RECENT TRENDS IN THE DEVELOPMENT OF LABOR LAW IN THE FEDERAL REPUBLIC OF GERMANY

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Ernst Benda. *Sozialrechtliche Eigentumspositionen im Arbeitskampf: Ein Beitrag zur Diskussion um die Änderung des § 116 Arbeitsförderungsgesetz* (The guarantee of private property and its extension on claims based on social security law in situations of industrial action: A contribution to the discussion on the amendment of section 116 of the Employment Promotion Act). (Baden-Baden: Nomos, 1986).

Manfred Bobke and Herbert Grimberg. *Der gewerkschaftliche Warnstreik im Arbeitskampfrecht: "Neue Beweglichkeit" gegen rechtliche Begrenzungen der gewerkschaftlichen Handlungsfreiheit* (The warning strike organized by trade unions as reflected in the law on industrial conflict: "New mobility" against legal limitations of trade unions' freedom). (Cologne: Bund, 1983).

Volker Jahnke. *Tarifautonomie und Mitbestimmung* (Freedom of collective bargaining and codetermination). (Munich: Beck, 1984).

Volkhart Kriebel. *Zentralisation und Dezentralisation im Tarifsystem: Möglichkeit und rechtliche Zulässigkeit einer dezentralen Tarifpolitik* (Centralization and decentralization in the system of collective bargaining: Factual and legal possibility of a decentralized collective bargaining policy). (Berlin: Duncker and Humblot, 1984).

Fritz Ossenbühl and Reinhard Richardi. *Neutralität im Arbeitskampf* (Neutrality in industrial conflict). (Cologne: Heymanns, 1987).

Eduard Picker. *Der Warnstreik und die Funktion des Arbeitskampfes in der Privatrechtsordnung* (The warning strike and the function of industrial action in the system of civil law). (Cologne: Heymanns, 1983).

Ulrich Runggaldier. *Kollektivvertragliche Mitbestimmung bei Arbeitsorganisation und Rationalisierung* (Codetermination of work organization and rationalization by collective agreements). (Frankfurt: Metzner, 1983).

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I. INTRODUCTION

The economic crisis of the 1970s and early 1980s has led to a continuous questioning of established patterns of labor law in the Federal Republic of Germany. Until the mid-1970s full employment was one of the basic characteristics of the German labor market. Since then, an unemployment rate of approximately 10 percent has become part of the picture. In spite of the fact that the economy has recovered to a great degree, unemployment persists. Evidently, economic growth by itself does not imply job creation, and rationalization has become the key word of management policy. Since economic growth is more easily reached by new technologies than by the use of more manpower, job security is endangered irrespective of economic prosperity. In order to remain competitive in the world market, German companies have no choice but to reduce costs and to increase productivity.

All the factors sketched above have fomented a struggle over the sharing of wealth between capital and labor. Employers are forced to reduce costs by all means; unions have to defend the status workers achieved after World War II. This development has led to a change of attitude between the actors on the industrial relations scene. Harmony and social partnership, at least to some extent, have been replaced by a climate of conflict in which each side has sought to influence through the law the instruments of the law of collective labor bargaining. In other words, the current economic situation has to be understood as a sort of stimulus to encourage employers' associations as well as trade unions to be imaginative in redefining the system according to their respective needs.

Thus it is not surprising that the limits of the unions' right to strike has become a primary battlefield. In the same way, the scope of collective bargaining and its relationship to institutionalized patterns of workers' participation have become issues of heated debate. This latter topic directly involves how a company's autonomy in decisionmaking can be restricted by mechanisms of collective labor law.

There is, in addition, the problem of whether it is possible to establish and coordinate different levels of bargaining. Traditionally, collective bargaining in the Federal Republic of Germany has taken place on an industry-wide or at least regional basis. The patterns of working conditions are becoming different from company to company and from plant to plant. This variety is largely the result of technological and economic needs. Therefore, it is not surprising that from management's point of view the decentralized nature of decisionmaking has become critical. Since traditional collective bargaining does not provide an answer this challenge, a pressing need exists to reconsider the system.

Finally, the integration of the Federal Republic of Germany

into the European Economic Community poses the question of whether it is possible to harmonize collective labor law throughout Europe. This development has led to an increasing awareness of the similarities and differences in European labor law.

