining procedure. However, justices trained and used to freedom of contract as a traditional concept may be more inclined to accept such a view. Abolishing Labour Courts hoping for a better application of traditional civil law concepts may be the most effective way to get rid not only of Labour Courts but also of labor law as we know it, including the protection of the collective bargaining process.

V. CONCLUSION

Times are difficult. Traditional institutions such as labor law and collective bargaining are no longer seen as a solution, but as part of the problem by many. That does not seem to be persuasive and in

49. ROLAND WOLF & TOM-FREDERIC BALDERS, ARBEIT UND ARBEITSRECHT – PERSONAL PROFI 86 et seq. (2005) describing the actual political discussions as well.

some cases is influenced by an interested viewpoint or a viewpoint influenced by particular interests. But collective regulation of working conditions is still out there and may prove to be effective enough to stay.