The following books reveal the intimate relationship between the academic discussion and the power struggle involving trade unions, employers' associations, and the state. The academic debate in labor law in the Federal Republic of Germany is by no means merely academic. It is extremely practice oriented and often (perhaps too much) influenced by the actors themselves.

II. INDUSTRIAL CONFLICT

In the Federal Republic there is no statute regulating the right to strike. Article 9, Section 3 of the Constitution protects the freedom of association and by implication collective bargaining and the right to strike. Since 1955 the Federal Labor Court upheld the right to strike, but it has required that only trade unions can call a strike and that a strike can be used to reach a collective agreement only as a last resort (so-called principle of *ultima ratio*). This principle of *ultima ratio* has a double meaning: strikes must be preceded by a secret ballot of union members, and strikes can only be carried out after all attempts at reaching a negotiated solution have failed.

According to the principle of *ultima ratio* a strike carried out before or during negotiations would be illegal. Nevertheless, spontaneous short strikes in one or more companies, lasting not more than a few hours, have traditionally been called for and backed by the unions during bargaining rounds. But there has been no strategy developed for using these warning strikes as a means of pressure.

Even though the rules established by the Federal Labor Court made clear that such strikes were illegal, it was this very same court which voted differently in a 1976 decision. The court had to evaluate a short strike of a few hours in one establishment during the negotiations. This strike remained the single action of this kind during the entire bargaining round within the respective industry and region. The court evidently wanted to legalize such an activity for the simple reason that in the past these small "warning strikes" had led to quicker compromises, thereby eliminating the necessity for big strikes. Thus with regard to the principle of *ultima ratio* the court concluded:

> The principle is only meant for a strike of longer duration or an indefinite period. . . . If the only intention of a strike is to promote the negotiations by showing the opposing party the readiness of the employees to go on strike, then this *mild pressure*, by way of a short warning strike, may

> be exerted before the means of negotiations are exhausted.[1]

In other words the criterion of *ultima ratio* only applies for a normal strike, but not for warning strikes. Since 1976, therefore, the question has become where to draw the line between "normal strike" and "warning strike," the latter being characterized by mild pressure and short duration.

In this situation some trade unions developed the so-called "new mobility" strategy, which consisted of short strikes shifted day-by-day from one establishment to another within the region covered by the collective agreement. This strategy aimed to increase the unions' power at the bargaining table in order to accelerate negotiations. The question was and still is whether these short strikes, based on a highly developed union strategy, come under the category of "normal strike" or under the category of "warning strike." The Federal Labor Court, by several decisions in 1984 and 1985, confirmed the legality of these strikes by categorizing them as warning strikes.[2] The entire matter is now before the Federal Constitutional Court.

The underlying problem is the balance of power between the parties. For the unions, the strategy of "new mobility" has a great advantage compared to the "normal strike." The normal strike, which requires the union to pay strike benefits, has become very expensive; a strike along the lines of "new mobility" is less costly because the union does not have to pay benefits.

A recent work by Bobke and Grimberg and one by Picker take different sides of this issue. The former argues the legality of the "new mobility" in order to achieve equal bargaining power. In other words, the analysis and evaluation of reality turns out to be their main argument. Picker, on the other hand, focuses on the legal tradition. He relies on empirical data about strike patterns to show that social behavior does not follow the law; instead, it is the other way around. Picker seeks to integrate collective bargaining and industrial conflict into the general principles of civil law. He demonstrates that negotiation and pressure are put in a clear-cut relationship according to the general principles governing civil law. First there have to be negotiations; strikes may occur only as a last resort in case of failure of negotiations.

These books refer to the basic theoretical issues of whether labor law in the Federal Republic is still a consistent part of traditional civil law. The latter position, represented by Picker, has growing support. In this view, collective agreements are a sort of civil law contract, and collective bargaining is governed mainly by

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[1] Federal Labour Court; decision of 17 December 1976, *EzA*, Artikel 9 Grundgesetz, number 19, pp. 119–125 (121).

[2] Federal Labour Court, decision of 12 September 1984 *EzA*, Artikel 9 Grundgestetz, number 54, pp. 593–629, and Federal Labour Court, decision of 29 January 1985, *EzA*, Artikel 9 Grundgesetz, number 56, pp. 635–640.

the rules regulating private negotiations between individuals. The ideology behind this position combines elements of individualism and deregulation.

Both books suggest why the reintegration of labor law into civil law is so appealing. Labor has yet to develop a consistent theoretical structure, as Bobke and Grimberg make clear. The history of collective labor law is nothing more than an attempt to overcome the individualistic structure of civil law. Thus Picker largely reverses social history.

III. THE PROBLEM OF STATE'S NEUTRALITY

In Germany unions traditionally pay rather high strike benefits during a "normal strike," with the union acting as a kind of insurer for the welfare of its members. If the union did not pay benefits, it probably would not be able to motivate a relevant group of workers to strike. In this context, of course, the question arises how those workers not on strike should be treated. There is no statute covering this contingency. According to rules developed by the Federal Labor Court, workers belonging to an industry suffering a strike lose their right to remuneration, no matter whether they are inside or outside the area covered by the intended collective agreement. If they do not belong to the same industry, they retain their right to remuneration at least in principle.[3]

But can those workers who lose financial support get money elsewhere? According to the standing rules of the unions, no strike benefits are paid to those workers. The Act on Employment Promotion, however, not only provides for unemployment benefits in case of unemployment, but applies as well to workers who are temporarily prevented from working. At least in theory, those workers who lose remuneration because of an industrial conflict elsewhere could be entitled to get such benefits. According to the traditional understanding, derived from the Constitution, the state has to be neutral in relation to the parties of the industrial conflict. But can the state be neutral if it pays these benefits?

The Act on Employment Promotion tried to solve this problem. Workers who lose remuneration and belong to the same industry involved in a conflict, and also belong to the region covered by the intended collective agreement, *never* receive unemployment benefits. Those workers who lose remuneration and belong to the same industry involved in the conflict, but do not belong to the region covered by the intended collective agreement, are entitled to unemployment benefits. There is, however, an important exception: the right to benefits is excluded if the bargaining claims of the union in the region the employee belongs to are "equal in kind and in extent" to the union's claims in the region where the indus-

[3] Federal Labour Court, decisions of 22 December 1980, *EzA* § 515 Burgerliches Gesetzbuch—Betriebsrisiko-, number 7 and 8, pp. 29–62.

trial conflict takes place. This formula assumes that unemployment benefits should not be paid if the cause of the industrial conflict is based on a collective agreement that is a model for all collective agreements in the whole industry.

This formula became controversial in 1984 when the hours of work per week in the metal industry in *all* regions were reduced from 40 to 35. But this change was not the only one subjected to negotiation within the bargaining round. There were also other claims relating to remuneration, fringe benefits, vacation, and such that involved only slight difference from region to region. Thus the question arose whether the formula applied only when *all* claims were identical or whether it applied when the main and predominant claim was identical. In preliminary lawsuits leading to injunctions by the Social Security Courts, the first interpretation led to the payment of unemployment benefits.

In reaction to the outcome of those preliminary lawsuits, employers' associations put pressure on the government to clarify the statute. Meanwhile the Federal Parliament has amended Section 116 of the Act on Employment Promotion. In attempting to clarify the meaning of the provision, it has changed the Act's content. Now the right to receive unemployment benefits is excluded if, in the area indirectly affected, a worker belongs to a union whose claim is "*equal* in kind and in extent *to a dominant claim* of the region where the industrial conflict takes place, *without being identical.*"[4]

In practical terms, this ruling means that, at least in comparison to the ruling of the Social Security Courts in the preliminary lawsuits in 1984, the situation of the indirectly affected workers has become worse. Unemployment benefits are less available than before. From the union's perspective, workers are more likely to put pressure on the union to end the strike and to reach a compromise. Not surprisingly, the unions have vigorously contested the constitutionality of this amendment. In close cooperation with the Social Democratic Party as well as the governments of some states within the Federal Republic, the unions have appealed to the Federal Constitutional Court. The case still is pending.

Benda's book, like Ossenbuhl and Richardi's, focuses on whether the legislator is allowed to worsen the position of those who formerly were entitled to unemployment benefits. They agree that the right to get such benefits is protected by the Constitution, at least in principle, based on Article 14, which guarantees private property. Social security benefits based on social insurance in its broadest sense, as well as unemployment benefits based on

[4] Appellate Social Security Court of Hesse, decision of 22 June 1984, *NZA*, 1984, pp. 100–103, and Appellate Social Security Court of Bremen, decision of 22 June 1984, *NZA*, 1984, pp. 132–136.

contributions from the unemployment insurance system, are treated as property in its traditional meaning.

The authors agree that the legislator may reduce or take away such benefits if such legislative intervention is justified by another principle in the Constitution. They also agree that this principle could be the state's neutrality in industrial conflict. This principle derives from Article 9, Section 3 of the Constitution: freedom of association implies an autonomous system of collective bargaining and state neutrality.

Ossenbuhl and Richardi justify legislative intervention based on this principle of state neutrality. Benda denies it. This former president of the Federal Constitutional Court considers the amendment unconstitutional. The important point, however, is the arbitrariness of constitutional reasoning. Both books treat neutrality as an empty concept. Its content depends mainly on the respective author's understanding of what would be a just result. In order to discuss politically the basic issues of labor law, the Constitution is used as *deus ex machina* to resolve the conflict. In view of the ambiguity of constitutional principles, it is not surprising that the Federal Constitutional Court has become a sort of superlegislator in the area of labor law. Whether this court will be able to maintain this role over an extended period is more and more open to question.

IV. THE SCOPE OF COLLECTIVE BARGAINING

Collective bargaining is implied by the guarantee of the freedom of association in Article 9, Section 3 of the Constitution. But how far can the state regulate matters of collective bargaining that have traditionally been management prerogatives? The words "working and economic conditions," taken in isolation, could be used to include, for example, decisions on investment and prices. But Article 9, Section 3 is only one of a number of conflicting articles in the Constitution, the most important being Article 14, the guarantee of private property. Since this article also includes the means of production, it protects core management decisions. Thus for a long time the leading opinion in labor law used the formula "working and economic conditions" as a sort of residual category. This usage implied that the collective agreement only provided data for management decisions, with those decisions subject to the employer's freedom as guaranteed in Article 14. In other words, collective agreements may fix the costs of management's decisions by setting standards for remuneration, vacation, and working hours, and they may regulate the effects of such decisions (e.g., effects of rationalization, of introduction of new technologies). However, decisions whether to engage in business at all, whether or not to invest, and whether or not to increase personnel remain management's prerogatives.

Decisions involving rationalization and investment, to take two examples, have decisive effects on the labor market. That is why more and more trade unions seek to influence those crucial decisions. The result has been a political debate over the scope of collective bargaining. Runggaldier has made the most impressive recent contribution to scholarship in this area. He compares the situation in Italy, Austria, and the Federal Republic of Germany, and he redefines the relationship between Article 9 and Article 14 of the Constitution in favor of an "open system." He considers the technological structure of the production process as a whole to be a subject of collective bargaining, which implies regulations on investment policy (what kind of new technology, how technological standards have to be observed) and how work is to be organized, as well as on personnel policy (whether skilled or unskilled workers are performing the jobs at specific workplaces, and how many workers have to be employed to work with specific technological equipment). He even would include clauses preventing employers from shifting production into other countries with cheaper labor.

In short, Runggaldier argues for a significant enlargement of the traditional scope of collective bargaining. But he also steps into a political discussion under the cover of constitutional arguments, suggesting that there is no other alternative to change the present constitutional boundaries. He succeeds in showing the importance of the question of whether a collective agreement in practice can be an efficient instrument to protect workers from the effects of rationalization, and he also argues persuasively that even if collective agreements shape an employer's decisions, such agreements have limited influence on management decisions. But clearly, much additional work remains to be done on the entire issue.

V. THE LEVEL OF COLLECTIVE BARGAINING

According to the law, parties to a collective agreement are, on the workers' side, only the unions and, on the employers' side, individual employers or associations of employers. Collective agreements concluded at company level between union and individual employer are a rarity in the Federal Republic of Germany. The general pattern is for collective agreements to be concluded between unions and employers' associations. These agreements cover either a certain region of an industry or the entire territory of the Federal Republic of Germany for a particular industry. Conditions laid down on such a high bargaining level cannot take account of the particular circumstances of different companies. By necessity the standards must be vague and ambiguous. In addition, the minimum standards specified in collective agreements generally do not exceed the possibilities of marginal companies within the respective industry. Hence, collective agreements quite often

have a limited relevance for the more prosperous sectors within the area covered.

In view of this deficiency, trade unions are always eager to discuss strategies of how to reach the plant and company level by collective agreements without giving up the pattern of centralized high-level bargaining, since such bargaining is understood as a necessary precondition for maintaining solidarity. Since collective bargaining policy has shifted more and more from traditional wage bargaining to regulation of working time and of protection from the effects of new technologies, the reconciliation of local and national concerns has grown in significance. In view of the variety of working patterns, traditional collective bargaining can only provide a framework for more detailed agreements on the plant or company level.

A combination of high-level collective bargaining and bargaining on the plant level makes sense only if unions can strive to reach agreements on the lower level. A legal obstacle prevents such a possibility: the so-called peace obligation. According to this obligation, for the duration of the collective agreement, neither of the parties is permitted to initiate industrial action against the other with the intent of altering working conditions laid down in the agreement. This obligation is an inherent element of the collective agreement. Even if the parties explicitly abrogated this obligation, it would remain. In other words, once a collective agreement on a regional or industry-wide level has been concluded, there is no more room for industrial action on the same subject matter on the plant or company level. That is why for a long time it was understood to be legally impossible to bargain collectively on both levels.

Kriebel questions this in a comprehensive analysis of clauses abrogating the peace obligation that might be made legal under certain circumstances. He draws a distinction between exclusion of the peace obligation and mere reduction of the peace obligation. Though he rejects the possibility of opening clauses for industrial action involving plant agreements or company agreements between the union and individual employers, he does believe in industrial action aimed at additional agreements related to specific companies but concluded between the parties of the original collective agreement.

Even if Kriebel's legal arguments are quite convincing, serious doubts exist about whether the result would have any practical impact. Such a model could only focus on a few selected companies; it most probably could not take account of the variety of all the companies within a region. Moreover, this selection process could raise difficult problems of solidarity within the union. Kriebel may have underestimated these practical implications because he focused so much on wage bargaining. Moreover, the trade unions

themselves seem unimpressed; they have made no attempt to adopt such a strategy.

VI. THE INTERRELATIONSHIP BETWEEN COLLECTIVE BARGAINING AND INSTITUTIONALIZED WORKERS' PARTICIPATION

Since collective bargaining on two levels evidently seems to be difficult—at least in view of the practical difficulties discussed in this review—the question arises whether collective agreements can be used as instruments to increase the bargaining power of the actors within the system of institutionalized workers' participation. The problem must be understood in the light of the basic structure of institutionalized workers' participation in the Federal Republic of Germany. Two systems have to be distinguished: workers' participation by works councils and workers' participation by workers' representatives on the supervisory board.

The Works Constitution Act of 1952, amended in 1972, contains the regulations on works councils' participation. Works councils in the Federal Republic of Germany are exclusively made up of workers' representatives and act as counterparts of the management on the side of the workers. They are separate institutions from trade unions. While trade unions represent only their members, works councils represent all workers in a plant, whether they are union members or not. According to the law, every plant with more than five employees over eighteen years of age, three of them having been employed for at least six months, is required by law to establish a works council, whose members have a three-year term.

The Works Constitution Act assigns specific rights to the works council, ranging from the mere right to information through the right of control to the most important right of all—the right of codetermination. Codetermination means that management cannot make any decisions without the consent of the works council. In the absence of a consensus, any move by management would be judged illegal. But codetermination goes even further. It gives both sides an equal voice in the decisionmaking process. Therefore—at least in principle—either side can take the initiative and call for a new settlement. If the works council and the employer do not reach agreement, either side may refer the dispute to a specific body for conflict resolution, the so-called arbitration committee. Industrial action as a means to resolve the conflict is prohibited by law. The Works Constitution Act exactly prescribes which type of participation right refers to which subject matter. Therefor, the definition of those subject matters is a permanent source of conflict over the power relationship between works councils and management. But codetermination applies to only a few subjects. That is why the question has arisen whether it is possible to ex-

tend this catalogue of subjects by collective agreement, thereby increasing the works council's power to influence management's decisionmaking.

The second channel of workers' participation, the workers' representation on the supervisory board, is based on a two-board system, one supervisory and the other a management board. Workers are represented only on the supervisory board, which has a purely control function. The management board has exclusive authority to run the company. The supervisory board elects the management board and monitors its activities, but it does not perform management functions.

The law distinguishes three different forms of participation. The first applies only to the coal-mining and iron and steel industries, whereas the other two cover the private sector as a whole. According to the statute for the coal-mining and iron and steel industries of 1951, shareholders and workers are equally represented on the supervisory board. The chairmanship is reserved for a "neutral" person, elected by majority vote of both workers' and shareholders' representatives. The second model introduced in 1952 covers all companies larger than 500 employees. But in this case only one-third of the board members must be workers' representatives. The third model, introduced in 1976 as a compromise between the earlier models, covers companies with at least 2,000 employees. In this case, employees and shareholders again have an equal number of representatives on the supervisory board.

However, there are two important differences between this model and that for the coal-mining and iron and steel industries. First, according to the statute of 1976, the managerial staff is entitled to have at least one representative of its group. This representative is an employees' agent, even if quite often the interests of the managerial staff may be closer to the shareholders' than to the other workers. Second, there is no "neutral" chairman. The chairman has to be one of the board members, elected by majority vote. In case of a deadlock, the law allows the shareholders' representatives to elect the chairman. If the board deadlocks over a decision, the chairman has the tie-breaking vote. In a real conflict, therefore, the shareholders' representatives have the final word. The management board is obliged to supply the supervisory board with comprehensive information on all basic issues at least once a year. In addition, the supervisory board, or any member of the supervisory board, can request at any time additional information on important company affairs. The management board is obliged by law to meet this request. The shareholders' meetings, or even the supervisory board itself, may extend the power of the supervisory board by a majority vote. According to the law, they are allowed to establish rules whereby some important decisions of the management board require the supervisory board's consent in order to become effective. But this circumstance seldom arises. Even if the

supervisory board refuses to consent, the management board can still appeal to the shareholders' meeting, which always has the power to supplant the supervisory board's consent.

In view of all these limitations on the supervisory board's power and the power of the workers' representatives, it is not surprising that the trade unions are using collective bargaining as a way to improve the workers' representation on the supervisory board and its influence on the management board's decisionmaking. Since it is quite evident that the present government of the Federal Republic of Germany will take no steps to extend by legislation workers' representation on the supervisory board, the matter has stirred great controversy.

Jahnke has analyzed the interrelationship between collective bargaining and the two systems of workers' participation. His study contains detailed suggestions about how works councils' codetermination rights may be extended and how far the position of the workers' representatives on the supervisory board may be improved by collective agreements. At the same time, he draws exact boundaries for such extensions, creating limits derived on the one hand from the Constitution and on the other hand from company law. He also insists that an individual's autonomy has to be protected from bodies of collective representation, thereby limiting the possibilities for extending workers' participation by collective bargaining.

Jahnke's proposals can be justified on two grounds. First, in analyzing comprehensively the interrelationship between collective bargaining, works councils' participation, and workers' representation on the supervisory board, Jahnke presents all available material. He offers in a concise manner a full picture of all the former attempts to elaborate some sort of consistent system between collective bargaining and at least parts of the institutionalized system of workers' participation. Second, and more important, Jahnke systematizes heterogeneous structures of collective labor law in a way consistent with Picker's study. For Jahnke, individual autonomy is one of the basic principles of traditional civil law and a paradigm to understand the function of collective bargaining and institutionalized workers' participation. Thus he suggests a homogeneous theoretical model for heterogeneous structures that were never designed to be complementary. Whether this attempt to reintegrate labor law into the individualistic structure of civil law is possible remains open to question. It cannot be denied, however, that Jahnke's approach represents a rather substantial position within the modern discussion of labor law in the Federal Republic of Germany.

As already indicated, the revival of the search for consistency in this inconsistent legal field and the rediscovery of civil law as a conceptual umbrella are its characteristic features.

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